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The Cheated Never Prosper: Recognizing Economic Harm in Sports From the Intentional Deprivation of Prospective Value in Publicity Rights

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Generally overlooked when an athletic contest is compromised by the deliberate malfeasance of the victor, is the loss suffered by the competitor and the misappropriation of their unvested publicity rights. This distinct economic harm should have redress. This misappropriation of publicity rights in the sports context is significantly more egregious than the traditional form, as the tortfeasor is not merely benefiting from the economic value of the celebrity’s image without consent, but is unjustly enriched as this economic value has increased the commercial value of his identity. This expansive view of a right of publicity is in line with the policy behinds its creation and subsequent development, as the courts have demonstrated a willingness to protect the economic value of an individual’s “celebrity” and ensure that its market potential is maximized. The courts have also stated that the possibility exists for recovery in a sporting contest for intentional interference with prospective economic advantage, as sporting disputes increasingly seek resolution in the courtroom.

* Juris Doctor Candidate 2011, University of La Verne College of Law. I thank my fellow classmates for their frank critique of this Comment’s first couple of drafts. I would also like to thank the law review committee Dean Linarelli, Professor Roark, and Professor Haneman. I am extremely grateful to Professor Malagrino for his encouragement, time, and direction.
“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”

-Samuel D. Warren & Louis D. Brandeis

**INTRODUCTION**

"Winning isn’t everything; it is the only thing."

- Vince Lombardi

“If you’re not cheating, you’re not trying.”

The sports world is saturated with axioms that elicit a pervasive understanding of success. Success is determined by who wins. This understanding has garnered greater prominence with the significant economic opportunities society now offers its most recognized athletes, including utilizing their increased celebrity for commercial opportunities. Many athletes therefore pursue a decisive advantage that will ensure victory because of the immense stakes involved. When that pursuit results in breaching a significant rule of competition, the response is often action taken against the offender and the loss suffered by the other competitors is overlooked. In particular, the loss suffered by the competitor that is deprived of the economic gain in the commercial value of their identity and the economic opportunities that accompany it because of the victor’s breach.

5 GARDINER ET AL., supra note 4, at 37.
Individual sports provide readily identifiable examples of this economic loss because the performance of each competitor can be isolated and any improprieties can be traced directly to the source to prove causation. An Olympic race provides a suitable hypothetical. Simmons trains for fifteen years leading up to the Olympics. He wins the 100-meter dash. Two weeks later without consent, AB Company places Simmons’s image on the boxes of its unfiltered cigarettes and has a substantial growth in sales. Simmons sues AB Company in a right of publicity action and is granted an injunction and awarded damages for the misappropriation of his image and name.

In the scenario this Comment addresses, the circumstances remain the same up to the Olympics where Simmons runs an identical race but finishes second to Dan, who improves his personal best by a staggering amount. Immediately Dan reaps the benefits of his victory and signs an endorsement contract in which he is the center of a marketing campaign for AB Company Cigarettes. Several months later it is determined that Dan has tested positive for a banned performance enhancing drug and he is unceremoniously stripped of his gold medal. Simmons receives a gold medal in the mail and an envelope in which to return his silver medal. Dan’s intentional breach of the rules deprives Simmons of victoriously crossing the finish line, the image of him victoriously crossing the finish line, the image of him on the medal stand, and the subsequent media attention and public appeal. The ultimate loss is that Simmons is deprived of the economic gain in his identity and the ability to profit from it that would have resulted from his increased notoriety.

The distinction addressed in this Comment is the economic value Simmons has worked to create has yet to vest in the commercial value of his identity. The value instead unjustly enriches Dan by increasing the commercial value of his identity. This is in contrast to the first scenario
where AB Company misappropriated the identity and was unjustly enriched by using the value of Simmons’s identity, rather than the value vesting in AB Company’s identity. Simmons is left without recourse despite having the same economic value intentionally misappropriated by the actions of another. There is no cause of action available to address this harm. This Comment makes a simple claim: this economic harm should be redressed. When an athlete intentionally breaches certain rules of competition\(^7\) and deprives a competitor of economic gain in their identity, that loss should be compensated through a claim for intentional interference with prospective economic advantage in a right of publicity.

Part I of this Comment describes the rise and development of the right of publicity tort to its current state, as the courts utilized it to address an increasing range of social phenomena, oftentimes in the sports world. The historical context illustrates the judicial intent of protecting an individual’s economic interests and assuring that resources are allocated efficiently to maximize market productivity. Part II then describes the tort of intentional interference with prospective economic advantage which redresses the deprivation of future economic gain,\(^8\) the type of economic loss identified in this Comment. Part III utilizes these two causes of action to propose the recognition of an intentional interference with a prospective economic advantage in a right of publicity as a valid cause of action because (1) it falls within the goals of tort law, (2) is a natural extension of a right of publicity’s expansion, and (3) follows the trend of courts addressing claims arising in sports. This Comment concludes by applying this cause of action to recent events in sports.

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\(^{7}\) The rules breached warranting this compensation are those that protect the sanctity of the game and insure a level of fair play and decency; this does not include breaching rules that would be considered mere acts of gamesmanship or minor rule violations that are penalized routinely within the scope of the game.

I. The Right of Publicity

The right of publicity is designed to protect economic interests. It arose as a legal response to the commodification of fame. Significant advancements in communication technology in the early nineteenth century led to the partnering of the entertainment and advertising industries and their creation of market demand for the use of a celebrity’s likeness. Businesses were willing to pay for right to use a celebrity’s likeness in hopes that it would create commercial appeal for their venture through association with the celebrity and a corresponding economic windfall. However, there was no cause of action that could adequately protect the celebrity’s interest. Claims brought for the misappropriation of their likeness, oftentimes by athletes whose celebrity status increased with the advancement of sports to the forefront of society’s consciousness, inevitably failed. A right of publicity was eventually created to protect this interest. As a relatively new cause of action, the right of publicity continues to develop conceptually as it carves its permanent place in the jurisprudence. Generally it is thought to overlap multiple areas of law including: the right to privacy, property, and unfair competition law. The receptiveness of the courts to recognize a right of publicity and the multiple areas of law it is currently thought to entail demonstrate a prevailing theme of protecting individuals’ distinct economic interests.

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11 Id. at 166.
12 Id.
14 Id.; Garry Whannel, Television and the Transformation of Sport, 625 ANNALS AM. ACAD. POL. & SOC. SCI. 05, 206 (2009).
17 J. Thomas McCarthy, The Rights of Publicity and Privacy §1.6 1-27.
A. The Origins of a Right of Publicity

The earliest conceptions of fame were that it was an intrinsic good derived from the respect and esteem of an individual’s contemporaries. There was no economic component to it, and thus no need to protect an individual’s likeness from the misappropriation by others. As society’s conceptualization of fame and celebrity changed, a new economic interest developed and the law had to adjust accordingly in order to protect this interest and maximize its value in the market.

In these pre-twentieth century times, an individual became famous through significant achievement and garnered the requisite attention and publicity through the communication vehicles of literature, theatre, and public monuments. The beginning of the twentieth century brought new forms of communication that increased the accessibility of fame through such things as photography, radio, television, and movies. These improved forms of communication allowed individuals to communicate faster, easier, and with greater numbers. The entertainment and advertising industries during the 1920s and 1930s identified the opportunity to capitalize on these new communication technologies and transformed the perception of fame as an intrinsic good, to a status sought as a means of deriving immense economic benefits. This transformation of fame occurred through the partnership of the entertainment and advertising industries creating consumption demand through the use of celebrity names and images in advertising tie-ins and product testimonials. “Celebrities” became commodities. The economic compensation they could command for the use of their likeness became proportional to

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19 Id. at 4.
20 Madow, supra note 10, at 166.
21 Id.
22 Id.
23 Madow, supra note 10 at 163.
24 Id.
their level of fame. Advertisers and merchandisers paid monetarily for the use of a celebrity’s image in hopes that attaching it to their ventures would increase its vitality. Movies stars and prominent athletes were presented with opportunities to extend themselves profitably beyond the realm of their own industries.

The improvement of technology and subsequent transformation of fame quickly proved the law ill-equipped to protect the economic value of an individual’s identity. The action most often advanced for redress was a right to privacy. The right to privacy addresses the tort concepts of personal injury to an individual’s dignity and state of mind, and measures damages by emotional distress. It is a cause of action for those who seek solitude, and runs contrary to the celebrity’s existence which is predicated on public exposure. The principle contention by a celebrity in a suit for the misappropriation of their identity is not based on unwanted exposure, but rather for its uncompensated use. This causes a right to privacy action to fail. Courts confronted with a misappropriation claim under a right to privacy action determine the celebrity has impliedly waived any unauthorized use of their name or image because they have dedicated their life to a public existence. A right to privacy action is also inadequate because of the inability to assign it. Great economic value exists in the ability to assign the use of an individual’s identity to others, and those willing to pay for this property right want an exclusive

25 Id.
26 Id. at 166.
27 Id.
28 Nimmer, supra note 13, at 204.
29 See id.
30 MCCARTHY supra note 17, § 1.6, at 1-27.
31 Id.
32 Id.
33 Id.
34 Paramount Pictures, Inc. v. Leader Press, Inc. 24 F. Supp. 1004, 1009 (W.D. Okla. 1938) (holding that motion picture stars had waived their right to privacy so defendant could make and sell posters bearing their names and images; reversed on other grounds); Martin v. F.I.Y. Theatre Co., 26 OHIO LAW ABS. 67 (Ct. C.P. 1938) (holding plaintiff had waived right of privacy as an actress in action for placing Plaintiff’s image on front of burlesque theatre without consent); Nimmer, supra note 13, at 204.
35 Nimmer, supra note 13, at 209.
use right. Any agreement granting a right to use an individual’s identity under a right to privacy theory is enforced as a waiver to the purchaser; thus giving the purchaser no right to enforce against a third party and prevent their use. This severely reduces an identity’s market value.

The other cause of action often advanced for a misappropriation of identity was unfair competition. An action for unfair competition fails because it requires competition and the lack of competition provides an effective defense. A name or image can be exploited in an uncompetitive field. For example, a chewing gum company that inserts photographs in each package of gum is not in competition with the baseball players whose photos it used. A suit by the players would fail upon the company’s asserting the defense of a lack of competition. An action for unfair competition is also inadequate because it does not effectively allocate the ability to assign an individual’s identity. The assignment of a name under an action for unfair competition requires the involvement of a business and the goodwill in connection with the business name. It provides no protection for the assignment of a name without a business, thus discouraging potential buyers because of the lack of protection from unauthorized use and limiting the market value of an identity.

Through years of failed right to privacy and unfair competition claims for the misappropriation of an identity, the courts at times recognized this economic interest by both

36 Id.
38 Nimmer supra note 13, at 209.
39 Id. at 210.
40 Women’s Mut. Benefit Soc’y v. Catholic Soc’y, 23 N.E.2d 886, 888-89 (Mass. 1939) (holding that the absence of competition between the plaintiff and defendant prevented the plaintiff from recovering in an action for unfair competition).
41 Nimmer, supra note 13, at 210.
42 Id.
43 Id.; see Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866 (1953).
44 Nimmer, supra note 13, at 213.
45 Id.
46 Id.
alluding to it and directly identifying it in court decisions. Therefore, the case that provided the prototypical example that illustrated the frustration of a misappropriation suit and the need for a suitable means of recourse was *O’Brien v. Pabst Sales Co.* In *O’Brien*, the defendant without consent placed the photograph of football star Davey O’Brien in its calendar to promote its product, Pabst Blue Ribbon Beer. O’Brien sued for the unauthorized use of his image in a right to privacy action. The court agreed with the defendant’s position determining that O’Brien failed to state a claim for which relief could be granted because as a national figure publicizing his name and pictures, he had impliedly waived his right to privacy.

The dissent by Judge Holmes identified the shortcomings of the law. Holmes stated the decision in *O’Brien* provided the precedent that “[i]f one is popular and permits publicity to be given to one’s talent and accomplishment in any art or sport, commercial advertisers may seize upon such popularity to increase their sales of any lawful articles without compensation of any kind of such commercial use of one’s name and fame.” Holmes identified the economic value created due to modern methods of advertising and determined authority existed under Texas common law that entitled O’Brien to recover the reasonable value of the use of his pictures.

Though there were no statutes or decisions that provided precedent, Holmes reasoned that it was

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47 Gautier v. Pro-Football Inc., 106 F. 2d 229, 230 (10th cir. 1939) (Desmond, J., concurring) (“His real complaint, and perhaps a justified one, but one we cannot redress in this suit brought under the New York Privacy statutes, is that he was not paid for the telecasting of his show.”); Pittsburgh Athletic Co. v. KQV, 24 F. Supp. 490 (W.D. Pa. 1938) (holding the defendant was liable for unfair competition and was in violation of plaintiff’s property rights the court determined the plaintiff had the property rights to profit on the news value of his team, the Pittsburgh Pirates, and sell the exclusive broadcasting rights); Madison Square Garden Corp. v. Universal Pictures Co., 7 N.Y.S.2d 845 (N.Y. App. Div. 1938) (holding for the plaintiff under an expanded theory of unfair competition the court determined the complaint sufficiently alleged a misappropriation of the plaintiff’s property rights for the use of images of Madison Square Garden in a film without consent); *Id.* at 218.

49 *Id.* at 168.

50 Supra note 13, at 220.

51 *O’Brien v. Pabst Sales Co.*, 124 F.2d 167, 171 (5th Cir. 1941).

52 *Id.* (citing English common law as the source of Texas common law); Nimmer *supra* note 13, at 220.
imperative for Texas common law to grow and adapt to changes in society that were unforeseeable when the laws of the republic of Texas were adopted in 1840. The absence of a statute or precedent did not relieve Texas or any other state from remedying the clear commission of a tort.

Judge Holmes’s dissent in O’Brien set the stage for Judge Frank of the Second Circuit in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. to recognize the misappropriation of this economic interest. In Haelan, the defendant deliberately induced a baseball player to contract for the right to use his photographs on their chewing gum cards knowing the ball-player had already contracted with the plaintiff for that exclusive right. The plaintiff sued the defendant in an action for intentional interference with contractual relations. The defendant supported by years of precedent argued that privacy was a personal and non-assignable right, and therefore the plaintiff had no right to assert against the defendant because the contract with the ball-player operated as a mere waiver between the two. The court dismissed this contention and recognized in addition to a right to privacy, the existence of another right:

This right might be called a “right of publicity.” For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

55 O’Brien, 124 F.2d at 171; Nimmer supra note 13, at 220.
56 Id.
57 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 869 (1953); McCARTHY supra note 17, § 1.7, at 1-31.
58 Haelan, 202 F.2d. at 867.
59 Id.
60 Id.
61 Id. at 868.
The court separated the interests in a right to privacy and right to publicity by focusing on the economic rather than personal interests involved.\textsuperscript{62} The court identified the now “common knowledge” that celebrities such as ball-players and actors were not fairly, or at all compensated for the commercial use of their likeness.\textsuperscript{63} A protection for this loss was warranted and should include the ability to assign an exclusive right of use to maximize the economic value of this property right.\textsuperscript{64}

\textbf{B. The Right of Publicity Defined}

The right of publicity exists in its infancy when compared to the traditional English common law torts,\textsuperscript{65} having existed for merely half a century.\textsuperscript{66} What it involves is continually being defined. The right of publicity is thought to entail multiple areas of law, including the right to privacy, property rights, and unfair competition law.\textsuperscript{67} This flexibility allows for a liberal application of this cause of action to protect distinct economic interests.

The right of publicity partially derives from a right to privacy, the action often advanced prior to its inception.\textsuperscript{68} The right to privacy tort includes the appropriation of a person’s likeness for commercial gain.\textsuperscript{69} An appropriation claim implicates the judicially created remedy of unjust

\begin{footnotesize}
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\item \textsuperscript{62} \textit{Id.}; Brief History of Right of Publicity, http://rightofpublicity.com/brief-history-of-rop (last visited Mar 11, 2010).
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} Haelan, 202 F.2d at 868.
\item \textsuperscript{65} DOBBS, supra note 8, at 25.
\item \textsuperscript{66} Haelan, 202 F.2d at 866.
\item \textsuperscript{67} MCCARTHY, supra note 17, §1.6, at 1-27.
\item \textsuperscript{69} Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 622 (6th Cir. 2002). See Parks v. LaFace Records, 329 F.3d 337, 460 (6th Cir. 2003) (limiting the pleadings to claim to a right to publicity when both a cause of action for a right to privacy and a right of publicity are applicable); Dean Prosser, \textit{Privacy}, 48 Cal. L. Rev. 383, 389 (1960) Prosser attempted to systemize the right to privacy by categorizing it into four interests: (1) Intrusion upon a person’s seclusion or solitude, or into his private affairs, (2) Public disclosure of embarrassing private facts about an individual, (3) Publicity placing one in a false light in the public eye; and (4) Appropriation of one’s likeness for the advantage of another.
\end{itemize}
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enrichment,\textsuperscript{70} which avoids the unwarranted benefit by an individual at the expense of another by requiring them to make restitution.\textsuperscript{71} Unjust enrichment is based on the determination that the free appropriation of an individual’s identity serves no social purpose.\textsuperscript{72} This is the same as in a right of publicity action when an individual misappropriates the identity of a celebrity for profit.\textsuperscript{73} The difference between the right to privacy action and right of publicity action is that a celebrity does not have the same expectation of privacy as the rest of society because they have lent themselves to public exposure and may not sue for the appropriation of likeness under a right to privacy.\textsuperscript{74} A right of publicity provides a cause of action in which a celebrity to able to recover monetary damages for the misappropriation of their identity.\textsuperscript{75}

A publicity right is also thought to involve property rights.\textsuperscript{76} An individual’s identity is legally recognized as their personal property and as property it is protected from any unauthorized commercial use.\textsuperscript{77} The economic value of this property is created through hard work, skill, and talent.\textsuperscript{78} Any loss of financial rewards stemming from this investment is a legal harm.\textsuperscript{79} In \textit{Ali v. Playgirl Inc.}, Muhammad Ali contested the unauthorized use of his likeness in a Playgirl drawing that depicted a nude black man seated in the corner of the boxing ring that

\textsuperscript{72}Cartoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 976 (10th Cir. 1996), see Schlacter, \textit{supra} note 61, at 476. A claim for unjust enrichments requires the plaintiff to prove that (1) the defendant received a benefit, (2) at the plaintiff’s expense, (3) under circumstances that would make it unjust for the defendant to retain benefit without paying for it.
\textsuperscript{73}Schlacter \textit{supra} note 45, at 476; Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 415-16 (9th Cir. 1996) (allowing Kareem Abdul-Jabbar to recover for the use of his former name, Lew Alcindor, in a television commercial).
\textsuperscript{74}McCARTHY, \textit{supra} note 17, §1.6, at 1-27.
\textsuperscript{75}Id.
\textsuperscript{77}Id.
\textsuperscript{78}Id.
\textsuperscript{79}Id.
was captioned the “The Greatest.” The court held in favor of Ali. The court reasoned that Ali had established a valuable interest in his identity through his significant athletic achievements, among other things. Playgirl’s unauthorized use and capitalizing on Ali’s likeness in its magazine was a misappropriation of his property.

The right to publicity is also conceptualized as a commercial tort in the area of unfair competition law. From the perspective of a plaintiff, publicity is a property right that can be assigned and infringed upon. From the perspective of a defendant, it is an invasion or infringement upon an individual’s right and thus a tort of unfair competition.

II. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

The loss of future economic gain because of the tortious actions of another is redressed in an action for intentional interference with prospective economic advantage (IIPEA). IIPEA is the same as an action for intentional interference with contractual relations, but without the presence of a contract; IIPEA instead requires the plaintiff’s to show the existence of a probable economic advantage. Courts have stated the intentional act of the tortfeasor in a claim for IIPEA must be malicious, but this is generally tapered to the intent being improper in some way. Impropriety may be shown by the violation of a statute, common law rule, or established

81 Id. at 726-27.
84 MCCARTHY, supra note 17, § 2.1[A], at 2-4.
85 Id.
86 Id.
87 DOBBS, supra note 8, at 1275.
88 Id.
89 Id. at 1259-1260.
standard of a trade or profession. Restatement § 767 gives a more relaxed standard determining impropriety through a list of several factors.

A claim for IIPEA or intentional interference with contractual relations has been linked to the unauthorized use of a person’s identity. In Haelan, the case from which a right of publicity arose, interference with contractual relations was a parallel claim. The defendant knowingly signed ballplayers that had already signed exclusive agreements with a rival company. The court determined the defendant had deliberately induced the players into signing and found the defendant liable for interference with contractual relations. The Right of Publicity claim involved the defendant’s contracts which had been assigned to them by an independent agent, and the use of player’s photos without any authorization. Circumstances such as this have lead some to argue that the whole body of law termed “Right of Publicity” can fit within the realm of interference with prospective economic advantage. William Prosser in his treatise on torts fits all of unfair competition, trademarks, and false advertising under the same section labeled “Interference with Prospective Advantage.”

The potential for an IIPEA claim regarding an individual’s chances of winning a game or contest has been entertained, but met with a general reluctance. The Restatement suggests that

91 Restatement (Second) of Torts § 767 (1979) (listing the factors to determine whether the defendant’s actions were improper in an action for intentional interference with prospective economic advantage: (a) the nature of the conduct, (b) the actor’s motive, (c) the interests of the other with which the actors conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor’s conduct to the interference, and (g) the relations between the parties).
92 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (1953); id.
93 Haelan, 202 F.2d at 866; McCarthy supra note 17, §5.14, at 5-163.
94 Haelan, 202 F.2d at 868; McCarthy supra note 17, §5.14, at 5-163.
95 Haelan, 202 F.2d at 868.
96 McCarthy supra note 17, §5.14, at 5-163.
98 DOBBS, supra note 5, at 1282.
the interference with prospective economic advantage in a sporting contest would only be actionable if the chances of winning before the interference were significant.\textsuperscript{100} The California Supreme Court held that the plaintiff must prove sine qua non the defendant’s interference the plaintiff would have won.\textsuperscript{101} The court determined public policy concerns fuel a reluctance to extend an action for interference with prospective economic advantage to sporting events because of the inherent uncertainty involved in the outcome.\textsuperscript{102} The court however did not close the door on the potential for recovery in such a claim.\textsuperscript{103} It has been suggested that when the defendant not only tortiously interferes with the plaintiff’s opportunity but profits as a result, the plaintiff may be allowed to recover the defendant’s gain in certain circumstances.\textsuperscript{104}

IIPEA recoups economic gain that was certain, but for the intentionally tortious actions of another.\textsuperscript{105} It significantly overlaps an intentional interference with contractual relations.\textsuperscript{106} These torts have arisen are parallel claims in a right of publicity claim.\textsuperscript{107} A claim for IIPEA in a sporting event has been determined to be viable if the plaintiff is able to prove sine qua non the defendant’s actions the plaintiff would have won,\textsuperscript{108} and suggested that when the defendant not only interferes but profits, the plaintiff may be allowed to recover.\textsuperscript{109} The application of IIPEA to future publicity rights would thus appear reasonable.

\textsuperscript{100} Restatement (Second) of Torts § 767 (1979).
\textsuperscript{101} Youst v. Longo, 729 P.2d 728, 736 (Cal. 1987) (holding that suit by plaintiff for intentional interference with prospective economic advantage failed because the plaintiff was unable to show as a matter of law that he would have won the horse race due to the defendant causing his horse to enter the path of the plaintiff’s horse and striking the plaintiff’s horse with his whip).
\textsuperscript{102} Id. at 737.
\textsuperscript{103} Id. at 736.
\textsuperscript{104} DOBBS, supra note 8, at 1282.
\textsuperscript{105} Id. at 1275.
\textsuperscript{106} Id.
\textsuperscript{107} Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (1953).
\textsuperscript{108} Youst v. Longo, 729 P.2d 728, 736 (Cal. 1987).
\textsuperscript{109} DOBBS, supra note 8, at 1282.
III. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE IN A RIGHT OF PUBLICITY

Tort rules reflect social values and norms that exist in society.\(^\text{110}\) Judges do not use their authority to create new standards, but utilize these rules to enforce what society already believes.\(^\text{111}\) The right of publicity cause of action demonstrates society’s belief in protecting the economic value of an individual’s identity that is misappropriated by another individual who is unjustly enriched. An intentional interference with prospective economic advantage demonstrates society’s belief in protecting an individual’s earned economic gain that is tortiously interfered with by another. Combining a right of publicity claim with a claim for intentional interference with prospective economic advantage adheres to the general tort principle of redressing a harm suffered by an individual because of the culpable actions of another, is in furtherance of the judicial trend of applying a right of publicity to an increasing number of circumstances, and follows the increasing trend of sports disputes seeking resolution in the courtroom.

A. The Commission of a Tort

The most fundamental reason for recognizing an interference with prospective economic advantage in a right of publicity exists in the basic principles of tort law. Tort law is premised on the assumption that the plaintiff has a right that has been violated.\(^\text{112}\) A tort is committed when an individual has sustained a loss or harm as the result of an act, or failure to act by another.\(^\text{113}\)

\(^{110}\) Id. at 30.
\(^{111}\) Id.
\(^{113}\) Id.; EXPLORING TORT LAW 12 (M. Stuart Madden ed., 2005) (The generally recognized objectives of tort law include: (1) returning the party who has suffered a loss to his or her original position; (2) requiring the wrongdoer to disgorge their benefit; (3) deterring the wrongdoer and others from engaging in the same injurious conduct; (4) corrective justice and morality; or (5) efficiency and deterrence. The idea is that there are certain parts of the human existence that are so inviolable that they require compensation because they define what it is to be a human being).
The intentional interference with prospective economic advantage in a right of publicity satisfies the basic tenants of tort law. The right of publicity is a property right. In an action for intentional interference with prospective economic advantage in a right of publicity, the injured party has invested time, skill, effort, and money to increase the value of this property right and is deprived of this investment. This value is intercepted by the intentional actions of another individual, who profits from the commercial opportunities created by the economic value vesting in their identity. A tort has been committed as an individual has sustained a loss due to the actions of another.

B. The Right of Publicity Continues to Evolve and Expand

The right of publicity is a recently recognized tort cause of action. The majority view is that it exists by common law in every jurisdiction. There is no federal statute recognizing a right of publicity, but it is recognized in nineteen states by statute. The Supreme Court has addressed the right of publicity once, in Zacchini v. Scripps-Howard Broadcasting Co. In Zacchini, the defendant videotaped the plaintiff’s 15-second human cannon ball act without permission and televised it on a news program. Zacchini filed suit alleging the film was

114 McCarthy, supra note 17, § 2.1[A], at 2-1.
115 Id.
116 Brief History of Right of Publicity, supra note 62; see McCarthy, supra note 17, § 3.1[B], at 3-3 (explaining a right of publicity action requires proof of the following elements: (1) the plaintiff owns an enforceable right in the identity of a human being, (2) the defendant has used some aspect of identity that is identifiable from defendant’s use, and (3) the defendant’s use is likely to cause damage to the commercial value of that persona).
120 Id.
shown and commercialized without his consent and this was a misappropriation of his professional property.\textsuperscript{121} The Court held that Zacchini had a commercial interest in compensation for the time and effort involved in his performance.\textsuperscript{122} The Court reasoned that an economic incentive must exist for Zacchini and other performers to create performances that interest the public or they will cease to exist.\textsuperscript{123}

The application of a right of publicity as a common law right left to state interpretation creates a forum for varying interpretations. The resulting trend is the recognition of an increasingly expansive right. The case most often referred to as illustrating this expansive approach is \textit{White v. Samsung Electronics America, Inc.}\textsuperscript{124} In \textit{White}, the defendant ran a television commercial showing a robot in a gown and blonde wig, standing next to a video board.\textsuperscript{125} The plaintiff, Vanna White of Wheel of Fortune Fame, sued Samsung for infringing upon her right of publicity, claiming that Samsung deliberately pawned her image and popularity.\textsuperscript{126} White’s name, voice, or signature were not used in the commercial.\textsuperscript{127} The court determined the right of publicity should not be limited simply to name and likeness because a clever advertiser could devise a number of ways of effectively reminding the public of a particular celebrity, thus eviscerating that celebrity’s publicity rights.\textsuperscript{128} The right of publicity should encompass anything evoking an individual’s personality.\textsuperscript{129} The court held Samsung had

\begin{flushright}
\textsuperscript{121} \textit{Id.}  \\
\textsuperscript{122} \textit{Id} at 582.  \\
\textsuperscript{123} \textit{Id.}  \\
\textsuperscript{124} \textit{White v. Samsung Electronics American, Inc.}, 989 F.2d 1512 (9th Cir. 1993).  \\
\textsuperscript{125} \textit{Id} at 1514.  \\
\textsuperscript{126} \textit{Id.}  \\
\textsuperscript{127} \textit{Id.}  \\
\textsuperscript{128} \textit{Id.}  \\
\textsuperscript{129} \textit{White}, 989 F.2d at 104, at 1514.
\end{flushright}
deliberately pawned the image and popularity of White because she was readily identifiable from the commercial.\textsuperscript{130}

The creation of new media forms and developments in society continually present the courts with unique circumstances and claims for the misappropriation of an identity. The common theme is flow of economic value from a celebrity to another individual who is unjustly enriched. Football star Elroy “Crazylegs” Hirsch recovered for the unauthorized use of his nickname in the marketing of a moisturizing shave gel for women.\textsuperscript{131} Director Woody Allen recovered for an advertising campaign that depicted a Woody Allen look-alike visiting video stores.\textsuperscript{132} Actress and singer Bette Midler recovered for a commercial using a singing sound-alike, even though the company had obtained permission from the song’s copyright owner to use the song.\textsuperscript{133} Late night talk show host Johnny Carson recovered from a portable toilet provider for the use of the phrase “Here’s Johnny,” used to introduce Carson on his show.\textsuperscript{134} The right of publicity has even been extended by some jurisdictions to survive the death of a person, awarding the publicity right to his/her estate.\textsuperscript{135}

C. Sports Related Disputes in the Courtroom

An intentional interference with prospective economic advantage in a right of publicity is an application of a right of publicity cause of action that will be primarily applicable in the sports realm. Recent history has revealed an increasing trend of sports disputes seeking resolve in the

\textsuperscript{130} Id; Brief History of Right of Publicity, supra note 62.
\textsuperscript{131} Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 140 (1979).
\textsuperscript{133} Midler v. Ford Motor Co. 849 F.2d 460, 463-64 (9th Cir. 1989).
\textsuperscript{134} Carson v. Here’s Johnny Portable Toilets, 698 F.2d 831, 836 (6th Cir. 1983).
\textsuperscript{135} Presley’s Estate v. Russen, 513 F.Supp. 1339, 1382 (D.N.J. 1981); see Estate of Mantle v. Rothgeb, 537 F.Supp.2d 533, 546 (S.D. N.Y. 2008) (holding that defendants were not authorized to use Mickey Mantle’s likeness without referencing the film them they had contracted to make).
courtroom rather than through their own governing bodies.\textsuperscript{136} This trend can partially be explained by the increased economic stakes involved in sports and the conflict of interests it creates between the athletes and governing bodies.\textsuperscript{137} The courts have been accommodating as the law has utilized traditional bodies of law to cater to the occasional peculiarities that are present in a sports dispute.

The intrigue and fascination of society with sports is largely founded on the competition and the uncertainty of outcome it presents.\textsuperscript{138} Sports teams and athletes are mutually dependent upon each other to provide an opponent and maintain some semblance of a level playing field.\textsuperscript{139} The loss of unpredictability results in the death of sports.\textsuperscript{140} Sports are therefore governed by a body of clearly articulated rules to ensure a standard of fair play and competitive balance that are enforced in a uniform and nondiscriminatory manner by a governing body.\textsuperscript{141} Recent trends have shown an increase in athletes seeking redress outside their sport’s governing bodies and looking to external authorities, such as courts and independent arbitrators.\textsuperscript{142}

The commercialization of sports and its evolution from recreational activity to business partially explains the motivation for seeking resolution of sports disputes from outside authorities.\textsuperscript{143} Major sporting events have become major media events, televised around the world, dominating the sports pages of newspapers, magazine covers, and advertising.\textsuperscript{144}

\textsuperscript{136} GARDINER ET AL., supra note 4, at 88; Timothy Davis, What is Sports Law?, 11 MARQ. SPORTS. L. REV. 211, 213 (2001).
\textsuperscript{137} LAW AND SPORT IN CONTEMPORARY SOCIETY 116 (Steve Greenfield & Guy Osborn eds., 2000).
\textsuperscript{138} GARDINER ET AL., supra note 4, at 50.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Mitten supra note 4, at 797.
\textsuperscript{142} LAW AND SPORT IN CONTEMPORARY SOCIETY, supra note 137, at 116.
\textsuperscript{143} Mitten, supra note 4, at 800; GARDINER ET AL., supra note 4, at 399 (stating that sports accounts for more than 3% of world trade).
\textsuperscript{144} Whannel, supra note 14, at, 206.
increase of attention and visibility has escalated sports in social prominence and made it more attractive to sponsors and advertisers. It has eroded away localism and created fan bases for the more prominent teams and athletes around the world, thus increasing their potential for economic gain. The level of media attention that sports attract has escalated the status of prominent athletes beyond their athletic excellence. Sports stars are celebrities whose lives, both professional and private, attract greater media coverage.

With the tremendous stakes now involved, particularly at the elite levels of sport, business conventions now generally govern the relationships within sports. A demand has grown for an expanding disciplinary jurisdiction of sports bodies for the widening array of misconduct. The contention is that certain conduct negatively impacts the image and integrity of sports and falls outside the jurisdiction of the governing body. When a claim is brought before a sport’s governing body, ultimately there is a concern over the bottom line and maintaining a public image that attracts the population. With the expanding jurisdiction of sports governing bodies, there is the inherent conflict and fear that the governance of sports will be motivated by a desire to protect its image rather than insure justice to its athletes.

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145 Id. at 210.
146 Id; Johah Freeman, Ranking the 50 Highest-Earning Athletes in the U.S., http://sportsillustrated.cnn.com/more/specials/fortunate50/2008/index.html. The 5 top-earning American athletes in terms of endorsements for 2008 included: Tiger Woods $105 million, Phil Mickelson $53 million, Lebron James $28 million, Floyd Mayweather $20.25 million, and Kobe Bryan $16 million; GARDINER ET AL., supra note 4 at 447. Sports sponsorship offers a wide variety of commercial right and opportunities, including: Title sponsorship, event sponsorship, broadcast sponsorship, team and individual sponsorship, official designations (such as official credit car to the event), official supplierships (such as sports equipment), franchise (such as exclusive sale of sponsor’s soft drinks at the event) and display rights, official program sponsorship, product and character merchandising, commemorative items, promotional items, corporate hospitality, and tickets and access to VIP areas.
147 Whannel, supra note 14, at, 206.
148 Id.
149 GARDINER ET AL., supra note 4, at 10.
150 Id.
151 Id.
152 Id.
153 Id.
154 Id.
The seminal case for courts having jurisdiction of incidents taking place within the confines of the sports arena is Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979). To determine whether it was appropriate to hear a case arising from a sports event, the Court considered the potential threat of legal liability having a significant deterrent effect upon the game and the function of private civil actions as an important mechanism for societal control of human conduct.\(^{155}\) The Court posited whether the social values would be improved by creating such a limitation.\(^{156}\) The court determined that principles of law are not precluded because the infliction of injury takes place within the realm of a sporting event.\(^{157}\) Actions that take place within the confines of the game can be unreasonably outside the realm of general custom,\(^{158}\) and it is fundamental that citizens be able to seek redress from the government when an injury has been wrongfully inflicted.\(^{159}\)

1. Liability Found for Breaching League Rules Between Two Sports Teams

Recent litigation in England between two soccer teams in the English Premier League demonstrates the potential for finding tort liability stemming from a competitor breaching league rules and becoming unjustly enriched at the expense of another.\(^{160}\) The incident occurred in April 2007 when West Ham admitted to breaching league rules B13 and U18.\(^{161}\) West Ham signed two players near the conclusion of the season, Carlos Tevez and Javier Mascherano, and

\(^{156}\) Id.
\(^{157}\) Id. at 520.
\(^{158}\) Id. at 521.
\(^{159}\) Id. at 523.
\(^{160}\) Id.
turned a blind eye to their registrations being in violation of league rules.\(^{162}\) West Ham then had a late season surge that prevented their relegation.\(^{163}\) As a result of West Ham’s avoidance, Sheffield United was relegated from England’s top division.\(^{164}\)

The Premier League eventually discovered the violation and charged West Ham with breaching league rules.\(^{165}\) An independent three-man panel imposed a fine of £5.5 million.\(^{166}\) Sheffield United was not satisfied with the result\(^{167}\) and filed an arbitration claim against West Ham\(^{168}\) for lost television revenue, merchandising, and bonuses as a result of relegation.\(^{169}\) An independent arbitration panel determined that Carlos Tevez had a decisive affect upon Sheffield’s fate and found in favor of Sheffield United.\(^{170}\) On March 15, 2009, the teams agreed to an out of court settlement of £25 million.\(^{171}\) Following the conclusion of arbitration hearing,


\[^{165}\text{Id.}\]


\[^{167}\text{Fitzgerald, supra note 168.}\]

\[^{168}\text{Kelso, supra note 165.}\]

\[^{169}\text{Fitzgerald, supra note 168.}\]

\[^{170}\text{Carlos Tevez played every minute of the final five games of the season. In that time he scored 44 percent of West Ham’s goals, was directly involved in 55 percent of them, and scored the only goal in a 1-0 defeat of Manchester United in the final game of the season. Tevez took 30.4 per cent of their shots and created 16.3 percent of their scoring changes. Kelso, supra note 165.}\]

players from Sheffield United spoke with a sports lawyer about pursuing their own individual compensations claims,\textsuperscript{172} contemplating legal action for lost bonuses and image rights.\textsuperscript{173}

D. Application of the Cause of Action

The increasing interaction of sports and law has created an accumulation of a body of sports-only law.\textsuperscript{174} Whether or not that has created a substantive area of “Sports Law,” or is an amalgamation of various substantive areas of law that are relevant to sports more appropriately referred to as “Sports and the Law,” the factual peculiarities of sports at times require a unique application of legal doctrine.\textsuperscript{175} Sports leagues such as Major League Baseball are granted antitrust exemption.\textsuperscript{176} Federal legislation has been designed specifically for sports, including statues regulating sports agents, and federal statues such as Title IX.\textsuperscript{177} The application of intentional interference with prospective economic advantage in a right of publicity would be an application of basic legal precepts to address an industry specific harm.

1. A Claim Brought by a Team: Kansas State v. Ohio State

The breaching of recruiting and eligibility rules is a frequent occurrence in college athletics that gives the breaching school a significant advantage.\textsuperscript{178} Studies have revealed a direct correlation between a school’s recruiting success and subsequent performance in major college athletics.\textsuperscript{179} The top performing teams are able to attract higher ranked recruits and a vicious cyclical is created with immense barriers to entry to becoming one of college football’s


\textsuperscript{173} Fitzgerald, \textit{supra} note 168.

\textsuperscript{174} \textit{GARDINER ET AL.}, \textit{supra} note 4, at 88; Davis, \textit{supra} note 126, at 213

\textsuperscript{175} \textit{GARDINER ET AL.}, \textit{supra} note 4, at 88; Davis, \textit{supra} note 137, at 214-15.

\textsuperscript{176} \textit{GARDINER ET AL.}, \textit{supra} note 4, at 213.

\textsuperscript{177} \textit{Id.} at 212.


perennial elite. For these top teams there is a lot at stake, as college athletics has grown into a big business. In college football in particular, the goal for the elite teams is to qualify for a BCS bowl. Qualifying for a BCS bowl increases a school’s notoriety and appeal through television exposure and the magnitude of the game. That is in addition to the significant economic compensation that comes with merely qualifying. In 2002, Ohio State University qualified for a BCS bowl and controversy later swirled regarding the eligibility of one its top performers. If these allegations were true, Ohio States actions came at the direct expense of Kansas State University who was next in line to qualify for a BCS bowl.

Ohio State finished the 2001 season unranked with a lackluster 7-5 record. Maurice Clarett, the USA Today High School Offensive Player of the Year in football, committed to play football at Ohio State for the following season. That year Ohio State finished with a 14-0

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180 Id.
182 The Bowl Championship Series (BCS) is an arrangement for post-season football designed to match the two-top rated teams in a national championship game and fill the remaining games with competitive high quality match-ups. The bowl game participants include the Tostitos Fiesta Bowl, FedEx Orange Bowl, Rose Bowl, and Allstate Sugar Bowl. In 2004, the policy was for one of the bowls to serve as the national championship game, based on a rotating basis. (See BCS – the 2004 Edition, http://football.kislanko.com/BCS2004.html.) The Schools involved in the BCS include the 11 NCAA Football Bowl Subdivision Conferences and Notre Dame. The participants for the bowl games are determined by the BCS standings, an average based on college football polls. The top two teams in the final BCS standings play in the national championship game. The conference champion from the big six conferences—ACC, Big East, Big Ten, Pac-10 and SEC—automatically qualify for the BCS games. The remaining at-large positions are selected from the big six, the remaining five conferences, and Notre Dame based on eligibility requirements. BCS Selection Procedures, http://www.bcsfootball.org/bcsfb/eligibility (last visited Mar. 11, 2010).
185 Ohio State finished number two in the BCS standings in qualifying for the national championship game. Ohio State was Co-Big Ten Champions with Iowa who finished the regular season with an 11-1 record and played Southern California in the Sugar Bowl. The Big Ten having been represented by Iowa already, had Ohio State not qualified the last spot would have been occupied by an at-large team. Kansas State was the highest ranked team in the BCS Standings not to qualify for a BCS bowl. See 2002-2003 College Football Season Final BCS Standings, http://www.collegefootballpoll.com/2002_archive_bcs.html (last visited Mar. 11, 2010).

Following the completion of the 2002 season, Clarett made several allegations regarding NCAA rule violations at Ohio State.\footnote{Pete Thamiel, Clarett Accuses Ohio State of N.C.A.A. Violations, N.Y. Times, Nov. 10, 2004, http://www.nytimes.com/2004/11/10/sports/ncaafootball/10clarett.html.} Clarett alleged among other things that he was paid for a no-show job, he was introduced by the coaching staff to boosters who gave him thousands of dollars, Buckeyes Head Coach Jim Tressel arranged for him to receive a loaner car,\footnote{Id.} and he was given passing grades in order to maintain his eligibility.\footnote{Jack Carey, Clarett Accuses Ohio State of Improprieties; School Denies Them, USA TODAY, Nov. 9, 2004, http://www.usatoday.com/sports/college/football/bigten/2004-11-09-ohiostate-clarett-allegations_x.htm.} Another football player corroborated Clarett’s story of rule violations at Ohio State, stating he was also given bogus jobs, received furniture from a booster, and borrowed cars in exchange for memorabilia.\footnote{Id.} The University denied the allegations of wrongdoing, and Ohio State Athletic Director Andy Geiger claimed most of Clarett’s charges when investigated revealed Clarett had lied.\footnote{Id.}

These allegations if true violated NCAA rules and compromised Clarett’s eligibility. The majority of these alleged violations involved direct participation by university officials or
occurred with an official’s knowledge, thus making the university an active participant and the university responsible under respondent superior.\textsuperscript{195} Ohio State’s success in 2002 came at the expense of other college football teams, but in particular it impacted the school deprived of a potential BCS bowl bid. Kansas State University was the highest ranked team in the BCS poll not to receive a BCS bowl bid and would have the strongest claim against Ohio State for depriving them of that opportunity.

Kansas State’s failure to qualify for a BCS game deprived the school of an increase in the economic value of its identity. Qualifying for a BCS bowl would have increased Kansas States notoriety and brought a subsequent increase in merchandise sales,\textsuperscript{196} and more importantly increased its ability to attract and recruit students and student athletes.\textsuperscript{197} This is particularly important for schools like Kansas State, not among the traditional powers of college football.\textsuperscript{198} They must have the ability to capitalize on every opportunity presented because they are not afforded many, and cannot be subject to the injurious actions of those ahead of them without being compensated. There are only so many instances in which their recruiting class, schedule, and other factors will align for them to achieve success.

For Kansas State to recover for an intentional interference with prospective economic advantage in a right of publicity it would need to prove it was directly harmed by the actions of Ohio State. Kansas State would maintain that it was deprived of a BCS bowl appearance

\textsuperscript{195} Respondeat superior is a form of vicarious liability—liability for the tort of another person—where the employer and employee are jointly and severally liable for the torts of the employee as long as they are within the scope of the employee’s duties. Dobbs, supra note 5, at 905. Under respondeat superior, Ohio State would be liable for the actions of head coach Jim Tressel in providing benefits to players in the recruiting process as well as during their time at the school because these actions take place within the scope of his duties.

\textsuperscript{196} Gardiner et al., supra note 4, at 400 (“The branding of sport, sports events, sports clubs and teams, through the application and commercialization of distinctive marks and logos, is a marketing phenomenon which, in the last 20 years or so, has led to a new lucrative global business of ’sports marketing.’”); Dees, supra note 6, at 200.

\textsuperscript{197} Roya R. Hekmat, Malpractice During Practice: Should NCAA Coaches be Liable for Negligence, 22 Loy. L.A. Ent. L. Rev. 613, 632 (2002).

because but for Ohio State’s breach, Kansas State would have qualified for a BCS bowl and experienced an economic increase its identity. This could be accomplished by ascertaining from bowl representatives what school they would have chosen if Ohio State was not invited. If able to do that, Kansas State would likely recover in an action.

2. A Claim Brought By an Individual: Greenwell v. Canseco

Winning the MVP award increases an individual’s notoriety. This presents future commercial opportunities for endorsements and increases bargaining leverage in future contract negotiations. The short span of a professional athlete’s career presents limited opportunities for an athlete to maximize the economic value of their identity they trained their entire lives to increase. Mike Greenwell finished second in the 1988 MVP voting to one of the now faces of performance enhancing drugs, Jose Canseco.

Athletes have used performance enhancing drugs for centuries as a way of gaining a competitive advantage. Mike Greenwell of the Boston Red Sox had a career season in 1988 that culminated in the Boston Red Sox winning the American League East Division crown.

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199 Steve Seepersaud, The Business of MVPs, Ask Men, http://www.askmen.com/sports/business_200/212b_sports_business.html. (quoting sports agent Leigh Steinberg A Super Bowl MVP with the right persona and the right marketing team would start to lay the foundation for an endorsement package that, year in and year out, could be anywhere from $1 million to $4 million a year.”) See Greenwell Makes Case for ’88 MVP, Feb. 17, 2005, http://sports.espn.go.com/mlb/news/story?id=1993112 (quoting Greenwell, “Every time you renegotiate a contract, if you’re an MVP, you have a different level of bargaining power.” Greenwell adds that not winning the award likely cost him millions of dollars).

200 The average career length for an NFL player is three and a half years, four years for an NBA player, and five and a half years for an NHL player. Meredith Brennan & Mark Momjian, The Hazards of Divorce For Professional Athletes, 21 WTR ENT. & SPORTS LAW. 1, 25 (2004). The short span of a professional athlete’s career is due to the high potential for injury and subject performance evaluations. Darryl Hale, Step up to the Scale: Wages and Unions in the Sports Industry, 5 MARQ. SPORTS & ENT. L.J. 123, 127 (1994).


but Greenwell finished second in the voting for American League Most Valuable Player Award to Jose Canseco.\footnote{Baseball Awards Voting for 1988, supra note 201.} Though anabolic steroids were not against the rules of professional baseball in 1988, they were illegal at the time.\footnote{Jeffrey Hedges, Note, The Anabolic Steroids Act: Bad Medicine for the Elderly, 5 ELDER L.J. 293, 308 (1997).} The general conception of steroid use in sports is that it is cheating because it “undermine[s] the natural essence of the game by creating unnatural disparities in athletic performance.”\footnote{Hanscom supra note 173, at 386.} Mike Greenwell was never quite able to duplicate the production he had in 1988\footnote{Mike Greenwell Career Statistics, http://www.baseball-reference.com/players/g/greenmi01.shtml (last visited Mar. 11, 2010).} and never won the MVP,\footnote{American League MVP Awards, http://www.baseball-almanac.com/awards/aw_mvp.shtml (last visited Mar. 11, 2010).} while Canseco reaped the benefits of winning the award.

To recover in an action for intentional interference with a prospective economic advantage in a right of publicity Greenwell would need to show that he would have won the MVP award, but for Canseco’s use of steroids. This could be achieved by utilizing the final vote tabulations and eliminating Canseco’s votes, or asking those that voted for Canseco who they would have voted for instead. Jose Canseco readily admits that he would not have been a major league-caliber player had he not taken steroids.\footnote{David Hancock, Steroid–User Canseco Names Names: Slugger Tells 60 Minutes He Injected Mark McGwire, Others, http://www.cbsnews.com/stories/2005/02/10/60minutes/main673138.shtml.} Canseco’s actions were egregious and far outside the scope of the game. Greenwell would likely be successful in a claim for intentional interference with a prospective economic advantage in a right of publicity.

**CONCLUSION**

The right of publicity was born after years of uncompensated economic losses suffered by celebrities because of the misappropriation of their identity by others. It currently exists in its
infancy and is continually molded by the courts to adjust to newly arising phenomena. The same state from which a right of publicity was born currently exists as economic losses are sustained by competitors when the victor breaches the rules. The competitor is deprived of economic gain in their identity and the victor is unjustly enriched. Tort law reflects social values and norms that already exist in the culture, and the causes of action for intentional interference with a prospective economic advantage and a right of publicity provide the tools necessary to redress this harm.

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210 Dobbs, supra note 8, at 30.