

A New "Twist" for "The Home Run Guys"?: An Analysis of the Right of Publicity Versus Parody

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In March, 2004, the *San Francisco Chronicle* reported that several Major League Baseball stars, including Barry Bonds, Jason Giambi and Garry Sheffield, were alleged to have received performance-enhancing drugs from Bay Area Laboratory Co-Operative ("BALCO"), a San-Francisco-based company under federal investigation for distributing performance-enhancing drugs to athletes, including tetrahydrogestrinone, known as THG (Salladay *et al.*, 2004).

Some six months after the initial newspaper reports of these high-profile Major League Baseball players' involvement in the BALCO steroid scandal, an enterprising baseball fan launched a website (www.thehomerunguys.com) playing off the letters THG (Kroichick, 2004). In addition to providing links to news articles regarding the BALCO scandal, the website also advertised the sale of a line of T-shirts priced at \$12.99 to \$19.99, called "THGshirts" (Kroichick, 2004). The T-shirts featured the images of Bonds, Giambi and Sheffield, "sporting comically oversized muscles" (Kroichick, 2004, p. F2). Noted one reporter:

The depictions of the players are strikingly authentic: Sheffield raising his left leg as he prepares to swing, and Bonds and Giambi with their signature, one-handed follow-throughs. Still, the cartoonish biceps make it clear Horan [the T-shirt creator] is offering a parody of the scandal; that's his defense against legal challenges, because parody enjoys broad free-speech protection (Kroichick, 2004, p. F2).

The originator of the T-shirt, a 29-year-old New York Yankees fan, stated in an interview: "I thought it was a funny idea that could make money" (Kro-

ichick, 2004, p. F2). In response to the website, Bonds' attorney "acknowledged the protections of parody" but added that "we're looking into it" (Kroichick, 2004).

Professional athletes like Bonds, Giambi and Sheffield have become increasingly attuned to the commercial opportunities that exist beyond the field of play. As a result, they, along with their marketing representatives, continually strive to protect their reputation and image and thus enhance the commercial value of their name and identity. However, as an athlete's image becomes more recognizable he or she faces the prospect of a variety of unauthorized uses by entities seeking to capitalize on the popularity of the athlete. Such uses often highlight the competing interests between an athlete's right of publicity and the First Amendment freedom of speech.

A recent Missouri Supreme Court decision in *John Doe, a/k/a Tony Twist v. TCI Communications, et al.* (2004) represents the latest in the evolving debate between the right of publicity and the First Amendment (Grady, McKelvey, & Clement, 2005). In becoming the first state to apply the "predominant purpose" test in balancing the right of publicity versus the First Amendment protections afforded expressive speech, the Missouri court's decision suggests a possible shift in the balancing act toward broader protections of the athlete's right of publicity based upon closer scrutiny of the degree of commercial exploitation involved in alleged unauthorized use of the athlete's image. The *Twist* decision also raises the issue of whether the unauthorized use of athlete images, even in the form of "The Home Run Guys"-type parody, might be considered more a form of commercial exploitation than an expression of speech protected by the First Amendment.

This article begins by briefly discussing the evolution and purposes of the right of publicity. Part II discusses the evolving balancing act of the First Amendment and the right of publicity, focusing on the various tests that courts have utilized. Part III presents the specifics of the *Twist* case and Missouri's application of the "predominant purpose" test, which focused on the extent of the commercial exploitation of the celebrity athlete. Part IV discusses the nature and protections afforded free speech in the form of parody, examining in greater detail several cases, including *Cardtoons L.C. v. Major League Baseball Players Association* (1996) and *White v. Samsung Electronics America Inc.* (1992), that specifically address the issue of parody. Part V discusses the implications of the *Twist* decision on potential cases involving what might arguably be deemed, given the specifics of the commercially-motivated "The Home Run Guys" website, parody for profit.

I. THE RIGHT OF PUBLICITY

The right of publicity evolved both from the intellectual property concept of misappropriation of name and the First Amendment-based right of privacy.

Misappropriation is "the unauthorized, improper, or unlawful use of . . . property for purpose other than that for which it is intended" (Black's Law Dictionary, 2004, p. 1019). Misappropriation of name is one of the four torts under the heading of invasion of privacy. It is the individual's exclusive use of his or her identity, name or likeness, for personal benefit (ALI, 1977, § 652C, cmt. a.).

In 1960, Prosser published an article on privacy in which he organized the right of privacy into four distinct torts: 1) unreasonable intrusion upon another's seclusion; (2) public disclosure of private facts; (3) false light invasion of privacy; and (4) appropriation of another's name or likeness (Prosser, 1960, p. 389). This important article first recognized "identity appropriation," otherwise known as one's "right of publicity," as a separate cause of action protecting both commercial and personal interests (American Bar Association, 2004).

Misappropriation of name protects an individual against intrusion on self esteem and dignity (McCarthy, 2000). Emotional distress is part of the damage that may be asserted by a victim of name misappropriation (ALI, 1997, § 652C, cmt. a). To establish a claim for misappropriation of name, the plaintiff must only prove that the defendant used the plaintiff's name without consent to obtain some advantage (*Nemani v. St. Louis University*, 2000).

Despite evolving specifically from the tort of misappropriation of name, the right of publicity is sufficiently distinct from its predecessor. McCarthy defined the right of publicity as the "right of every person to control the commercial use of his or her identity (McCarthy, 2001, p. 1:3). The term "right of publicity" was first coined in 1953 in *Haelen Laboratories, Inc. v. Topps Chewing Gum* and was given structure in Prosser's (1960) article on privacy. In *Haelen*, a dispute between two baseball card companies, both of whom possessed contracts of exclusive rights to a single baseball player, the judge created a new right, the right of publicity, to be used when celebrities, entertainers, and public figures claimed misappropriation or invasion of privacy. Kruse (2004) commented that the *Haelen* court "recognized that while celebrities may not suffer a high level of emotional harm when their identities are misappropriated, celebrities nevertheless need some type of protection from such activities" (p. 803). The right of publicity "grants property rights to everyone, allowing each person to control the commercial use of his or her identity"

(Marr, 2003, p.863). Entertainers and athletes have profited most from the right of publicity as their identities tend to have considerable economic value.

The elements of a right of publicity action are (1) the defendant used plaintiff's name as a symbol of his or her identity; (2) without consent; and (3) and with the intent to obtain a commercial advantage (ALI, 1995, § 46). In a right of publicity action, the plaintiff must prove the same elements as in a misappropriation suit, with the exception that the plaintiff must prove that the defendant used the name to obtain a commercial advantage, as opposed to the lower threshold of "some advantage" in misappropriation of name cases (ALI, § 46).

The use of the plaintiff's identity, without consent, to gain commercial advantage necessary to establish infringement of the right of publicity has been upheld in a number of sport-related cases including such athletes as basketball player Kareem Abdul-Jabbar, auto racer Lothar Motschenbacher, and former baseball player Art Shamsky (Hetzl, 2004).

In a seminal non-sport case involving Johnny Carson (*Carson v. Here's Johnny Portable Toilets, Inc.* (1980)), the defendant applied to register 'Here's Johnny' in the United States Patent and Trademark Office, without effort to notify or seek permission from the entertainer. Carson brought suit. The defendant testified in his deposition, "that he thought the use of the mark would be a good play on the phrase, 'Here's Johnny.'" (*Carson*, 1980, p. 75). Additionally, the word "commodian, used in defendant's advertising, was intended to be a play on the word, 'comedian'" (*Carson*, p. 75). The court identified the elements of the right of publicity as the fourth category of tort in the right of privacy (Prosser, 1960, p. 389), specifically the "appropriation, for the Defendant's advantage, of the Plaintiff's name or likeness" tort (*Carson*, 1980, p. 77). On the right of privacy and right of publicity claims, the district court found that 'Here's Johnny' could not be construed as the name of the former Tonight Show host and held that the fourth category of tort extends only to a "name or likeness," for which "Here's Johnny" did not qualify (*Carson*, p. 77). Consequently, Carson was not entitled to damages for violation of his right of privacy or his right of publicity (p. 78). On appeal, the Sixth Circuit vacated the district court's judgment and found that Carson's right of publicity had been infringed through the use of phrase "Here's Johnny" on a portable toilet because the defendant intentionally appropriated Carson's identity in order to commercially exploit Carson's fame and celebrity (*Carson*, 1983, p. 837).

The right of publicity, like misappropriation, prohibits commercial use of identity without prior permission. However, there is a significant legal distinction in the origins of the two claims. "Publicity rights in personas differ from privacy rights in personas because publicity rights are property rather than per-

sonal interests. Publicity rights can be sold, and in many jurisdictions survive beyond the life time of the creator" (Zimmerman, 2000, p. 284). Publicity rights allow "individuals or their successors and assignees to exert legal control over when, whether, and how their various personal characteristics (at a minimum, their names and actual likenesses) can be used by others for commercial ends (Zimmerman, 1998, p. 36).

One can further appreciate the distinction between misappropriation (a personal right) and the right of publicity (a property right) by considering the damages that may be asserted. While damages for misappropriation of name are "measured by mental distress and bruising of the human psyche: . . . right of publicity damages focus on the pecuniary loss to the plaintiff or the unjust pecuniary gain to the defendant" (ALI, 1995, § 49 cmt. b). The right of publicity protects against commercial loss caused by appropriation of an individual's identity for commercial exploitation (McCarthy, 2000). It does not protect personal feelings.

Since 1953, the right of publicity has evolved under individual state statutes and common law. The U.S. Supreme Court has decided only one case based on a right of publicity claim (*Zacchini v. Scripps-Howard Broadcasting Co.*, 1977) and in that case the Court fashioned it not as a right of publicity but as a "right of performance" claim based on the defendant media outlet's desire to broadcast the performer's entire act (p. 574-75). The result has been a confusing situation in which 28 states recognize the right of publicity, either by statute or common law (McCarthy, 2001). An example of statutory law is found in the Oklahoma statute that was the basis for the *Cardtoons* (1996) case, and which is similar to those in many other states. The heart of the Oklahoma statute provides that:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for the purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such persons prior consent, . . . shall be liable for any damages sustained by the person or person injured as a result thereof, and any profits from the unauthorized use that are attributable to the use shall be taken into account in computing actual damages (12 Okl. St. § 1449(A), 2004).

While no state or federal court has ever held that a right of publicity does not or should not exist (American Bar Association, 2004), in 2004, in an attempt to provide "uniformity, stability, and predictability" to cases involving right of publicity, the ABA's Section of Intellectual Property Law recom-

mended that their House of Delegates support the enactment of federal legislation to protect an individual's right of publicity. They pointed out that federal legislation would "allow individuals to effectively stop the unauthorized commercial use of their identities" (American Bar Association, p.2). To date, a federal right of publicity statute has not been enacted.

II. BALANCING THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT

The tension between the right of publicity and the First Amendment has been well documented through recent legal decisions and legal commentary (Grady, *et al.*, 2005; Grady, 2004; Kruse, 2004; Lee, 2003; McMillen & Atkinson, 2004). The First Amendment provides protection for a wide range of expression ranging from written and spoken words to artistic expression, with the goal of preserving an uninhibited marketplace of ideas and fostering self-expression free of government restraint. While many jurisdictions have struggled with how to properly balance the celebrity's interest in protecting his/her right of publicity and society's interest in freedom of artistic expression, there has not been a definitive approach used consistently by the courts given the lack of Supreme Court guidance on this issue (Kruse, 2004; Peles, 2004). The result is a confusing maze of balancing tests put forth by different courts and legal commentators. Three balancing tests that have been applied most frequently by the courts are the *Restatement (Third) of Unfair Competition's* Related Use Test (1995, § 47 cmt. c), the California Supreme Court's Transformative Use Test (Calif. 2001), and the "predominant purpose" test utilized recently by the Missouri Supreme Court in the *Twist* case. A brief synopsis of each test will be provided as well as a discussion of significant cases which have applied each of the tests.

A. The Restatement's "Related Use" Test

The central question posed by the "Related Use" or "Relatedness" test (ALI, 1995, § 47 cmt. c) asks whether the use of a celebrity's name or likeness is sufficiently related to the celebrity (ALI, § 47 cmt. c). "If the use is sufficiently related to that person, the speech is protected" (Kruse, 2004, p. 807; ALI, § 47 cmt. c), whereas "if the name or likeness is used solely to attract attention to a work that is not related to or the identified person," the speech is unprotected (§ 47 cmt. c). Therefore, the First Amendment protection will only attach where the use of a celebrity's right of publicity in an expressive work "relates" to the work (§47 cmt. a, c). In addition, the post-mortem right of publicity is addressed such that "use of a [deceased personality's] identity in

advertising, magazine or newspaper articles, biographies, films, or similar works relating to the identified individual is not an infringement of the right of publicity" (§ 47 cmt. a).

One of the most often cited right of publicity-First Amendment cases applying the relatedness test is *Gugliemi v. Spelling-Goldberg Productions* (1979). In *Gugliemi*, the heirs of the late silent motion picture actor Rudolph Valentino (whose real name was Rudolpho Gugliemi) claimed that the use of Valentino's name, likeness, and personality for television, in a fictionalized version of Valentino's life, was a misappropriation of Valentino's right of publicity. Valentino's heirs argued that the right of publicity descended upon his death making them the present owners of the right. However, the issue of descendibility had already been decided in the negative by the court in *Lugosi v. Universal Pictures* (1979), a case involving the use of Bela Lugosi's likeness in connection with the sale of a variety of commercial products related to his portrayal of the title role in the film *Dracula* (1979). In their complaint, Lugosi's heirs argued that, as his heirs, they were entitled to recover the profits made by Universal in its licensing the use of the likeness of Lugosi's character, Count Dracula. The California Supreme Court held that "the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime" (*Lugosi*, 1979, p. 431). The right, therefore, is not descendible and expires upon the death of the person (*Lugosi*, p. 428).

Perhaps more noteworthy than the majority's conclusions about whether the right of publicity is descendible, Chief Justice Bird's concurring opinion in *Gugliemi* offered insight into how courts have applied the relatedness test. In determining whether there was an infringement of Valentino's right of publicity, the focus was on "the context and nature of the use" of Valentino's name and likeness in the film (*Gugliemi*, 1979, p. 457). In this case, Valentino's name and likeness were used in a work of fiction for television where the main character was based on Rudolph Valentino. Chief Justice Bird therefore concluded that "such statements establish that this is not a case in which the use is wholly unrelated to the individual" (*Gugliemi*, p. 457). Justice Bird further elaborated that a different result may occur if someone published a Rudolph Valentino cook book and "neither the recipes nor the menus described in the book were in any way related to Rudolph Valentino" (p. 457).

Appreciating the distinction between the two scenarios posed by Chief Justice Bird is significant in understanding when the use of a celebrity's identity may be protected under the First Amendment. In order to receive constitutional protection, the use must be found to be "related" to the celebrity. While the concurring justice in *Gugliemi* found that the use was not "wholly unrelated" (*Gugliemi*, 1979, p. 457) to Valentino, the unresolved question remains

"how related" to the celebrity must the use be in order to trigger constitutional protection. Given the two scenarios posed, one using Valentino in a film about his life and the other in a totally unrelated cook book, there seems to be a rather stark contrast justifying First Amendment protection in the former but not in the latter.

The following hypothetical scenario serves to illustrate the related use test in the context of sport. A writer authors a biography of a famous basketball coach, and in order to promote the book includes a photo of the coach on the cover of the book. The use of the coach's photo is clearly and sufficiently related to the celebrity. If, however, that writer authors an instruction-based book entitled "How to Play the Game of Basketball" and uses the coach's photo on the cover of this book, such usage would clearly not be related.

A recent case applying the "relatedness" test is *Montgomery v. Montgomery* (2001). In *Montgomery*, the personal representative of the estate of musician Harold Edward Montgomery brought suit to determine whether the use of Montgomery's name, image, and voice in a music video tribute to him by his son, country singer John Michael Montgomery, violated the father's right of publicity. In conducting its inquiry, the Kentucky Supreme Court focused on the context and nature of the use, using the same method of analysis as Chief Justice Bird in *Gugliemi* (*Montgomery*, 2001, p. 528; *Gugliemi*, 1979, p. 457). The *Montgomery* court utilized the *Rogers* test, a balancing test that largely resembles the Restatement's relatedness test., which states that "the right of publicity is . . . inapplicable under the First Amendment if the content of an expressive work bears any relationship to the use of a celebrity's name" (*Rogers v. Grimaldi*, 1989, p. 1004). The Kentucky Supreme Court ultimately found that the use of Harold Montgomery's likeness was "intimately related to the underlying work. . . and the music video itself [was] not a disguised commercial advertisement" (*Montgomery*, 2001, p. 529) entitling the use to be protected under the First Amendment.

In support of its rationale the majority opinion of the Kentucky Supreme Court cited the case of *Parks v. LaFace Records* (1999). In *Parks* (1999), the rap group Outkast included the a song called "Rosa Parks" on one of its albums without the permission of Rosa Parks, the civil rights icon. Parks claimed this violated her common law right of publicity (*Parks*, 1999). In determining whether the song's title and the song itself were entitled to First Amendment protection, the *Parks* court relied on the *Rogers* test, discussed above (*Rogers v. Grimaldi*, 1989). Upon finding an obvious metaphoric and symbolic relationship between the song's lyrics, which made reference to going to the back of the bus, and its title, Rosa Parks, the court found as a matter

of law that Park's right of publicity claim was not applicable (*Parks*, 1999, p. 782).

On appeal before the Sixth Circuit Court of Appeals (*Parks*, 2003), the court agreed with the district court that the *Rogers* test was the proper balancing test to use but found that determining whether the title "Rosa Parks" was or was not "wholly unrelated" to the content of the song presented a genuine issue of material fact making the district court's finding of summary judgment for the defendants improper (p. 442). In reversing and remanding the case back to the district court for further consideration on the right of publicity claims, the appellate court noted "a reasonable finder of fact. . . could find the title ["Rosa Parks"] to be a 'disguised commercial advertisement' or adopted solely to attract attention' to the work" (*Parks*, p. 461) which would support a finding of no constitutional protection for the artist under the First Amendment.

Finding similarity with the song at issue in *Parks*, the *Montgomery* court found "a genuine connection" between the use of Montgomery's name and likeness in the video and the song, which made Montgomery's right of publicity claim inapplicable (*Montgomery*, 2001, p. 530). However, not every justice on the Kentucky Supreme Court deciding *Montgomery* was satisfied with the balancing test adopted by the majority. Justice Keller, in dissent, referred to the *Rogers* test as a "litmus test" (*Montgomery*, 2001, p. 535) for First Amendment challenges in right of publicity cases. Justice Keller also criticized the "any relationship" balancing test as "amorphous" and one that "puts the cart before the horse by presupposing the nature of the work itself without regard to questions raised by its content" (*Montgomery*, p. 535). Keller further expounded on his criticism by suggesting that under the "any relationship" test, any use of another's artist's name or likeness in a music video would receive First Amendment protection "if the music video's content had any, presumably even a tangential or symbolic, relationship to the appropriated recording artist's identity" (p. 530). Categorizing the work at issue in *Montgomery* as "within the gray area between commercial speech and other forms of expression" (p. 535), Justice Keller asserted that the "any relationship" test used by the majority was insufficient to satisfy the state's interest in protecting against the misappropriation of the right of publicity (p. 535).

Rather than using the "any relationship" balancing test employed by the majority in *Montgomery*, Justice Keller favored using the transformative use test set forth in *Comedy III Productions, Inc. v. Saderup* (2001) (hereinafter "*Comedy III*"). Keller suggested that the transformative use test "reconciles the competing interests more appropriately" than the "any relationship" test

(*Comedy III*, p. 535). The specifics of the transformative use test are discussed in greater detail below.

B. California's Transformative Use Test

The California Supreme Court in *Comedy III* framed the legal issue that is frequently presented in right of publicity cases where the First Amendment is raised as a defense as follows: "The state's interest in preventing the outright misappropriation of . . . intellectual property by others is not automatically trumped by the interest in free expression or dissemination of information; rather . . . the state law interest and the interest in free expression must be balanced, according to the relevant importance of the interests at stake" (*Comedy III*, 2001, p. 401). Several recent opinions have acknowledged that an inherent conflict exists between the right of publicity and the First Amendment because "the right of publicity threatens two purposes of the First Amendment, . . . preserving an uninhibited marketplace of ideas and . . . furthering the individual right of self expression" (*Comedy III*, p. 397; *Winter v. D.C. Comics*, 2003, p. 477). Furthermore, the tension between the right of publicity and First Amendment becomes especially acute when the person seeking to enforce the right of publicity is a sport or entertainment celebrity whose personal life and professional accomplishments are often fodder for media scrutiny.

In *Comedy III*, the Supreme Court of California proffered an alternate test, referred to as the transformative use test, to be used in balancing California's statutory right of publicity and the First Amendment. In developing the transformative use test, the court incorporated one factor of the fair use doctrine from copyright law, "the purpose and character of the use" (*Comedy III*, 2001, p. 404). At issue in the case was an artist's charcoal sketches of the Three Stooges characters which were then made into lithographs and T-shirts. The California Supreme Court emphasized that the critical question asked in the transformative balancing test is "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness" where expression refers to something other than the celebrity's likeness (*Comedy III*, p. 406). In determining whether and to what extent a creative work is "transformative," the court will analyze whether the literal and imitative or the creative elements predominate the work. When the literal and imitative elements predominate the work, the First Amendment must yield to the right of publicity under the rationale that "the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist" (p. 405). However, if the creative elements predominate and the work is found to contain significant

"transformative" elements, the First Amendment right of the artist must prevail (p. 407). Another way of viewing the test is to ask "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question" (p. 406).

The court may also utilize a subsidiary inquiry in especially close cases to determine whether a creative work is "sufficiently transformative" (*Comedy III*, 2001, p. 407). The question asked in this subsidiary inquiry is whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?" (*Comedy III*, p. 407). If the marketability and economic value does not derive primarily from the celebrity's fame, then there would be no infringement of the celebrity's right of publicity (p. 406). This result is based on the rationale that "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 artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection" (p. 407). However, as suggested in *Comedy III*, if the value of the work is derived from the celebrity's fame, the work may still found to be a transformative work entitled to First Amendment protection.

Applying the transformative use test to the Three Stooges T-shirts, the court first noted that "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" (*Comedy III*, 2001, p.408). In other words, the artist depicting a celebrity must contribute something more than a "merely trivial' variation" in order to receive First Amendment protection (p.408). Analyzing the Three Stooges T-shirts, the court found "no significant transformative or creative contribution" to justify constitutional protection (p. 409). Furthermore, using the subsidiary inquiry, the court found that the marketability and economic value of the artist's work derived primarily from the fame of the Three Stooges (p. 409), providing further that the T-shirts were not constitutionally protected.

The California Supreme Court again applied the transformative use test, with a differing result, in *Winter v. D.C. Comics* (2003). The court considered whether the use of the names and likenesses of two musicians, Johnny and Edgar Winter, in comic book characters named Johnny and Edgar Autumn violated the Winter brothers' right of publicity. The Winter brothers alleged that the authors of the comic book selected the names of the comic book characters in order to signal to readers that the Winter brothers were being portrayed. Johnny and Edgar Winter further alleged that the comic book charac-

ters resembled them in appearance and that the title of the specific volume at issue, "The Autumn of Our Discontent" referred to the phrase from Shakespeare, "the winter of our discontent" (*Winter*, p. 476).

Using the transformative use test, the California Supreme Court found that the comic books "do not depict plaintiffs literally but [i]nstead. . . are merely part of the raw materials from which the comic books were synthesized" (*Winter*, 2003, p. 479). The court further noted that the comic book characters were "not just conventional depictions" of the musicians Johnny and Edgar Winter but instead contained "significant expressive content other than plaintiff's mere likenesses" (*Winter*, p. 479). The court found that the Winter brothers were "merely part of the raw materials from which the comic books were synthesized" (p. 479). The court further commented that the comic book characters, portrayed as half human-half worm, made the comic books "quite expressive" (p. 479), warranting First Amendment protection.

Commenting on the potential threat to the Winter brothers' right of publicity attributable to the use of their name and likeness in the comic books, the court found that the use "[did] not greatly threaten" (*Winter*, 2003, p. 479) the Winters' right of publicity since "fans who want to purchase pictures of [the Winter brothers] would find the drawings of the Autumn brothers [in the comic book] unsatisfactory as a substitute for conventional depictions" (*Winter*, p. 479). The court found the comic book characters similar to the baseball cards parodying baseball players in the Supreme Court's decision in *Cardtoons* (1996), holding that both the trading cards and the comic book characters "'are no less protected [by the First Amendment] because they provide humorous rather than serious commentary'" (p. 479). To conclude its analysis, the California Supreme Court distinguished their holdings in *Comedy III* and the *Winter* cases based on the different facts presented in the two cases, noting that in *Comedy III*, the artist sold pictures of the Three Stooges, which the court found were "not transformed expressive works of the artist" (*Comedy III*, 2001, p. 642) whereas in *Winter*, the creators of the comic book "depict[ed] fanciful, creative characters not pictures of plaintiffs" (*Winter*, 2003, p. 480). Accordingly, the First Amendment was held to protect the comic book but not the T-shirts (*Winter*, p.480).

While most courts have chosen to adopt one balancing test to use in their analysis, the Sixth Circuit Court of Appeals seemingly chose to "blend" two balancing approaches, one from the Restatement and the transformative use test, in the often cited right of publicity decision, *ETW v. Jireh Publishing* (2003). In considering whether an art print commemorating Tiger Woods' win at the Masters violated Woods' right of publicity, the *ETW* court suggested that using the *Restatement (Third) of Unfair Competition's* rule to construe Ohio's

right of publicity was appropriate in this case. The Restatement's rule suggests that "the substantiality and market effect of the use of the celebrity's image is analyzed in light of the informational and creative content of the defendant's use" (*ETW*, 2003, p. 937). Applying this test, the court found that the artist's work "has substantial informational and creative content which outweighs any adverse effect on ETW's market" (*ETW*, p. 937) that does not infringe Woods' right of publicity. Using a rationale that vaguely resembles the "related use" test to balance Woods' right of publicity and the artist's First Amendment rights, the court finds that Tiger Woods, as a professional golfer, "generates a significant amount of income which is unrelated to his right of publicity" and that his appearance in the artwork will not "reduce the commercial value of his likeness" (p. 938). After conducting its balancing test, the court concluded that "the effect of limiting Woods' right of publicity. . . is negligible and significantly outweighed by society's interest in freedom of artistic expression" (p. 938).

After completing its analysis using the Restatement rationale, the court then turned its inquiry to the transformative use test. In conducting its analysis of the piece of art in question, the court determined that the artist's work depicting several previous winners of the Green Jacket as well as the clubhouse and green at the Masters, was "much more than a mere likeness of Woods" (*ETW*, 2003, p. 936) and that the artist "has added a significant creative component of his own to Woods' identity" (*ETW*, p. 938). Furthermore, the court noted that unlike the "nearly photographic reproduction of the faces of the Three Stooges in *Comedy III*," the Tiger Woods print was not a literal depiction of Woods (p. 938). In the end, because the print contained "substantial transformative elements," the First Amendment defense raised by the artist prevailed over Tiger Woods' right of publicity claims.

C. The Predominant Purpose Test

While the transformative balancing test used in *Comedy III* and *ETW* has been criticized as "a narrow test that allows a plaintiff to recover only when a work copies his identity without adding anything new" (*Missouri supreme court creates. . .*, 2004, p. 1280), another test, the "predominant purpose test" (also referred to as the "predominant use" test), has been proffered as a preferred means of resolving the interface between the right of publicity and the First Amendment. After expressing concern that commercial products were being sold which predominantly exploited the commercial value of a celebrity's identity but still received First Amendment protection due to the presence of expressive content, intellectual property litigator Mark Lee (2003)

suggested an alternative approach that could be used in such cases. Lee suggested that courts grappling with the right of publicity-free speech tension "involve judicial attempts to protect the commercial value of identity while permitting, where appropriate, the identity to be used for predominantly expressive purposes" (Lee, 2003, p. 499). Furthermore, Lee argued that the balancing approaches used by the different courts in such cases "lack substantive content and encourages uncertainties" (Lee, p. 500) and could impose a dangerous chill on the First Amendment protections afforded free speech.

Acknowledging these concerns, Lee proposed a new approach to use when rights of publicity are being used in a creative work. The focus of this approach answers the question "what is being exploited" (Lee, 2003, p. 500).

If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight (Lee, p. 500).

Lee (2003) suggested that his approach would protect both the expressive interest fostered by the First Amendment as well as the property interest fostered by intellectual property protection.

Lee offered some insight into how his "predominant purpose" approach could be practically applied by courts. For example, bobble head dolls of professional athletes "predominantly are intended to capitalize on the commercial value of an [athlete's] identity" by allowing fans to purchase a symbolic representation of that athlete's identity in the form of the bobble head doll (Lee, 2003). Consider the much debated print of Tiger Woods' win at the Masters at issue in *ETW* (2003). Lee (2003) argued that if most consumers are motivated to buy the print because they are fans of Tiger Woods rather than for its artistic value, that print should be held to violate Tiger Woods' right of publicity, contrary to the holding of the *ETW* court which found the artist's work was protected by the First Amendment (*ETW*, 2003). By focusing the inquiry on the predominant purpose for using the celebrity or athlete, Lee (2003) argued that his approach would be the "fairest" and "best comports with applicable authority" (p. 500).

III. THE APPLICATION OF "PREDOMINANT PURPOSE" TEST IN *TWIST*

The state of Missouri recently adopted the predominant purpose test in the *Twist* case (*Doe, a/k/a Tony Twist v. TCI Communications*, 2003), which took a winding route through the Missouri court system. During his career as a player in the National Hockey League, Tony Twist became "the League's pre-eminent 'enforcer,' a player whose chief responsibility was to protect goal scorers from physical assaults by opponents" (*Twist*, 2003, p. 366). In 1997, Twist became aware of the existence of a comic book entitled "Spawn," and of the comic book's use of his name for a villainous character named "Anthony 'Tony Twist' Twistelli," a Mafia don "whose list of evil deeds included multiple murders, abduction of children and sex with prostitutes" (*Twist*, p. 366). In addition to the comic book, the defendant also produced "Spawn" trading cards depicting the Mafioso character "Tony Twist."

In October 1997, Twist filed suit against the publisher, Todd McFarlane, as well as various companies associated with the "Spawn" comic book, seeking an injunction and damages for, *inter alia*, misappropriation of name. At trial, Twist produced evidence that in marketing "Spawn" products, McFarlane directly targeted hockey fans (Twist's primary fan base) by also producing and licensing "Spawn" logo hockey pucks, hockey jerseys and toy zambonis, and by conducting a "Spawn"-themed promotional event at a minor league hockey game. Evidence was also offered in which McFarlane admitted, in interviews with trade media, that he decided to use the name and identity of the hockey player Tony Twist because of his recognition and appeal (*Twist*, 2003).

In 2000, a Missouri jury awarded Twist \$24 million in damages, rejecting the defendants' First Amendment defense. However, the judge overruled the jury verdict, holding that Twist had failed to present evidence that the defendant possessed a specific intent to use Twist's name for his benefit and to Twist's detriment (*Twist*, 2002, p. 2). On appeal, the Missouri Court of Appeals ruled in favor of the defendants, holding that the First Amendment barred Twist's claim (*Twist*, p. 55). The court applied a strict scrutiny test, finding that the government's interest in protecting speech that informs or entertains outweighed Twist's interest in protecting his property right and endorsement value (*Twist*). The court of appeals, distinguishing *Zacchini* (1977) and relying on *Cardtoons* (1996), concluded that a comic book is an important expressive medium entitled to full First Amendment protection (p. 36). The Court of Appeals further stated that *Spawn* did not lose its First Amendment protection because it was published for profit (p. 46), and that Twist must

therefore prove actual malice. Twist subsequently appealed to the Missouri Supreme Court.

In 2003, the Missouri Supreme Court charted new territory in the balancing of the right of publicity with the First Amendment. The court began by determining that Twist's claim for misappropriation of name was, in actuality, a right of publicity claim (a point that both parties conceded in their briefs) (*Twist*, 2003, p. 368). Based upon his admission that the character in *Spawn* was named after Tony Twist, the hockey player, and evidence of the defendants' hockey-related marketing activities, the court also determined that there was sufficient evidence enabling Twist to prove McFarlane's intent to gain commercial advantage (*Twist*, p. 371).

The court next addressed whether the right of publicity claim was prohibited by the First Amendment, an issue that courts have struggled with, as noted above. The threshold question for the court was "whether the use of a person's name and identity is 'expressive', in which case it is fully protected, or 'commercial', in which case it is generally not protected" (*Twist*, 2003, p. 373). In doing so, the court rejected both the related use and transformative use tests, finding that both "give too little consideration to the fact that many uses have both expressive and commercial components" (*Twist*, p. 374). The court instead adopted the "predominant purpose" test first espoused by Lee (*Twist*). The court held that "if a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content . . . that might qualify as 'speech' in other circumstances" (p. 374). The court determined that

the metaphysical reference to Twist, though a literary device, has very little literary value compared to its commercial value . . . the use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under the circumstances, free speech must give way to the right of publicity (p.374).

The Missouri Supreme Court thus ordered a new trial and in July, 2004, a jury awarded Twist a \$15 million judgment (*Twist*, 2003, p. 376; Sedgwick, Detert, Moran, & Arnold, 2004). (Prior to the new trial, the U.S. Supreme Court rejected defendant McFarlane's appeal of the Missouri Supreme Court ruling (*McFarlane v. Twist*, 2004).

IV. A LEGAL ANALYSIS OF THE PROTECTIONS AFFORDED PARODY

Although a person has the right to control the use of his or her identity, this right is constricted by the First Amendment protections afforded freedom of speech (Olander, 2002). The spectrum of speech protected by the First Amendment ranges from non-commercial speech which receives the highest level of protection (i.e., political speech, news, historical accounts), to commercial speech which can be subject to time/place/manner restrictions. Historically, parody and satire have been deemed by the courts to fall into that category of speech deserving a stronger level of protection.

Although the crux of the Ninth Circuit's decision in *White* (1992) was to expand the definition of what can constitute a celebrity's "identity," the court also addressed the issue of parody, raised as a defense by the defendant, in the context of a commercial/non-commercial distinction. The case involved an advertisement for Samsung electronic goods that featured a robot, dressed to conspicuously resemble Vanna White's blond hair and large jewelry, beside a game board "instantly recognizable" as the "Wheel-of-Fortune" game show set, "in a stance for which White is famous" with the caption "Longest-running game show. 2012 A.D." (*White*, p. 1396). The defendants also specifically referred to the advertisement as the "Vanna White" ad (p.1396).

White sued claiming that the advertisement violated her common law right of publicity. The district court dismissed White's claim finding that the defendants had not appropriated her "name or likeness," a pleading requirement for a common law right of publicity cause of action in California (*White*, 1992, p. 1397). However, on appeal the Ninth Circuit determined that this requirement to show that name or likeness (i.e. the means of appropriation) was not so specific so as to bar other claims for violation of the right of publicity (*White*, p. 1397). The court noted that "if we treat the means of appropriation as dispositive in our analysis of the right of publicity, we would not only weaken the right of publicity but effectively eviscerate it" (p. 1399). Therefore, the court found that the district court erred in rejecting White's claims on summary judgment.

The Ninth Circuit court then went on to consider the defendant's parody claim that its advertisement constituted protected speech. In rejecting Samsung's parody defense, the court determined that "[t]his case involves a true advertisement run for the purpose of selling Samsung VCRs. The ad's spoof of Vanna White and the Wheel of Fortune is subservient and only tangentially related to the ad's primary message: 'buy Samsung VCRs'" (*White*, 1992, p. 1401). The majority elaborated on its conclusion by stating that "commercial

advertising which relies on celebrity fame is different from other forms of expressive activity in two crucial ways" (*White*, p.1401). First, the advertising "must evoke the celebrity's identity" in order for the celebrity exploitation to be effective (p. 1401). Noted the court, "the more effective the evocation, the more effective the advertising" (p. 1401). Second, "even if some forms of expressive activity, such as parody, do rely on identity evocation, the first amendment hurdle will bar most right of publicity actions against those activities" (p. 1401).

An approach that considers the commercial/noncommercial speech distinction was also utilized in *Comedy III* and *ETW*. In applying this test, the court must decipher whether the work at issue qualifies for the broad protection afforded non-commercial speech or for the more limited protection afforded commercial speech.

For instance, in applying the transformative use test, the *Comedy III* court discussed the rationale for retaining constitutional protection of parody in the face of a right of publicity challenge. Citing their previous decision in *Gugliemi*, the California Supreme Court noted, "The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment" (*Comedy III*, 2001, p. 397). The court further stated that "any such [balancing] test must incorporate the principle that the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals" (*Comedy III*, p. 403). Therefore, the right of publicity is not a right of censorship but is instead "essentially an economic right," which gives the celebrity "a right to prevent others from misappropriating the economic value generated by the celebrity's fame" through the creation of merchandise related to the celebrity (p. 403).

The court in *Comedy III* also considered the argument that expressive works protected by the First Amendment interfere with a celebrity's right to profit from the sale of goods related to his celebrity status, often referred to as the right to profit from one's self. The court stated that "when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity" (*Comedy III*, 2001, p. 405). Borrowing from the Tenth Circuit's rationale in *Cardtoons*, the court in *Comedy III* found that "works of parody or other distortions of the celebrity figure are not, from the celebrity fan's viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect" (*Comedy III*, p. 405). Therefore, works of parody "would not likely substantially impact

the economic interests of celebrities" and are therefore entitled to broad constitutional protections (p. 406). However, the court was careful to note that in cases of goods which are deemed conventional depictions, "the right-of-publicity holder continues to enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity" (p. 405). The thrust of this argument is that fans desiring to purchase athlete-themed goods, such as in the form of a poster or trading card, would prefer to purchase a "conventional depiction" of the athlete rather than a piece of memorabilia which parodies the athlete. This rationale is especially significant when considering the market for sport-themed memorabilia.

The Supreme Court of California furthered the legal discourse about the role of the parody defense in right of publicity cases in *Winter* (2003). Referring to the drawings of the musicians Johnny and Edgar Winter in the comic book, the court stated, "To the extent the drawings of the Autumn brothers resembled plaintiffs at all, they were distorted for purposes of lampoon, parody, or caricature" (*Winter*, p. 479) and, as such, do not greatly threaten the Winter brothers' right of publicity. The court found similarity between the comic books in *Winter* and the trading cards in *Cardtoons* noting that like the trading cards, the comic books "are no less protected because they provide humorous rather than serious commentary" (p. 479).

The seminal case involving a sport-related parody was *Cardtoons*, in which a baseball trading card company produced comic-book style artwork that parodied major league baseball players using a variety of themes. In looking to the social purpose of parody, the Tenth Circuit held that by poking fun at baseball players the defendant provided "an important form of entertainment and social commentary" (*Cardtoons*, 1996, p. 976). As the court explained,

Parodies of celebrities are an especially valuable means of expression because of the role celebrities play in modern society. . . . Because celebrities are an important part of our public vocabulary, a parody of a celebrity does not merely lampoon the celebrity, but exposes the weakness of an idea or value that the celebrity symbolizes in society. . . . In order to effectively criticize society, parodists need access to images that mean something to people, and thus celebrity parodies are a valuable communicative resource. Restricting the use of celebrity identities restricts the communication of ideas. (*Cardtoons*, p. 972).

A review of the cases decided prior to *Twist* suggest a sliding scale upon which to assess the level of First Amendment protections that should be afforded parody. One the one end of the parody spectrum is *Cardtoons*, which

upheld the right to parody celebrities regardless of the fact that the parody message was delivered through a less-traditional medium (in this case, trading cards offered for sale to the public). The court further stated, "The fact that expressive materials are sold neither renders the speech unprotected . . . nor alters the level of protection under the First Amendment.. Cardtoons need not give away its trading cards in order to bring them within the ambit of the First Amendment" (*Cardtoons*, 1996, p. 970). On the other end of the spectrum is *White*, in which the Ninth Circuit determined that parodying a celebrity directly in the context and for the purpose of selling a product or service (in this case, Samsung VCRs) would not afford the defendant First Amendment protection (*White*, 1992, p. 1401). The most recent decision in *Twist*, given its increased emphasis on the commercial profit motive behind the expressive content, raises an as yet undecided question: How might future courts treat a parody in which the use of the celebrity image is "predominantly a ploy to sell" a commercial product (*Twist*, 2003, p. 374), and in which the defendant's stated goal is to "make money" (Kroichick, 2004, p. F2)?

V. POTENTIAL IMPLICATIONS OF *TWIST* ON ATHLETE-RELATED PARODY

Recalling "The Homerun Guys" T-shirts parodying the BALCO scandal introduced at the beginning of this article, one must ask whether, in light of *Twist*, any and all parodies still provide a First Amendment "safe harbor" to a potential right of publicity claim by Barry Bonds, Jason Giambi, or Garry Sheffield. Given the parallels between the *Twist* court's interpretation of McFarlane's motives in specifically using Tony Twist's name and image to drive sales of "Spawn" products, and "the Home Run Guys" T-shirt seller's public admission that "he could make money," the answer to this question seems worthy of further analysis. In other words, would Bonds, Giambi or Sheffield have a potentially winnable right of publicity case were they to file a lawsuit in the state of Missouri?

Granted, parody has historically received very strong First Amendment protection. Furthermore, as suggested above, the courts appear to consider the protections afforded parody along a continuum based upon the commercial/non-commercial context of the parody, as well as the medium through which the parody is conveyed. However, the cases of *Cardtoons* and *White*, both of which involved a parody defense, as well as the *Comedy III* and *ETW* cases, which discussed parody, were all decided prior to *Twist*. Although *Twist* did not specifically involve a First Amendment parody claim, the Missouri Supreme Court did make reference to parody. Both parties agreed (per-

haps, as the court suggests, to avoid a defamation claim) that "the use was not a parody or other expressive comment or a fictionalized account of the real Twist" (*Twist*, 2003, p. 374). Furthermore, the overruled Missouri Appeals Court, while acknowledging that the case did not involve parody, found that the *Twist* case had some similarity to the decision in *Cardtoons*, stating: "The ability to use Twist's name for a Mafioso character in *Spawn*, like the ability to make parody baseball cards, is important in a society such as ours, where so much of social life and discourse revolves around celebrities" (*Twist*, 2002, p. 38).

However, the extent to which the Missouri Supreme Court focused on commercial exploitation, based in part on the defendant's intent and profit motive, suggests that the same analysis might also be applied to parodies in which an overriding purpose of the defendant is to use the celebrity's image "as a ploy" to derive a commercial advantage more than as an outlet for expressive speech. After all, the aim of the First Amendment is to protect the free expression of ideas, not to protect products offered for sale that exploit the commercial value of a celebrity athlete's name and image.

Clearly, if one were to apply the "related use" test or the transformative use test to a potential claim by Bonds, Giambi or Sheffield, the plaintiffs would lose. In the first instance, the expressive speech, in this case involving parody, is clearly related to the plaintiffs. In the second instance, the courts have determined that a parody is, per se, transformative.

However, the predominant purpose test in *Twist*, the application of which hinged in large part on McFarlane's commercial exploitation of Twist's name and image, suggests several avenues upon which a plaintiff might pierce the veil of protection historically accorded parody. As the Court elaborated in *Twist*:

The weakness of the RESTATEMENT'S 'relatedness' test and California's 'transformative' test is that they give too little consideration to the fact that many uses of a person's name and identity have both expressive and commercial components. These tests operate to preclude a cause of action whenever the use of the name and identify is in any way expressive, regardless of its commercial exploitation (*Twist*, 2002, p. 374).

The predominant purpose test utilized in *Twist* provides a different perspective, and balancing test, through which to potentially analyze athlete parodies. *Twist* suggests that, in seeking to better protect one's right of publicity, courts should place greater emphasis on the level of commercial exploitation of the celebrity's image; in other words, the predominant purpose for the use of

the celebrity image. In *Twist*, based on the evidence that included the defendant's own admissions, the court concluded that the "predominant purpose" for the use of Tony Twist's name and identity was ultimately to make his product more marketable.

Second, courts and commentators have suggested that some distinction may be made regarding the medium in which the message is conveyed. Judges attempting to balance the right of publicity and the First Amendment have made a distinction between the use of a celebrity's name or likeness on what has traditionally been considered "merchandise," such as a poster; compared with use of a celebrity's name or likeness in a more conventional medium, such as a book or movie (*Gugliemi*, 1979). Alluding to the commercial goods at issue in *Lugosi*, which included "plastic toy pencil sharpeners, soap products, target games, candy dispensers, and beverage stirring rods" (*Lugosi*, 1979, p. 851), the *Gugliemi* court noted that "these objects, unlike motion pictures, are not vehicles through which ideas and opinions are regularly disseminated" (*Gugliemi*, p. 463, citing *Hicks v. Casablanca Records*, 1978). The *Gugliemi* court cited the decision in *Hicks* which considered "whether the right of publicity attaches where the name or likeness [of the celebrity] is used in connection with a book or movie" (*Hicks*, p. 430). The *Hicks* court noted that "books and movies are vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections, not generally accorded 'merchandise'" (p. 430). Despite the lower standard of constitutional protection afforded merchandise, Chief Justice Bird noted in *Gugliemi* that this is not to say that the use of a celebrity's name or likeness in connection with merchandise "could never be considered an expression entitled to constitutional protection" (*Gugliemi*, 1979, p. 464).

In *Cardtoons*, the court explicitly held baseball trading cards to be an important medium for conveying a parody message regarding baseball players (1996, p. 969). Furthermore, the court in *Comedy III* noted that the fact that the defendant's art appeared in large part on a "a less conventional avenue of communications" (T-shirts) should not result in reduced First Amendment protection (*Comedy III*, 2001, p. 804). Although the court in *Twist* did not explicitly address the medium used by the defendant to convey his expressive speech, we know from the decision that even the defendant's use of a more conventional medium (in this case, a comic book) did not automatically afford First Amendment protection. These cases suggest that the medium used in expressing parody is one factor that could be further considered in balancing the First Amendment with the right of publicity. Thus, one is left to wonder how the *Twist* court might view the use of an athletes' image on T-shirts offered for sale to the public (versus less commercial alternative means of conveying this

social commentary), assuming it found evidence supporting an intent by the defendant to commercially exploit the celebrity athlete.

Other legal scholars have suggested that the intersection of the right of publicity and parody involves an ethical element. For instance, in an article published prior to the *Twist* decision, one legal scholar stated:

The parody defense has simply gone too far and is now permitting blatant rip-offs of valuable intellectual property. Worse yet, the courts have expanded the definition of parody to the point where it has become – quite literally – not funny. . . . the courts are now giving parodies carte blanche protection with no other rationale. . . . What is so sacrosanct about all parodies that they deserve First Amendment protection? If I am not free to slap a celebrity's image on a commercial product to sell, why am I allowed to slap it on any parody to sell (Moore, 2004, p. 21)?

Another legal commentator has noted that the right of publicity carries over a type of moral element (Barnett, 2002). A defendant's use of the plaintiff's identity to advertise or sell a separate product violates the plaintiff's ownership right in his or her identity (Barnett). In such a case, "the defendant is misusing the plaintiff's identity for a selfish purpose" (Peles, 2004, p. 320).

Although the court in *Twist* did not specifically utilize the phrases "commercial intent" or "profit motive," the defendant McFarlane's admissions regarding his decision to use Tony Twist weighed heavily in the court's decision-making process. In *Twist*, the court held that the use of Twist's name and identity was "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression" (*Twist*, p. 374).

To date, Missouri is the only state to have adopted Lee's (2003) relatively new "predominant purpose" approach in balancing the right of publicity and First Amendment protections. Furthermore, as stated above, the *Twist* decision did not specifically provide guidance as to how the "predominant purpose" test might be applied in parody cases. However, while parody has historically received a strong level of First Amendment protection, particularly when utilized in a non-commercial context, the Missouri court has provided a potential new "twist" in analyzing celebrity parodies that would give greater weight to a defendant's profit motive and his or her use of a less conventional means of communicating the parody message. With respect to "The Home Run Guys," one could argue that the use of the images of Bonds, Giambi and Sheffield is, while admittedly conveying social commentary, more "predominantly a ploy" to profit from the sales of T-shirts via the Internet (*Twist*, WHICH YEAR, p. 374). As was the case in *Twist*, this would entail a fact-sensitive analysis in-

cluding, for instance, the THG T-shirt creator's own public admission regarding his motives. Thus, while it is impossible to determine, for the purposes of this article, the outcome of a claim were these noted baseball players to file suit in Missouri, the emergence of the "predominant purpose" test at least provides the possibility of a novel challenge to overcoming the traditionally strong protections afforded parody.

VI. CONCLUSION

The Missouri Supreme Court's recent decision in *Twist* suggests a new approach that arguably tips the balance of the right of publicity-First Amendment scales in favor of the celebrity athlete. However, the *Twist* decision has not been without its critics:

"The implication of the *Twist* case upon the [F]irst [A]mendment rights of artists has sent a chilling affect throughout the artistic community" (Sedgwick, et. al., 2004, p.2) McFarlane's attorney has opined that should the Missouri Supreme Court's "predominant use" test become the dominant standard, then even Simon and Garfunkel could potentially be held liable for using the name Joe DiMaggio in their hit song "Mrs. Robinson" (Sedgwick, et al., 2004). Perhaps not reaching that extreme conclusion, media lawyers, nonetheless, have predicted that "unless the Supreme Court decides to get involved, [which they have chosen not to do (*McFarlane v. Twist*, 2004)], the 'predominant use' test will continue to have a chilling effect on the First Amendment by allowing a celebrity to suppress ideas associated with his or her identity" (Sedgwick, et al., 2004, p. 2).

It remains to be seen whether, just as California's transformative use test has been utilized in other jurisdictions (including the Sixth Circuit in *ETW*), other states will now adopt the "predominant purpose" test which recognizes a need to better protect the right of publicity of celebrity athletes. Furthermore, as suggested above, the jury remains out as to whether or not the "predominant purpose" test could be applied to specific parody cases and, if so, under what factual circumstances. However, given the rationale for the *Twist* court's holding, and particularly the overarching emphasis on the defendant's admitted motive to exploit the commercial value of the celebrity athlete, one can at least propose that, even though positioned as a parody, "The Home Run Guys" might have a more compelling case within jurisdictions that adopt the "predominant purpose" test over the other balancing tests.

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