

Free expression? The limits of personality rights

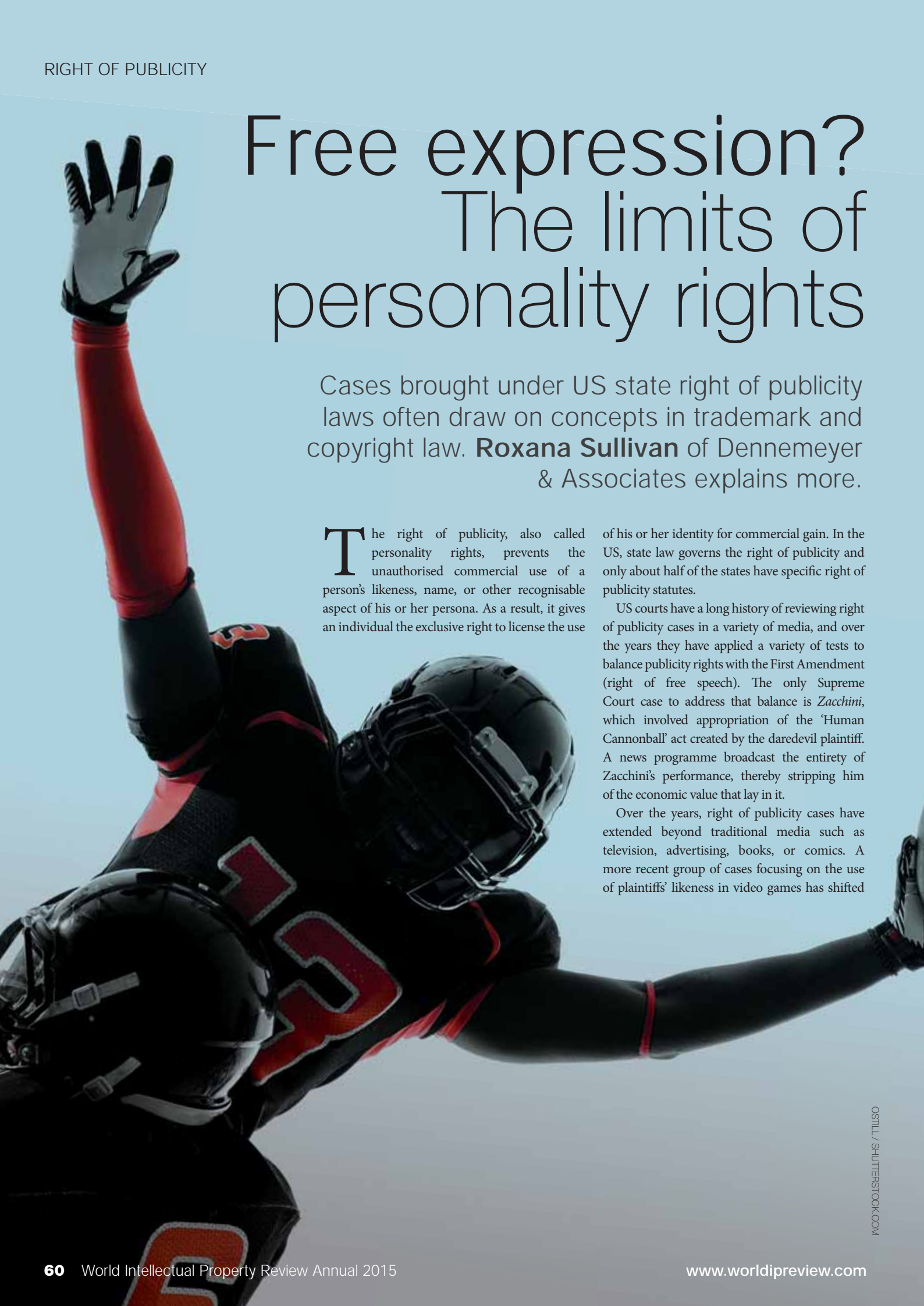
Cases brought under US state right of publicity laws often draw on concepts in trademark and copyright law. **Roxana Sullivan** of Dennemeyer & Associates explains more.

The right of publicity, also called personality rights, prevents the unauthorised commercial use of a person's likeness, name, or other recognisable aspect of his or her persona. As a result, it gives an individual the exclusive right to license the use

of his or her identity for commercial gain. In the US, state law governs the right of publicity and only about half of the states have specific right of publicity statutes.

US courts have a long history of reviewing right of publicity cases in a variety of media, and over the years they have applied a variety of tests to balance publicity rights with the First Amendment (right of free speech). The only Supreme Court case to address that balance is *Zacchini*, which involved appropriation of the 'Human Cannonball' act created by the daredevil plaintiff. A news programme broadcast the entirety of Zacchini's performance, thereby stripping him of the economic value that lay in it.

Over the years, right of publicity cases have extended beyond traditional media such as television, advertising, books, or comics. A more recent group of cases focusing on the use of plaintiffs' likeness in video games has shifted



right of publicity case law and the balancing test that courts apply.

This article will focus on the most recent three cases dealing with athletes depicted in sports video games. These cases, brought against Electronic Arts (EA) for allegedly violating the athletes' right of publicity, have pushed and developed the balancing tests that courts use in such cases.

Brown v EA

In *Brown v EA*, from July 31, 2013, National Football League (NFL) great Jim Brown asserted that EA used his likeness in several versions of its popular video game Madden NFL. Brown, as a retired player, was not covered by the licensing agreements EA had signed with the NFL and the NFL Players Association, and as a result did not receive compensation for the use of his likeness. Brown did not assert his right of publicity; instead, he asserted Lanham Act trademark claims.

The US Court of Appeals for the Ninth Circuit applied the 'Rogers' test. Under this test, liability will not be found under the Lanham Act "unless the [use of the trademark or other identifying material] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [use of trademark or other identifying material] explicitly misleads as to the source or the content of the work".

This test was first established in the case of *Rogers v Grimaldi*, which the US Court of Appeals for the Second Circuit ruled on in 1989. Ginger Rogers, the late actress, filed suit against the producers and distributors of *Ginger and Fred*, a film that allegedly infringed her right of publicity and confused consumers, in violation of the Lanham Act. Despite its title, the movie was not about either Rogers or late actor Fred Astaire.

The court dismissed the claim because the title clearly related to the content of the movie and was not a disguised advertisement for the sale of goods and services or a collateral commercial product.

In *Brown*, the ninth circuit held that because video games were expressive works, the district court correctly applied the Rogers test. Applying this test, the court concluded that Brown's likeness was artistically relevant to the games and that there were no facts to support the claim that EA explicitly misled consumers about Brown's involvement in the games. The court reasoned that the public interest in free expression outweighed the public interest in avoiding consumer confusion.

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The two cases that came after the *Brown* decision applied a different analysis because they were based on rights of publicity instead of the Lanham Act. The courts in these college sports cases applied the transformative use test instead of the author-friendly Rogers test.

Hart v EA

The first such case was *Hart v EA*, decided by the US Court of Appeals for the Third Circuit in May 2013, when Ryan Hart sued EA for allegedly violating his right of publicity under New Jersey law. Hart was a quarterback at Rutgers University.

EA's popular NCAA Football video game featured a Rutgers quarterback with the same number, same height, weight, throwing distance, and physical appearance as Hart in its 2006 version of the game. Because of National Collegiate Athletic Association (NCAA) rules preventing student athletes from earning money from merchandising or sport-related commercial deals, EA did not sign any licensing deals with any college players.

In this case, the third circuit chose to apply the transformative use test, which is rooted in copyright law. Under this test, a court examines "whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness".

This test finds its roots in the *Comedy III Productions v Gary Saderup* case, which looked at a defendant's unadorned drawings of the comedy act The Three Stooges and whether those drawings manifested the artist's skill and talent or whether they exploited the plaintiff's rights in order to achieve fame.

Applying the transformative use test to the facts in *Hart*, the court concluded that EA failed the test because the digital Hart was doing

what the actual Hart did—that is, he played college football. In an analysis similar to the one applied in another video game case, *No Doubt v Activision*, the court ruled that while the game allowed users to literally transform (ie, modify the Hart avatar), that was insufficient to satisfy the transformative use test.

Keller v EA

The second college sports case was *Keller v EA*, ruled on in July 2013 by the ninth circuit. In a case very similar to *Hart*, Samuel Keller accused EA of violating his right of publicity under California Civil Code 3344 and California common law by using his likeness as part of the NCAA Football video game series.

The ninth circuit also applied the transformative use test to balance Keller's right of publicity with EA's First Amendment rights. Under this test, the court held that EA's use did not qualify for First Amendment protection as a matter of law because it literally recreated Keller "in the very setting in which he had achieved renown".

Based on the *EA* cases, it seems that courts may have shifted towards the plaintiffs and against the defendants in video game disputes. However, those cases also presented sympathetic plaintiffs, ones who had worked hard to become excellent athletes but were not compensated under the NCAA student-athlete system. The growing criticism of that system for allegedly exploiting student athletes may have created a bad environment for EA's defence.

It will be interesting to see whether courts will revert to being more sympathetic to authors when the plaintiffs are less sympathetic, or as more video games come over the horizon. ■



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