

THE LEGAL ASPECTS OF SPORT SCULPTURE

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I. Introduction

Sport and sculpture have an inseparable past. For several millennia, artists have used sculpture to commemorate sport and its heroes — from the clay action figures depicting the first recorded team sport in history in 1500 B.C., the idealistic statues of Olympic champions in Ancient Greece, to today’s trophies and busts of legendary coaches and players enshrined in the NFL Hall of Fame.

Despite the longstanding history between sculpture and sport, the regular use of sport sculpture may be drawing to an end. In the sport marketplace where an athlete’s image can be worth millions of dollars, the right of publicity provides a growing number of professional athletes a means to guard against the unauthorized use of their likeness.² Caught in between the law and the athletes are sport artists who argue that state right of publicity laws violate the First Amendment of the federal constitution and their right to artistically portray athletes to the rest of society.

This article addresses the leading judicial tests used to balance a celebrity’s publicity rights with an artist’s First Amendment rights, and maintains that the current application of those tests jeopardize one of history’s most storied and treasured forms of art – sport sculpture.

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² John D. McMillen & Rebecca S. Atkinson, *Artists and Athletes: Balancing the First Amendment and the Right of Publicity in Sport Celebrity Portraits*, 14 J. LEGAL ASPECTS OF SPORT 117 (2004).

II. The History of Sport Sculpture

Long before the first event of history was purposefully recorded, ancient civilizations used sculpture to capture the world around them. Artists have used sculpture for more than 30,000 years as an essential medium of expression to document everyday life, celebrate significant events, and commemorate noteworthy members of society. Because of sports prevalence through ancient civilizations, it is not surprising that sculpture's formidable history includes a storied exhibition of society's most revered athletes, whose likenesses artists fashion into everything from marble, wooden, and clay statues, to pottery, paintings, and even silver coins that depict those athletes.³

The first discovered use of sport sculpture can be traced back some 3,500 years to Mesoamerica, a subtropical region between North and South America, which lays claim to the first known team sport.⁴ The Mesoamerican ballgame was a complex game that was not so different from today's major sporting events.⁵ Archeological evidence suggests that players competed in stadiums where fans cheered their teams on to victory,⁶ and the teams also featured their own ancient forms of half-time shows, mascots, and gambling.⁷ In addition, just like modern society, Mesoamericans relied on sculpture artists to capture life as a Mesoamerican athlete. For example, archeologists have uncovered clay figurines dressed in protective uniforms that exhibit athletic poses that are remarkably similar to modern sport action figures.⁸

³ See David Gilman Romano, *The Real Story of the Ancient Olympic Games*, at <http://www.museum.upenn.edu/new/olympics/olympiccommercialism.shtml> (last visited at Oct. 28, 2004).

⁴ THE NEWARK MUSEUM, THE SPORT OF LIFE AND DEATH: THE MESOAMERICAN BALLGAME, WWW.BALLGAME.ORG, at <http://www.ballgame.org/main.asp?section=2> (last visited March 24, 2005).

⁵ *Id.*

⁶ THE SPORT OF LIFE AND DEATH: THE MESOAMERICAN BALLGAME 130 (E. Michael Whittington ed., 2001) (the losers often were sacrificed to the 'death gods' as part of a religious ritual).

⁷ *Id.*

⁸ *Id.*

Not long after the Mesoamericans, the Ancient Greeks formally recognized the achievements of individual athletes during the Olympic Games. Victorious athletes not only received a crown of olive leaves, but they also received a statue erected in their honor at Olympia.⁹ Artists designed those commissioned sculptures to create idealistic images of athletes, unless an athlete had achieved three Olympic victories, in which case, an athlete received the ultimate honor, a realistic statue of the athlete was placed in the Sanctuary of Zeus at Olympia.¹⁰

Like the Mesoamericans and Ancient Greeks, the Romans also used sculpture to commemorate its passion for sports. Roman artists fashioned gladiators into miniature sport action figures detailed with helmets and suits of armor.¹¹ Coupled with other archeological evidence, these demonstrative figurines vividly depicted some of Rome's most revered athletes and the gladiatorial games in extraordinary detail.

There are a number of sport sculptures still preserved today in museums throughout the world. Of these, art historians likely would classify the sculpture, "Discobolos" as sport art's most renowned.¹² Sculpted by the Greek artist Myron c. 460 B.C., many art historians believe that Discobolos represents the perfect athletic form, and its reproductions are now featured in elite museums throughout the world, including the Vatican.

Modernly, the Heisman Trophy represents the most recognizable sport sculpture. Awarded each year to the Outstanding College Football Player in the United States, the Downtown Athletic Club commissioned the Heisman Memorial Trophy Award in 1935 to pay

⁹ See Gregory Crane, *The Ancient Olympics*, Perseus Digital Library Project, at <http://www.perseus.tufts.edu/Olympics/faq7.html> (last visited at March 24, 2005) (the athlete could have the statue placed in his home town).

¹⁰ David Gilman Romano, *The Real Story of the Ancient Olympic Games*, at <http://www.museum.upenn.edu/new/olympics/olympiccommercialism.shtml> (last visited March 24, 2005).

¹¹ See THE BRITISH MUSEUM, GLADIATOR FIGURINE OF BONE OR IVORY, Compass Collections Online, at [http://www.thebritishmuseum.ac.uk/compass/ixbin/hixclient.exe?_IXDB_=compass&_IXFIRST_=1&_IXMAXHITS_=1&_IXSPFX_=graphical/full/&\\$_with+all_unique_id_index+is+\\$_OBJ1182&submit-button=summary](http://www.thebritishmuseum.ac.uk/compass/ixbin/hixclient.exe?_IXDB_=compass&_IXFIRST_=1&_IXMAXHITS_=1&_IXSPFX_=graphical/full/&$_with+all_unique_id_index+is+$_OBJ1182&submit-button=summary) (last visited March 24, 2005).

¹² FURIO DURANDO, ANCIENT GREECE: THE DAWN OF THE WESTERN WORLD 140 (2004).

tribute to the legendary football coach and innovator John W. Heisman.¹³ Frank Eliscu, a well-known sculptor and National Academy Prize Winner created the Heisman trophy.¹⁴ Eliscu initially selected Ed Smith, a leading player on the 1934 New York University football team as his subject and prepared a rough clay model that he sent to Jim Crowley, one of the legendary Four Horsemen of Notre Dame, for his inspection.¹⁵ Crowley showed the clay sculpture to his players who took various positions on the field to illustrate and verify “the sidestep” and the strong thrust of the right arm.¹⁶ Eliscu closely observed the action sequences and consequently modified his clay prototype to correspond to the player’s movements.¹⁷ The result was a truly lifelike simulation of a player in action.¹⁸ Eliscu converted that image into a plaster cast, a preliminary step to ultimate production in bronze.¹⁹

For thousands of years, sculptures have helped athletes, teams, and fans celebrate sport. No matter what the era, culture, or type of sport, society has relied on sculpture to capture the essence and spirit of sport and its heroes. Today, an illustrious list of sport sculptures fashioned after athletes to commemorate significant sporting achievement and events compliments the Heisman Trophy, including, the National Basketball Association’s MVP trophy²⁰ and the

¹³ HEISMAN.COM, TROPHY DESIGN AND HISTORY, at <http://www.heisman.com/history/heisman-trophy.html> (last visited March 24, 2005).

¹⁴ *Id.*

¹⁵ Lori Capullo, *The Hands of Time: A Profile of Frank Eliscu*, FineArt-e.com, at <http://www.maui.net/~artful/eliscustory.htm> (last visited March 24, 2005). Creating the trophy was no simple task. Like all sculptors of sport awards, Eliscu faced several critical issues, such as what style, design, size the image should be. For example, the traditional cup or bowl seemed too commonplace, lacked distinction and was in no way emblematic of the athletic talent to be honored and immortalized. Thus, the Club Trophy Committee decided after deliberation that the trophy should be the replica, in bronze, of a muscular football player driving for yardage. *Id.*

¹⁶ HEISMAN.COM, TROPHY DESIGN AND HISTORY, at <http://www.heisman.com/history/heisman-trophy.html> (last visited March 24, 2005).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Marc Richard Mellon, *Marc Mellon Studio: Sports Sculpture*, at <http://www.marc Mellon.com/sports.html> (last visited March 24, 2005).

National Football League's Hall of Fame busts.²¹ However, the mass production of sport memorabilia items and the attempted commercial appropriation of athletes' images have raised the question, "Do modern athletes have the right to prevent artists from using their images in works of art?"²²

III. The Right of Publicity and Professional Athletes

The right to control the commercial use of one's name and likeness falls under the legal theory known as "the right of publicity."²³ Judge Jerome Frank first formally used the phrase "right of publicity" in *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*²⁴ In that case, he "founded" a common law property right in the publicity value of a photograph. In 1977, the Supreme Court recognized the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*²⁵ Today, the majority of states recognize an independent right of publicity either at common law or by statute.²⁶

When applied to sport, the right of publicity protects a professional athlete's identity from commercial misappropriation by recognizing their right to control and profit from their names,²⁷ nicknames,²⁸ likenesses,²⁹ performances,³⁰ biographical facts,³¹ symbolic representations,³² or

²¹ PRO FOOTBALL HALL OF FAME, 2004 HALL OF FAME WEEKEND IN REVIEW, *at* <http://www.profootballhof.com/2004HOFInReview.jsp> (last visited March 24, 2005) (showing busts from John Elway, Carl Eller, Barry Sanders and Bob "Boomer" Brown); *see also* AMERICAN SPORT ART MUSEUM AND ARCHIVES, SPORT ARTISTS OF THE YEAR: 1990 BLAIR BUSWELL, *at* <http://www.asama.org/ARTISTS/BUSWELL.HTM> (last visited March 31, 2005) (showing additional examples of sport sculpture).

²² McMillen & Atkinson, *supra*, note 2, at 117.

²³ 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28-3 (4th ed. 2000) (the right of publicity is said to be "the inherent right of every human being to control the commercial use of his or her identity.").

²⁴ *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

²⁵ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

²⁶ MCCARTHY, *supra* note 23, at § 6-5.

²⁷ *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (holding that the unauthorized use of Kareem Abdul-Jabbar's former name and his college basketball statistics violated his common law right of publicity).

²⁸ *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979) (deciding a dispute between a former professional football player and a shaving gel manufacturer concerning the use of Hirsch's nickname, "Crazylegs").

²⁹ *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (holding that a nude drawing of an African American male seated in a boxing ring evoked Muhammad Ali's marketable identity and violated his right of publicity).

essentially anything else that evokes another's marketable identity.³³ In sum, the right of publicity protects a professional athlete's ability to earn income from endorsement contracts, a revenue source that exceeds a growing number of athlete's annual playing salary.³⁴

A. Elements and Defenses of a Right-of-Publicity Claim

To establish a right of publicity claim, plaintiffs must prove two elements: validity and infringement.³⁵ Generally, validity is not considered a material issue because as long as an athlete asserts a right of identity claim, the existence of that right will not be an issue unless the applicable state law does not recognize commercial rights in human identity.³⁶ Infringement determines whether the unauthorized use of an athlete's image is likely to damage the commercial value of his or her image or persona.³⁷ In most instances, "identifiability" of the athlete becomes the primary test for establishing a prima facie right of publicity claim.³⁸

Two recent sport-related cases have discussed the parameters of identifiability regarding athletes. First, in *Ali v. Playgirl*, the court considered whether Playgirl's cartoon depiction of a nude African-American man seated in the corner of a boxing ring was identifiable as Muhammad

³⁰ *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 681 (7th Cir. 1986) (acknowledging that Major League Baseball players' rights of publicity might be violated wherever their performances are broadcasted without their consent).

³¹ See *Abdul-Jabbar*, 85 F.3d 407; *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D.C. Minn. 1970) (ruling that the unauthorized use of professional baseball players' names and statistics in table games violated the players' rights of publicity); *Palmer v. Schonhorn Enter. Inc.*, 232 A.2d 458 (N.J. 1967) (holding that the unauthorized use of professional golfers' names and career statistics in a board game violated their rights of publicity).

³² *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974).

³³ *Abdul-Jabbar*, 85 F.3d at 416.

³⁴ See Scott Street, *Jordan Lives On Without Endorsements*, UCLA Daily Bruin Online, at <http://www.dailybruin.ucla.edu/db/issues/00/04.06/sports.street.html> (last visited March 24, 2005) (sport marketers estimate that Michael Jordan earned up to \$40 million a year in endorsements at the peak of his career compared to \$36 million dollars during his last season with the Chicago Bulls); David Dukceovich, *Forbes Faces: Tiger Woods*, at <http://www.forbes.com/2000/11/14/1114faces.html> (last visited March 24, 2005) (Tiger Woods earned \$70 million in endorsements in 2002).

³⁵ MATHEW A. McMURPHY & LAURA LEE STAPLETON, *THE ART LAW HANDBOOK* 220 (Roy S. Kauffman, ed., 2000).

³⁶ *Id.* at 221.

³⁷ *Id.*

³⁸ *Id.* at 222. Deception and false endorsement are not needed for a violation of the right of publicity. *Id.*

Ali.³⁹ Although Playgirl labeled the caption of the picture as “Mystery Man,” Ali claimed that the image bore an unmistakable likeness to him, therefore, Playgirl’s use violated his right of publicity. The court agreed, concluding that Playgirl’s image bore a clear likeness to Ali because of the cartoon’s reference to “the Greatest,” a name commonly associated with Ali, along with other distinctive markings resembling Ali’s eyes, nose, and smile..

Second, in *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the Ninth Circuit Court of Appeals discussed the level of recognition necessary to identify a sport celebrity in a right of publicity lawsuit.⁴⁰ The plaintiff, a professional race car driver named Lothar Motschenbacher, drove a distinctive red car with a white pinstripe numbered eleven that was well known to car racing fans. The defendant, R.J. Reynolds Tobacco Co., produced a commercial with an altered version of the red car and placed the number seventy-one on the rear spoiler with the word "Winston". The court concluded that Motschenbacher's likeness in the commercial was unrecognizable.⁴¹ However, the court found that the driver in the commercial could still be identified as Motschenbacher for three reasons, (1) because the car’s markings were peculiar to his car, (2) the markings caused some people to think that the car in the commercial was his, and (3) people could infer that the person driving the car was Motshchenbacher.⁴² Based on the uniquely distinctive features of Motschenbacher’s car, the court determined that a jury must ultimately decide whether the defendant violated his right of publicity.⁴³

When applied to sport sculpture, the holdings in *Ali* and *Motschenbacher* suggest that the issue of identifiability primarily rests on the style of sculpture created and how closely it resembles the athlete. A sculpture’s style can range from a truly representative portrait to an

³⁹ *Ali*, 447 F. Supp. 723.

⁴⁰ *Motschenbacher*, 498 F.2d 821.

⁴¹ *Id.* at 827.

⁴² *Id.*

⁴³ *Id.*; see also *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992) (holding that even a robot dressed like game show hostess Vanna White’s satisfied the identifiability element).

abstraction and everything in between. For example, artists design portrait busts, like those commissioned for the NFL Hall of Fame inductees,⁴⁴ to portray the subject in virtual likeness. However, more abstract sculptures depart from representational accuracy with a variable range of possible degrees.⁴⁵ In other words, in abstract sculpture the subject may be unrecognizable without some other reference to the person.

Most portrait sport sculptures sufficiently identify the sport celebrity and establish the identifiability element in a right of publicity lawsuit; the recently erected sculpture of Florida State University football coach, Bobby Bowden, serves as an example.⁴⁶ However, abstract sculptures of athletes are more difficult to discern. Unless other uniquely identifying marks or references to an athlete exist, as in *Ali* or *Motschenbacher*, such as his or her uniform number, particular sporting equipment, or unique body features, abstract sculpture may not sufficiently identify the athlete.⁴⁷ The court in *Ali* noted that “[t]he cheekbones, broad nose and widest brown eyes, together with the distinctive smile and close cropped black hair” constituted features that were sufficient to infer that the boxer in the cartoon was Ali.⁴⁸ Invariably, sculpture cases with an identity issue will be decided on a case-by-case basis. In many instances, such as for portraiture busts or life-sized statues, that issue, like *Ali*, should not be difficult to determine.

When a plaintiff establishes the validity and infringement elements of a right of publicity claim the burden shifts to the defendant to raise a valid defense; both consent and the First

⁴⁴ PRO FOOTBALL HALL OF FAME, 2004 HALL OF FAME WEEKEND IN REVIEW, at <http://www.profootballhof.com/2004HOFInReview.jsp> (last visited March 24, 2005).

⁴⁵ See generally Michael Delahunt, *Abstract Art*, at www.artlex.com/ArtLex/a/abstraction.html (last visited March 31, 2005). Abstract artists exaggerate or simplify the forms suggested by the world around them. Pablo Picasso’s paintings and Henry Moore’s sculptures are examples of abstract art.

⁴⁶ Jill Elish, *FSU paying tribute to Bowden*, at http://www.fsu.com/pages/2004/09/28/bowden_window.html (last visited March 24, 2005).

⁴⁷ MCMURPHY & STAPLETON, *supra*, note 35, at 223 (the precise number of people that are needed to be able to recognize the athlete as the person depicted by a sculpture currently is unknown).

⁴⁸ *Ali*, 447 F. Supp. at 723.

Amendment serve as possible options.⁴⁹ Of those two defenses, the bulk of contention with right of publicity cases lies in First Amendment challenges.⁵⁰ Like the right of publicity, the First Amendment is not an absolute right.⁵¹ To date, three courts with varying degrees of analysis and outcomes have employed balancing tests to weigh a celebrity's publicity rights versus an artist's First Amendment rights. The remaining sections of this article address the application of those judicially-fashioned tests to sport sculpture.

B. Right of Publicity Balancing Test Cases Involving Art

The first case involving professional athletes where courts balanced the right of publicity and the First Amendment was *Cardtoons, L.C. v. Major League Baseball Players Ass'n*.⁵² Cardtoons designed a set of trading cards that featured caricatures of Major League Baseball players and ridiculed the players using a variety of themes. The Major League Baseball Players Association (hereinafter "MLBPA") sued, alleging that the trading cards violated the players' rights of publicity. In a three-part analysis, the Tenth Circuit determined that, (1) Cardtoons' unauthorized use of the players' likenesses violated Oklahoma's right of publicity statute, (2) the First Amendment protected Cardtoons' expression in the trading cards, and (3) Cardtoons' First Amendment rights outweighed the players' proprietary rights in their identities.

When balancing the professional athlete's proprietary rights and Cardtoons' First Amendment rights, the court concluded that maximizing creative expression was one of the primary goals of intellectual property law. The court achieved that goal by striking a proper

⁴⁹ MCMURPHY & STAPLETON, *supra* note 35, at 225. The First Amendment states: "Congress shall make no law... abridging the freedom of speech, or of the press...." U.S. CONST. amend. I.

⁵⁰ MCMURPHY & STAPLETON, *supra* note 35. The First Amendment protects speech from unlawful government regulation. Although private parties typically litigate right of publicity claims, these cases apply either a state statute or the state's common law. A court's enforcement of the right of publicity statute satisfies the state action requirement. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

⁵¹ *Kaplan v. California*, 413 U.S. 115 (1973) (holding that pictures, films, paintings, drawings, and engravings are entitled to First Amendment protection unless they are obscene).

⁵² *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

balance between the professional athlete's entitlement to the fruits of his or her labor and an artist's rights to free expression. The court reasoned that the "underprotection of intellectual property reduces the incentive to create whereas overprotection creates a monopoly over any creative expression," and it concluded that Oklahoma's right of publicity statute was a classic case of overprotection.⁵³ Thus, when the court balanced the interests, the MLBPA stood to benefit little, whereas, Cardtoons and society would be deprived of an important form of entertainment and social commentary if courts permitted players to fully control their identities.

In *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, the California Supreme Court fashioned its own balancing test to determine when a work of art outweighs a celebrity's right of publicity.⁵⁴ The plaintiff, Comedy III Productions, owned all rights to the comedy act known as "The Three Stooges." The artist defendant, Gary Saderup, drew the Stooges without Comedy III Production's consent and then created silk screen t-shirts of his drawings. Comedy III Productions discovered Saderup's t-shirts and sued under California's right of publicity statute. In response, Saderup raised a First Amendment defense claiming that the enforcement of a judgment against him violated his right to free expression.

The California Supreme Court determined that, (1) Saderup's unauthorized use of the Stooges violated California's right of publicity statute, (2) Saderup's drawings were protected by the First Amendment, and (3) Saderup's First Amendment rights with Comedy III Production's publicity rights required balancing under a new transformative test.⁵⁵

⁵³ *Id.* at 976.

⁵⁴ *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Cal. 2001).

⁵⁵ *Id.* at 811.

Under the new transformative test, works of art must be significantly “transformative.”⁵⁶ To determine whether Saderup’s work contained significant transformative elements, the court asked two questions and conducted a “subsidiary inquiry.”⁵⁷ First, the court asked whether the creative elements of a portrait dominated its literal and imitative elements. If creative elements dominated, then creative expression outweighed any commercial publicity rights. However, the court gave no clear indication as to what it considers “creative” or how to make this determination. On the other hand, if literal and imitative elements dominated, the court then asked whether a work is so transformed that it has become primarily the artist's personal “expression” as opposed to a duplicate image of the celebrity.⁵⁸

When the court applied the new transformative test to Saderup’s work the California Supreme Court concluded that the drawings were purely imitative and did not contain any significant creative elements, therefore, Comedy III Production’s publicity rights outweighed Saderup’s First Amendment rights:

When an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity... an artist depicting a celebrity must contribute something more than merely trivial variation, [but must create] something recognizably his own.⁵⁹

⁵⁶ *Id.* at 809. According to the court, transformative elements take many forms, such as parody, factual reporting, fictionalized portrayal, heavy-handed lampooning, or subtle social criticism. *Id.*

⁵⁷ *Id.* The subsidiary inquiry is used for “particularly close cases” to gauge whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.” *Id.* at 808. Unlike the first prong which is based on copyright law the subsidiary inquiry appears to be a judicially created standard because the court cited no authority for its construction.

⁵⁸ *Id.* at 809. The term “expression” in this sense means “expression of something other than the likeness of the celebrity.” Because of the admitted difficulty of determining when artists add creative contributions to their works, *Comedy III* also proposed a subsidiary inquiry for “close cases,” the court asks whether the marketability and economic value of the challenged work derive primarily from the artist or the fame of the celebrity depicted. “When the value of the work comes principally from some source other than the fame of the celebrity – from the creativity, skill, and reputation of the artists – it may be presumed that sufficient transformative elements are present to warrant First Amendment protection.” *Id.* at 810.

⁵⁹ *Id.* at 810-811 (internal quotations omitted) (citing *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976)).

ETW Corp. v. Jireh Publ'g, Inc. represents the most recent case to address a First Amendment defense to a right of publicity claim between a sport artist and professional athlete.⁶⁰ The plaintiff, ETW Corporation (hereinafter “ETW”), was the exclusive licensing agent of Tiger Woods. The defendant, Jireh Publishing, Inc. (hereinafter “Jireh”), was the exclusive publisher of Rick Rush, a prominent sport artist.

The lawsuit arose after the 1997 Masters Tournament when Rush painted three separate paintings of Tiger Woods. As Rush’s exclusive publisher, Jireh turned these paintings into 250 limited edition serigraphs and 5,000 lithographs, selling the serigraph prints for \$700 each and the lithograph prints for \$15 each. ETW claimed that the prints violated Woods’ right of publicity. Jireh argued that the First Amendment protected Rush’s prints.

The court in *ETW* relied on *Comedy III’s* transformative test “in determining where the proper balance lies between the First Amendment and Woods’s intellectual property rights.”⁶¹ The court noted that Woods, “like most sports and entertainment celebrities with commercially valuable identities, engages in an activity, professional golf, that in itself generates a significant amount of income which is unrelated to his right of publicity.”⁶² Thus, “even in the absence of his right of publicity, he would still be able to reap substantial financial rewards from authorized appearances and endorsements” to supplement his annual earnings in professional golf.⁶³ Moreover, the court noted that Rush’s paintings were an independent “creative enterprise,” separate from Woods’ image because they contained “a significant creative component.”⁶⁴ Because of these “transformative elements,” permitting Woods’ right of publicity to prevail over

⁶⁰ *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003).

⁶¹ *Id.* at 936.

⁶² *Id.* at 938.

⁶³ *Id.*

⁶⁴ *Id.* (“Rush’s work consisted of a collage of images in addition to Woods’s image which were combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods’s achievement in that event.”).

Rush's freedom of expression would essentially quash Rush's right to profit from his own creative enterprise.⁶⁵ In other words, the negligible economic impact on Woods compared to the significant impact on Rush and society's interest in freedom of artistic expression, tipped the scales in Rush's favor.

C. Right of Publicity Sculpture Cases and the First Amendment

Only a handful of right of publicity infringement cases have involved sculptures.⁶⁶ However, none of these cases specifically addressed the competing rights of the right of publicity and the First Amendment. In any event, the celebrity sculpture cases offer some insight into the gradual recognition of First Amendment protection of sculpture.

The first modern case, *Memphis Dev. Found. v. Factors Etc., Inc.* addressed a nonprofit corporation's attempt to memorialize Elvis Presley with a bronze sculpture shortly after his death.⁶⁷ In order to finance the estimated \$200,000 cost of the project, the plaintiff announced its intention to offer eight-inch pewter replicas of the bronze statue to persons who contribute \$25.00 or more to the project. Although the district court did not address a First Amendment defense, its characterization of the miniature sculptures as "commercially exploitive souvenir merchandise," implies that the court would not have considered the replica pewter statues as a form of protected expression.⁶⁸

In *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, the defendant, American Heritage Products, Inc., wanted to pay tribute to Martin Luther King, Jr.

⁶⁵ *Id.*

⁶⁶ Non-verbal expression may be protected by the First Amendment. *See* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Zacchini*, 433 U.S. 562 (1977). Non-verbal expression includes works of art like sculpture. *See* *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014 (1993); *Serra v. U. S. Servs. Admin.*, 847 F.2d 1045, 1048 (2nd Cir. 1988); *Sefick v. City of Chicago*, 485 F. Supp 644, 648 (N.D. Ill. 1979).

⁶⁷ *Memphis Dev. Found. v. Factors Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977), *rev'd*, 616 F.2d 956 (6th Cir. 1980).

⁶⁸ "Defendant here, as plaintiff in that case, sought, successfully, to enjoin the distribution and sale of posters and commercially exploitive souvenir merchandise bearing the likeness of Elvis Presley." *Factors Etc., Inc.*, 441 F. Supp. at 1327.

after his death.⁶⁹ American Heritage sponsored two half-page advertisements in Ebony magazine, offered a plastic bust as “an exclusive memorial” and “opportunity to support the Martin Luther King, Jr., Center for Social Change,” and included a free booklet about the life of Dr. King. Georgia’s Supreme Court recognized the potential conflict between the right of publicity and First Amendment, but circumvented the issue when it held that the First Amendment offered no protection for advertisements. Thus, the clash between the right of publicity and First Amendment never came to fruition.

However, in a special concurring opinion, Justice Weltner criticized the majority’s opinion for its views on the plastic sculptures. Pointing to other sculptures as examples of non-verbal expression that “express the sentiments of those who raised them,” he noted that “ofttimes [sic] the most powerful of expressions involve no words at all, e.g.; Jesus before Pilate’ Thoreau in the Concord jail; King on the bridge at Selma.”⁷⁰ Accordingly, Weltner contended that sculpture is a form of expression no matter what its style, and is entitled to First Amendment protection. However, as one legal scholar has pointed out, Weltner’s opinion “presents a passionate recognition of free speech protection for works of art generally... [but it] gives little guidance to determine when the exploitation of expressive works portraying a celebrity should be considered actionable.”⁷¹

In 1993, the court in *Simeonov v. Tiegs* addressed an internationally renowned sculpture artist’s plaster casting of model, Cheryl Tiegs.⁷² Simeonov created the cast and delivered it to Tiegs where it was accidentally destroyed by maintenance workers. Simeonov sued for \$200,000, claiming that he intended to sell ten limited edition bronze copies for \$20,000 each.

⁶⁹ *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982).

⁷⁰ *Id.* at 685 (Welter, J., concurring).

⁷¹ F. Jay Dougherty, *All the World’s Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1 (2003).

⁷² *Tiegs*, 602 N.Y.S.2d 1014.

Tiegs claimed a right of privacy under New York law. The court concluded that, “works of art, including sculptures, convey ideas, just as do literature, movies or theater” and held that “[a]lthough a person's right of privacy...is also a very significant right, it must fall to the constitutionally protected right of freedom of speech.”⁷³ The court then declared that “[a]n artist may make a work of art that includes a recognizable likeness of a person without her or his written consent and sell at least a limited number of copies thereof.”⁷⁴

Although *Tiegs* suggests that sculptors may produce a small number of reproductions without a celebrity’s permission, the court did not address what constitutes a “limited number” of sculpture copies. The court also failed to address what happens if an artist exceeds this allotment, or why selling sculpture should be considered any different than selling unlimited copies of any other protected media expression, such as newspapers or books.⁷⁵

IV. Discussion

Artists maintain that art needs an unfettered environment in order to flourish and advance. They contend that the right of publicity stifles expression because state laws that protect the right of publicity potentially limit who artists can portray and what mediums they may choose.⁷⁶ On the other hand, professional athletes fear that an overextension of the First Amendment may lead to the unregulated over-commercialization of their images. For example, if courts allow artists to paint an athlete’s picture or sculpt their likeness at will, what prevents

⁷³ *Id.* at 1018 (“It is a maxim of constitutional law that, if a Court can avoid declaring a provision of law unconstitutional, it must do so.”).

⁷⁴ *Id.*

⁷⁵ MCMURPHY & STAPLETON, *supra* note 35, at 236.

⁷⁶ This article specifically addresses the varying balancing tests courts have employed to address the right of publicity and First Amendment conflict in art-related cases. Whether all forms of sport sculpture should be classified as protected speech is beyond the this article’s scope.

them, or any anyone else, from mass producing these images and diluting the athlete's income potential?⁷⁷

Of the solutions currently offered by courts to resolve these competing interests, none sufficiently resolve the issue or adequately address sport sculpture. In *Cardtoons*, the Tenth Circuit held that parodying works of art outweigh a celebrity's pecuniary rights in their image.⁷⁸ The courts in *Comedy III* and *ETW* agreed.⁷⁹ However, *Cartoons* has little applicability to sport sculpture. Only in rare circumstances would purely satirical expression be the object of sport sculpture. Rather, most sport sculpture seeks to capture the exact likeness of a sport celebrity by painstakingly representing every detail of his or her image. Although parody in sport sculpture is rare, *Cardtoons* may still be applicable because the court examined the importance and consequences of limiting MLBPA and *Cardtoons*' respective rights.⁸⁰ First, the court addressed the effect of limiting *Cartoons*' right to free expression and noted that parodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society. It stated,

[C]elebrities are 'common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and collective memory.'⁸¹

To gauge the potential impact that the baseball cards had on player's economic rights, the court first noted that the incentive for publicity rights is often overstated by sport celebrities. Most professional athletes "with commercially valuable identities engage in activities that

⁷⁷ Kim, *First Amendment & Publicity: Who Controls Tiger Woods?*, The Internet Party, at http://www.theinternetparty.org/commentary/c_s.php?section_type=com&td=20020708000159 (last visited March 24, 2005). "Can you knock off thousands of copies of the image of Tiger Woods and then hide behind the First Amendment and say it is a work of art? The judge's opinion [in *ETW*] threatens the very existence of the right of publicity, because nearly every commercial product, be it a figurine, trading card, replica jersey or poster, has design elements that could be characterized as artistic."

⁷⁸ *Cardtoons*, 95 F.3d at 976.

⁷⁹ See *Comedy III*, 21 P.3d at 808; *ETW*, 332 F.3d at 936.

⁸⁰ *Cardtoons*, 95 F.3d at 972.

⁸¹ *Id.*

themselves generate a significant amount of income.”⁸² In other words, not only is “the commercial value of their identities... merely a by-product of their performance values...[m]oreover, the additional inducement for achievement produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated.”⁸³ Thus, the extra income generated by licensing a professional athlete’s image does not provide a necessary inducement for the athlete to enter into his or her respective sport.⁸⁴ Consequently, the court concluded that “[i]t is unlikely that little leaguers will stop dreaming of the big leagues or major leaguers will start ‘dogging it’ to first base if MLBPA is denied the right to control the use of its members’ identities.”⁸⁵

Second, the court dismissed MLBPA’s argument that without the right of publicity, the player’s identities would be commercially exploited until the marginal value of each use reaches zero. Noting the efficiency argument may be persuasive in advertising contexts, the court concluded that it was not as persuasive in non-advertising cases because the value of the player’s image may actually increase if “everybody’s got one.”⁸⁶ In other words, if a large portion of the public has an image of Barry Bonds, his commercial appeal is far greater than if no one had one.

Finally, the court pointed out that the use of celebrity names or likenesses in baseball cards generally will not be confusing or deceiving to consumers. Because none of MLBPA’s economic arguments rose to the level, nor outweighed the significant effect of limiting Cardtoons’ freedom of expression, the court’s ruling favored Cardtoons because its free expression rights and society’s interests were more impacted than MLBPA’s economic rights.

⁸² *Id.* at 973.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 975.

Like satirical speech, sport sculpture is an important form of expression. For thousands of years athletes, teams, fans, and commentators have used sculpture not only to celebrate sport, but to symbolically underscore an athlete's importance as a historical figure and a social icon. For example, the significance of Michael Jordan's statue outside of the United Center in Chicago is far more reaching than an obvious artistic rendition of Jordan soaring over an entanglement of opponents, preparing to unleash one of his signature dunks.⁸⁷ Emblematically, this statue expresses, albeit silently, Jordan's importance to the city of Chicago and his fans around the world. According to the United Center, Jordan's statue "has fast become one of Chicago's favorite tourist attractions... people from all over the world come to visit and have their picture taken in front of one of Chicago's most famous and recognizable landmarks."⁸⁸ To think of Jordan as a mere basketball player disregards his global impact. He "revolutionized not only basketball; he changed our ideas of what role athletes can play in society."⁸⁹

Comedy III also recognized the social implications and roles athletes often play in society. An athlete's local, national, or international appeal is an outlet of expression for many sport fans. Because "celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression."⁹⁰ The court stated,

Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are 'the chief agents of

⁸⁷ UNITED CENTER JOINT VENTURE, THE JORDAN STATUE, at <http://www.unitedcenter.com/pagetemp.php?copy=arenjordan> (last visited March 24, 2005). "The statue, unveiled before a national television audience...sits on a 5-foot high black granite base inscribed with...the words, 'The best there ever was. The best there ever will be.'" The statue is cast in bronze and took Omri and Julie Rotblatt-Amrany, the artists, four months, working sixteen hour days, seven days a week to complete the statue. *Id.*

⁸⁸ *Id.*

⁸⁹ See Roy S. Johnson, *The Jordan Effect*, Fortune Magazine, June 22, 1998, at 138 (the impact of Jordan to the economy was estimated at \$10 billion in 1998).

⁹⁰ *Comedy III*, 21 P.3d at 803.

moral change in the United States,' they certainly are widely used--far more than are institutionally anchored elites--to symbolize individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.⁹¹

In addition, *Comedy III* pointed out three reasons why art does not lose its constitutional protection: (1) it is created for purposes of entertaining, (2) it is a nonverbal, visual representation, or (3) it conveys no discernable message.⁹²

Unfortunately, *Comedy III's* balancing test between the right of publicity and the First Amendment stifles artistic expression and potentially penalizes portrait sculpture more than any other art form. The court's mandate that the creative elements of an artist's work must predominate its literal and imitative elements is too rigid. For example, abstract sculpture would pass the transformative test because it has inherent "creative elements" that predominate its literal and imitative elements. However, portrait sculpture would likely fail the transformative test because it inherently portrays the exact likeness of a professional athlete.⁹³ Both styles are artistic forms of expression, yet an artist's First Amendment rights will be outweighed by the celebrity's right of publicity if a sculptor chooses to portray an athlete using the latter style.

⁹¹ *Id.* (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1993)).

⁹² *Comedy III*, 21 P.3d at 803. The fact that expression takes a form of nonverbal, visual representation does not remove it from the ambit of First Amendment protection. *See Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book or other form of writing, and is similarly entitled to full First Amendment protection). The First Amendment protects a work of art even if it conveys no discernable message. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557 (1995) ("a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' [citation omitted], would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."). First Amendment doctrine does not disfavor nontraditional media of expression. *See Ayres v. City of Chicago*, 125 F.3d 1010 (7th Cir. 1997) (T-shirts received First Amendment protection); *Cohen v. California*, 403 U.S. 15 (1971) (jacket with words "Fuck the Draft" on the back is protected speech).

⁹³ Portraiture art is judged, in part, by how closely it resembles the appearance of the subject.

Like portrait drawings, portrait sculpture is adequately creative, and hence, “transformative” because of the creative skills needed to produce such works.⁹⁴ However, the court in *Comedy III* discounted a similar argument from Sauderup, namely, that portraiture drawings required creative decisions. Instead, the court noted that literal depictions, even if accomplished with great skill must still add something of the artist’s own.⁹⁵ According to the court, a celebrity’s likeness becomes the "raw materials" of an original work of art and only when artistic expression becomes the dominant attribute will the artist's First Amendment rights trump the celebrity’s publicity rights. However, this standard fails to recognize the creative aspects of portraiture art, and unwisely mandates that courts make aesthetic judgments about art.

In *ETW*, the court also fashioned an uncertain solution to the right of publicity and First Amendment quandary and its application to sport sculpture. The court applied *Comedy III*’s transformative test to Rick Rush’s sport paintings of Tiger Woods and held that Rush’s works outweighed Woods’ publicity rights. At first glance, *ETW* seems favorable to sport artists, but it is unclear whether its holding restricts First Amendment protection to portrayals of newsworthy events since Rush’s paintings depicted Woods in a historical event — the 1997 Masters Tournament. The court stated,

Unlike the unadorned, nearly photographic reproduction of the faces of The Three Stooges in *Comedy III*, Rush's work does not capitalize solely on a literal depiction of Woods. Rather, Rush's work consists of a collage of images in addition to Woods's image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event. Because Rush’s work has substantial transformative elements, it is entitled to the full protection of the First Amendment. In this case, we find that Woods’s right of publicity must yield to the First Amendment.⁹⁶

⁹⁴ *Comedy III*, 21 P.3d at 810.

⁹⁵ *Id.* at 809.

⁹⁶ *ETW*, 332 F.3d at 938.

The court did not elaborate on its application of the transformative test; therefore, it is difficult to know how other courts will gauge an artist's freedom of expression of newsworthy events versus an athlete's publicity rights. Like the transformative test in *Comedy III*, a "newsworthy" mandate would severely penalize sport sculptors because the very essence of their work depends on the artist's ability to intimately capture the athlete's persona, not the specific sport setting or event.⁹⁷ For example, in *ETW* the court determined that Rush's paintings consisted of a collage of images that were "combined to describe, in artistic form, a historic event in sports history and convey[ed] a message about the significance of Woods's achievement in that event."⁹⁸ Although sport sculptors can create a collage of events depicting an historical event, in many instances artists exclusively focus on the athlete's image in order to portray the emotive aspect of their likeness. Thus, a newsworthy requirement would wrongfully dictate the style and subject matter of sport sculpture because it forces sport artists to create "newsworthy" scenes to achieve transformativeness and avoid a right of publicity lawsuit.

In summary, the current judicial tests do not properly balance an athlete's right of publicity and sport sculpture. In particular, the "transformative test" in *Comedy III* and *ETW* raises several concerns. First, *Comedy III's* failure to find significant creative elements in portrait art is not a view shared by the art world. Many of history's most treasured artworks are portraits. It is hard to imagine the California Supreme Court labeling Rembrandt's portraiture works as "purely imitative" and "non-transformative."⁹⁹

⁹⁷ *Id.* at 936.

⁹⁸ *Id.* The court further noted that Rush's work consisted of more than a mere literal likeness of Woods; they consisted of a panorama of the tournament, including images of the Augusta clubhouse, leader board, Woods' caddy, and six past winners of the tournament. *Id.*

⁹⁹ Where would society and the field of medicine be without Leonardo da Vinci's essential and painstaking replica portrayals of the human body?

Second, the transformative test's mandate that all works of art add "sufficiently creative elements" counters the very purpose of portraiture art.¹⁰⁰ Portrait sculpture seeks to capture a subject with life-like accuracy, expressing that person's unique persona. More so than any other art form, portrait sculpture and its three-dimensional reference creates a transcending likeness of the subject. For example, every August the NFL inducts a select group of members into its Football Hall of Fame. The Hall of Fame presents each inductee with a portrait bust that gets placed in the enshrinement gallery with the other past football greats. Highlighted by overhead spotlights and placed on a foundation that emits light from below, the busts represent the NFL's attempt to bring the players into the physical presence of the thousands of touring visitors each year.¹⁰¹

Third, and perhaps even more disconcerting, the transformative test chills freedom of expression. Stringent application of this test would transpose artistic expression back some 5,000 years when ancient kings and rulers also mandated a ridged set of rules for the creation of statues.¹⁰² Under the current applications of the transformative test, an artist also must create a specific style of sculpture to avoid a right of publicity lawsuit. In other words, the transformative test requires sculptors to shift from realistic images of athletes to some other varying form. Ironically, a realistic sculpture of an athlete today is considered bad art, whereas, the greatest honor an athlete in Ancient Greece could receive was an exact replica of his image.

¹⁰⁰ *Comedy III*, 21 P.3d at 808.

¹⁰¹ Museums use a number of education programs to emotionally connect with their patrons. For example, the NFL's Hall of Fame's Educational Outreach Program is designed to educate as well as entertain students as they tour the pro grid museum. The program attempts to integrate the pro football and the museum experience with classroom studies while encouraging the use of critical thinking skills. See PRO FOOTBALL HALL OF FAME, ENSHRINEMENT, at http://www.profootballhof.com/hall/education/field_trip-faq.jsp (last visited March 24, 2005).

¹⁰² See LAURIE SCHNEIDER ADAMS, *ART ACROSS TIME* 104 (2nd ed. 2002). Egyptian Pharaohs had statues made in their honor to protect their legacy. Like paintings, where images of the gods were strictly regulated and all had to be precisely made in the god's likeness, statues were stiff and formal and were either in an upright standing position or rigidly sitting. That changed when Pharaoh Amenhotep came into power; he allowed art to become much less formal and more relaxed in his time.

V. Conclusion

The courts in *Tiegs*, *Comedy III*, and *ETW* suggest that they will extend First Amendment protection to art that depicts celebrities in limited circumstances. Alternatively, *Comedy III* and *ETW* also indicate that not all styles of art will prevail in a right of publicity claim. Both of those cases rely on the California Supreme Court's transformative elements test, a subjective assessment that compels artist to create style-specific art.

As the Tenth Circuit reasoned in *Cardtoons*, sport artists are not unjustly diluting a professional athlete's commercial rights. Sport sculptors, like sport parodists, are "not merely hitching [their] wagon to a star."¹⁰³ In other words, the sculpting process requires a significant creative component from sculptors; their effort culminates into an entirely new product.¹⁰⁴ To hold otherwise would ultimately permit sport celebrities to curtail artists' unique creative enterprises.¹⁰⁵ In addition, without expansive First Amendment protection, sport sculpture cannot be freely distributed to the public. Instead, the production and distribution of sculpture becomes subject to each sport celebrity's consent. That not only allows professional athletes to censor art, but also causes a chilling effect on future artistic works because a right of publicity claim always looms around the corner.

As it currently stands, the transformative elements test limits an artist's freedom of expression in depicting public figures. This test should be reworked by the courts and state legislatures; they should formally recognize that sculpture of a celebrity is an important form of expression that outweighs a celebrity's proprietary rights. If those standards are not adopted, one of history's most storied and treasured forms of art, sport sculpture, may be jeopardized.

¹⁰³ *Cardtoons*, 95 F.3d at 976.

¹⁰⁴ There are two general forms of sculpture: sculpture in the relief and sculpture in the round. The former term applies when the image is cut away from material and the latter term applies when the image is built up from material, such as clay. In both instances, artists are creating an entirely new product.

¹⁰⁵ *Cardtoons*, 95 F.3d at 976.