REFORMATION OF THE RIGHT OF PUBLICITY

THOMAS WRIGHT*

INTRODUCTION

Chloe Kim is a sensational snowboarder who won gold for the women's snowboard half-pipe in the 2018 PyeongChang Olympics at 17.[1] Before Kim's Olympic win, she had around 15,000 Twitter followers and after, she had around 325,000 followers.[2] Kim's Olympic win has allowed

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* B.A. Political Science, 2017, University of Kentucky; J.D., 2020, University of Kentucky J. David Rosenberg College of Law. Special thanks to Brian Frye for his guidance in researching and writing the article. I dedicate this piece to my father, Mark W. Wright, who has sparked my interest in this area of law.

1. Scott Weingust, *Chloe Kim's Right of Publicity: The Value of Gold*, STOUT (Feb. 21, 2018), https://www.stout.com/en/insights/commentary/chloe-kim-right-of-publicity-the-value-of-gold/ [https://perma.cc/3UWT-43GG].

2 *Id.*

her to market herself better, which has drawn endorsement deals from Visa, Nike, and Toyota.[3] One Olympic gold medal increased the value of her publicity rights due to the availability of future appearances, sponsorships, and promotions using her likeness and image.[4] If Kim had signed away publicity rights before her Olympic win, she would not have received an accurate value for the use of her name, image, and likeness, which changed in the blink of an eye. Today, a number of celebrities and student athletes who enter into long-term contracts for their publicity rights without a fair valuation of what those rights may be worth in the future face the same issue. The purpose of this article is to examine the problem of exploitation of athletes' and celebrities' name, image, and likeness while providing suggested solutions, including laws that federal or state legislatures should enact to protect those transferring their publicity rights.

In 2019, California passed Senate Bill ("SB") 206, which is known as the Fair Pay to Play Act, allowing student-athletes to earn money.[5] The bill allows California college athletes to earn compensation for the use of their name, image, and likeness.[6] This provided a major step for college athletes toward better contractual circumstances and ultimately more athlete-friendly contracts regarding the use of their own likeness. Subsequent to the passage of SB 206 and the proposal and passage of comparable legislation in numerous other states, the National Collegiate Athletic Association ("NCAA") recently adopted an updated policy that allows student-athletes to profit off their name, image, and likeness.[7] Within weeks of the NCAA interim policies, student athletes have already signed NIL deals that have reached near a million dollars.[8]

Despite the progress made, student-athletes are still not sufficiently protected from NCAA-enforced abuses. The NCAA's new policy only

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3. *Id.*

4. *Id.*

5. Harmeet Kaur, *Former college basketball star who sued the NCAA says California's fair pay bill is 'changing the game'*, CNN (Sept. 14, 2019, 1:19 PM), https://www.cnn.com/2019/09/14/us/ed-obannon-ncaa-california-bill-trnd/index.html [https://perma.cc/484Q-6FGT].

6. *Id.*

7. Roshaun Colvin & Joshua Jansa, *California's 'Fair Pay to Play' law for college athletes has other states racing to join up. Here's why.*, WASH. POST (Nov. 18, 2019), https://www.washingtonpost.com/politics/2019/11/18/californias-fair-pay-play-law-college-athletes-has-other-states-racing-join-up-heres-why/ [https://perma.cc/XV72-T8A4]; Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/NC5Y-5FKP].

8. Chris Morris, *Alabama QB Bryce Young already has nearly $1 million in likeness deals*, FORTUNE (July 21, 2021, 11:07 A.M.), https://fortune.com/2021/07/21/bryce-young-nil-deals-endorsements-name-image-likeness-ncaa-sponsors-nick-saban/ [https://perma.cc/AR8Q-MLQN].

allows collegiate athletes to engage in name, image, and likeness activities.[9] Unfortunately, state name, image, and likeness laws and the NCAA's new policy do not adequately address the exploitation issue of student athletes' name and likeness. The NCAA has required student athletes to sign contracts, transferring the rights of those student athletes' names and likenesses forever.[10] The transfers by student athletes took place when they had little bargaining power, as well as little to no legal representation.[11] This allowed the NCAA to purchase the likeness for small amounts of money, hoping the student athletes make it big in the future with successful professional careers.[12] While the NCAA has eliminated the contractual transfer of these rights, the organization continues to televise student-athletes' participation in NCAA-sanctioned sports and, until recently, had strictly prohibited student-athletes from profiting off of their name, image, and likeness.[13] Simply put, these practices exploit student-athletes for their fame.[14] Despite the NCAA's decision to implement its own name, image, and likeness policy in response to the passage of several state laws addressing the matter, the exploitation problem persists for professional athletes and celebrities who transfer their publicity rights. However, exploitation issues could, once again, affect student athletes in the future. Therefore, protections must be added to the right of publicity to better protect those licensing away their name, image, and likeness.

Section I discusses the law that allows for the transferability of individuals' use of name and likeness in the right of publicity. The right of publicity is a tool that can be used for and against exploitation of one's name, image, and likeness and provides a framework for this topic going forward.

Section II will discuss the problem with student athletes, professional athletes, and celebrities negotiating the rights of their name and likeness early on in their career with no real appreciation of the value of

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9. Hosick, *supra* note 7.

10. Jennifer Rothman, *If California cares about student athletes, it will give them rights to their identities*, S.F. CHRON.: OPINION: OPEN FORUM (Oct. 4, 2019), https://www.sfchronicle.com/opinion/openforum/article/Open-Forum-If-California-really-cares-about-14490928.php [https://perma.cc/4HN8-TV5E].

11. *Id.*

12. *Id.*

13. Dan Murphy, *NCAA clears student-athletes to pursue name, image, and likeness deals*, ESPN (June 30, 2021), https://www.espn.com/college-sports/story/_/id/31737039/ncaa-clears-student-athletes-pursue-name-image-likeness-deals [https://perma.cc/8HTC-V6LX].

14. Evan Gourvitz, *Insight: Student-Athletes on Cusp of Compensation With 'Right of Publicity' Changes*, BLOOMBERG L. (Dec. 20, 2019, 3:00 AM), https://news.bloomberglaw.com/us-law-week/insight-student-athletes-on-cusp-of-compensation-with-right-of-publicity-changes [https://perma.cc/HJB7-B7MZ].

their name and likeness. Additionally, this section will also address the current state of NCAA.

Next, Section III proposes adding a statutory right to terminate the transferable right of publicity after five years. These two suggestions would work together to create better contracts for those who transfer rights before a proper valuation is given for those rights. This will allow for contractual continuation, renegotiation to pursue a more profitable deal, or termination of the transfer.

Lastly, Section IV will argue for the implementation of protections by means of state or federal statutes. It is not enough to recommend that parties add these protections to their contracts. Instead, the protections need to be solidified by statute.

I. THE RIGHT OF PUBLICITY

The "right of publicity" is a form of an intellectual property right, which protects against the unauthorized use of an individual's name, image, or likeness.[15] Because of this, the right of publicity remains an important right that allows for celebrities, sports professionals, and others to retain the choice of what to do with the use of their own person. The right of publicity is governed by state law and varies slightly from state to state.[16] In 1903, New York became the first state to sign a law recognizing the right of publicity by prohibiting the nonconsensual use of an individual's name or image for advertising or trade purposes.[17] Since then, twenty-four states have enacted statutes that recognize some form of the right of publicity.[18]

The right of publicity has traditionally been considered a property right.[19] This is due to the justification that the use of one's likeness is based upon personal autonomy, natural rights, and unjust enrichment.[20] However, the right of publicity is transferable and alienable to other parties as seen with student athletes, professional athletes, and celebrities. As such, the person who owns the rights to another's likeness may not be the same person as that to whom those rights were originally based.[21] Jennifer

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15. Steven Semeraro, *Property's End: Why Competition Policy Should Limit the Right of Publicity*, 43 CONN. L. REV. 753, 755 (2011).

16. *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY (July 31, 2015), https://rightofpublicity.com/brief-history-of-rop [https://perma.cc/47ZQ-YA34].

17. *Id.*

18. *Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes [https://perma.cc/2A7F-HTCD] (last visited June 23, 2021).

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

20. *Id.* at 187.

21. *Id.*

Rothman has given a useful characterization that helps separate the two. Rothman suggests, "[t]he identity-holder is the person whose name, likeness or other indicia of identity is used and, when used without permission, forms the basis of a right of publicity violation."[22] Next, Rothman asserts, "[t]he publicity-holder, by contrast, is the person who owns the property interest in (commercial) uses of that identity."[23] This alienability is what has led to the fierce conflict between the publicity-holder and the identity-holder.

A. Importance and Function of the Right of Publicity

Even with this conflict, the right of publicity serves an important function in society. First, the right of publicity finds its roots in the right of privacy, grounded in the theory that we should protect aspects of human dignity, which is caused by publicly exposing private facts.[24] While the right to privacy is not explicitly recognized in the Constitution, Supreme Court case law has recognized the right to protection from governmental intrusion.[25] Consequently, the Supreme Court has recognized the right to privacy in a string of cases following the *Griswold v. Connecticut* decision.[26] This decision provides precedent allowing for individuals to protect their personal image, name, likeness, and self from the unauthorized use or intrusion of others.[27] The right of publicity serves, in part, to protect personal autonomy.

As briefly mentioned above, the right of publicity originates from property rights as well. This stems from the idea that "human identity is a self-evident property right," which the law should protect as any other property right.[28] Thus, the right of publicity was created to help protect an individual's autonomy and the right to control aspects of their own being in society, such as their name, image, and likeness. Given that the right of publicity has provided a nexus between an individual's natural rights and privacy, the right of publicity has grown in importance in today's society.[29]

In addition to the implications of natural rights, the right of publicity is important for other reasons. The right of publicity allows for the commercialization of one's identity and provides a vehicle for such.

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22. *Id.*
23. *Id.*
24. Daniel Gervais & Martin L. Holmes, *Fame, Property & Identity: The Scope and Purpose of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 186 (2014).
25. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
26. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing rights to privacy).
27. *Lawrence*, 539 U.S. at 558.
28. Gervais & Holmes, *supra* note 24, at 194.
29. *Id.*

Licensing one's identity could be a complex transaction, but the right of publicity allows for efficiency.[30] In addition, the right of publicity serves a protective function. In a world of deceptive news, there need to be protective functions in place to prevent deceptive uses of one's identity. The right of publicity protects individuals and the public from deceptive uses of one's name, image, and likeness.[31] In accordance, most states find that the unauthorized commercial use of a person's identity violates the right of publicity.[32]

Additionally, the right of publicity may extend after one dies. This issue was discussed in *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.,* a case regarding the estate of Marilyn Monroe.[33] Marilyn Monroe died and left her estate to Lee Strasberg before a transferable publicity right existed, which created problems for the estate.[34] After losing, the governor of California, Arnold Schwarzenegger, signed a new law creating a posthumous right of publicity for California citizens.[35] Importantly, a posthumous right of publicity allows for a publicity holder to maintain control over one's name, image, and likeness beyond the grave. Further, this is a matter of state law because state law allows the posthumous right to exist where the deceased individual was domiciled.[36] In an effort to determine whether or not the state recognizes a posthumous right of publicity, one must look to the state legislation of the area where a person is domiciled.

Since the right of publicity is founded within property law, an individual has a right to possess, use, exclude, and transfer their right of publicity.[37] As seen, a person can use their own image or name to profit themselves either by personal use, transfer to someone else the use of their publicity rights, and exclude others from use. Remedies for the

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30. *Id.* at 195–96.

31. *Id.* at 196.

32. David Carducci, *The Right of Publicity & the Lanham Act*, GA. LAW. FOR THE ARTS (Aug. 21, 2018), https://glarts.org/the-right-of-publicity-the-lanham-act/ [https://perma.cc/5CWF-293S].

33. Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., No. CV 05-02200 MMM (MCx), 2008 U.S. Dist. LEXIS 22213 (C.D. Cal. Jan. 7, 2008).

34. *See id.*

35. Jim Zarroli, *Law Decides Who Owns a Dead Star's Image*, NAT'L PUB. RADIO (Oct. 11, 2007, 3:53 PM), https://www.npr.org/templates/story/story.php?storyId=15198298 [https://perma.cc/UHC8-NFQ9].

36. Squire Patton Boggs, *Speaking from the Grave: Postmortem Rights of Publicity for the Deceased*, GLOBAL IP AND TECH. L. BLOG (Oct. 15, 2014), https://www.iptechblog.com/2014/10/speaking-from-the-grave-postmortem-rights-of-publicity-for-the-deceased/ [https://perma.cc/5VMQ-BQWZ].

37. For more information, see Andrew Beckerman-Rodau, *Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 132, 147–48 (2012).

unauthorized use are typically seen through economic recovery.[38] In order to prevail on a claim for unauthorized use, the plaintiff must generally show three elements.[39] The plaintiff must show: (1) the unauthorized use of a protected attribute (2) for an exploitative purpose (3) without the plaintiff's consent.[40] With these elements in mind, parties enter into contracts that give consent for the use or transfer of their right to publicity.

With its transferability, parties will often enter agreements to transfer the rights to another party for their usage, which often will make the transferee more profitable. In 2015, Lebron James signed a lifetime endorsement deal with Nike worth $30 million annually after an original nine-year contract.[41] Having access to Lebron James' endorsement has allowed Nike to receive access to the single-largest athlete deal in Nike's history.[42] While these contracts are costly to companies, they are insurmountable as it helps their brand sell better, by increasing their profits, in comparison to other companies.[43] Through the agreement, the transferor guarantees that he or she has the authority to license his or her rights and transfers those rights for compensation and an allotted time.[44] With these agreements, athletes like Lebron James frequently transfer their publicity rights to companies in exchange for compensation. Evidence shows that when celebrities endorse brands, it helps the sale of their products because people "idolize celebrities," which persuades consumers to buy more of that product.[45] Allowing brands to use the name and image of a celebrity gives a company legitimacy and grabs the attention of the consumer.[46] Due to this, after one endorsement, companies find that their sales could increase by four percent immediately and could have an increase in stocks by 25%.[47] In

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38. *Id.* at 140.

39. *Using the Name or Likeness of Another*, DIGIT. MEDIA L. PROJECT, https://www.dmlp.org/legal-guide/using-name-or-likeness-another [https://perma.cc/2E7N-X4U7] (last visited June 24, 2021).

40. *Id.*

41. Cork Gaines, *Why Lebron James' record-breaking deal with Nike is a game-changer*, BUS. INSIDER (Dec. 8, 2015, 8:41 AM), https://www.businessinsider.com/lebron-james-nike-lifetime-contract-game-changer-2015-12 [https://perma.cc/W8KE-MBNY].

42. *Id.*

43. *See generally id.* (suggesting that use of Lebron James' name and image allows Nike to be a top seller in athletic gear).

44. GREGORY J. BATTERSBY & CHARLES W. GRIMES, MULTIMEDIA & TECHNOLOGY LICENSING AGREEMENTS § 4:81 (2021).

45. Steve Olenski, *How Brands Should Use Celebrities For Endorsements*, FORBES (July 20, 2016, 2:43 PM), https://www.forbes.com/sites/steveolenski/2016/07/20/how-brands-should-use-celebrities-for-endorsements/#48a123e95593 [https://perma.cc/6FT3-QAKH].

46. *Id.*

47. *Id.*

consequence, there is a lot of power behind being able to obtain rights to a celebrity's name, image, and likeness.

B. Issues with the Right of Publicity

As with all things, the right of publicity comes with its own issues. Michael Madow outlines four issues with the right of publicity: (1) it redistributes wealth upwards; (2) it leads to the facilitations of censorship; (3) there are distributional consequences; and (4) it creates incentives that favor those with greater wealth, such as celebrities.[48] All of these are important issues to address to create a more favorable use of the right of publicity.

First, the right of publicity shifts the wealth upwards because it is usually the rich who get richer.[49] The rich get richer because publicity rights mostly compensate those who can benefit from having those rights, like celebrities or professional sports players. Each of these individuals are well-known within society and benefit from being able to capitalize off that popularity. This is where criticism stems, because it is effectively creating law that benefits the wealthy while they are already handsomely compensated.[50] This shift in wealth has also been seen in the art world concerning resale royalties.[51] The concept of resale royalties essentially provides for a percentage of the resale value of a piece of work to go back to the artist.[52] Sprigman and Rub suggest that this will inevitably cause resellers to take into consideration the amount of the resale they will not receive, which will affect the price and only benefit the wealthy artists.[53] The policy considerations against resale royalties can apply in the publicity context through the initial contracts with parties licensing their publicity rights for the first time. The transferee will want to receive the best deal for themselves at the newcomer's expense due to the uncertainty of the deal, which shifts costs away from the sophisticated parties onto vulnerable parties.

Second, the right of publicity allows private censorship to be possible as it creates opportunities for celebrities to suppress disfavored or

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48. *See generally* Michael P. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993) (analyzing four issues with the right of publicity).

49. *Id.* at 136–37.

50. *Id.* at 137.

51. Christopher Sprigman & Guy Rub, *Resale Royalties Would Hurt Emerging Artists*, ARTSY (Aug. 8, 2018, 5:00 PM), https://www.artsy.net/article/artsy-editorial-resale-royalties-hurt-emerging-artists [https://perma.cc/N984-TBME].

52. *Id.*

53. *Id.*

favored messages and meanings.[54] Giving the identity-holder more rights to themselves allows more control over the use, which in turn grants more power over the use. Madow's fear is that giving celebrities so much influence over our thinking discourages independent discourse and thought.[55] This can be seen through the idolization by the public of student athletes, professional athletes, and celebrities.

Third, the right of publicity creates distributional consequences that shift those consequences to consumers.[56] Sprigman and Rub suggest that the shifting of wealth will negatively impact those of lesser wealth as it will take away money from the primary art market.[57] This will disadvantage and hurt artists who are struggling or just starting out, which can be seen to disincentivize art in general.[58] Further, these distributional consequences are seen in those licensing their right of publicity for the first time with no real valuation of those rights.

Lastly, Madow brings to light the idea that the right of publicity overemphasizes celebrity and professional sports careers.[59] The right of publicity incentivizes individuals to pursue sports careers, most of which will not actually prove to be profitable.[60] Madow suggests that without the right of publicity, society may get more computer programmers or engineers because time spent on free throws or developing TikTok videos may then be devoted to learning other crafts.[61] With this, one can see the parallel between student athletes who dream of playing for a professional sports team and those who are actually cut out for it. Nevertheless, these issues surround the right of publicity and affect student athletes who are considering going to college to play sports, athletes who go straight to the professional association of their choice, and prospective celebrities looking to create a name for themselves.

II. THE RIGHT OF PUBLICITY AS APPLIED TO ATHLETES AND CELEBRITIES

A. NCAA Student Athletes

The National Collegiate Athletic Association ("NCAA") is an association that organizes sports programs of universities and colleges in

54. Madow, *supra* note 48, at 239.
55. *Id.* at 138–39.
56. *Id.* at 218.
57. Sprigman & Rub, *supra* note 51.
58. *See id.*; Madow, *supra* note 48, at 218.
59. Madow, *supra* note 48, at 216–17.
60. *Id.*
61. *See id.*

Canada and the United States.[62] Among the participants in the NCAA are high standing institutions that are well known for their sports programs, such as the University of Alabama, University of Southern California, and the University of Kentucky. The NCAA is represented across the United States as a national organization. With this organization, high school athletes from across the world come to the United States to play college sports, many hoping to make it professionally. Some athletes will receive scholarship offers by colleges or universities in efforts to persuade them to attend and play sports for the institution. In order to play for participating universities of the NCAA, the athletes sign a National Letter of Intent to play. This contract forms a relationship between the institution and the player, which generally provides for tuition, room and board, and books. However, the National Letter of Intent is not directly affiliated with the NCAA.[63]

The college or university becomes a member of the NCAA and the NCAA ensures that member institutions follow NCAA guidelines.[64] The NCAA has established a Manual that provides the rules and guidelines for member institutions regarding the amateurism of their student athletes.[65] In the NCAA Division 1 Manual, the NCAA includes provisions describing acceptable use by participating institutions of the student athletes. Article 3 of the Manual suggests, "[f]or agreements that may involve the use of a student-athlete's name or likeness, an institution shall include language in all licensing, marketing, sponsorship, advertising, broadcast and other commercial agreements that outlines the commercial entity's obligation to comply with relevant NCAA legislation, interpretations and policies on the use of a student-athlete's name or likeness."[66] Right off the bat, the NCAA asserts control over the member institutions use of the student-athlete's likeness, as any use of such must comply with NCAA rules and regulations. This control does not only affect the member institutions but also extends to member conferences such as the SEC, ACC, and other Power-Five conferences.[67]

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62. *Frequently Asked Questions*, SCHOLARBOOK SPORTSTIPENDIEN USA, https://www.scholarbook.net/en/sports-scholarships-usa/faq/ [https://perma.cc/R8QD-GWVS] (last visited July 5, 2021).

63. *National Letter of Intent and National Signing Day,* NEXT COLLEGE STUDENT ATHLETE, https://www.ncsasports.org/recruiting/managing-recruiting-process/national-signing-day [https://perma.cc/BJR6-XD2Y] (last visited July 5, 2021).

64. *See* 2020-21 NCAA DIVISION 1 MANUAL, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 1, 2020), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/J4W2-JW48].

65. *See id.*

66. *Id.* at 11.

67. *Id.* at 13.

In addition to asserting control over member institutions and member conferences, the NCAA exerts extensive control over the student athletes. To play in the NCAA, the student athlete must maintain "amateur status," which can be taken away if the student athlete "[u]ses athletics skill (directly or indirectly) for pay in any form in that sport."[68] Additionally, the NCAA states that it is a violation to accept a promise of pay after the completion of college athletics.[69] All things considered, the NCAA controls almost all aspects of Division 1 athletics along with all other NCAA divisions.

Accordingly, the NCAA has drawn harsh criticism for this and their continuing fight to keep control. This control has allowed the NCAA to report annual revenues that top $1 billion due to their television and marketing rights.[70] The NCAA has changed its policies regarding the transfer of student-athletes' name, image, and likeness, and, as expected, the NCAA has also altered its general name, image, and likeness policy in response to the pressure placed on the organization by the passage of California's Fair Pay to Play Act and other comparable state laws.[71] On June 30, 2021, the NCAA released a press release stating "[g]overnance bodies in all three divisions today adopted a uniform interim policy suspending NCAA name, image, and likeness rules for all incoming and current student-athletes."[72] Further, the NCAA has directed student-athletes to act in a manner consistent with their state, school, and conference's Name, Image, and Likeness laws and policies until federal legislation or new NCAA rules are adopted.[73] While it remains to be seen exactly how the NCAA's new name, image, and likeness policy will operate over time, one can surmise that the NCAA will continue to exert as much control as possible over its member institutions, conferences, and athletes with regard to the monetization of student-athletes' name, image, and likeness.

B. Professional Athletes

Once a student athlete moves to professional sports, whether out of high school or college, those individuals can make large amounts of money

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68. *Id.* at 63.

69. *Id.*

70. Colin Dwyer, *NCAA Plans to Allow College Athletes To Get Paid For Use of Their Names, Images*, NAT'L PUB. RADIO (Oct. 29, 2019, 2:59 PM), https://www.npr.org/2019/10/29/774439078/ncaa-starts-process-to-allow-compensation-for-college-athletes [https://perma.cc/TH44-ZLCA].

71. Rothman, *supra* note 10 ; Tom Goldman, *A New Era Dawns in College Sports, as the NCAA Scrambles to Keep Up*, NAT'L PUB. RADIO (June 28, 2021, 5:01 AM), https://www.npr.org/2021/06/28/1010129443/a-new-era-dawns-in-college-sports-as-the-ncaa-scrambles-to-keep-up [https://perma.cc/VJ2E-BW46].

72. Hosick, *supra* note 7.

73. *Id.*

by licensing their name, image, and likenesses to others.[74] Interestingly, the money professional sports athletes make from endorsement deals often exceeds the amount of money they are paid for playing sports.[75] An example of this is Zion Williamson who signed an endorsement deal with Nike worth around $13 million a year, which could grow even higher due to royalties and bonuses.[76] While Zion makes the majority of his money from his endorsement deal, he is guaranteed $20 million over the course of two years for his NBA contract, which gives him about $10 million per year.[77] Thus, the contracts for an athlete's right of publicity provides greater salaries, some of the time, for athletes.

Zion was the number one pick in the 2019 NBA draft by the New Orleans Pelicans.[78] Thus, it is not an assumption that Zion's monetary value of his publicity rights skyrocketed because of his athletic talent. However, while playing basketball at Duke, Zion broke through his shoe and injured his knee in a game against North Carolina.[79] Further, Zion sustained an injury during his first preseason with the New Orleans Pelicans and did not start in the regular season because he had to undergo surgery for a torn lateral meniscus in his knee.[80] While his injuries have not cost him monetary value for his publicity rights, one could see how a career-ending injury could affect the monetary value of his rights. As a consequence, the value of any athlete's rights can change in the blink of an eye.

C. Influencers and Celebrities

While the foremost discussion has involved athletes, the right of publicity reaches everyone capable of monetizing their publicity rights. With the current state of the global entertainment industry, individuals are

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74. Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L. J. 23, 23 (1999).

75. *Id.*

76. Kurt Badenhausen, *Gatorade Signs Zion Williamson To Its Endorsement Roster*, FORBES (Sept. 26, 2019, 1:48 PM), https://www.forbes.com/sites/kurtbadenhausen/2019/09/26/exclusive-gatorade-signs-zion-williamson-to-its-endorsement-roster/#19151cff4d5f [https://perma.cc/HR6Q-FC5H].

77. Terry Collins, *Zion Williamson and Other Top NBA Draft Picks Are About to Cash In. Here's How Much They Could Make*, YAHOO! FIN. (June 21, 2019), https://finance.yahoo.com/news/zion-williamson-other-top-nba-154526177.html [https://perma.cc/ZJB9-TN5K].

78. Ben Morse, *NBA rookie Zion Williamson to miss 6 to 8 weeks with knee injury*, CNN (Oct. 22, 2019, 5:53 AM), https://www.cnn.com/2019/10/22/sport/zion-williamson-injury-nba-new-orleans-pelicans-spt-intl/index.html [https://perma.cc/DFE2-WN7N].

79. Marc Tracy, *Zion Williamson's Injury Has Some Saying He Should Quit Duke*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/sports/zion-williamson-injury-duke.html [https://perma.cc/97PH-6GPT].

80. Morse, *supra* note 78.

becoming famous through online resources such as TikTok, YouTube, and other social media platforms. As such, these individuals are erupting into the limelight and securing endorsement deals at a young age. One example is Charli D'Amelio, a sixteen-year-old TikTok sensation with millions of followers and significant endorsement deals.[81] Among D'Amelio's endorsements are Hollister, Hulu, and Dunkin Donuts.[82] This has allowed her to reach roughly four million in earnings.[83] Like athletes, it is becoming easier for other young and inexperienced individuals to find avenues to market their publicity rights. Thus, the protections for publicity transfers must be implemented.

D. Issues Stemming from the Monetization of Publicity Rights

In hopes of becoming a professional sports player, many student athletes will move to a college or university to play sports and sign contracts with the NCAA, which, in the past, has transferred to the NCAA the rights to the students' likeness and name in perpetuity.[84] The NCAA was able to do this because of the ability of individuals to freely transfer property rights, such as name and likeness, to others.[85] However, laws and policies have changed to allow student-athletes to profit off of their name, image, and likeness. By contrast, some student-athletes elect to forego collegiate athletics in favor of a swift transition to the professional leagues. Even before the NCAA's recent policy changes, those athletes who pursued a professional career earlier were permitted to market their publicity, creating an incentive for gifted athletes to skip college.[86] Lastly, influencers and celebrities will make a name for themselves and increase their publicity rights through their own endorsements as well. All things considered, it is becoming easier for everyone to monetize their publicity rights.

When thinking about basic property rights, the right to transfer property, whether by sale or gift, is a basic property right in the owner's

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81. Grant Phillips, *Charli D'Amelio's Top 10 Brand Deals and Endorsements*, THE RICHEST (Mar. 29, 2021), https://www.therichest.com/rich-powerful/charli-damelio-brand-deals-endorsements/ [https://perma.cc/R5HA-YKUC].

82. *Id.*

83. Elizabeth Robertson, *The Top 5 Richest TikTokers in the World*, THE RICHEST (Mar. 2, 2021), https://www.therichest.com/rich-powerful/richest-tiktokers-2021/ [https://perma.cc/6H3U-FWCU].

84. Rothman, *supra* note 10.

85. *Id.*

86. *See generally* Dan Wolken, *Opinion: RJ Hampton passing on college basketball is what NCAA wants, but won't start trend*, USA TODAY (May 28, 2019, 6:53 PM), https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2019/05/28/rj-hampton-skipping-college-basketball-what-ncaa-wants/1258702001/ [https://perma.cc/FZ3Y-792B] (suggesting that RJ Hampton went pro through an Australian basketball league, which allows him to be paid to play and have the ability to sign endorsement deals that the NCAA prohibits).

bundle of rights. However, the transfer of a house, car, or boat is much different than the transfer of the use of one's name, likeness, or image. States, like California, have made the property right of publicity freely transferable to other parties.[87] It is also worth mentioning "freely transferable" is a synonym for "freely alienable." To be "freely alienable" means that it is possible for the original owner of the right to lose "control" over their own rights and identities forever.[88] As Rothman notes, this presents a real issue for individuals because everyone could be at risk of losing ownership of their name, likeness, and image with one move–contracting with someone else for the use of the transferor's name, likeness, and image. [89]

This brings us to the problems presented with athletes and other individuals signing contracts with companies, like the NCAA, Nike, or Hulu, for use of their name, image, and likeness. In college athletics, incoming freshmen are seventeen or eighteen years old.[90] At seventeen or eighteen, young men and women are entering contracts to play for universities, colleges, and professional organizations in the NCAA, NBA G-League, or Minor League Baseball.[91] In addition, companies are offering endorsement deals to young athletes and influencers without any real guidance as to what they are contracting away. Some student athletes hire attorneys to help them navigate the initial legal processes, but that neglects the point that no one knows their true potential going forward.

A couple of examples illustrate this point. In 2007, the Portland Trail Blazers selected Greg Oden as the number one pick in the NBA Draft over Kevin Durant, a future NBA All-Star and champion.[92] Greg Oden was plagued with knee injuries and became a bust in the NBA.[93] On the other end of the spectrum, Tom Brady was arguably the biggest NFL Draft steal

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87. CAL. CIV. CODE § 3344.1(b).

88. Jennifer Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 277, 299–300 (2019).

89. *Id.*

90. Danielle Allentuck, *NCAA age rule hurts younger college athletes*, THE ITHACAN (Apr. 17, 2018), https://theithacan.org/columns/ncaa-age-rule-hurts-younger-college-athletes/ [https://perma.cc/H3F6-DJRF].

91. *See* Krysten Peek, *Jalen Green and Jonathan Kuminga highlight the staked inaugural G League Ignite*, MSN (Feb. 10, 2021), https://www.msn.com/en-us/sports/nba/jalen-green-and-jonathan-kuminga-highlight-the-stacked-inaugural-g-league-ignite/ar-BB1dzhHF [https://perma.cc/JL9T-49VN]; *see also* Marc Katz, *Minor leagues a big adjustment on, off field for high school player*, DAYTON DAILY NEWS (July 27, 2018), https://www.daytondailynews.com/sports/minor-leagues-big-adjustment-off-field-for-high-school-players/NSwbyYzevRETkN1OKCzL8O/ [https://perma.cc/XVW3-K86W].

92. Justin Hussong, *15 biggest NBA Draft Busts of All Time*, BLEACHER REP. (June 2, 2013), https://bleacherreport.com/articles/1657535-15-biggest-nba-draft-busts-of-all-time#slide12 [https://perma.cc/VFA5-PVC6].

93. *Id.*

of all time.[94] In the 2000 NFL Draft, the New England Patriots selected Tom Brady as the 199th pick in the sixth round.[95] Tom Brady underperformed in the NFL Combine and teams did not believe he was athletic enough to play in the NFL.[96] Now, nearly 20 years later, Tom Brady has seven Super Bowl wins, setting a new NFL record for a single player.[97] These examples support the notion that parties do not entirely know what they are contracting for at such a young age with their entire career ahead of them, as the valuation of one's publicity rights can change in an instance.

There is so much pressure on many of these men and women because they are forced to contract at such a young age and without any experience. Using the NCAA as an example, under the NCAA Manual, a student athlete can secure counsel unless the counsel is secured to represent the student athlete in negotiations for professional sports contracts.[98] The NCAA explains that this is to preserve the amateurism aspect of student athletes.[99] Even if this option is available, many prospective student athletes cannot afford to hire an attorney to look over and explain these contracts to them. Additionally, for students leaving high school to play professionally or young celebrities and influencers, they likely do not have the resources to hire counsel to help negotiate their initial deals.

Those licensing their publicity rights can range in wealth from extremely rich to extremely poor. An example of this is Bam Adebayo, a former college basketball player for the University of Kentucky, now playing for the Miami Heat.[100] Bam grew up in a single-wide trailer in North Carolina with his mother Marilyn Blount and watched as his mom

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94. Cork Gaines, *Tom Brady was the biggest steal in NFL Draft history, but there was more to it than just luck*, BUS. INSIDER (Feb. 3, 2019, 12:32 PM), https://www.businessinsider.com/patriots-draft-tom-brady-2017-1 [https://perma.cc/7B2S-KR3G].

95. *Id.*

96. *Id.*

97. Bryan DeArdo, *Tom Brady already has a lock on the NFL's GOAT status, but there are a few more records he could break*, CBS SPORTS (Feb. 10, 2021, 7:29 PM), https://www.cbssports.com/nfl/news/tom-brady-already-has-a-lock-on-the-nfls-goat-status-but-there-are-a-few-more-records-he-could-break/ [https://perma.cc/M3CB-Q3H5].

98. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 64, at 72.

99. *See generally id*. (explaining that student athletes cannot hire an attorney to keep amateur status because doing so would be considered representation by an agent according to the NCAA).

100. Brian Hamilton, *Bam's Beginnings: From humble origins, Adebayo has grown into a star*, SPORTS ILLUSTRATED (Jan. 26, 2017), https://www.si.com/college/2017/01/26/edrice-bam-adebayo-kentucky-wildcats-recruiting-freshman [https://perma.cc/73BR-92CR].

struggled to put food on the table.[101] Unfortunately, there are many individuals who either have been in or are in his same position. One may assume this is not unique to Adebayo and that others cannot afford representation during initial contracting with NCAA member institutions, endorsement deals after their college tenure is over, or contracting with professional corporations.

Most college athletes can be separated into two different categories by student athletes who receive full athletic scholarships and those who receive partial scholarships. Even at that, college athletes receiving a full ride only get three meals from the cafeteria a day and purchase what they need out of their own pocket.[102] A report conducted by the National College Players Association suggested that "86 percent of college athletes live below the poverty line."[103] If there are so many student athletes below the poverty line who are having trouble affording basic needs, then they will likely not be able to afford an attorney. Thus, there is a detachment between student athletes with low resources and athletes with resources when it comes to contracting with universities, the NCAA, professional sports teams, or commercial corporations. Also, it is a fair assumption that high school athletes and those starting to license their publicity may not have experience with contracting, complex legal documents, or the ability to retain counsel. Ultimately, this places many individuals who initially license their publicity rights in a position to be exploited.

After the California legislation, a NCAA spokesperson provided some statements about student athletes' use of their name, image, and likeness. The NCAA's policy group 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."[104] This policy was publicly announced on June 30, 2021, and became effective the following day.[105]

Now that the NCAA will allow student athletes to profit off their name, image, and likeness, exploitation concerns will be further magnified as the NCAA continues to work to implement new policies and rules

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101. *Id.*; Beverly L. Jenkins, *NBA Star Surprises Hardworking Mom With a New Home*, INSPIREMORE (Dec. 13, 2020), https://www.inspiremore.com/nba-player-bam-adebayo-buys-mom-house/ [https://perma.cc/89KZ-RXXU].

102. Armstrong Williams, *Time to Pay College Athletes*, NEWSMAX (Apr. 9, 2014, 7:47 AM), https://www.newsmax.com/ArmstrongWilliams/NCAA-college-athletes-nlrb/2014/04/09/id/564508/ [https://perma.cc/2EP4-WB3H].

103. *Id.*

104. 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/53VT-M4VG] (internal citation omitted).

105. Hosick, *supra* note 7.

regarding student-athlete publicity transfers. Additionally, any new policies implemented by the NCAA could prove to be reminiscent of past NCAA policies that transferred student athletes' publicity rights in perpetuity to the NCAA and allowed the organization to retain almost total control over the athletes.[106] Regardless of what the future holds for student athletes and their ability to transfer their publicity rights, real issues remain for others who have been able to and remain able to transfer their publicity rights, including professional athletes, musicians, influencers, and anyone able to market their publicity rights. Legislatures must address the exploitation concerns of those licensing their name, image, and likeness rights.

III. THE STATUTORY ADDITION OF THE RIGHT OF TERMINATION AFTER A PERIOD OF FIVE YEARS TO RIGHT OF PUBLICITY TRANSFERS

The proposal of this article is to add a statutory right to terminate name, image, and likeness transfers after a period of five years. This proposal will give control back to individuals transferring their rights, which assists those who sign contracts at a young stage in their career that may be binding long-term. Instituting these additions to transferal contracts will allow for a more friendly environment for those who transfer rights and will promote the efficient use of publicity rights.

Also, this proposal builds upon Nabeel Gadit's proposal to allow student athletes' right of publicity to automatically revert to them after their college tenure has ended.[107] Gadit's proposal analyzes the Copyright Act's reversionary period and applies it to student athletes' contractual right of publicity transfers to the NCAA.[108] While the NCAA no longer has the policy of transferring student athletes' right of publicity in perpetuity, these policies may return, and the entertainment industry can still exploit those willing to transfer the rights to their name, image, and likeness. To contrast, Gadit's proposal does not go far enough, as Gadit recommends that the NCAA grant the automatic contractual reversion themselves.[109] Transferors likely cannot rely on the transferees to implement selfless policies themselves where transferees capitalize off the exploitation of others with great profit. As a result, termination rights after a period of five years must be codified.

Additionally, transferors should be given a right to terminate transfers, but the termination should not be an automatic reversion. An

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106. *See* Rothman, *supra* note 10.

107. *See generally* Nabeel Gadit, *An End to the NCAA's Exploitation of Former Student-Athletes: How O'Bannon v. NCAA Highlights the Need for an Inalienable Reversionary Interest in the Right of Publicity for Former Student-Athletes*, 30 CARDOZO ARTS & ENT. L.J. 347 (2012) (showing that this proposal builds upon Gadit's original idea).

108. *Id*. at 360–67.

109. *Id.* at 367.

automatic reversion would terminate upon a set time whether the parties want to or not, which simply makes it a term contract. Then, the parties would need to come to another agreement if they wish to continue their contractual relationship. The more beneficial option would be to allow for an option to terminate, which would allow the prior contract to continue if desired.

Along with athletes who transfer rights, this proposal applies to the right of publicity in general, which affects musicians, artists, celebrities, and other individuals that transfer their rights of publicity. Those who transfer their rights typically do so through contracts. By having a statutory right to terminate after five years, it will create a better environment for those who transfer their rights to others. Thus, these concepts can be adopted by policymakers, either federally or at the state level, to better protect those who transfer these rights.

A. Addition of the Right to Terminate

The notion of a "right to termination" is founded and codified within the Copyright Act, which allows authors to terminate an interest in a copyright.[110] Given that this right is statutory, the right to termination in the Copyright Act is inalienable.[111] Termination rights are founded on the concern that an author may make a poor decision at the beginning of the copyright and as such should have an opportunity to terminate that poor deal in order to renegotiate.[112]

In addition to this concern, Congress realized that the authors of copyright are at a disadvantage at the beginning of their work because of the little knowledge of what their work is actually worth.[113] The right to terminate allows authors to renegotiate the transfers so they can receive a better economic return.[114] With this, courts want to protect non-sophisticated parties from sophisticated parties, which presents an underlying policy for the right to terminate by promoting author-friendly contractual obligations.[115] In order to exercise their termination rights, the authors must comply with the statute by following notice requirements and

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110. Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1333 (2010).

111. Dylan Gilbert, *It's Time To Pull Back the Curtain on the Termination Right*, PUB. KNOWLEDGE (Dec. 5, 2019), https://www.publicknowledge.org/blog/its-time-to-pull-back-the-curtain-on-the-termination-right/ [https://perma.cc/C3KW-QTQQ].

112. Loren, *supra* note 110, at 1332.

113. *Id.* at 1344–45 (citing Mills Music, Inc. v. Snyder, 469 U.S. 153, 172–73 (1985)).

114. Loren, *supra* note 110, at 1344–45.

115. *Id.* at 1346 (citing Marvel Characters, Inc. v. Simon, 310 F.3d 280, 292 (2d Cir. 2002)).

act within the allotted time frame.[116] For copyright, an author can terminate licenses after 35 years have passed.[117] This allows the author to have a better valuation of his or her work and renegotiate a better license or find a more profitable deal.[118]

Along with notice requirements, the Copyright Act provides additional protections for the termination rights if the author of those rights is deceased.[119] The Copyright Act gives termination rights to their widow, widower, children, grandchildren, executor, administrator, personal representative, or trustee, depending on which option is applicable.[120] This allows additional flexibility for the right to terminate by allowing the author's successor to exercise this right and effect a proper interest in the copyright. Allowing for a right to terminate through legislation allows for this right to be concrete as compared to simply instituting the right by contractual obligation. Congress should institute termination rights, whether through the state or federal legislature, to better protect those that contract away their rights of publicity. Given that it is unlikely for parties to contract for a right to terminate, this appears to be the best choice for protection.

As important as the right to termination is for authors of copyright, there are glaring issues with the statute.[121] Among the issues is ambiguity within the law itself, which presents issues with filing and timing.[122] Consequently, creators can find themselves in complex litigation that is expensive, which in turn inhibits creators from using this right. Going forward, policymakers can learn from these ambiguities and can institute a clearer right to termination for the right of publicity.

B. Adding a Right to Terminate to the Right of Publicity

Adding a right to termination to the right of publicity is useful for the same reasons that underlie giving said right to copyright authors. Those who often transfer publicity rights have issues with the valuation of those rights, which makes transferors prime for making bad deals.[123] Additionally, providing for a right to terminate allows those who make bad deals to renegotiate and prevents further exploitation.

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116. *Id.* at 1334.

117. Gilbert, *supra* note 111.

118. *Id.*

119. 17 U.S.C. § 304(c) (2021).

120. *Id.* at § 304(c)(2).

121. DYLAN GILBERT, MEREDITH ROSE & ALISA VALENTIN, MAKING SENSE OF THE TERMINATION RIGHT: HOW THE SYSTEM FAILS ARTISTS AND HOW TO FIX IT (2019), https://www.publicknowledge.org/wp-content/uploads/2019/12/Making-Sense-of-the-Termination-Right-1.pdf [https://perma.cc/9JTM-CL6B].

122. *Id.*

123. *See* Gadit, *supra* note 107, at 365–66 (recognizing valuation issues for student athletes).

Valuation is a problem that most who contract at an early stage, whether it be student athletes, celebrities, or musicians, have at the very beginning of their career. As mentioned, this is because early on it is extremely difficult to place a value on the worth of a certain individual's name, image, and likeness.[124] As a result, those contracting for use of their name, image, and likeness often enter into unfortunate deals that allow others to exploit the use of their name, image, and likeness by receiving those rights for a small sum. In addition to entering into deals for nominal sums, in states where the right of publicity is freely alienable, individuals can lose their rights to publicity forever.[125]

One suggestion from the Copyright Act is that the right to terminate should have an automatic reversion, which after a certain time period the right would automatically revert to the owner of the copyright.[126] With an automatic reversion, an author would still retain the option to renegotiate with a possibility to delay or opt-out of a pending agreement if both parties can come to an agreement.[127] Further, allowing for an automatic reversion would help keep owners from expensive litigation.[128] However, an automatic reversion is not the best option. With an automatic reversion, the parties would need to come to a new agreement. Instead, the transferor should be afforded a right to terminate, which would be optional and allow the parties' contract to continue if satisfactory.

While these suggestions apply to copyright, like the above discussion, the concepts should be applied to the right of publicity as well. With the addition of a right to terminate, parties could contract for the length of time desired but if the transferor's publicity value increases, the transferor would be afforded an opportunity to realize that increase without being stuck long-term. Also, a noted issue is that with the addition of a right to termination and term limits, many contracts will create a retroactive effect.[129] This would put many contracts in limbo until a deal can be negotiated but is necessary to protect those who transfer their rights.

In sum, adding a right to terminate will alleviate issues of valuation because it gives the original owner an opportunity to realize their true value in the future. As time progresses, it will be much easier to determine the actual value of an individual's name, image, and likeness and provide protection for the transferor with the opportunity to renegotiate or seek a new deal. In addition to addressing the valuation problem, adding a right to terminate protects unsophisticated parties from sophisticated parties, which is another policy consideration for having the right in regards to

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124. *See id.*
125. Rothman, *supra* note 10, at 299–300.
126. GILBERT ET AL., *supra* note 121, at 26.
127. *Id.*
128. *Id.*
129. *See id.* at 27.

copyright.[130] Much of the time, the companies contracting to use an individual's name, image, and likeness are sophisticated and enhance their brand through other's name, image, and likeness, such as the NFL and NBA.[131] Leagues, like the NFL and NBA, and others who contract for other's publicity rights, often have experience doing so when compared to a first time transferor licensing away his or her rights. This proposal will shift bargaining power away from sophisticated parties and create more neutral contractual terms.

C. Addition of Term Limits to Right of Publicity Transfers

Taking notes from the Copyright Act, Section 203 introduces the concept of allowing termination rights after a term of thirty-five years.[132] Additionally, the right can only be exercised within a five year period at the beginning of the thirty-five year period.[133] The reasoning behind providing terms for a copyright is to give the author or their family an opportunity to regain the copyright an author may have transferred to realize the full value.[134] Adding term limits serves many of the same functions that the right to termination provides, such as protection from valuation issues[135] and sophisticated parties.[136]

The addition of term limits works together with the right to terminate as seen in the Copyright Act.[137] Term limits allow parties to negotiate and contract for what they wish but provides a safety net for the transferor. Even though each purports to do the same thing, it is important to have both enacted by statute. The reasoning behind this is that ultimately, transferors must have the right to terminate publicity contracts that are unprofitable and exploit their person. By imposing term limits, parties will not be able to contract around an individual's right to terminate because the right will occur automatically within a set time frame, which the proposal, here, is five years. Allowing for simplicity and uniformity creates favorable circumstances for the original holder and saves that person from expensive litigation that may ensue.

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130. Loren, *supra* note 110, at 1346 (citing Marvel Characters, Inc. v. Simon, 310 F.3d 280, 292 (2d Cir. 2002)).

131. *See* Adam Levy, *PWND or Owned? The Right of Publicity and Identity Ownership in League of Legends*, 6 PACE INTELL. PROP., SPORTS & ENT. L.F. 163, 178 (2016).

132. 17 U.S.C. § 203(a)(3) (2002).

133. *Id.*

134. Loren, *supra* note 110, at 1334.

135. *See id.* at 1332.

136. *See id.* at 1346.

137. *See generally* 17 U.S.C. § 203 (showing how the two work together in the Copyright Act).

With the addition of term limits, intervals need to be established. While the term limits for copyright are thirty-five years, this length of time is too long for the transferor's right of publicity.[138] The proposal is five-year statutory term limits for right of publicity transfers. This would be useful for professional athletes because the average professional athlete has a career of about ten years, with the exception of NFL athletes, who have an average of a three-and-a-half-year career.[139] Allowing professional athletes to renegotiate contracts halfway through their professional career permits each to have a better valuation of their publicity rights and develop the resources to better deal with sophisticated parties. Additionally, this five-year statutory term limit would allow NCAA athletes to opt to terminate transfers after their college tenure has ended or when they have a better realization of their publicity value in the pros. For others, like artists, musicians, and influencers, allowing for a five-year period enables them to develop a better understanding of the value of their publicity rights, then renegotiate or license elsewhere if need be. The addition of term limits and the right to terminate alleviates some of the distributional consequences, such as shifting the risk away from transferors contracting for the first time who have yet to determine a valuation of their rights.

After the first interval has passed, a determination should be made as to the length of time that the right of termination would recur. One possibility is that the right to terminate would vest after every five years. After five years, the athlete can continue the deal if it is profitable for them or can terminate and renegotiate. Revaluation allows transferors and transferees to receive a more accurate monetary valuation for the rights, which could change instantly. A vesting option presents the best scenario for the vulnerable parties, allowing them to realize the actual value of their rights and to protect themselves from being taken advantage of. Once the option to terminate vests, the transferor can terminate and renegotiate for a new five-year contract or continue the same contract without renegotiating.

D. The Outlook for the Right of Publicity

The NCAA's decision to allow athletes to profit off their name, image, and likeness by entering into endorsement deals serves only to magnify concerns surrounding the current state of publicity rights. This

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138. *Id.* § 203(a)(3).

139. Daisy M. Jenkins, *Pro Athletes, Big Winners and Losers When the Career Clock Goes to Zero*, HUFFINGTON POST (June 17, 2014, 3:27 PM), https://www.huffpost.com/entry/pro-athletes-bigwinners_b_5504073?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANO__h46_8W3_UuiLujNUTU6E1sZGmumCGifVWCSIbb0g8LxnH2HMfLgj3z1cw9HuKIeKv9APtNoOhVCnizFB3SRVmd4qgboBvlKzMu4n0KZAmHMaL26R4dc9ZYxxceKtkmCyjCeutJbvcd5pMPQi7nDWMs1hJKjZqRBxupA0q14 [https://perma.cc/2NEF-XEKU].

decision has magnified such concerns because, as a result of the widespread viewership of collegiate athletics, NCAA student-athletes find themselves placed on a national pedestal. Naturally, this also cements these athletes as marketing tools for the NCAA and other organizations. While it is the right decision to allow student athletes to profit off their publicity, additional protections must be put in place to protect young men and women who transfer their rights and gain fame due to national exposure. This will protect student athletes from the NCAA and other companies looking to purchase their publicity rights. With these protections, young men and women in college sports can profit off their publicity and make better decisions that will not place them in ill-advised positions.

The same can be said for professional athletes, artists, musicians, and anyone else that wants to market their publicity rights. The entertainment and commercial industries are filled with experienced parties looking to promote their brand and increase profits. As a consequence, there are vast amounts of publicity transfers that occur. With the rise of internet access, individuals are gaining fame and popularity easier and faster than ever before. With this new and fast-paced market, adding a right to terminate the right of publicity transfers after a period of five years can be a valuable protection.

IV. IMPLEMENTATION

In order for protections to be effective, it is necessary that the protections be implemented by statute. It is not enough to suggest that these rights be placed into contracts at the will of the parties. That would shift bargaining power back to the sophisticated parties in the agreement and would allow for further exploitation. With the current condition of right of publicity law, there are no federal laws allowing for the transferability of publicity rights.[140] Since the right of publicity is afforded by state law, one suggestion is to implement these protections through the state legislature.[141] State policymakers must take it upon themselves to enact provisions that implement termination rights and term limits for right of publicity transfers. Additionally, it will be up to citizens in states that allow publicity transfers to lobby their representatives to move to add these protections into law.

Another possibility for implementation of these rights is for the United States Congress to pass a federal statute enacting these protections like the Copyright Act. However, there first must be a federal law that recognizes the transferability of publicity rights, which does not yet exist. Nevertheless, a federal statute would eliminate most of the concerns presented through the state legislature model in that this would be a blanket statute applying to all states, which would create uniformity. A federal

140. *See A Brief History of the Right of Publicity*, *supra* note 16.
141. *See id.*

statute would provide protections to all student athletes, professional athletes, celebrities, or any other person looking to transfer their publicity rights, which is why this would be the most beneficial solution for implementation.

A recurring theme for both copyright and the right of publicity is that protections have had to come through the legislature. The transferability of one's publicity rights is recognized only through state law. In order to recognize a posthumous right of publicity, the legislature needed to enact law to grant protections.[142] The same can be said for copyright due to the codification of the Copyright Act. Those who contract for another's publicity rights do so to enhance their brand and make money. These deals are done with self interest in mind and it is not enough to recommend that these protections be instated through contracts. Thus, in order to protect publicity transfers, these proposed right of publicity protections must be codified by statute.

Further, implementation of these rights raises questions as to whether or not these protections should be retroactive. Retroactivity was an issue that was recognized by those who implemented automatic reversions for copyright authors.[143] By implementing these statutorily, the addition of a vested right to terminate after five years should be retroactive because it would protect those still in unprofitable transfers and promote efficient use of publicity rights. Even though this would place some transfers in limbo after the five-year mark, the addition of protections is needed and useful. Additionally, this may place transferees in a predicament due to the amount expended for long-term transfers and not being able to recognize the long-term benefits. Nevertheless, these transfers will need to be modified going forward to implement protections.

Lastly, based upon the recent name, image, and likeness policy changes and the potential for further changes coming within the NCAA, states will need to make changes to their own laws to recognize the right of publicity. Whereas twenty-four states already recognize a form of right of publicity, those states could gain a significant advantage in NCAA recruiting and eliciting companies that want to contract for transfers.[144] Those advantages will become more substantial if states recognize these protections within their publicity laws. Moreover, the NCAA's recent press release directs student athletes to act in accordance with state law while new rules are implemented.[145] As such, this may foreshadow the direction of future NCAA rules regarding the monetization of student-athlete name, image, and likeness. States have an opportunity to protect transferors with

142. *See* Zarroli, *supra* note 35.
143. *See* GILBERT ET AL., *supra* note 121, at 27.
144. *See Statutes & Interactive Map*, *supra* note 18.
145. Hosick, *supra* note 7.

added protections to the right of publicity law and can easily make these progressive changes.

CONCLUSION

In conclusion, the right of publicity serves an important role in society. It allows those to profit off their name, image, and likeness. This right can be transferred to others and it is important that protections are put in place to protect transferors from injurious deals, sophisticated parties, and valuation issues concerning their publicity rights. Protections should be put in place by adding a statutory right to terminate right of publicity transfers after five years. These protections are not new to the intellectual property realm, as the Copyright Act has enacted forms of both protections to protect authors of copyrights.[146]

Additionally, the reasoning behind having the protections in the Copyright Act are the same as those for the right of publicity, such as concerns with attributable valuation to the rights and unequal bargaining power during contracting.[147] Since the NCAA has recently changed its position on student-athletes' publicity rights, these protections will become even more useful and will help to protect student-athletes going forward. Moreover, these protections will safeguard all individuals seeking to transfer their publicity rights, such as professional athletes, musicians, artists, and internet influencers.

Implementation of the protections should be solidified by statute for those who are transferring their publicity rights because otherwise power remains with the sophisticated parties. With this, policymakers must move to enact the statutory protections to create a better contractual environment for those transferring their rights. Lawmakers should follow the Copyright Act by enacting the right to terminate after a period of five years. Publicity law currently fosters the exploitation of those contracting for their name, image, and likeness rights. Through the addition of the right to terminate after a period of five years, the contractual relationship between the transferor and transferee will be enhanced.

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146. 17 U.S.C. § 203.

147. *See* Loren, *supra* note 110, at 1344–45.