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MONEY TALKS: WHY THE FIRST AMENDMENT SHOULD PROTECT THE ABILITY OF STUDENT ATHLETES TO PROFIT OFF THEIR NAME, IMAGE, OR LIKENESS

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INTRODUCTION

Ba bump. Ba bump. Tie game. John Jouer races down the court with seconds left in the fourth quarter. He splits the trap,[1] stops on a dime, raises up, and *swish.* Jubilation rings throughout the home arena. Thousands, if not millions, of fans cheer from the comfort of their homes or at sports bars. Everyone was focused on the game, but not everyone saw the game—the business of the NCAA. Everyone got paid. The NCAA, schools, broadcasters, sideline reporters, coaches, concession workers, and even the students who worked in the arena got paid. Hey, what about the student-athletes who played the game? Alright, maybe not everyone got paid.

On September 30, 2019, California Governor Gavin Newsom approved Senate Bill No. 206, which allows student-athletes in California's postsecondary educational institutions to profit from their

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* A lot has changed since I wrote this Note (for example, I was a law student, now I am an attorney), but one thing has remained the same: the joy I feel knowing that I have contributed something to legal scholarship. I am eternally grateful to my family and friends for their support. I am thankful for the editors at JLPP who worked meticulously to make this Note as great as possible. To the reader, I hope you enjoy reading this Note and that it inspires you to influence change.

1. In basketball, a trap is a defensive strategy used to force a turnover by surrounding the ball-handler with two or more defensive players. *Basketball trap*, ROOKIE ROAD, https://www.rookieroad.com/basketball/coaching/trap/ [https://perma.cc/LW33-6X47] (last visited Jan. 4, 2020).

names, images, and likenesses without losing their scholarship eligibility.[2] Although California's new law has garnered a lot of attention, it is important to note that other states and even members of Congress intend to introduce, or are in the process of introducing, similar legislation to allow student-athletes to profit from their names, images, and likenesses.[3] On HBO's *The Shop*, Governor Newsom stated that the "[law] is going to change college sports for the better by having now the interest finally of the athletes on par with the interests of the institutions."[4] Unsurprisingly, the NCAA begs to differ.[5] Before the bill was signed into law, the NCAA issued a response describing how the bill would negatively impact college athletics.[6] The NCAA indicated that allowing student-athletes to profit from their names, images, and likenesses would negatively impact the amateurism[7] component of college sports and remove the element of fairness in recruitment of college athletes.[8] On one hand, the NCAA warned that it would consider responding to California's bill by barring California's student-athletes from participating in NCAA competitions.[9] On the other hand, the NCAA indicated that it was already working on changing its likeness rule.[10]

On October 29, 2019, about a month after Governor Newsom signed California's likeness bill into law, the NCAA announced that its Board of Governors voted "unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image, and likeness in a manner consistent with the collegiate model."[11] Although the announcement generated a lot of positive reactions, the details, or lack

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2. CAL. EDUC. CODE § 67456 (West 2019).

3. Steve Berkowitz, *College Sports: California Governor Signs Image and Likeness Bill*, USA TODAY (Sept. 30, 2019), https://www.usatoday.com/story/sports/college/2019/09/30/college-sports-california-governor-signs-image-and-likeness-bill/2367426001/ [https://perma.cc/L6ZG-PGUD].

4. UNINTERRUPTED, *Gavin Newsom Signs California's 'Fair Pay to Play Act' with LeBron James & Mav Carter*, YOUTUBE (Sept. 30, 2019), https://www.youtube.com/watch?v=7bfBgjxVgTw [https://perma.cc/8MVU-Y832].

5. NCAA Board of Governors, *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206 [https://perma.cc/LZ62-PDNP]; *see also* Berkowitz, *supra* note 3.

6. NCAA Board of Governors, *supra* note 5.

7. *Amateurism*, NCAA, http://www.ncaa.org/student-athletes/future/amateurism [https://perma.cc/JN4S-7LB8] (last visited Jan. 3, 2020) (listing actions that may impact amateur status of student-athletes) [hereinafter *Amateurism*].

8. NCAA Board of Governors, *supra* note 5.

9. *Id.*

10. *Id.*

11. Steve Berkowitz & Dan Wolken, *NCAA Board of Governors Opens Door to Athletes Benefiting from Name, Image and Likeness*, USA TODAY (Oct. 29, 2019, 9:26 PM), https://www.usatoday.com/story/sports/college/2019/10/29/ncaa-board-opens-door-athletes-use-name-image-and-likeness/2492383001/ [https://perma.cc/SNW3-PMVW].

thereof, accompanying the announcement should make one wary.[12] The NCAA Board of Governors outlined the various principles and guidelines that they will use to change the NCAA's name, image and likeness rule.[13] One of the guidelines states that the NCAA's new name, image and likeness rule should "make clear the distinction between collegiate and professional opportunities."[14] This guideline is a cause for concern because the NCAA may define the distinction between collegiate and professional opportunities in a manner that prevents student-athletes from having full control over how they profit off of their names, images, or likenesses. Furthermore, the NCAA announced that its new rule would reflect the NCAA's consistent belief that student-athletes are students, not employees, of the universities they attend.[15] Whether student-athletes are employees is an interesting question,[16] but its resolution is unnecessary to resolving the issue at hand. Student-athletes must be allowed to profit from their names, images, or likenesses (Identity) in a country where they generate billions[17] of dollars for the NCAA.

In their response to California's new law, the NCAA stated that California's bill was unconstitutional.[18] However, it is the NCAA's actions that violate the Constitution. The purpose of this Note is to show that the First Amendment should protect the ability of student-athletes to profit from their Identities. Part I of this Note will evaluate how Identity is traditionally protected under the right of publicity.[19] Part II will explain the tension between the First Amendment and the right of publicity.[20] Part III will discuss the various theories that guide First Amendment protections and demonstrate how the self-fulfillment theory applies to student-athletes.[21] Part IV will explain how the commercial speech doctrine of the First Amendment can protect the ability of student-athletes

12. Sally Jenkins, *Don't be Fooled by Empty Rhetoric: The NCAA Isn't Going to Change Voluntarily*, WASH. POST (Oct. 29, 2019, 6:59 PM), https://www.washingtonpost.com/sports/colleges/dont-be-fooled-by-empty-rhetoric-the-ncaa-isnt-going-to-change-voluntarily/2019/10/29/0988dfcc-fa9a-11e9-8906-ab6b60de9124_story.html [https://perma.cc/L2SE-26YJ].

13. Stacey Osburn, *Board of Governors Start Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [https://perma.cc/6Z89-SZ5P].

14. *Id.*

15. *Id.*

16. *See* Lori K. Mans & J. Evan Gibbs, *Student Athletes As Employees?*, FLA. B.J. 34, 36 (Apr. 2015) (discussing the trend in student-athletes seeking recognition as employees).

17. Darren Rovell, *NCAA Tops $1 Billion in Revenue During 2016-17 School Year*, ESPN (Mar. 7, 2018), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first [https://perma.cc/PZ8G-QFU8].

18. NCAA Board of Governors, *supra* note 5.

19. *See infra* Part I.

20. *See infra* Part II.

21. *See infra* Part III.

to profit from their Identities.[22] Lastly, Part V of this Note will illustrate how student-athletes can enforce their First Amendment commercial speech rights against the NCAA even though it is a private actor.[23]

I. THE RIGHT OF PUBLICITY

The right of publicity arose from the right of privacy, which was articulated in the 1890 law review article written by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*.[24] Warren and Brandeis defined the right of privacy as a general right to be left alone,[25] and they argued that the right of privacy protects the facts relating to one's private life.[26] In 1953, the Second Circuit Court of Appeals became the first court to recognize a right of publicity.[27] In *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*,[28] the court extracted the right of publicity from the right of privacy and held that the right of publicity involved the exclusive right to control who publishes or uses one's picture.[29] Even after the *Haelan* court's recognition of the right of publicity, most courts were slow to recognize and protect the right of publicity until after William Prosser's influential 1960 law review article.[30] Prosser argued that the right of privacy should be divided into four separate categories: (1) intrusion; (2) disclosure; (3) false light; and (4) appropriation.[31] Prosser argued that the *Haelan* decision best fit the fourth category because it was a case involving "the exclusive use of the plaintiff's name and likeness as an aspect of his identity."[32] Since the publication of Prosser's article, a majority of states have recognized the right of publicity.[33] However, Congress has failed to enact a federal right of publicity.[34]

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22. *See infra* Part IV.

23. *See infra* Part V.

24. Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890); *see also* William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 1, 6 (2013) ("The standard account of the right of publicity begins with Samuel Warren and Louis Brandeis' 1890 article . . . 'The Right to Privacy.'").

25. Warren & Brandeis, *supra* note 24, at 205.

26. *Id.*

27. Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 896 (2017).

28. 202 F.2d 866 (2d Cir. 1953).

29. *Id.* at 868.

30. Michael Feinberg, *A Collision Course Between the Right of Publicity and the First Amendment: The Third and Ninth Circuit Find EA Sports's NCAA Football Video Games Infringe Former Student-Athletes Right of Publicity*, 11 SETON HALL CIR. REV. 175, 183–85 (2014).

31. *Id.* at 183.

32. *Id.* at 183–84 (quoting Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406 (1960)).

33. *See id.* at 184.

34. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:2 (2d ed. 2019).

The right of publicity is a state law right that essentially protects the time, money, and energy one spends on creating value in one's Identity.[35] The majority view is that the right of publicity protects ordinary people as well as celebrities.[36] This view leads to a simpler, and frankly better, application of the right of publicity because a celebrity and a non-celebrity are both capable of suffering from commercial exploitation of their Identities.[37] The right of publicity as it exists in the various states can be defined as a person's right to control the commercial use of his or her Identity.[38] In general, to recover under the right of publicity, a plaintiff must prove the following: (1) plaintiff has a right to control the commercial value of his or her Identity or another's Identity; (2) defendant used the plaintiff's Identity without the plaintiff's permission; and (3) defendant's use of plaintiff's Identity is likely to cause damage to the commercial value of plaintiff's Identity.[39]

The first element will likely seldom be at issue unless the relevant state law refuses to recognize commercial rights in one's Identity.[40] In regard to the second element, a key inquiry is whether the defendant's use of plaintiff's Identity is identifiable.[41] Identifiability turns on whether it is clear from a visual examination of a representative photo of plaintiff and the accused image that the defendant is using plaintiff's Identity.[42] The amount of people who identify or would reasonably identify the plaintiff from defendant's work is immaterial to deciding whether the plaintiff's Identity is identifiable in defendant's work; the focus is mainly whether the plaintiff's Identity was recognizable.[43]

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35. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804–05 (2001).

36. MCCARTHY & SCHECHTER, *supra* note 34, at § 4:2.

37. *See* Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 260 (Sup. Ct. 1984), aff'd, 488 N.Y.S.2d 943 (1985) ("The principle to be distilled from a study of the statute [which prohibited the commercial use of a living person's name, portrait or picture without written consent] and of the cases construing it is that all persons, of whatever station in life, from the relatively unknown to the world famous, are to be secured against rapacious commercial exploitation.").

38. MCCARTHY & SCHECHTER, *supra* note 34, § 1:3.

39. *Id.* § 3:2.

40. *Id.* § 3:3.

41. *Id.* § 3:10.

42. *Id.*

43. *See* Hirsch v. S.C. Johnson & Son, Inc., 280 N.W. 2d 129, 137 (1979) ("In the instant case, it is not disputed at this juncture of the case that the nickname identified the plaintiff Hirsch. It is argued that there were others who were known by the same name. This, however, does not vitiate the existence of a cause of action."); Negri v. Schering Corp., 333 F. Supp. 101, 104 (S.D.N.Y. 1971) ("[T]he number of people who recognized the photograph in the advertisement as Miss Negri, while it may be relevant on the question of damages, is not material on the issue of liability. On that issue the question is whether the figure is recognizable, not the number of people who recognized it.").

In general, a student-athlete should be able to assert that they have a right to control the commercial value of their Identities.[44] It will likely be easy for a student-athlete to establish that the defendant's use of their Identities was recognizable. For instance, if a student-athlete's picture or name was used to promote an athletic competition or event, then it would be easy to establish that the defendant's use of plaintiff's Identity clearly identified plaintiff. Nevertheless, the issue is that the student-athlete's right to control the commercial value of their Identity would not be guaranteed across the several states because there is not a federal right of publicity establishing a baseline standard, and states differ in their formulation of the right of publicity.[45] The majority view is that intent to identify or injure the plaintiff is unnecessary to establish a claim for infringement of plaintiff's right of publicity.[46] For example, the Missouri Supreme Court held that in a right of publicity suit, the plaintiff does not need to prove that the defendant intended to injure plaintiff or succeeded in obtaining a commercial advantage by using plaintiff's Identity.[47] Instead, the plaintiff only needs to prove that the defendant intended to obtain a commercial advantage.[48]

In contrast, the minority view is that the plaintiff must prove intent to establish a claim for infringement of plaintiff's right of publicity.[49] For example, in Oklahoma to establish the prima facia case for the statutory right of publicity, the plaintiff must establish three elements: "(1) defendants knowingly used [plaintiff's] name or likeness, (2) on products, merchandise or goods, (3) without [plaintiff's] prior consent."[50] The lack of a uniform right of publicity is particularly troubling in a time where the world is more connected than ever before. Student-athletes participate in competitions in neighboring states and across the country, and their performances are televised and posted on a plethora of social media platforms. Given the lack of a uniform right of publicity among the states, a student-athlete may be vulnerable to exploitation in Oklahoma, but not Missouri, and vice versa, depending on the situation. Even in states that have relatively strong right of publicity laws, student-athletes will not be fully protected because, under certain circumstances,

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44. MCCARTHY & SCHECHTER, *supra* note 34, § 3:3.

45. Kevin L. Vick & Jean-Paul Jassy, *Why A Federal Right of Publicity Statute is Necessary*, COMMC'NS. LAW., Aug. 2011, at 14 (discussing how different states have widely divergent right of publicity laws and why a federal right of publicity is necessary to bring uniformity and predictability to right of publicity law).

46. MCCARTHY & SCHECHTER, *supra* note 34, § 3:14.

47. Doe v. TCI Cablevision, 110 S.W.3d 363, 370–71 (Mo. 2003).

48. *Id.* at 371.

49. MCCARTHY & SCHECHTER, *supra* note 34, § 3:14.

50. Bates v. Cast, 316 P.3d 246, 254 (Okla. Civ. App. 2013); OKLA. STAT. ANN. tit. 12, § 1449 (West 2019).

one's right of publicity may be overcome by another's First Amendment rights.

II. RIGHT OF PUBLICITY VS. FIRST AMENDMENT

In *Zacchini v. Scripps-Howard Broad. Co.*,[51] the Supreme Court evaluated, for the first time, the tension between the right of publicity and the First Amendment.[52] In *Zacchini*, a television broadcasting station, without consent, videotaped and broadcasted an entertainer's entire act, which consisted of being "shot from a cannon into a net some 200 feet away."[53] The Court articulated that protecting the right of publicity is important because it economically incentivizes individuals to produce works of interest to the public.[54] The Court also recognized that the broadcasting of entertainment is protected under the First Amendment.[55] However, upon balancing the interest underlying the entertainer's right of publicity and the broadcast station's First Amendment rights, the Court reasoned that the broadcast station's First Amendment rights would not be infringed because the entertainer did not seek to stop the broadcast of his performance; he simply wanted to be compensated for it.[56] In summary, *Zacchini* stands for two propositions: (1) the state-law right of publicity protects one's ability to commercially exploit his or her Identity; and (2) the interest underlying the right of publicity is not automatically outweighed by the interest underlying the First Amendment.[57]

Although the Court in *Zacchini* balanced the interest between the right of publicity and the First Amendment, it did not articulate a uniform balancing test. As a result, the lower courts have experimented with a multitude of tests over the years.[58] Aside from an ad-hoc balancing test, the three balancing tests that lower courts have used to weigh the interest protected by the right of publicity against the interest protected by the First Amendment include: (1) the Predominant Use Test; (2) the *Rogers* Test; and (3) the Transformative Use Test.[59] The Predominant Use Test focuses on whether the main purpose of a product is to exploit the commercial value of an individual's Identity or make an expressive comment about said individual.[60] If the main or predominant purpose of the product is to exploit the individual's Identity, then the product is not

51. 433 U.S. 562 (1977).
52. Feinberg, *supra* note 30, at 188.
53. *Zacchini*, 433 U.S. at 563.
54. *Id.* at 576.
55. *Id.* at 578.
56. *Id.*
57. *Id.* at 574–75; Feinberg, *supra* note 30, at 189.
58. Feinberg, *supra* note 30, at 190.
59. *Id.* at 193.
60. Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003).

protected by the First Amendment, and it violates the individual's right of publicity.[61] However, if the predominant purpose of the product is to make an expressive comment about an individual, then it may be protected under the First Amendment.[62]

In *Doe v. TCI Cablevision*,[63]Tony Twist, a professional hockey player, sued McFarlane and various companies associated with a comic book for using his name, without consent, for one of the villains in the comic book.[64] The Missouri Supreme Court employed the Predominant Use Test and held that "the use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity."[65] The Predominant Use Test is interesting because it presents a balancing test that accurately emphasizes the core issue underlying the tension between the right of publicity and the First Amendment—exploitation.[66] When a celebrity asserts the right of publicity, she is attempting to prevent others from exploiting her Identity. Although the Predominant Use Test seems like it would be a good test for balancing the right of publicity and the First Amendment, only the Missouri Supreme Court has adopted it.[67]

The *Rogers* Test, unlike the Predominant Use Test, has been adopted by a number of courts. The *Rogers* Test involves two factors: (1) whether the use of the individual's name in the work was "wholly unrelated" to the work, or (2) whether the use of the individual's name in the work was "simply a disguised commercial advertisement for the sale of goods or services."[68] In *Rogers v. Grimaldi*,[69] Academy Award winning entertainer Ginger Rogers, sued the producers of a film for using her name in the title of their movie.[70] The court held that Rogers did not have a right of publicity claim because the title of the movie was related to the content of the movie and was not simply a disguised commercial advertisement for a product.[71] Courts have applied the *Rogers* Test to resolve tensions between trademarks and the First Amendment.[72]

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61. *Id.*
62. *Id.*
63. 110 S.W.3d 363 (Mo. 2003).
64. *Id.* at 367.
65. *Id.* at 374.
66. Lee, *supra* note 60, at 500.
67. Feinberg, *supra* note 30, at 195.
68. Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989).
69. *Id.* at 994.
70. *Id.* at 997.
71. *Id.* at 1004–05.
72. *See* Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 901 (9th Cir. 2002); Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc., 886 F.2d 490, 494 (2d Cir. 1989) (holding that

In *Mattel, Inc. v. MCA Records, Inc.*,[73] the makers of Barbie sued music companies who produced, marketed, and sold a song titled "Barbie Girl" for trademark infringement and dilution.[74] The court applied the *Rogers* Test and held that MCA's use of Barbie did not infringe Mattel's trademark because the use of Barbie in the song title was relevant to the song itself, and the song title did not strongly suggest that the song was produced by Mattel.[75] Although the *Rogers* Test was formulated in a case involving the right of publicity, the test itself does not adequately resolve the tensions underlying the right of publicity and the First Amendment when trademarks are not involved.[76] The *Rogers* Test fails to adequately balance the interest of celebrities in their Identities because it focuses on whether an artistic or literary work misleads consumers and the test fails to appreciate the fact that the right of publicity protects the interest of the celebrity, not the consumer.[77]

Unlike the Predominant Use Test and the *Rogers* Test, the Transformative Use Test has been widely embraced by courts across the country.[78] The California Supreme Court[79] created the Transformative Use Test to better balance the interests underlying the right of publicity and the First Amendment.[80] In *Comedy III Products, Inc. v. Gary Saderup, Inc.*,[81] the owner of the rights to the comedy act *The Three Stooges*, sued an artist for selling lithographs and T-shirts that bore the likeness of the Three Stooges in the form of a charcoal drawing.[82] The *Comedy* court used five factors to help determine whether the work was transformative enough to overcome the right of publicity and merit First Amendment protection.[83] The first factor is whether the celebrity's Identity is simply one of the "raw materials" of the work, rather than the very substance of it.[84] If the work is not substantively based on the

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the *Rogers* test is applicable in Lanham Act cases to weigh the public interest in free expression against the public interest in avoiding consumer confusion).

73. 296 F.3d 894 (9th Cir. 2002).

74. *Id.* at 899.

75. *Id.* at 902.

76. Feinberg, *supra* note 30, at 212.

77. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1280–81 (9th Cir. 2013).

78. Feinberg, *supra* note 30, at 198.

79. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001).

80. Feinberg, *supra* note 30, at 198.

81. 21 P.3d 797 (Cal. 2001).

82. *Id.* at 800–01.

83. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1274 (9th Cir. 2013) (breaking down the Transformative Use Test into five factors).

84. *Comedy III*, 21 P.3d at 809; *see also* Kirby v. Sega of Am., 50 Cal. Rptr. 3d 607, 615 (Ct. App. 2d 2006) ("The transformative test is straightforward: The 'inquiry is whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or

celebrity's Identity, then the balance will tilt in favor of treating the work as transformative and worthy of First Amendment protection.[85] The second factor is whether the work is primarily the expression of something other than the celebrity's Identity.[86] The third factor focuses on whether the celebrity's Identity plays a predominant role in the work.[87] The quality of the artistic contribution is irrelevant in determining whether the work is transformative.[88]

The fourth factor is whether the marketability and economic value of the work is mainly derived from the celebrity's Identity.[89] If the value of the work primarily comes from the skill, reputation, and creativity of the artist, rather than the celebrity's Identity, then the work is transformative enough to warrant First Amendment protection.[90] However, if the value of the work is primarily based on the celebrity's Identity, then the balance may tilt in favor of the celebrity's right of publicity depending on the resolution of the other factors.[91] The final factor focuses on whether the main goal of the work is to commercially exploit a celebrity's Identity through the creation of a conventional portrait of the celebrity.[92] If the artist's skill and talent is clearly secondary to the commercial exploitation of the celebrity's Identity, then the artist's First Amendment right is outweighed by the celebrity's right of publicity.[93] After applying the Transformative Use Test, the court held that the artist's charcoal drawing of the Three Stooges was not transformative.[94] Thus, the artist's work was not protected under the First Amendment.[95] In other words, *Comedy* involved an instance in which the right of publicity outweighed the First Amendment.

The Transformative Use Test has been used to resolve disputes involving litigants ranging from rock bands[96] to student-athletes[97] because it adequately balances one's right to use a celebrity's Identity against the considerable effort the celebrity exerted to make his or her

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whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.'").

85. *See Kirby*, 50 Cal. Rptr. 3d at 615.

86. *Comedy III*, 21 p.3d at 809.

87. *Id.* at 810.

88. *Id.* at 809.

89. *Id.*

90. *Id.*; *see also* Kirby v. Sega of America, 50 Cal. Rptr. 3d 607, 616 ("Ulala is more than a mere likeness or literal depiction of Kirby. Ulala contains sufficient expressive content to constitute a 'transformative work' under the test articulated by the Supreme Court.").

91. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001).

92. *Id.*

93. *Id.*

94. *Id.* at 811.

95. *Id.*

96. *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (2011).

97. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

Identity marketable.[98] In *No Doubt v. Activision Publishing, Inc.*,[99] the rock band No Doubt sued a videogame publisher because it violated the parties' licensing agreement and released a videogame that improperly used the band members' Identities.[100] The court held that the videogame publisher's use of the band members' Identities in the videogame was not transformative.[101] The court employed the final factor in the Transformative Use Test and concluded that the graphics and features of the game were secondary to the videogame publisher's primary goal of creating a conventional portrait of the band to commercially exploit its fame.[102]

Similarly, in *Hart v. Electronic Arts, Inc.*,[103] the court focused on whether the avatar in the college football videogame represented a sufficient transformation of the student-athlete's Identity, which included biographical information.[104] The court used a couple of the factors in the Transformative Use Test to balance the interest between the right of publicity and the First Amendment.[105] The court held that the interactive feature of the game that allowed users to alter the avatar was insufficient to transform the student-athlete's Identity into the video game maker's own expression.[106] The court also held that realistic depictions of student-athletes were the very substance, not just a raw material, of the college football video game.[107] In the end, cases like *Hart* and *No Doubt* demonstrate that courts have discretion and need not apply all of the factors in the Transformative Use Test when balancing the interest between the right of publicity and the First Amendment.[108]

After evaluating the Predominant Use Test, the *Rogers* Test, and the Transformative Use Test, it is clear that the First Amendment can be a defense to the right of publicity. However, the First Amendment can also be a vehicle for the right of publicity. Imagine if a student-athlete were to use his free time to make and post comedic and athletics-related videos. Over time he gains a considerable following and starts to earn money from advertisement revenue. One day the NCAA becomes aware that the student-athlete is earning money from his videos. As a result, the NCAA confronts him and states that he will either have to stop making money

98. Feinberg, *supra* note 30, at 213.
99. 122 Cal. Rptr. 3d 397 (2011).
100. *Id.* at 1022.
101. *Id.* at 1035.
102. *Id.*
103. 717 F.3d 141 (3d Cir. 2013).
104. *Id.* at 165.
105. *Id.* at 169.
106. *Id.* at 168.
107. *Id.*
108. *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (2011); Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

from his videos, or he will lose his scholarship and become ineligible to continue playing the game he loves.

Unfortunately, in 2017, Donald De La Haye, a UCF punter, had to make that choice.[109] De La Haye had his scholarship taken away by school officials after he declined to stop profiting off his Identity on YouTube.[110] He claimed that the school violated his First Amendment and due process rights by taking away his scholarship.[111] He eventually settled out-of-court with the school officials who revoked his scholarship.[112] As a result, the court never got the opportunity to decide whether the First Amendment could protect a student-athlete's Identity. Nevertheless, the following discussion will demonstrate that the First Amendment can work in concert with the right of publicity and protect a student-athlete's Identity.[113]

III. THE IMPORTANCE OF FREEDOM OF EXPRESSION FOR STUDENT ATHLETES

The First Amendment states, *inter alia*, that "Congress shall make no law . . . abridging the freedom of speech."[114] The freedom of speech is arguably the most important freedom guaranteed by the Constitution. Justice Cardozo once referred to the freedom of speech and thought as "the matrix, the indispensable condition, of nearly every other freedom."[115] Justice Brandeis argued that free speech was capable of freeing people from irrational fears.[116] Throughout the years, various theories have been promulgated to explain why freedom of speech should be protected.[117]

One theory is that the freedom of speech is necessary for the procurement of truth.[118] John Stuart Mill argued that silencing an opinion

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109. *See* Dan Gartland, *UCF Kicker Ruled Ineligible After YouTube Channel Gets Him in Trouble with NCAA*, SPORTS ILLUSTRATED (July 31, 2017), https://www.si.com/college-football/2017/07/31/ucf-kicker-donald-de-la-haye-ineligible-ncaa-youtube-videos [https://perma.cc/T7WC-UFPQ].

110. David Harris & Iliana Limon Romero, *Former UCF Kicker, YouTube Star Settles Lawsuit with School*, ORLANDO SENTINEL (Nov. 2, 2018, 10:45 PM), https://www.orlandosentinel.com/news/breaking-news/os-ne-donald-de-la-haye-lawsuit-settle-20181102-story.html [https://perma.cc/W6G9-SGQX].

111. *Id.*

112. *Id.*

113. *See infra* Part III.

114. U.S. CONST. amend. I.

115. Palko v. Connecticut, 302 U.S. 319, 327 (1939).

116. Whitney v. California, 274 U.S. 357, 376 (1927).

117. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 150 (3d Cir. 2013) ("[F]reedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth.") (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) (Brennan, J., dissenting)).

118. *See id.*

is even more harmful to those who dissent from the opinion than it is to the speaker.[119] Mill proposed three reasons why suppressing speech is deleterious.[120] First, the suppressed opinion may be true.[121] If the suppressed opinion is true, then the effect of suppression is that everyone is robbed of the opportunity to attain the truth.[122] Second, a false opinion should not be suppressed because it can lead to a better understanding of the truth.[123] If a true opinion is not frequently discussed, and challenged by others, then it will cease to be a robust, living truth.[124] Lastly, the speaker and the dissenter may share the truth.[125] One's opinion may supply the missing piece of truth that the other's opinion lacks.[126] Similarly, in the judicial sphere, Justice Holmes has argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[127]

Another theory is that freedom of speech is necessary for self-governance.[128] Alexander Meiklejohn argued that freedom of speech protects the citizenry's ability to be self-governing.[129] He wrote that "[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger."[130] In order for the citizenry to be self-governing, Meiklejohn argues that political deliberations must be protected by the First Amendment.[131] Moreover, he argued that the protection should be focused on not prohibiting the discussion of policies when they appear false or dangerous.[132] If citizens who are in charge of deciding issues relating to public policy are denied the opportunity to be confronted with opposing opinions, their resolutions will be half-baked.[133]

The final theory that has received great attention is that freedom of speech or expression is necessary for self-fulfillment.[134] The self-fulfillment theory argues that freedom of expression protects and

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119. *See* JOHN STUART MILL, ON LIBERTY 49 (Batoche Books 2001) (1859).
120. *Id.* at 49–50.
121. *Id.* at 50.
122. *Id.*
123. *Id.*
124. MILL, *supra* note 119, at 50.
125. *Id.* at 50–51.
126. *Id.*
127. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
128. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 150 (3d Cir. 2013).
129. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNANCE 26 (1948).
130. *Id.* at 26.
131. *Id.* at 24–25.
132. *Id.* at 26.
133. *Id.*
134. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 150 (3d Cir. 2013).

encourages the exercise of human abilities.[135] It encourages a person to create and express ideas in exact, complex, and subtle ways through speech, writing, pictures, and music.[136] Moreover, the freedom of expression protects an individual's autonomy by disfavoring content-related restrictions on communication.[137] In relation to the self-fulfillment theory, courts have recognized that the freedom of expression is necessary to the development of ideas and one's sense of identity.[138] The freedom of expression also protects the listener's ability to decide whether she wants to listen to the speaker's message.[139] A government that dictates what messages people can be exposed to by restricting speech displays contempt for personal autonomy and a person's ability to decide what messages to be exposed to.[140] In the end, the self-fulfillment theory recognizes that freedom of expression is important because of its strong relation to autonomous self-determination.[141]

The theory that best lends itself to protecting the right of student-athletes to profit from their Identities is the self-fulfillment theory of freedom of expression. First, the search for truth theory is inadequate because it does not protect the right of student-athletes to profit from their Identities. When a university at the implicit or explicit behest of the NCAA informs a student that he will lose his scholarship if he does not stop profiting from his YouTube videos,[142] the issue is commercial. This issue is not related to a search for truth because the NCAA will allow student-athletes to continue posting videos as long as they do not profit from the videos.[143] Therefore, the search for truth theory is inapplicable because it does not protect the commercial interest of student-athletes. Likewise, the self-governance theory is inapplicable because a student-athlete who is prohibited from profiting from his or her videos or posts is not directly or indirectly prevented from attending town meetings or otherwise participating in the political discourse.

Unlike the aforementioned theories, the self-fulfillment theory is applicable to the issue at hand because allowing student-athletes to profit

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135. David A. J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

136. *Id.*

137. *Id.*

138. *See Hart*, 717 F.3d at 149 ("The Supreme Court in *Procunier v. Martinez* noted that the protection of free speech serves the needs 'of the human spirit—a spirit that demands self-expression,' adding that '[s]uch expression is an integral part of the development of ideas and a sense of identity.'") (quoting Procunier v. Martinez, 416 U.S. 396, 427 (1974) *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989)).

139. Richards, *supra* note 135, at 62.

140. *Id.*

141. *Id.*

142. *See* Gartland, *supra* note 109.

143. *See id.*

from their Identities through their videos or posts demonstrates respect for the autonomy of student-athletes. Human beings are distinguished from other animals principally by the qualities of their mind.[144] Therefore, people should be free to explore the limits of their abilities and develop their character.[145] A student-athlete, like any human being, may find meaning in life through the development of his imagination and personality by expressing himself through videos and posts.[146] A restraint on student-athletes' ability to make profitable videos and posts affects the development of student-athletes; moreover, it represents an affront to the dignity of student-athletes because the restriction prevents student-athletes from expressing themselves. [147]

By forcing student-athletes to choose between keeping their athletic scholarship or their profitable business, the NCAA has denied student-athletes access to the full liberties of both students and athletes. A student is allowed to receive an academic scholarship and pursue outside income. Likewise, a professional athlete is paid for his or her performance on the field of play and is allowed to earn outside income. However, a student-athlete[148] is not allowed to receive a scholarship and profit from his or Identity like a student, and a student-athlete, unlike a professional athlete, is not paid for his or her performance on the field of play.[149] As it stands, the NCAA's policies have restricted the autonomy and self-development of student-athletes.

IV. COMMERCIAL SPEECH AND STUDENT ATHLETES

In addition to the self-fulfillment theory of free expression, the commercial speech doctrine justifies allowing student-athletes to profit from their Identities through the advertisement revenue generated from their videos and posts. In 1942, the United States Supreme Court held that commercial speech was unprotected under the First Amendment.[150] Over time, the Court clarified the contours of the unprotected category of commercial speech, indicating that purely commercial speech was unprotected, but speech that contained both commercial and political components was protected.[151] Moreover, the Court specified that speech

144. Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

145. *Id.*

146. *See id.*

147. *See id.* ("[S]uppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.").

148. A moment's reflection makes it clear that the term "student-athlete" is one of the greatest oxymorons ever invented for a student-athlete is neither a student nor an athlete.

149. Osburn, *supra* note 13.

150. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) *overruled by* Va. State Bd. of Pharmacy, 425 U.S. 748 (1976).

151. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

was protected even if transmitted through a medium that was sold for profit, like books and newspapers.[152] In 1976, more than thirty years after making commercial speech an unprotected category, the Court reexamined whether commercial speech was unprotected under the First Amendment.[153]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[154] the Supreme Court held, for the first time, that commercial speech was partially protected under the First Amendment.[155] In *Virginia State Board of Pharmacy*, the appellee was a pharmacist who wanted to advertise that he sold "X prescription drug at the Y price."[156] In reaching its holding, the Court disregarded the notion that the advertiser's purely economic interest made his speech an unprotected category under the First Amendment.[157] The Court reasoned that the general public is likely to be interested in commercial speech because it involves the dissemination of information related to the sale of goods and services.[158] Moreover, in a free enterprise economy, exposing the general public to various advertisements relating to commercial transactions will presumably lead to better-informed private economic decisions.[159]

The Court has defined commercial speech in a few ways since it first afforded commercial speech First Amendment protection.[160] One definition of commercial speech relies on the "commonsense distinctions" between commercial and noncommercial speech.[161] Another definition of commercial speech is speech that solely proposes a commercial transaction.[162] Lastly, commercial speech has been defined as speech related solely to the economic interests of the speaker and his or her audience.[163] Partly due to the various definitions of commercial

152. *Id.*

153. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760–61 (1976).

154. *Id.* at 748.

155. *Id.* at 770.

156. *Id.* at 761.

157. *Id.* at 762.

158. *Va. State Bd. Of Pharmacy*, 425 U.S. at 765.

159. *Id.*

160. J. Wesley Earnhardt, Nike, Inc. v. Kasky: *A Golden Opportunity to Define Commercial Speech—Why Wouldn't the Supreme Court Finally "Just Do It™"?*, 82 N.C. L. REV. 797, 799 (2004).

161. Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 637 (1985).

162. United States v. United Foods, Inc., 533 U.S. 405, 409 (2001).

163. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

speech employed by the Court, the scope and effect of commercial speech is still uncertain.[164]

This Note adopts the *Bolger v. Youngs Drug Products Corp.*[165] articulation of commercial speech. In *Bolger*, a corporation that was engaged in the manufacturing and selling of contraceptives decided to carry out an advertising campaign where it disseminated unsolicited pamphlets to members of the public.[166] The corporation sought to mail three types of pamphlets: (1) a pamphlet that promoted a variety of products available at a drug store, including prophylactics; (2) a pamphlet that substantially promoted prophylactics; and (3) an informational pamphlet that discussed the desirability and availability of prophylactics in general.[167] The Postal Service warned the corporation that its mailing violated 39 U.S.C. § 3001(e)(2), which prohibits the mailing of unsolicited advertisements for contraceptives.[168] The Supreme Court affirmed the district court's ruling and held that as applied to the corporation's mailings, the statute violates the First Amendment.[169]

To reach its conclusion, the Court first determined whether the mailings constituted commercial speech.[170] The Court easily concluded that the first and second type of pamphlet constituted commercial speech because those pamphlets solely proposed a commercial transaction.[171] Conversely, the Court faced a tough task in classifying the informational pamphlets because they could not be categorized as speech merely proposing a commercial transaction.[172] To determine whether the informational pamphlets constituted commercial speech, the Court identified three considerations:[173] (1) whether the communication is an advertisement;[174] (2) whether the communication refers to a specific product;[175] and (3) whether the speaker has an economic motivation in disseminating the communication.[176] The Court concluded that a combination of the aforementioned considerations provided strong support for classifying the informational pamphlets as commercial

164. Earnhardt, *supra* note 160, at 799.

165. 463 U.S. 60 (1983).

166. *Id.* at 62.

167. *Id.*

168. *Id.* at 63; 39 U.S.C. § 3001(e)(2) (2018).

169. *Bolger*, 463 U.S. at 61.

170. *Id.* at 65.

171. *Id.* at 66.

172. *Id.*

173. *See* Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 519 (7th Cir. 2014) ("[T]he *Bolger* inquiry asks whether the speech in question is in the form of an advertisement, refers to a specific product, and has an economic motive.").

174. *Bolger*, 463 U.S. at 66.

175. *Id.*

176. *Id.* at 67.

speech, even though none of the factors alone would have classified the informational pamphlets as commercial speech.[177] The Court also addressed the issue of mixed commercial and noncommercial speech; it ruled that commercial speech regarding matters of public concern will not be entitled to the stronger constitutional protection given to noncommercial speech because such protection would allow commercial speakers to make false or misleading claims with impunity.[178]

According to the NCAA, a student-athlete's amateur status may be impacted if the student-athlete, *inter alia*, promotes or endorses a commercial product or service.[179] The NCAA's amateurism restrictions conflict with the constitutional rights of student-athletes to profit from their Identities through social media and/or endorsements under the commercial speech doctrine of the First Amendment.[180] The Supreme Court has made it clear that individuals acting in a professional capacity can engage in commercial speech.[181] Yet, the Court has never addressed the question of whether individuals can engage in nonprofessional commercial speech.[182] Nevertheless, the distinction between individuals acting in a professional or nonprofessional capacity is not likely to be dispositive because the Court has also held that the identity of the speaker is not a determinative factor in categorizing speech as commercial.[183] As a result, student-athletes, who are nonprofessional individuals, may have their speech protected if it meets the requirements of the commercial speech doctrine.

First, to attain such protection under the First Amendment, the *Bolger* considerations must weigh in favor of classifying a student-athlete's speech involving social media and/or endorsements as commercial speech.[184] In regard to a student-athlete who seeks to profit from social media, the *Bolger* considerations weigh in favor of classifying the videos and posts that the student-athlete disseminates on social media as commercial speech.

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177. *Id.*

178. *Id.* at 68.

179. *Amateurism*, *supra* note 7.

180. "[F]orms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." *Social media*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20media [https://perma.cc/9T77-LDEN] (last visited Jan. 4, 2020).

181. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (involving a pharmacist); Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977) (involving an attorney).

182. Alison L. Stohr, *Valor for Sale: Applying the Commercial Speech Exception to Self-Promoting Individuals*, 85 TEMP. L. REV. 455, 469 (2013).

183. First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 776–77 (1978).

184. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

The first *Bolger* consideration is whether the communication is an advertisement.[185] Advertising is no longer confined to television commercials, billboards, and print.[186] Today, individuals engage in personal branding where they manage and commercialize their online presence.[187] As a result, student-athletes who use their Identities to profit from social media meet the first consideration because they are engaged in advertisement of their personal brands.

The second *Bolger* consideration is whether the communication refers to a specific product.[188] The content of the videos and posts that student-athletes disseminate to their social media fans and followers constitute specific products. The reason why people like Lilly Singh become YouTube stars with millions of subscribers is because viewers gravitate to their content.[189] Given that viewers consume the content by viewing, liking, and subscribing to the creator's channel or profile, it is fair to say that student-athletes who create social media content meet the second *Bolger* consideration because their communications refer to a specific product.

The final *Bolger* consideration is whether the speaker has an economic motivation in disseminating the communication.[190] Objectively, it is clear that creating content and posting it on social media platforms such as YouTube can be a profitable undertaking. For instance, in 2018, the top ten YouTube stars earned in total $180.5 million.[191] The going rate, in terms of ad dollars, for top YouTube stars is about $5 per thousand views.[192] Although it is difficult to ascertain one's motivations, it would be fair to infer that a student-athlete who accepts the ad dollars generated by her posts is economically motivated to disseminate content. In the end, the *mélange* of the *Bolger* considerations strongly weighs in favor of classifying a student-athletes videos and posts on social media as commercial speech.

Similarly, the *Bolger* considerations strongly weigh in favor of classifying student-athlete endorsements as commercial speech. In the case of a student-athlete who endorses a product or business, the *Bolger*

185. *Id.* at 66.

186. Stohr, *supra* note 182, at 476.

187. *Id.* at 482.

188. *Bolger*, 463 U.S. at 66.

189. Stephanie Schomer, *Lilly Singh Conquered YouTube –Now She's Taking On Hollywood*, ENTREPRENEUR (Mar. 15, 2019), https://www.entrepreneur.com/article/328067 [https://perma.cc/4FHZ-6HET].

190. *Bolger*, 463 U.S. at 67.

191. Natalie Robehmed & Madeline Berg, *Highest-Paid YouTube Stars 2018: Markiplier, Jake Paul, PewDiePie and more*, FORBES (Dec. 3, 2018), https://www.forbes.com/sites/natalierobehmed/2018/12/03/highest-paid-youtube-stars-2018-markiplier-jake-paul-pewdiepie-and-more/#7024e852909a [https://perma.cc/6YUL-JBSQ].

192. *Id.*

considerations are easily met. The first *Bolger* consideration is whether the communication is an advertisement.[193] In general, an advertisement is a public notice.[194] When an individual endorses a product or business, he or she provides a notice to the public that the product should be bought, or the business should be patronized. Thus, if a student-athlete endorses a product or business, the first *Bolger* consideration will weigh in favor of classifying his or her speech as commercial speech because the communication will be considered an advertisement. The second *Bolger* consideration is whether the communication refers to a specific product or business.[195] This will be easy to establish because advertisements where an individual endorses a company's product or business typically, if not always, involve a reference to the product or business in question.

Lastly, the third *Bolger* consideration is whether the speaker has an economic motivation in disseminating the communication.[196] To understand the economic motivation that student-athletes have in endorsing products, it is helpful to look at those entrusted to lead them—college coaches. In 2019, the top ten highest-paid college coaches earned no less than six million dollars.[197] To note, the bulk of college coaches' compensation comes from the portion of their contracts that relate to personal service fees which includes media appearances, endorsements, and representing the university.[198] For instance, in the 2011–2012 season, Nick Saban earned about $225,000 from his coaching salary and $3.93 million from media appearances, endorsements, and representing the university.[199] Leaving aside the injustice of allowing college coaches to make millions of dollars beyond their "coaching salary" while student-athletes are limited with an athletic scholarship, it is clear that there is a market for those involved in college athletics to profit from their Identities through endorsements. Given that there is a market for student-athletes to endorse products and businesses, the third *Bolger* consideration weighs in favor of classifying student-athlete endorsements as commercial speech because student-athletes will be economically motivated to disseminate their endorsement of a product or business.

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193. *Bolger*, 463 U.S. at 66.

194. *Advertisement*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/advertisement [https://perma.cc/992F-5M4T] (last visited Jan. 5, 2020).

195. *Bolger*, 463 U.S. at 66.

196. *Id.* at 67.

197. Thomas Barrabi, *College Football's Highest-Paid Coaches Earn Million, Fly Private at Taxpayer-Funded Public Universities*, FOX BUS. (Oct. 23, 2019), https://www.foxbusiness.com/sports/college-football-highest-paid-coaches-public-universities [https://perma.cc/XGX3-SC86].

198. James K. Gentry & Raquel Meyer Alexander, *From the Sideline to the Bottom Line*, N.Y. TIMES (Dec. 31, 2011), https://www.nytimes.com/2012/01/01/sports/ncaafootball/contracts-for-top-college-football-coaches-grow-complicated.html [https://perma.cc/N6EG-7YXS].

199. *Id.*

V. COMMERCIAL SPEECH, STATE ACTION, AND NCAA POLICIES

A few years before the *Bolger* decision, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[200] held that restrictions on commercial speech are subject to intermediate scrutiny.[201] The first part of the *Central Hudson* test asks whether the commercial speech at issue concerns lawful activity, and is not false, misleading, or deceptive.[202] The second question is whether the government has demonstrated a substantial or significant interest for restricting the commercial speech in question.[203] If both queries result in affirmative responses, then the court must determine whether the restriction directly advances the asserted substantial governmental interest in a manner that is not more extensive than is necessary.[204] This last part of the test looks to whether there is a "reasonable fit" between the substantial governmental interest and the restriction.[205]

Upon establishing that student-athletes' videos and posts on social media can constitute commercial speech, it is now important to determine whether the entity in question, the NCAA, can be scrutinized for constitutional violations under the Fourteenth Amendment's Due Process Clause. Generally, the Fourteenth Amendment does not protect against private conduct that abridges individual rights.[206] The Supreme Court's Fourteenth Amendment jurisprudence differentiates between state action, which is subject to scrutiny, and private conduct, which is not subject to scrutiny.[207] In *NCAA v. Tarkanian*,[208] the Court held that the NCAA was not subject to scrutiny because its conduct did not constitute state action.[209] In *Tarkanian*, the University of Nevada, Las Vegas (UNLV) informed its head basketball coach, Jerry Tarkanian, that it was going to suspend him for violations of NCAA rules.[210] The suspension was motivated by the fact that the "NCAA had placed the university's basketball team on probation for two years and ordered UNLV to show cause why the NCAA should not impose further penalties unless UNLV

200. 447 U.S. 557, 566 (1980).

201. *Id.* at 573 (Blackmun, J., concurring).

202. *Id.* at 566.

203. *Id.*

204. *Id.*

205. Kasky v. Nike, Inc., 45 P.3d 243, 251 (Cal. 2002) (citing Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

206. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

207. *Id.* (first citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948); then citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974)).

208. 488 U.S. 179 (1988).

209. *Id.* at 181–82.

210. *Id.* at 180–81.

severed all ties during the probation between its intercollegiate athletic program and Tarkanian."[211]

The main issue before the Court was "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."[212] To resolve the issue, the Court analyzed the relationship between UNLV and the NCAA.[213] First, the Court concluded that UNLV's decision to adopt the NCAA's standards and its minor role in the formulation of the NCAA's rules did not establish that the NCAA was engaged in state action.[214] Second, the Court determined that the NCAA's investigation, enforcement proceedings, and consequent recommendations did not constitute state action because UNLV did not delegate power to the NCAA to take action against any university employee.[215] Moreover, the Court stated that the NCAA is similar to a state-compensated public defender[216] in that it is properly viewed as a private actor in opposition to the State when it represents the interests of its entire membership in an investigation of one public university.[217] Lastly, the Court entertained the notion that UNLV had no practical alternative to compliance with the NCAA's demands and concluded that a private monopolist that imposes its will on a state agency by threatening to not deal with it does not engage in state action.[218]

Although the Court in *Tarkanian* essentially foreclosed direct action against the NCAA for violating the Constitution,[219] individuals still have a way to indirectly affect the NCAA. The First Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment.[220] The Court made it clear that a state university is a state actor and that its executive officials act under color of state law when performing their official functions.[221] As a result, a student-athlete, who attends a state university or college, can sue his university or college when it acts in

211. *Tarkanian*, 488 U.S. at 181.

212. *Id.* at 193.

213. *Id.*

214. *Id.* at 195.

215. *Tarkanian*, 488 U.S. at 195–96.

216. *See* Polk County v. Dodson, 454 U.S. 312, 320 (1981) (holding that state-compensated public defenders act in their private capacity when they represent a client in a conflict against the State).

217. *Tarkanian*, 488 U.S. at 196.

218. *Id.* at 198–99.

219. *Id.* at 182.

220. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

221. *Tarkanian*, 488 U.S. at 183.

accordance with the NCAA's rules and regulations to violate his commercial speech rights.

To fully appreciate the viability of indirectly enforcing one's rights against the NCAA, it is important to wade through a few statistics. Based on data from the 2020–2021 academic year, the NCAA has 1,108 member schools.[222] Of the 1,108 member schools, 475 are public universities or colleges, and 633 are private universities or colleges.[223] It is necessary to filter for Division I member schools because television and marketing rights fees, primarily from the Division I men's basketball championship, generate the majority of the NCAA's revenue.[224]

When accounting solely for Division I member schools, there are 233 public universities or colleges and 117 private universities or colleges.[225] Given that about sixty-seven percent of Division I member schools are public universities or colleges, student-athletes who attend those schools can have a significant impact on the NCAA. By successfully suing the public Division I member schools of the NCAA, student-athletes will threaten the NCAA's main source of revenue. For instance, the public Division I member schools that are successfully sued will likely begin to consider options similar to UNLV, the public Division I university in *Tarkanian*: (1) disobey the NCAA's rules and regulations and risk sanctions, (2) obey the NCAA's rules and regulations and risk violating the constitutional rights of others, or (3) leave the NCAA.[226] Unlike UNLV in *Tarkanian*,[227] the public Division I member schools that are sued for violating the commercial speech rights of their student-athletes will probably be more likely to threaten to leave the NCAA unless changes are made because as a group the public Division I member schools have leverage as they generate a significant portion of the

222. *NCAA Member Schools*, NCAA, http://www.ncaa.org/about/resources/research/ncaa-member-schools [https://perma.cc/TJ3H-6EA8] (last visited Mar. 18, 2021) [hereinafter *NCAA Member Schools*].

223. *Id.*

224. *Where Does the Money Go?*, NCAA, https://www.ncaa.org/sports/2016/5/13/where-does-the-money-go.aspx [https://perma.cc/29UH-UF76] (last visited Mar. 18, 2021) [hereinafter *Where Does the Money Go?*]; *see also 2017-18 NCAA Financial Statements*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/finance/2017-18NCAAFin_NCAAFinancialStatement.pdf [https://perma.cc/6RCK-25WF] (last visited Mar. 18, 2021) [hereinafter *Financial Statements*].

225. *NCAA Member Schools*, *supra* note 222.

226. *See Tarkanian*, 488 U.S. at 187 (detailing that the vice president of UNLV advised the president of UNLV that he had three options: (1) reject the NCAA sanction requiring them to disassociate Coach Tarkanian from the athletic program and risk heavier sanctions; (2) accept the NCAA's sanctions and reassign Tarkanian from his present position without adequate notice; or (3) pull out of the NCAA completely).

227. *See id.* at 198 ("Tarkanian argues that the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands.").

NCAA's revenue.[228] Therefore, student-athletes at public Division I member schools can hold the NCAA accountable by suing their respective member schools for violating their commercial speech rights.

CONCLUSION

Watching college athletics generates a certain *je ne sais quoi* among viewers in the United States, and some may worry that allowing student-athletes to be compensated will damage their viewing experience. This Note operates under the assumption that college athletics will continue to thrive even if student-athletes, like everyone else involved with college athletics, are compensated. To be clear, this Note does not contend that student-athletes must be paid to play their respective sports; rather, this Note argues that student-athletes must be allowed to profit from their Identities and maximize their potential as young professionals.

Accordingly, the purpose of this Note was to showcase that the First Amendment can and must protect the ability of student-athletes to profit from their Identities. This Note examined the history of the right of publicity and explained why the First Amendment will better protect the ability of student-athletes to monetize their Identities. This Note also highlighted how the freedom of expression will allow student-athletes to explore the limits of their abilities and develop as people. Furthermore, this Note analyzed the commercial speech doctrine and demonstrated how student-athletes' videos and posts on social media and endorsements can be classified as commercial speech worthy of First Amendment protection. In the end, this Note illustrated how student-athletes can indirectly enforce their First Amendment commercial speech rights against private actors such as the NCAA by suing the public universities and colleges that execute the unconstitutional policies of the NCAA.

228. *See Where Does the Money Go?*, *supra* note 224; *see also Financial Statements*, *supra* note 224.