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Playing Around Hart and Keller's Full-Court Press: Designing a Federal Compulsory Licensing Regime For Rights of Publicity That Enables Developers and Compensates Rights Holders

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PLAYING AROUND *HART* AND *KELLER'S* FULL-COURT PRESS: DESIGNING A FEDERAL COMPULSORY LICENSING REGIME FOR RIGHTS OF PUBLICITY THAT ENABLES DEVELOPERS AND COMPENSATES RIGHTS HOLDERS

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Two right of publicity cases concerning Electronic Arts' NCAA Football video game series, *Hart* and *Keller*, have held that those games infringe the rights of publicity of the athletes they depict, effectively ending the franchise. While both decisions featured a thoughtful dissent, neither the majority nor minority opinions offered an interpretation of right of publicity law that, in practice, results in athletes being paid for their likeness. This article joins other scholars in concluding that a compulsory licensing regime for rights of publicity would provide a way to remedy the inconsistency between the effects of *Hart* and *Keller* and the historical and economic underpinnings of right of publicity law. This article then presents the first comprehensive proposal for what such a compulsory licensing regime would look like. By examining existing compulsory licensing regimes for other forms of intellectual property, assessing the specific challenges that exist in adopting a similar regime in the context of rights of publicity, and analyzing the effective compensation rates observed in recent comparable transactions, this article presents a complete and actionable structure for such a regime. Specifically, this article concludes that an effective compulsory licensing regime for rights of publicity should: allow, but not require, interactive entertainment developers to opt-in to the system; make the system available only to works depicting more than forty likenesses outside of a fixed narrative; provide an exemption for organizations that successfully aggregate and license large numbers of rights of publicity; fix compensation at 5% of gross revenue; and distribute the collected funds through a flexible committee system.

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I. INTRODUCTION

In its final installment, Electronic Art's ("EA") video game series *NCAA Football* sold nearly two million copies.[1] Today, the series is canceled. It was not canceled because it was unpopular or unprofitable. Instead, it was canceled because two circuit court decisions—*Hart* and *Keller*—leave EA and other video game developers with no feasible way to make historically accurate simulations like *NCAA Football* without violating right of publicity law.[2] While the First Amendment protects most expressive uses—even those uses that incorporate the image or likeness of another person—the rulings in *Hart* and *Keller* held that the video games were not sufficiently expressive or transformative to avoid running afoul of right of publicity law absent licenses from the rights holders.[3] Given the sheer number of rights involved and the potential for opportunistic holdout on the part of rights holders, this is a feat that can be accomplished only in fiction. Whatever one might think of the legal analysis, the *Hart* and *Keller* decisions represent a remedy that is worse than the disease, ensuring that these simulations go unmade and, in turn, that rights holders go uncompensated.[4] This article explains how we got here: to a place where all players lose, whether they are holding a controller or a ball. It also suggests an immediate solution: a compulsory licensing regime that would allow developers to make their games and allow compensation for depicted persons' rights of publicity.

Technological advancement often outpaces legal advancement. As this article explains, there is no interpretation of existing right of publicity law that allows for a disorganized, large group of individuals, like NCAA athletes, to receive compensation for nontransformative depictions of their

1. *Game Database: Global Sales of NCAA Games*, VGCHARTZ, http://www.vgchartz.com/gamedb/?name=NCAA [http://perma.cc/U2JX-ZQEU].

2. *See generally* Elec. Arts Inc. v. Keller, 135 S. Ct. 42 (2014); Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).

3. *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1279 ("The district court was correct in concluding that EA cannot prevail as a matter of law based on the transformative use defense at the anti-SLAPP stage."); *Hart*, 717 F.3d at 169 (applying the transformative use test and determining that "while we recognize the creative energies necessary for crafting the various elements of *NCAA Football* that are not tied directly to reality, we hold that they have no legal significance in our instant decision").

4. *See generally Keller*, 135 S. Ct. 42; *Hart*, 717 F.3d 141; *In re NCAA Student-Athlete Litig.*, 724 F.3d 1268.

likenesses in a video game or other work. To create a system that allows both nontransformative simulation works to be created and rights holders to be compensated, we must look towards old solutions and enact new laws. The music and television industries have established compulsory licenses to address similar market failures in the past, but to date, such licenses have not touched rights of publicity. As new forms of entertainment—namely nontransformative sports simulation games—test our understanding of the right of publicity and its impact, a compulsory license system presents itself as one solution to the problem. Establishing a compulsory license for the rights of publicity brings new benefits and challenges: to be effective, the system must account not only for the efficiencies it seeks to promote, but also for the many opportunities for misuse that may come with it.

The bulk of this article sets about that task. It proposes a system that limits the compulsory license for rights of publicity to works that depict a large number of rights holders outside a set narrative. It also proposes a system where licensing can continue as it does today where it has proven feasible and where it falls short, to resort to a federal compulsory licensing regime. This article recognizes that unlike other compulsory licensing systems, there can be no one-size-fits-all model for distributing royalties and thereby utilizes a committee system for making that determination. This article considers the costs, benefits, and political implications of different structural decisions. In doing so, it presents a full and functional recommendation for a federal compulsory licensing regime for rights of publicity.

II. THE RIGHT OF PUBLICITY

This section introduces the history and the law surrounding rights of publicity. First, this section provides a brief background on the emergence of the right of publicity. Second, it details the decisions in *Hart* and *Keller*. Rather than arguing that the decisions were or were not correctly decided, this article points out that no matter the decision of the court, our legal system leaves athletes without a feasible way to receive compensation for their talent, ability, and publicity. Even assuming athletes are willing to license their rights, drafting and negotiating thousands of separate licenses is likely to be a prohibitive cost to developers. Third, this section discusses *Zacchini v. Scripps-Howard Broadcasting Co.*,[5] the sole United States

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

Supreme Court case addressing the right of publicity.[6] This article explains why *Zacchini* provides little practical guidance to the courts in *Hart* and *Keller* but argues that it does provide policymakers with a comprehensive understanding of right of publicity values and what the right of publicity intends to promote. Finally, this section reviews the scholarship surrounding the right of publicity, including scholarship calling for federal reforms or advocates the enactment of a compulsory licensing regime.

A. *The Emergence of the Right of Publicity*

In jurisdictions where it exists, the right of publicity grants all persons limited control over the use of their likeness even when their actions intentionally place them in the public eye.[7] By the middle of the 20th century, courts had firmly established that individuals had some right to be left alone—i.e., a right of privacy—although the bounds of that right were, and still are, not clearly defined.[8] One of the struggles that courts faced as the right of privacy doctrine developed was whether and how privacy rights applied to those who intentionally placed themselves in the spotlight.[9] Because the traditional values underlying a right to privacy, such as protecting the person from unwanted intrusion and disclosure, are greatly diminished for those who voluntarily subject themselves to public exposure, the initial reaction by courts was to suggest that no privacy rights exist for public figures.[10]

In 1953, Judge Jerome Frank coined the term "right of publicity,"

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6. The Supreme Court has only ever mentioned the right of publicity in two cases. The other case, *Hustler Magazine, Inc. v. Falwell*, only mentions the right of publicity in a parenthetical citing *Zacchini*. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

7. RUDOLF CALLMANN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:32 (4th ed. 2010) ("By contrast, a right of publicity action is designed for individuals who have placed themselves in the public eye. It secures for them the exclusive right to exploit the commercial value that attaches to their identities by virtue of their celebrity.").

8. *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 958 (1989) ("The origins of the tort of invasion of privacy lie in a famous article on The Right to Privacy published in 1890 by Samuel Warren and Louis Brandeis.").

9. *See* THOMAS PHILLIP BOGGESS V, CAUSES OF ACTION FOR AN INFRINGEMENT OF THE RIGHT OF PUBLICITY § 121.2 (2016).

10. *Id.*; *see* O'Brien v. Pabst Sales Co., 124 F.2d 167, 169 (5th Cir. 1941); Pallas v. Crowley-Milner & Co., 54 N.W.2d 595, 597 (Mich. 1952).

thereby breaking away from the then-emerging jurisprudence limiting the access of celebrities to privacy torts.[11] Judge Frank distinguished the dispute before him from other privacy rights cases, stating:

> 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.[12]

A year later, the first academic work on the right of publicity was published.[13] In the years to follow, academic literature began to formally distinguish the right of publicity from traditional privacy torts.[14] Jurisdictions that recognize both of these causes of action now distinguish these rights.[15] While the right of privacy protects against intrusion, disclosure, and false light like any privacy action, the right of publicity also protects against the misappropriation of a person's image.[16] With this additional protection, many states established the right either by common law or statute.[17] Today, 29 states recognize the right in some form.[18]

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11. *See* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); *see also* BOGGESS, *supra* note 9.

12. *Haelan Laboratories, Inc.*, 202 F.2d at 868.

13. BOGGESS, *supra* note 9.

14. *See*, *e.g.*, Herman Miller, Inc. v. Palazzeti Imp. & Exp., Inc., 270 F.3d 298, 325 (6th Cir. 2001) ("Although the right of publicity is an outgrowth of the right of privacy, the two rights 'protect fundamentally different interests and must be analyzed separately.'").

15. *Id.*

16. BOGGESS, *supra* note 9.

17. *Id.*

18. *Id.*

B. *Recent Right of Publicity Litigation Surrounding the Use of NCAA Athletes in Video Games*

The past few years have seen a flurry of parallel litigation relating to the use of NCAA athlete's likenesses in video games. The federal circuits decided three cases in 2013 regarding EA's catalog of sports simulations, which made unlicensed use of athlete's likenesses.[19] One case, *Brown v. Electronic Arts, Inc.*, was brought as a Lanham Act claim and was dismissed.[20] However, the other two cases were brought under a right of publicity theory and were permitted to move forward by two-to-one decisions in the Third and Ninth Circuits.[21] As discussed further below, the effect of these cases' holdings is that under right of publicity law, game developers must compensate current and former NCAA athletes for the use of their likenesses in the creative works the developers produce at rates individually negotiated with each and every person depicted.[22]

The *Keller* and *Hart* decisions both addressed whether the uses of the individual athletes' likenesses are protected by the First Amendment and specifically, whether the transformative use test was met in regard to the use of the likenesses in the work.[23] The transformative use test, as applied to right of publicity cases, allows the creator of a work to use another's likeness so long as he or she transforms it in a way that it becomes part of his or her own expression.[24] As phrased by the court in *Hart* (quoting the Supreme Court of California), the critical question is "whether the product

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19. *See generally* Brown v. Elec. Arts, Inc., 724 F.3d 1235 (9th Cir. 2013); Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).

20. *See Brown*, 724 F.3d at 1247–48.

21. *See* Elec. Arts Inc. v. Hart (*Hart Dismissal*), 717 F.3d 141, 163 (3d Cir. 2013), *cert. dismissed*, 135 S. Ct. 43 (2014); *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1276.

22. *See Hart*, 717 F.3d at 151; *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1281.

23. *See Hart*, 717 F.3d at 163; *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1281.

24. CALLMANN, *supra* note 7 ("The defendant is entitled to summary judgment upon a showing that its work 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message,' that it is 'transformative.'") (citing Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607 (Ct. App. 2006)).

containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."[25] The court in *Keller* concluded that in EA's video games it did not so transform the likeness, stating "EA's use of Keller's likeness does not contain significant transformative elements such that EA is entitled to the [transformative use First Amendment] defense."[26] The court in *Hart* concluded the same, reasoning that "[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative [. . .]."[27]

While largely agreeing on the transformative use test's applicability and functioning, the dissenting judges found that the requirements of the test had been met and the likenesses were sufficiently transformed.[28] These opinions noted that the entire work contained substantial transformative elements. Both decisions made reference to the games' "dynasty" and "campus legend" modes, which allow the user to create a wholly fictional character or coach and control that avatar's career, effectively turning the work into a historical fiction where the user's fictional team faces the real teams and players of the time period.[29] The opinions also posited that a rule that penalized realism and commercial success was essentially penalizing the creators for their immense talent.[30] As Judge Thomas noted in *Keller*, "I would not punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games."[31] Judge Ambro, too, was zealous in defending the right to turn a profit by engaging in First Amendment activity: "The First Amendment extends protection to biographies, documentaries, docudramas, and other expressive works depicting real-life figures, whether the accounts are factual or fictional."[32] He went on to note that under *Brown*, video games

25. *Hart*, 717 F.3d at 160.

26. *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1276.

27. *Hart*, 717 F.3d at 166.

28. *See id.* at 175; *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1289.

29. *See Hart*, 717 F.3d at 175; *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1271–72.

30. *Hart*, 717 F.3d at 173; *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1287.

31. *Hart*, 717 F.3d at 173; *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1287.

32. *Hart*, 717 F.3d at 173.

were entitled to the full-unbridled range of First Amendment protection.[33] For these reasons and others, Judges Thomas and Ambro ultimately concluded that while "the public's perception of fairness" might suggest otherwise, EA was entitled to First Amendment protection for their accurate depictions of athletes in their games.[34]

This article does not take a position on the correctness of these rulings under current law. Rather, it points out the stark choice these courts face when choosing an interpretation of the law. If these courts had reached the opposite result, they would have preserved the ability of innovative game developers to create and sell games based on these current and former teams and players. These games would be enjoyed by millions of fans and possibly generate substantial revenue for the game developers. The persons depicted—the athletes who put in the work and time to become skilled athletes—however, would receive nothing.

Under the Ninth and Third Circuits' rulings, however, game developers are required to carefully consider whether their use of historically accurate athletes' likenesses in simulation sports games is transformative enough to be protected under the First Amendment and, if it is not, to locate, negotiate with, and pay for licenses from every rights holder whose likeness they use in that historically accurate simulation.[35] That task is practically impossible and it is far more likely that such games will simply never be made. These games include thousands of players, some of whom are alive, some of whom are dead and, of the deceased players, some of whom do not have postmortem publicity rights and some of whom who do, which are ultimately owned by heirs (knowingly or unknowingly).[36] Tracking all of these people down would be a logistical challenge and a cost-prohibitive task. Even then, players could opportunistically holdout, demanding a large sum of money from

33. *Id.* at 173–74.

34. *Id.* at 171.

35. *In re NCAA Student-Athlete Litig.*, 724 F.3d at 1270–71 (acknowledging that video games "are entitled to the full protections of the First Amendment" yet holding that certain celebrity uses, like those in the NCAA series, could still be violations of rights of publicity); *Hart*, 717 F.3d at 163 (adopting the transformative use test because it is "flexible" and delineating no bright line rules for developers to follow in the future).

36. J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:3 (2d ed. 2016) ("About 20 states recognize a right of publicity in the identity of a deceased person.").

developers or requiring mechanics concessions (e.g., "my avatar must be the fastest in the game"). For video games that aim to show the full, historically accurate roster for every team, it would only require a few similarly motivated players to destroy any hope of securing the rights required for a game by holding out and demanding an unreasonably high price or by refusing to license their rights entirely. The result would be that game developers could no longer create these sorts of realistic simulations and millions of consumers could no longer purchase a product they desire. And the persons depicted, the athletes who put in the work and time to become skilled athletes? *They still receive nothing.*

As discussed in greater detail in the next section, the purpose underlying the right of publicity is to ensure that people are compensated, not to limit what is published.[37] Therefore, the economic and social failure resulting from these legal decisions calls for a legislative solution.[38] In economic terms, the ruling could be described as *Pareto pessimal*, which is to say it hurts one or more groups without helping anyone. Just as a *Pareto optimal* improvement is always desirable, a *Pareto pessimal* one can never be.[39] But when viewed in regard to the fundamental values embodied in the right of publicity, both the Third and Ninth Circuits' majority positions *and* those of their dissenting judges seem wrong. Neither interpretation offered by either side accomplishes this result going forward.[40] If right of publicity statutes are "correctly" read as generating a dichotomous choice of this nature, then the law needs to be amended to provide more options for developers, athletes and judges alike.

Most people can agree that game developers should be able to create

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37. *Id.*

38. While it is conceivable that future court decisions will remedy this problem, more recent court decisions indicate that this is very unlikely. In *O'Bannon v. National Collegiate Athletic Ass'n*, litigation which was parallel to *Hart* and *Keller* in attacking the NCAA's amateurism rules on antitrust grounds, the district court ruled that universities had to allow players to collect up to $5,000.00 a year in compensation for the use of their rights of publicity by universities. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1007−08 (N.D. Cal. 2014). This opened the door for developers to obtain the necessary licenses through universities, a somewhat less cumbersome process than going athlete by athlete. However, on appeal, the Ninth Circuit overturned this part of the ruling, holding "the district court's[] remedy, allowing students to be paid cash compensation of up to $5,000 per year, was erroneous." O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).

39. *See*, *e.g.*, *id.* at 1007–08.

40. *See supra* Section II.B (explaining why neither interpretation fosters a world in which athletes receive compensation for their likenesses).

fun, innovative, and captivating games without being legally constrained in such a way that makes doing so, as a practical matter, impossible. Most people would also be comfortable providing athletes and other public figures depicted in video games reasonable compensation for the use of their name and likeness. Assuming these statements are both true, then the relevant question is not "were *Hart* and *Keller* correctly decided?" but instead, "how can we create a regime that satisfies both of these wishes meaningfully and simultaneously?"

C. *Zacchini v. Scripps-Howard Broadcasting Co.*

Zacchini v. Scripps-Howard Broadcasting Co. is the only United States Supreme Court case addressing the right of publicity.[41] *Zacchini* considered whether a human cannonball performance by Zacchini could be broadcast without a license by a local television station.[42] The Supreme Court of Ohio found that Zacchini's "right of publicity" could not trump a local television station's right under the First Amendment to broadcast the news, even if it showed footage of the entire fifteen-second act.[43] The Supreme Court granted certiorari to resolve whether the First Amendment did indeed bar the state of Ohio from limiting the use of the film for journalistic purposes through its "right of publicity." Based on this procedural posture, the United States Supreme Court found that it did not.[44]

However, this "right of publicity" claim may have been better handled under unfair competition law, where the right of producers to protect the value of their performance by excluding third-party copying is, and was at the time of the decision, firmly established.[45] As various news outlets noted in their amicus brief in support of rehearing en banc for the EA right of publicity cases:

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41. *See Hart*, 717 F.3d at 152 ("We begin our inquiry by looking at *Zacchini v. Scripps-Howard Broadcasting Co.*, the only Supreme Court case addressing the First Amendment in a right of publicity context.").

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

43. *Id.*

44. *Id.* at 579.

45. *See generally* Nat'l Exhibition Co. v. Fass, 143 N.Y.S.2d 767 (Sup. Ct. 1955); Sw. Broad. Co. v. Oil Ctr. Broad. Co., 210 S.W.2d 230 (Tex. Civ. App. 1947); Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490 (W.D. Pa. 1938).

> [T]he Supreme Court's rationale for protecting Zacchini's proprietary rights is clearly grounded in his role as the producer of his show, not because his image appeared on television. The Court emphasized that Zacchini was entitled to the same basket of rights as other event producers, including not only the right to license broadcasting rights to his entire event, but also the right to charge admission fees—something plainly only event producers can do.[46]

Thus, *Zacchini* is best seen as a case maintaining the ability of those who invest time in creating creative works and performances from having those efforts copied wholesale, rather than one limiting the scope of the First Amendment where a person's right of publicity is involved. As the Court stated:

> It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act [but] the Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.[47]

The awkward procedural posture of *Zacchini*—coming to the United States Supreme Court as a right of publicity claim[48] rather than an unfair competition claim—makes it a frustratingly poor case for deciding the recent litigation surrounding the rights of NCAA athletes. However, from a policymaker's standpoint, it is quite useful in understanding the values that underlie the right of publicity and in turn, provides guidance on what

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46. Motion for Leave to File a Brief *Amici Curiae* in Support of Petition for Rehearing *En Banc* by Advance Publications, et al. at 11, Davis v. Elec. Arts Inc., 775 F.3d 1172 (9th Cir. 2015) (No. 12-15737).

47. *Zacchini*, 433 U.S. at 574–75.

48. *Id.* at 564–65.

legislatures and judges should aim to achieve when drafting and interpreting the right of publicity. *Zacchini* makes two critical points on this matter: (1) the right of publicity protects similar interests as patent and copyright law and (2) unlike the privacy torts that are the right of publicity's historic predecessors, the right of publicity does not shield a person from publicity; instead, it promotes compensation for it.[49]

The *Zacchini* opinion makes multiple comparisons between the right of publicity and other forms of intellectual property protection. It states: "the State's interest is closely analogous to the goals of patent and copyright law."[50] Later, the Court goes on to state "[the] same consideration[s] underlie [the right of publicity as] the patent and copyright laws long enforced by this Court."[51] It is clear that the *Zacchini* Court felt that the right of publicity was a closely analogous right with other intellectual property protections and in part for this reason, found that the First Amendment could not eviscerate this new right, at least in situations where the plaintiff might well have brought the claim under a more traditional intellectual property theory.[52] As policymakers, this analogy should be our first signpost on how to resolve the current conflict between the creative rights of game developers and the publicity rights of famous persons. The past three decades have shown a rapid legislative response to the challenges faced in administering copyrights in a digital world.[53] Organizations like the American Society of Composers, Authors, and Publishers ("ASCAP") quickly, cheaply, and effectively collect and distribute royalties to and from thousands of entities, allowing artists and application developers alike to be compensated in the new media landscape.[54]

Second, the opinion makes it clear that the right of publicity is meant to promote, not inhibit, the public use of people's images and likenesses.[55]

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49. *Id.* at 576.

50. *Id.* at 573.

51. *Id.* at 576.

52. *Id.*

53. *See generally 2015 Annual Report*, ASCAP 1 (2015), http://www.ascap.com/about/annualreport.aspx [http://perma.cc/7QJT-CZ9G].

54. *See 2015 Annual Report*, *supra* note 51 (noting that they collected over $1 billion in revenue and have "one of the lowest overhead operating rates in the world at 12.3%").

55. *Zacchini*, 433 U.S. at 576.

The right of publicity was not established to protect a person from being thrust into the public eye, "focusing [instead] on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation."[56] The court goes on to state matter-of-factly that "[t]he rationale for" protecting the right of publicity "is the straightforward one of preventing unjust enrichment [. . .]."[57] In reference to Ohio's rationale for establishing the right in the first place, the Court summarizes that "Ohio's decision to protect petitioner's right of publicity here rests on [both] a desire to compensate the performer for the time and effort invested in his act [and to] provide[] an economic incentive for him to make the investment required to produce a performance of interest to the public."[58] The court is clear that this is not a case about what a person can say; it is a case about who they have to pay.[59] Like all intellectual property, the right of publicity aims to encourage the creation of valuable works, not extinguish them.[60]

Both of these principles suggest that where the right of publicity ceases to promote the creation of valuable speech—where, like in the *Hart* and *Keller* decisions, the court's holdings resulted in fewer profitable uses of a person's likeness—the right should be amended so that it properly effectuates its goals. This article proposes such an amendment. It details how a federal compulsory licensing regime for rights of publicity ("FCLRRP") would allow both developers and depicted persons to profit from the use of their likenesses, an outcome that is functionally impossible under both the prevailing and dissenting opinions in *Hart* and *Keller.*

D. *Current Proposals to Modify the Right of Publicity System*

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56. *Id.* at 573 (The right of publicity tort was compared to the tort of "false light." In doing so, it reiterates the desire for publication. The Court states: "In 'false light' cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter while in 'right of publicity' cases, the only question is who gets to do the publishing.").

57. *Id.* at 576.

58. *Id.*

59. *Id.*

60. *See*, *e.g.*, Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1997) (stating "the fundamental and complementary purposes of both the intellectual property and antitrust laws, [is] to 'encourag[e] innovation, industry and competition.'") (citing generally Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572 (Fed. Cir. 1990)).

Before addressing this article's proposal, it is worth pausing to consider those proposals found in other scholarship. The decisions in *Keller* and *Hart* have sparked a moderate body of literature.[61] Many of these scholarly articles suggest using a federal regime to replace the *ad hoc* state-level administration of rights of publicity.[62] With a single notable exception, these scholars suggest simply imposing either a speech-protective or celebrity-protective rule at the federal level, which provides no better solution than the choices facing the judges in *Hart* and *Keller*.

On the speech-protective side, Alex Wyman suggests "we need a federal right of publicity not just to clarify the mess of laws on the subject, but also to restrain the right to prevent it from impinging on our constitutional rights any further."[63] Jon M. Garon proposes a regime that clearly defines video games out of the "commercial speech" category and "then builds upon . . . existing regulatory framework[s]" such as the FCC "to suggest a reformulation of publicity rights that are consistent with the Constitution, the interests of the public, and the rights of individuals to control their rights of publicity."[64] Susannah M. Rooney would create "[a] federal right of publicity under the Lanham Act," which both the text of her article and the Ninth Circuit's decision in *Brown* suggest would mean that game developers would be free to create games on the order of the NCAA series without compensating players.[65]

Conversely, Talor Bearman believes "Congress needs to pass a right-of-publicity statute providing a comprehensive cause of action for all US citizens" and thinks that the length of that right should mirror copyright

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61. *See* Alex Wyman, *Defining the Modern Right of Publicity*, 15 TEX. REV. ENT. & SPORTS L. 167, 175 (2014). *See generally* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 11:50 (2d ed. 2016); Lee Levine & Steven Wermiel, *The Court and the Cannonball: An Inside Look,* 65 AM. U. L. REV. 607 (2016); Mark Conrad, *A New First Amendment Goal Line Defense—Stopping the Right of Publicity Defense*, 40 OHIO N.U. L. REV. 743 (2014).

62. *See* Conrad, *supra* note 61, at 743; Levine, *supra* note 61, at 607; Wyman, *supra* note 61, at 175. *See generally* MCCARTHY, *supra* note 61.

63. Wyman, *supra* note 61, at 175.

64. Jon M. Garon, *Beyond the First Amendment: Shaping the Contours of Commercial Speech in Video Games, Virtual Worlds, and Social Media*, 2012 UTAH L. REV. 607, 609 (2012).

65. Susannah M. Rooney, Note, *Just Another Brown-Eyed Girl: Toward a Limited Federal Right of Publicity Under the Lanham Act in a Digital Age of Celebrity Dominance*, 86 S. CAL. L. REV. 921, 924 (2013).

protections.[66] Similarly, Alex J. Berger would unify, but not fundamentally modify, the right of publicity under a federal regime that "would reinforce the Ninth Circuit's reasoning pre-*Keller*."[67] Whichever side of the coin these scholars fall on, their arguments, by and large, simply rehash those of the attorneys in *Hart* and *Keller*. Federal reform is needed, but there is little sense in asking our legislatures to simply pick a side in that false dichotomy.

One pair of scholars, David Frankly and Adam Kuhn, appear to be exceptional in their recognition of the problem, if perhaps a little too ambitious in their solution. They astutely note that "[t]he current state of the law contrives an artificial dichotomy—property vs. speech—in uses of celebrity images that plainly fails to accommodate reality."[68] They go on to propose that free speech jurisprudence shift, to allow for a form of ex post judicial compulsory licensing, under which the Constitution guaranteed all persons the right to use any person's image, but might have to pay a portion of the revenue as decided by the judge.[69] They suggest that "we must allow judges to honestly deal with the underlying economic issues."[70]

A wholesale overhaul of free speech jurisprudence to accommodate the economic realities of the modern world is almost certainly a bridge too far, but the basic premise of creating a system that, in a meaningful way, allows for game developers to purchase the rights of publicity en masse from rights holders for something approximating fair market value is spot on. At its conception, the right of publicity was about ensuring compensation,[71] and a federal regime should be implemented to ensure that purpose is effected.

While Frankly and Kuhn are the only scholars who have yet to suggest any form of mandatory licensing for rights of publicity to remedy

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66. Talor Bearman, Note, *Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 107 (2012).

67. Alex J. Berger, Note, *Righting the Wrong of Publicity: A Novel Proposal for a Uniform Federal Right of Publicity Statute*, 66 HASTINGS L.J. 845, 867 (2015).

68. David Frankly & Adam Kuhn, *Owning Oneself in a World of Others: Towards a Paid-for First Amendment*, 49 WAKE FOREST L. REV. 977, 981 (2014).

69. *See id.* at 979.

70. *Id.* at 1015.

71. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977).

the tension created by *Keller* and *Hart*,[72] scholarship contemplating the possibility of a FCLRRP goes back to at least the late 1980s.[73] Eugene Salomon appears to be the first scholar to contemplate the use of a compulsory licensing system as part of a federal right of publicity but ultimately rejects it, in large part because of fears that a compulsory scheme would prohibit exclusivity agreements necessary for rights holders to obtain fair compensation.[74] He suggests that rights of publicity should always be licensed voluntarily but that to protect free speech, they should only apply to commercial works.[75] Presumably, he did not anticipate the challenges courts in cases like *Keller* would face in distinguishing between what was and what was not a commercial use.[76]

The suggestion of a FCLRRP reemerged in the early 1990s.[77] Apart from an article that mentions it in a single sentence as a possible solution to right of publicity issues,[78] the next scholar to tackle the issue was Pamela Lynn Kunath. Kunath approached the issue from the perspective of using computer-generated imagery to create realistic likenesses of famous actors.[79] While most of the work is dedicated to deciphering the issue under the present legal framework, Kunath briefly suggests that compulsory licensing may be a solution to the problem.[80] Like Salomon, Kunath is concerned about balancing exclusivity rights with the ability of creators to access a person's image, wanting to ensure that compulsory

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72. Frankly, *supra* note 68, at 997.

73. *See generally* J. Eugene Salomon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987).

74. *Id.* at 1195.

75. *Id.* at 1194 (positing that "[t]he better solution is to grant the individual an exclusive right within the limited sphere of commercial use").

76. *See generally* Salomon, Jr., *supra* note 73 (All provided examples of commercial works are classic advertisements).

77. *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 240 (1993).

78. *Id.*

79. Pamela Lynn Kunath, Note & Comment, *Lights, Camera, Animate!: The Right of Publicity's Effect on Computer-Animated Celebrities*, 29 LOY. L.A. L. REV. 863, 870 (1996).

80. *Id.* at 903–04.

licenses are not "glutting the market."[81] Kunath suggests solving this problem by forcing the right holder to agree to a limited number of contracts per year, although Kunath does not address what would happen if agreements stalled or if there were fewer bidders than the mandated minimum.[82] Kunath also identifies the holdout problem inherent in rights of publicity negotiations, stating that "[w]ithout compulsory licensing, when celebrities are asked to license their likeness for use in narrative works, they will inevitably and understandably attempt to get the most money for their image, [but] will lack the foresight to see the ramifications such stubbornness will have on the . . . system as a whole."[83]

While none of these works go into detail about how a FCLRRP might function, their discussion of the potential benefits and pitfalls of such a system serve as the foundation for this article's recommendations. Until *Hart* and *Keller*, a FCLRRP remained necessary only in theory. But now the problem is very real, jeopardizing games loved by millions of fans that generate billions of dollars in revenue. The time has come to put theory into practice.

III. COMPULSORY LICENSING IN THE UNITED STATES

Compulsory licensing systems to facilitate the efficient distribution of intellectual property are established in at least four areas[84] and can provide guidance in crafting a FCLRRP. The current systems are notable in several regards. First, they all cover the licensing of copyrighted material and all but one concerns the copyrights of musical works.[85] Second, they exhibit a wide range of fee and distribution structures, suggesting that there is no

81. *Id.* at 904.

82. *Id.* ("Personalities will not be forced to accept every request, which could result in glutting the market with their likeness; however, there will be a statutory minimum requirement of acceptances.").

83. *Id.* at 906.

84. *See* Rates & Terms for Use of Musical Works Under Compulsory License for Making and Distrib. of Physical & Digital Phonorecords, 37 C.F.R. § 385 (2009); 17 U.S.C. § 111 (2014); 17 U.S.C. § 115 (2010).

85. 37 C.F.R. § 385; 17 U.S.C. § 111; 17 U.S.C. § 115.

definitive method for administering such a system.[86] These structures are tailored to the particular intellectual property rights at issue. Indeed, even within a given licensing regime, one sees a hybrid of statutory, regulatory, judicial, and free market mechanisms for administering the compulsory license. This section provides an overview of these compulsory licensing regimes, while the next section highlights challenges that would be specific to a compulsory license governing rights of publicity.

A. *Musical Performance Rights*

Among the various copyrights embedded in a musical work is a song's performance right, which covers the right to perform a work, including broadcast performance.[87] The right allows the holder to *spin* tracks but does not cover outright sales of the song in tangible mediums, such as in a CD.[88] There is no statute that compels a right holder to license the performance right in a musical work, but most rights holders are part of a Performing Rights Organization[89] which is bound by an antitrust consent decree to license the catalog of songs it holds to a purchaser at a reasonable price.[90] In practice, entities like radio stations who wish to play a wide variety of music can purchase a license from one or all of the three Performing Rights Organizations which then allows them to play all the musical works in that organization's catalog.[91]

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86. *Compare* Mechanical Rights Licensing (setting at a fixed fee), *infra* Section III.B, *with* Digital Performance Rights Licensing (paying a statutorily mandated 50/50 split of revenues to artists and rights holders), *infra* Section III.C.

87. 17 U.S.C. § 106(4) (2002).

88. *Compare id.*, *with* 17 U.S.C. § 106(1), (3) (2002).

89. While it is difficult to quantify the total pool of all "musicians" let alone "rights holders," there are nearly a million members in ASCAP and BMI, substantially more than the number of persons the Bureau of Labor Statistics estimates work full time in the "Musical Group or Artist" and "Music Directors and Composers" employment categories. While there are many retired and part-time musicians, the fact that PROs have more members than there are full time musicians in the U.S. demonstrates the consensus that most musicians generating any sizable revenue are members in a PRO. *See* Kristin Thomson, *How Many Musicians Are There?*, ARTIST REVENUE STREAMS (June 15, 2012), http://money.futureofmusic.org/how-many-musicians-are-there/ [http://perma.cc/72AR-T8CA].

90. *See* United States v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395(WCC), 2001 WL 1589999, at *6 (S.D.N.Y. June 11, 2001).

91. Of the roughly 15,000 United States radio stations, more than 10,000 are members of the Radio Music Licensing Committee, which negotiates rates for full-catalog licenses with the

Performing Rights Organizations arose to meet a logistical need;[92] gathering the necessary licenses from all rights-holders is a time consuming and inefficient process. Performance Rights Organizations gather these catalogs of music for licensors, allowing radio stations, cover bands, bars, and nightclubs to interact with only a handful of organizations to obtain the rights to play a wide range of songs.[93] In turn, artists are motivated to join Performing Rights Organizations as many licensors will only play and pay for music that is available through a catalog license—and if his or her music were played by a broadcaster, the artist would often lack the means to police and enforce his or her rights.[94] If an artist holds out, a licensee will simply play other songs for which they can easily obtain the performance rights.[95] But while Performing Rights Organizations solve the inefficiency that is inherent in the market for musical performance rights, they create the danger of another: that they might exercise monopoly power in distributing the rights.[96] For this reason, Performing Rights Organizations like ASCAP are subject to consent decrees that limit the scope of their operations.[97]

First, while Performing Rights Organizations do not have statutorily fixed rates and instead, rates are regularly negotiated, they are obligated to offer their whole catalog to any purchaser for a price that is the same as

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Performing Rights Organizations. *See Our Mission*, RADIO MUSIC LICENSE COMMITTEE (2010), http://www.radiomlc.org/ [http://perma.cc/FA4D-RCN4]; Jennifer Waits, *Number of Radio Stations in the U.S. Grows this Quarter According to FCC*, RADIO SURVIVOR (Oct. 14, 2015), http://www.radiosurvivor.com/2015/10/14/number-of-radio-stations-in-the-u-s-grows-this-quarter-according-to-fcc/ [http://perma.cc/4ZT2-4CXA].

92. *See* Bernard Korman & I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT SOC'Y U.S.A. 332, 367 (1986).

93. *See id.*

94. *Id.* at 360−64.

95. *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 358 (S.D.N.Y. 2014) (noting that "because of the nature of its music service, [the online radio station] ha[s] more of an ability to substitute one work for another than many other music services" and that unlike an on-demand service, a radio station does not need "to play virtually any composition its listeners demand").

96. *See* Richard Ergo, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 258 DUKE L.J. 258, 260 (1959).

97. *See generally* United States v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395(WCC), 2001 WL 1589999. *See also* United States v. Broad. Music, Inc., 426 F.3d 91, 93 (2d Cir. 2005).

they charge other similarly situated licensors.[98] For this reason, the licenses are considered compulsory. Second, a Performing Rights Organization cannot hold exclusive control over the songs in its catalog.[99] The rights holder must remain free to license the performing rights to its musical works on an individual basis.[100] This limits the opportunities for Performing Rights Organizations to exploit licensors, as a licensor finding the price too high or only seeking the rights to a few songs can always set about the task of gathering the needed licenses one by one from the rights holders. Third, the Federal Register publishes price schedules so interested parties can ensure they are getting similar rates as other purchasers and purchasers who believe they are not receiving a rate that comparable entities are receiving can litigate the matter in court.[101] For licensees who operate interactive streaming services, like Spotify, the rate for the combined performance and mechanical license is set by statute.[102] Subject to these restrictions, Performing Rights Organizations remain free to otherwise set rates as they see fit.[103] This means rates can be—and are—set based on a wide range of factors, including venue type, size of the audience, and number of track "spins."[104]

Performing Rights Organizations also remain largely free to determine the most effective way to monitor the use of particular performance rights, enforce those rights against unauthorized users, and set distribution schedules for transferring royalties to its member rights holders.[105] These distribution schedules can be complex.[106] For example,

98. *Am. Soc'y of Composers*, 2001 WL 1589999, at *3.

99. *Id.* at *4.

100. *Id.* at *3.

101. *See, e.g.*, Determination of Reasonable Rates and Terms for Noncommercial Broadcasting, 77 Fed. Reg. 24662, 24665 (proposed Apr. 25, 2012) (to be codified at 37 C.F.R. 381).

102. *See* Rates & Terms for Use of Musical Works Under Compulsory License for Making and Distrib. of Physical & Digital Phonorecords, 37 C.F.R. § 385.12 (2009).

103. *See generally Am. Soc'y of Composers*, 2001 WL 1589999; 37 C.F.R. § 385.

104. *See ASCAP Music License Agreements & Reporting Forms*, ASCAP (2015), http://www.ascap.com/licensing/licensefinder [http://perma.cc/QGH2-PGTG].

105. *See* 17 U.S.C. § 106 (2002); *see also Am. Soc'y of Composers*, 2001 WL 1589999, at *9–10.

ASCAP determines the royalties paid to members based on factors including the music's role in the performance (background, promotional, theme, etc.), the type of licensees using the music (radio, television, night clubs), the time of day the music was performed, and whether the music was performed enough times to be considered "premium."[107] Once calculated, royalties exceeding $1 are direct-deposited into members' accounts every quarter or for members opting to receive a live check, all royalties reaching at least a $100 threshold are mailed to the member.[108]

B. *Mechanical rights to a song or composition*

Another compulsory licensing regime in the United States exists for the mechanical rights to a song.[109] In order to legally affix a song into a recording, either analog or digital, an artist needs to secure the mechanical rights to the music.[110] When recording an original work that has not been sold by the creator to a third-party, an artist will already possess the mechanical rights to the music by virtue of owning the copyright to the song.[111] When a person wishes to sell or distribute copies of a work for which he or she does not have the mechanical right, such as when a song was written by a separate song writer or the artist is covering another's song and recording it, mechanical rights need to be obtained.[112] Similar to

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106. The current operative antitrust consent decrees for both ASCAP and BMI place some broad restrictions on how rights are enforced and royalties are distributed. For example, money is to be distributed "primarily on the basis of performances of its members' works," although special awards can be granted to works that "have a unique prestige value." *See Am. Soc'y of Composers*, 2001 WL 1589999, at *9.

107. *See ASCAP Payment System: Royalty Calculation*, ASCAP (2015), http://www.ascap.com/members/payment/royalties.aspx [http://perma.cc/XRA7-UKUR].

108. *See Direct Deposit and Royalty Thresholds*, ASCAP (2015), http://ascap.com/members/payment/payment.aspx [http://perma.cc/4SDW-53QK].

109. 17 U.S.C. § 106(1) (2002).

110. *Id.* § 115 (2010); *see also* ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 8:6 (3d ed. 2015).

111. 17 U.S.C. § 106(1), (3).

112. 17 U.S.C. § 501 (2002), *invalidated by* Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297 (11th Cir. 2011); *see also* 17 U.S.C. § 115.

the regime for performance rights, the mechanical right to a musical work can be obtained by individual negotiation with the rights holder, but there is also a rate set by the Copyright Royalty Board that a rights holder is statutorily required to accept.[113] This rate is currently 9.10 cents per song sold for songs under five minutes and twelve seconds, and an additional 1.75 cents a minute for longer works.[114]

Unlike performance rights, mechanical rates are universally applicable to all entities seeking a license under the compulsory scheme.[115] This means that unlike performance rights, the rates for mechanical rights generate little if any litigation surrounding the reasonableness of charged pricing.[116] It also means that there is no flexibility with pricing based on the type of use or the user's business model.[117] This tradeoff reflects the far less diverse usage of mechanical licenses relative to performance licenses.[118] Mechanical rights are necessary to sell tracks of songs that listeners can play on-demand.[119] Whether the form is a digital or analog copy, the basic use is the same: a user is *selling* a track.[120] While the business models for the companies that distribute music tracks are

113. *See* 17 U.S.C. § 115; *see also* Michael Simon, *The Basics of Mechanical Licensing from Harry Fox*, ARTIST HOUSE MUSIC (July 12, 2007), http://www.artistshousemusic.org/articles/the+basics+of+mechanical+licensing+from+harry+fox [http://perma.cc/77PN-E5TZ].

114. *See* Rates & Terms for Use of Musical Works Under Compulsory License for Making and Distrib. of Physical & Digital Phonorecords, 37 C.F.R. § 385.3 (2009); *see also* Dale Kawashima, *An Overview of Mechanical Royalty Rates*, SONGWRITER UNIVERSE, http://www.songwriteruniverse.com/mechanical.html [http://perma.cc/67JM-Y8LC].

115. *See* 17 U.S.C. § 115(a)(1).

116. *See generally* Meredith Corp. v. SESAC, LLC, No. 09 Civ. 9177, 2011 WL 856266 (S.D.N.Y. Mar. 9, 2011); *In re* Pandora Media, Inc., 6 F. Supp. 3d 317 (offering examples of notable royalty rights litigation focused on performance rights rather than mechanical rights).

117. *See generally* 17 U.S.C. § 115.

118. *See generally What is a Mechanical License?*, HARRY FOX AGENCY (2015), http://www.harryfox.com/license_music/what_is_mechanical_license.html [http://perma.cc/436S-94QW].

119. *See id.* ("A mechanical license grants the rights to reproduce and distribute copyrighted musical compositions (songs) on CDs, records, tapes, ringtones, permanent digital downloads, interactive streams and other digital configurations supporting various business models, including locker-based music services and bundled music offerings.").

120. *See id.*

undoubtedly variable, the basic function varies far less than in the case of performance rights, which run the gamut from garage bands to national radio broadcasters.[121] There is also a greater similarity in the range of profit per use in the case of mechanical rights. A track sold is a track sold and any one sale is unlikely to be massive in absolute monetary terms regardless of whether the distributor is a small start-up or a massive record label.[122] In contrast, a single use of a performance license could be a song played to a bar with one customer or a national broadcast reaching millions of people.[123] The presence of a limited range of profitability per use in the mechanical rights sphere makes a nonvariable rate a more sensible option for a compulsory scheme, as compared to one for performance rights.

C. *Digital Performance Rights for Sound Recordings*

Since 1995, sound recording copyright owners ("SRCOs") have held a digital performance right in the broadcasting or other performance of that sound recording apart from or in addition to the performance rights in the same work.[124] Conceptually, this can be thought of as a more precise form of the performance right. Whereas the performance right covers any performance or broadcast of a song, the sound recording copyright covers the performance of a specific digital recording of a song.[125] Like the system for generally applicable performance rights, compulsory licensing for sound recording performance rights is overseen by the copyright royalty board, but on a day-to-day basis is negotiated through a separate independent entity.[126] Currently, there is a single organization that licenses

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121. *See id.*

122. *See, e.g.*, iTunes, APPLE INC. (2016), http://www.apple.com/itunes/music/ [http://perma.cc/NZF7-29XD] (featuring songs for as little as $0.00 to as much as $9.99).

123. *See, e.g.*, Phil Gallo, *MTV VMA Ratings: Biggest Audience Ever*, BILLBOARD (Aug. 29, 2011), http://www.billboard.com/articles/photos/live/467676/mtv-vma-ratings-biggest-audience-ever [http://perma.cc/Z84V-KJSK].

124. *See* 17 U.S.C. § 114 (2010).

125. 17 U.S.C. § 106(6) (2002).

126. *See Commercial Webcaster (CRB)*, SOUNDEXCHANGE (2014), http://www.soundexchange.com/service-provider/commercial-webcaster/commercial-webcaster-crb/ [http://perma.cc/KNS8-MXRW].

sound recording rights, collects the royalties for them, and distributes them to the rights holders and artists. [127] This organization is SoundExchange.

SoundExchange's current price structure is complicated, with different policies based on broadcaster size and type.[128] Licenses are a combination of lump sum minimum fees, per-play fixed rates, and percentage of gross revenue rates, making calculations of comparable effective rates difficult.[129] However, in 2015, Pureplay Webcasters were charged a minimum of 25% of gross revenue[130] and Small Webcasters were charged a minimum of 10%.[131] Because larger broadcasters are charged a fixed per-play rate, a precise figure cannot be calculated for them.[132] However, a recent court decision noted that Pandora pays over 50% of its gross revenue to SoundExchange.[133]

Although SoundExchange has the authority to enter into individual negotiations over rates and generally has the discretion to attempt to set reasonable rates on its own, it lacks the power to determine how the collected revenue is distributed.[134] Under 17 U.S.C. § 114(g)(2), SoundExchange is required to distribute its revenue according to a

127. Eduardo Loret de Mola, *SoundExchange Explained*, MUSIC BUSINESS JOURNAL (Oct. 2015), http://www.thembj.org/2015/10/soundexchange-explained/ [http://perma.cc/PS2D-7AWA] ("Currently, this organization is the sole entity entrusted by the Copyright Royalty Board (which is appointed by the U.S. Library of Congress) with administering statutory license fees paid by non-interactive digital radio services.") (internal quotations omitted).

128. *See 2016 Rates*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/rates/ [http://perma.cc/3S9P-Z6DU].

129. *See id.*

130. *See Pureplay Webcaster*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/commercial-webcaster/pureplay-webcaster/ [http://perma.cc/TY49-KSM7].

131. *See Small Webcaster*, SOUNDEXCHANGE (2014), http://www.soundexchange.com/service-provider/commercial-webcaster/small-webcaster/ [http://perma.cc/Z5T7-Z2BU].

132. *See Commercial Webcaster 2016 Rates*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/rates/commercial-webcaster [http://perma.cc/EEN6-TA8E].

133. *See In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 333 (S.D.N.Y. 2014) ("Pandora pays over half of its revenue to record companies for their sound recording rights.").

134. 17 U.S.C. § 114(g)(2) (2010).

statutorily mandated formula.[135] Specifically, after deducting administrative expenses associated with monitoring, collecting, and distributing sound recording royalties, 50% must be distributed to the rights holder, 45% to the featured artists, and the remaining 5% placed in escrow for distribution to nonfeatured artists and vocalists.[136] There is no apparent economic necessity for the mandated distribution structure, which is not found in the licensing regimes enacted for performance and mechanical rights. Likely, the mandate reflects Congress's attempt to cater to the popular belief that record labels extort artists,[137] with the mandate thereby ensuring that half of the revenue goes to the artists rather than the record labels who generally hold the copyright in the sound recordings.

D. *Cable Television Retransmission*

In 1972, the United States established a compulsory licensing system for the retransmission of television signals.[138] At the time, there was a growing trend of cable television providers retransmitting the signals of broadcast television, often from stations that were outside the immediate geographic location of the viewership.[139] Initially, this move was not viewed as harming copyright holders, as the retransmission expanded the audience of the channel, which then allowed television providers to charge higher rates for advertising.[140] However, when the signals were viewed at distant locations, local advertisers were unwilling to pay extra for these views as they were outside the target market and moreover, cable television increasingly generated revenue through subscription fees which were in part driven by the availability of content provided by local broadcasters.[141]

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135. *Id.* § 114(g)(2).

136. *Id.* § 114(g)(2)–(3).

137. *See* Michael Arrington, *The Music Industry's New Extortion Scheme*, TECHCRUNCH (Mar. 27, 2008), http://techcrunch.com/2008/03/27/the-music-industrys-new-extortion-scheme/ [http://perma.cc/L7N6-WN4D].

138. Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191, 199 (1990).

139. *Id.*

140. *Id.*

141. *Id.*

While it would have been possible for the cable providers to individually negotiate licenses for this content, Congress felt "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[142] For this reason, along with a fear that "big television networks" would holdout or set an unfair price (along with the influence of related lobbying from the cable industry), a compulsory system was established in lieu of a purely free market approach to licensing.[143]

The rate charged for licensing the right to retransmit television programming is set by statute and is subject to modification by the Copyright Royalty Judges to account for inflation and changes in fees paid for cable subscriptions.[144] Fees paid by retransmitters vary based on location of the originating station, whether it is network television or not, and the overall revenue of the retransmitter.[145] The fees charged on network television are lower than those charged on local broadcast stations, based on reasoning that network television, which attracts national advertisers, is more likely to gain revenue as a result of the retransmission than their local broadcast counterparts.[146] Retransmitters also pay declining rates as more content is retransmitted, thereby reflecting the declining marginal value of additional content to the cable viewer.[147] At this stage in the licensing royalty process, rates do not reflect any indicator of actual value added or viewership.[148]

The formula for imposing fees on retransmitters is complicated but fixed as a portion of revenue.[149] A cable service provider knows in advance what portion of gross revenue it will have to pay based on what

142. H.R. REP. NO. 94-1476, at 89 (1976).

143. Cate, *supra* note 138, at 203.

144. *See* 17 U.S.C. § 111(d)(1)(A) (2014); *see also id.* § 801(b)(2)(A) (2006).

145. *See id.* § 111(d)(1)(A); *see also* WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:75 (2016).

146. Cate, *supra* note 138, at 207.

147. *Id.* at 208.

148. *Id.*

149. *Id.*

stations, if any, it chooses to retransmit using the compulsory license.[150] In contrast, the mechanism for distributing the collected royalties is not only more complicated but also subject to a more nuanced (and subjective) valuation of the content that is provided by the original content providers. Under the compulsory licensing scheme for cable television retransmission, royalties are distributed as follows:

> After deducting its reasonable costs incurred as a result of administering the Statements of Account, the Copyright Office deposits the balance in the United States Treasury, where it is invested in interest-bearing U.S. securities for later distribution by the Librarian of Congress.
>
> The fees are distributed among the following copyright owners: (1) those whose works were included in a nonnetwork television program imported as a distant signal; (2) those whose works were included in a secondary transmission identified in a special statement of account filed pursuant to Section 111(d)(1)(A); and (3) those whose works were included in nonnetwork radio broadcasts and imported as distant signals. Distribution is conducted in two phases. . . . The first stage of the proceeding, called "Phase I," is conducted to determine the percentage of the funds to be allocated among the various categories of copyrighted programs retransmitted by cable operators [while] Phase II determines the allocation of royalties among the individual claimants within any given category.[151]

While rights holders are allowed and encouraged to reach an agreement as to how the fees should be distributed in lieu of litigation, the Copyright Royalty Board resolves the controversies that inevitably arise.[152] While the Copyright Royalty Board is prone to find that genuine controversies over royalty distribution exist, in practice, by Phase II, all distribution is settled by private negotiation.[153] In settling these disputes,

150. *Id.*

151. PATRY, *supra* note 145, at §§ 14:76–78.

152. Cate, *supra* note 138, at 209.

153. *Id.* at 210.

the Copyright Royalty Board looks at a number of primary and secondary criteria:

> (1) [H]arm caused to copyright owners by cable transmissions of copyrighted works; (2) benefit derived from the secondary transmission of copyrighted works; and (3) marketplace value of the copyrighted works that are transmitted. The secondary criteria are: (1) the quality of the copyrighted works; and (2) time-related considerations. According to the C[opyright Royalty Board], the Tribunal's underlying goal is "to simulate market evaluation."[154]

Resolving these issues often takes years and the result for the litigants can be underwhelming. Cate notes that in the 1982 distribution, one company sought to increase its $28.42 million payment; while ultimately victorious, the increase amounted to only $70,000.[155] Whatever the total cost on courts and rights holders, the distribution of royalties for cable television retransmission presents a less efficient system than those found in the music industry, where royalties can be distributed according to an established and existing structure. But this complication reflects the simple reality that computing the value of a television channel is a substantially more complicated process than computing the value of a song, and changes in the value of a broadcast channel retransmission are not neatly captured by changes in overall retransmission rates in the same way a change in the value of a musical work is seen in a reduced number of "spins" or reproductions. The fluid structure of cable retransmission's compulsory licensing regime is born of necessity, not convenience.

Yet despite criticism of the cable television's compulsory license, the inefficiency generated by the system does not appear to be one of them. In his critique of the system, Cate notes the system is characterized by a "fairly low administrative cost" relative to the size of the total fund.[156] In a United States Copyright Office report from 2008 which recommended phasing out the outdated system, the authors noted that the regime "has proven to be an efficient mechanism to clear copyrighted works[, but] at

154. *Id.*

155. *Id.*

156. Cate, *supra* note 138, at 221.

below-market rates."[157] The compulsory licensing regime for cable television retransmission rights shows that even a flexible system can generate gains in licensing efficiency, even if it does not also generate gains in efficacy.

IV. CHALLENGES IN IMPLEMENTING A LICENSING REGIME FOR RIGHTS OF PUBLICITY

As noted above, no scholar to date has laid out a complete or comprehensive structure for a federal compulsory licensing regime for rights of publicity FCLRRP and this is not without good reason.[158] Creating a regime for rights of publicity implicates challenges unlike those faced by existing statutory regimes. The business environment for interactive entertainment, combined with the underlying nature of the right of publicity, means that in implementing a FCLRRP, little can be copied wholesale from existing regimes. Beyond the administrative burdens of establishing a new compulsory system, challenges exist that, without careful or creative design, threaten the viability of the entire regime. If there is to be a genuine push for legislation establishing a FCLRRP that addresses these challenges, they first need to be acknowledged. This section highlights these novel challenges, explaining how they arise in the context of a FCLRRP and why they are nonexistent or trivial in the implementation of existing compulsory licensing regimes.

An effective FCLRRP will need to be designed to consider the following: (1) rights of publicity generate greater holdout concerns than the rights subject to existing compulsory regimes; (2) the value of a person's likeness is difficult to quantify; (3) use of regulated private entities such as ASCAP is not feasible for rights of publicity; (4) the ability of rights holders to enter into exclusive agreements has demonstrated value in the interactive entertainment industry so any loss of this ability under a FCLRRP may have negative impacts; and (5) the functional and profitable aggregation and assignment of rights of publicity in the context of professional sports means that any FCLRRP will need to be drafted to leave these systems intact if the regime is to maintain its efficacy and political viability. This article addresses each of these challenges.

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157. U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION & REAUTHORIZATION ACT § 109 REPORT, Exec. Summary, at vii (2008).

158. *See supra*, Section II.D.

A. *The Existence and Ethics of Holding Out*

To date, compulsory licensing regimes have addressed markets where bargaining for, monitoring, and enforcing intellectual property rights would be unduly burdensome. Whether it involves music licensing or television transmission, it is the often-stated view that there are too many stakeholders and too much content to allow prices to be set by the free market through unwieldy individual bargaining.[159] This feature exists for attempts to license large quantities of rights of publicity as well.[160] A video game can include hundreds or even thousands of likenesses[161] and the process of approaching and negotiating with each individual rights holder would be costly—likely prohibitively so. For this reason alone, a compulsory regime for rights of publicity is sensible.

Rights of publicity pose a problem even greater than the inefficiencies found in many intellectual property markets. For those seeking to create a historically accurate simulation of the real world, a license for the entire set of rights of publicity necessary for the game is not just desirable, it is necessary. A game that is 90% accurate is substantially less valuable than one that is 100% accurate. Unlike a DJ who can play other musicians who are popular at the moment or play other music in the same genre if he or she lacks access to some music, the creator of a historical simulation has no substitute for the real thing. Spotify survived for years without the Beatles,[162] but an NCAA football game cannot survive without Derrick

159. *See, e.g.*, H.R. REP. NO. 94-1476, at 89; United States Department of Justice Antitrust Division, Comments of Netflix, Inc. 1, 10 (Aug. 6, 2014), http://www.justice.gov/sites/default/files/atr/legacy/2014/08/20/307908.pdf [http://perma.cc/Z9QW-BWX4] ("Th[e] hypothetical competitive market for broadcast music performance rights would involve transaction costs. That is, programming producers and copyright owners would potentially have to expend time and/or money negotiating and then paying the fees. These costs would likely be passed on to the downstream broadcasters, so that the cost of programming would be increased to reflect both the value of the performance rights conveyed by the copyright holders and the costs of acquiring those rights.").

160. *See generally id.*

161. *See generally* Order Granting Preliminary Approval of Class Action Settlement with Defendant Elec. Arts Inc., 724 F.3d 1268 (9th Cir. 2013) (accepting allegation that the class contained "over 100,000 individuals" in granting preliminary approval of the class action settlement).

162. *See* Max Willens, *The Beatles are Streaming Everywhere, but Spotify has the Most to Gain*, INT'L BUS. TIMES (Dec. 23, 2015, 1:30 PM), http://www.ibtimes.com/beatles-are-streaming-everywhere-spotify-has-most-gain-2238361 [http://perma.cc/K89N-G76S].

Henry. As addressed in the above discussion of *Hart* and *Keller*, the possibility of holdout eviscerates the ability for developers and other creative artists to create historically accurate simulations in a way that is simply not present in the music or cable television industry.[163] Without a compulsory regime, the last few rights holders can holdout in an effort to exploit the creative artists out of additional compensation. This possibility, when considered prior to work beginning on an interactive medium, will likely deter developers from even attempting the process. For this reason, the need for a compulsory license is far greater in the context of rights of publicity than for other intellectual property rights.

This is unfortunate because from an ethical perspective, there is far less reason to think such an outcome is tolerable than in the context of the intellectual property rights governing creative works. When an artist writes a song or a director films a movie, he or she is creating something new that would not exist absent his or her active work and effort. If a rights holder then chooses to keep that work private, there may be a loss of value, but that loss is no greater than if the artist had not set about the task of creating the work in the first place. There is no fear that the exercise of copyright to withhold works from the general populace will ever leave us as a society worse off than if the right had not been established since the creator always has the option of simply not engaging in the creative enterprise in the first place. J. D. Salinger's decision to keep his writings private is disappointing, but it does not infringe on the ability of others to realize their creative potential, engage in political discourse, or otherwise pursue their lives as they choose.

Those who exercise their rights of publicity in a manner that prevents others from creating historically accurate simulations are not withholding something they have created: they are preventing others from creating. As the majority in *Hart* acknowledges, the right to speak truths about whomever and whatever a citizen desires is at the heart of the First Amendment and our democracy.[164] As described above, at its very inception, the right of publicity distinguished itself from privacy rights in that it was not meant to protect a person's right to be left alone, it was meant to protect a person's right to receive compensation for his or her

163. *See supra* Section II.B.

164. "Freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth." Hart v. Elec. Arts, Inc., 717 F.3d 141, 150 (3d Cir. 2013) (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985)).

fame and notoriety.[165] There is no reason to believe that a system that allows rights of publicity to be used as a shield, not from defamation or degradation but from the discussion in its entirety, should be maintained. While a person's right to reject a bargain normally ensures a fair price is reached in the free market, there is little reason to maintain it in the context of rights of publicity where the right of refusal is used not to arrive at a fair price, but to extort an unfair one.

A FCLRRP needs to be drafted with this in mind. Functionally and morally, any FCLRRP that, like the regimes for music, allows rights holders to opt out of the system entirely cannot be sustained. In designing a FCLRRP, drafters need to ensure that any mechanisms aimed at preserving or mimicking free market bargaining do not allow opportunities for exploitive holdout to linger. A failure to do so means the FCLRRP will fail to achieve its fundamental purpose.

B. *Difficulty in Quantifying the Value of a Given Depiction or Likeness*

To compensate someone fairly for the use of his or her property, whether it is real or a legally established intellectual property right like the right of publicity, the value of that right must be determined. In free market exchanges, this is simple: the value of a good is what someone is willing to pay for it. In a compulsory regime, however, the license is mandatory, so one cannot simply look at the exchange price to determine the property's value, if there is even an existing exchange price to begin with. This determination is all the more difficult where the acquired rights are bundled intellectual property rather than a single right or work. While Performing Rights Organizations like ASCAP rely primarily on free market negotiations to settle on a fair price for their catalog of works,[166] there is no equivalent mechanic for determining how that revenue should be distributed among component rights holders. Instead, the organization must look elsewhere to generate a fair distribution.

In music, there is a readily available metric to apportion value—track listens.[167] While the digital age gives us access to a wealth of music in a

165. *See supra* Section II.A.

166. United States v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395(WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001).

167. *U.S. Radio Royalties*, BMI (2016), http://www.bmi.com/creators/royalty/us_radio_royalties [http://perma.cc/8MA7-Q2TV].

variety of genres, the function of listening to a track remains largely the same whether one is listening to Prince or Phillip Glass. Regardless of venue, music genre, or audience size, when people listen to music, they are pretty much engaging in the exact same act. This makes track listens a comparable metric across all musicians, which in turn makes it an effective way of assigning value to the rights within a Performing Rights Organization's catalog. This is all the more true because, with rare exceptions, people tend to listen to one track at a time, which ultimately provides discrete units of measurement.[168] There is also a strong indication that a played track provides the highest value of any track in the Performing Rights Organization's catalog at the time it is played—otherwise the user would simply have selected a more desirable song—which means track listens are a great indicator of actual value to the consumer.[169] While a given customer may get more absolute value out of a given song than another user, we know that each is getting the most value at that moment in time relative to their other options. For this reason, a distribution system based primarily on track listens is a sensible and efficient way to distribute royalties in the music industry and indeed, we see Performing Rights Organizations using precisely such a system.[170]

In video games, however, there is no such comparable metric. Unlike in music, the process of playing one game is often radically different from the next. Rather than presenting a continuous flow of information to a single sense, as listening to a song does, a video game engages many senses at a rate that is influenced, if not entirely controlled by, the user. What the player sees and focuses on varies from user to user, and from play session to play session. While data could be collected to document the amount of time a given likeness appears on a player's screen,[171] such information cannot be reflexively converted to a monetary value as in music. A given screen may contain dozens or even hundreds of likenesses at a given time, which will provide varying degrees of value to the player experience. For example, a user playing a basketball game may mostly derive value out of

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168. *See Billboard 200 Makeover: Album Chart to Incorporate Streams and Track Sales*, BILLBOARD (Nov. 19, 2014), http://www.billboard.com/articles/columns/chart-beat/6320099/billboard-200-makeover-streams-digital-tracks [http://perma.cc/UJR6-Y5VU].

169. *Id.*

170. *See, e.g.*, *U.S. Radio Royalties*, *supra* note 167.

171. *See* Extra Credits, *Extra Credits: Metrics*, YOUTUBE (May 10, 2012), http://www.youtube.com/watch?v=nqGcXOksFGg [http://perma.cc/FTQ4-C5NA].

being able to play as his favorite basketball player, even when he is controlling that player's other team members periodically throughout the game. That consumer may find the game more authentic, and thus more valuable, if the players on the sidelines are the team's real life second string, but the second string's presence on the screen is unlikely to be as valuable as the avatars controlled by the player, even if they occupy comparable screen time. Thus, for the use of publicity rights in video games, there is simply no common currency like in music.

This means that any FCLRRP will need to adopt a more nuanced approach to determining value if it is going to do so fairly. As we see in the system governing television retransmission rights,[172] it is possible to have a more nuanced, flexible approach to such determinations. However, doing so adds cost, uncertainty, and arbitrary allocations. A well-designed FCLRRP will need to create a system that efficiently determines the relative value of licensed likenesses while also minimizing these pitfalls.

C. *Inability to Establish Regulated Private Rights Aggregators*

At first glance, it would appear the use of regulated private entities like ASCAP to gather, negotiate, and license rights of publicity would be a way to maintain free market mechanics in a FCLRRP and to duplicate existing and successful systems. Certainly, the use of such entities in the music industry has been successful.[173] Moreover, professional sports organizations already serve this function for the rights of publicity of their players,[174] so it would seem the market is already implementing these mechanisms successfully. Unfortunately, a FCLRRP would face difficulty in relying on a system of regulated aggregators as the primary or sole method of pricing and distributing rights. The number of rights of publicity is simply too massive and the variety and value of those rights too divergent, for such a system to be functional in a FCLRRP. While many different professionals contribute to different aspects of the musical

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172. *See supra* Section III.D.

173. *See About ASCAP*, ASCAP, http://www.ascap.com/about [http://perma.cc/FL35-NHWW].

174. *See, e.g.*, U.S. SEC. & EXCH. COMM'N, EXHIBIT 10.3: NFL PLAYER CONTRACT FOR ARIAN FOSTER § 4 (Mar. 6, 2012), http://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm [http://perma.cc/G4R8-4M75].

creation process and may end up holding different types of rights to the music, as a group they are relatively small and share similar interests.[175] In contrast, a federal right of publicity statute would cover every United States citizen—that is, nearly a thousand times the number of people whom musical rights organizations like SoundExchange represent.[176] If a single organization established a license to all existing rights, it would have to represent every United States citizen in at least twenty-nine different states. A citizen's right of publicity has a radically different value, in different contexts, and many have no value at all.[177] The administrative hassle of creating a new organization that purports to represent them all would be foolhardy in light of the sheer number of rights held and the fact that most members would never have their likeness licensed or used.

The ability of organizations like ASCAP to function is further supported by the fact that there is a natural incentive for music rights holders to be members of those organizations. Without the monitoring ability of a large organization, an individual rights holder would have immense difficulty in tracking and policing the use of its music.[178] And its music might not be played at all, as a DJ could simply select a song in the licensed catalog rather than play the music of a musician who chose not to join.[179] In this way, Performing Rights Organizations can be voluntary, allowing musicians who want to exploit their rights through the free market to do so, but also sustainable since, as a practical matter, membership in a Performing Rights Organization is likely the financially best option for most rights holders.

But licensing rights of publicity are more complicated. As addressed above, a handful of rogue rights holders can destroy the commercial

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175. SoundExchange represents a little over 100,000 rights holders. *See Working with SoundExchange*, SOUNDEXCHANGE, http://www.soundexchange.com/wp-content/uploads/2015/02/SX-Infographic_as-of-2.13.151.jpg [http://perma.cc/7UMR-V39Z].

176. *Id.*

177. *See* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 226–30 (2005) (discussing the difficulty of valuing an individual's name or likeness in comparison to valuing a celebrity's name or likeness).

178. *See* Bernard Korman & I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT SOC'Y U.S.A. 332, 367 (1986).

179. *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 358 (S.D.N.Y. 2014) ("Because of the nature of its music service, [an online radio station] ha[s] an ability to substitute one work for another than many other music services.").

viability of a video game—and the value of any catalog license possessed by the aggregator—in a way that the withdrawal of a rogue musician from a Performing Rights Organization simply cannot. Whereas a musical performing rights holder has an individual interest in joining a Performing Rights Organization, an individual right of publicity holder has an interest in abstaining from membership and holding out. As noted above, eliminating the holdout problem is necessarily one of the core functions of a FCLRRP. For this reason, unlike in the case of music, any ASCAP equivalent would have to have mandatory membership, which in turn introduces the administrative difficulties inherent in such a gigantic organization.

This does not mean that private aggregators cannot have a place in a well-designed FCLRRP. Where an organization can gather the complete set of rights needed to create a historically accurate simulation or other nontransformative creative work, there is no reason to prevent that from occurring. Currently, organizations like the NFL already assemble the publicity rights of their players and negotiate with developers to reach a fair market rate.[180] But these organizations cannot be relied on as the principal method for operating the FCLRRP. If a regime is to be effective in solving the holdout problem, then a FCLRRP must have some mechanism of compelling every rights holder to license their rights, not just those who choose to cede their rights of publicity to an aggregator.

D. *Benefits of Exclusive Licensing in the Interactive Entertainment Industry*

Among the benefits preserved by the ability of a rights holder to abstain from licensing found in the free market and in compulsory systems, like that for performance rights, is the possibility that a rights holder may grant a licensee exclusive rights to the property in question. This exclusivity provides additional value to the licensee, as it can be the only product in the market offering a product with likeness features or with that likeness endorsing the product in question. When compared with a system

180. *See* Brian Mazique, *Building the Perfect Football Game to Coexist with 'Madden'*, FORBES (Mar. 4, 2016, 9:53 AM), http://www.forbes.com/sites/brianmazique/2016/03/04/building-the-perfect-football-game-to-coexist-with-madden/#2140da837d30 [http://perma.cc/2E5M-2AD2] (discussing the NFL's exclusive license with Electronic Arts for the "Madden" series, as well as the pros and cons of that licensing relationship).

where anyone is statutorily permitted to license a work, exclusivity provides consumers a benefit as well. If there is only one such product in the marketplace, the consumer avoids confusion over which it is they want or which is endorsed by the rights holder. An unchecked, unlimited compulsory licensing regime for all rights of publicity could lead to a market where consumers could not distinguish which games or other works are worthwhile, which could ultimately jeopardize the entire industry. Under a simple or underdeveloped compulsory regime, we can imagine a world where every year there are fifty NFL simulation games, leading consumers to buy inferior products not endorsed or sanctioned by the NFL.

This concern is particularly prevalent in the video game industry, which experienced a massive crash in 1983 as a result of out of control branding and a lack of product control. The leading game system at the time, Atari 2600, did not have a mechanism for excluding unauthorized games from use.[181] The business model at the time was not substantially hurt by third-party developers creating content for the platform, just as the television industry is not hurt by the generation of TV shows, movies, and consoles that utilize them. But without the ability to exclude low-quality or nonfunctioning games, these third-party products diminished the perceived quality of the system.[182]

Two additional factors exacerbated this problem. First, at the time, parents who—without a source of trustworthy reviews like the Internet—often lacked knowledge of which games were high- or low-quality, primarily purchased video games.[183] This allowed poor quality titles to generate revenue from purchases by unsophisticated buyers rather than being driven out of the market. Second, at the time, most companies viewed video games as a way to make a small amount of extra profit through licensing or even as commercials themselves, not as a method of

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181. Ryan Lambie, *The 1983 Videogame Crash: What Went Wrong, and Could it Happen Again?*, DEN OF GEEK! (Feb. 19, 2013, 7:01 AM), http://www.denofgeek.com/games/24531/the-1983-videogame-crash-what-went-wrong-and-could-it-happen-again#ixzz3wb4VTBo [http://perma.cc/55HR-PKGZ].

182. *See id.*

183. *See The Great Video Game Crash of 1983*, TV TROPES, http://tvtropes.org/pmwiki/pmwiki.php/UsefulNotes/TheGreatVideoGameCrashOf1983?from=Main.TheGreatVideoGameCrashOf1983 [http://perma.cc/5W6V-AUAT]; Nadia Oxford, *Ten Facts About the Great Video Game Crash of ’83*, IGN (Sept. 1, 2011), http://www.ign.com/articles/2011/09/21/ten-facts-about-the-great-video-game-crash-of-83?page=1 [http://perma.cc/8CEJ-KZFV].

building or sustaining a related but separate core brand.[184] For this reason, many companies were willing to license their brands and trademarks with no oversight into the quality of the final product—leading to such colossal failures as the "E.T.: The Extra-Terrestrial" game, most copies of which were ultimately buried in the Mojave Desert.[185] The end result was massive distrust in the market as a whole, which lead to a 97% drop in console profits over a one-year period and caused industry valuation to plummet from $3 billion to just $100 million.[186] This may be why Salomon, writing just four years after the video game market crash of 1983, cites a concern that a FCLRRP might limit exclusivity rights when ultimately rejecting the suggestion as a viable solution.[187]

While not dispositive, Salomon's concern is valid. Exclusive agreements are one way in which the industry maintains control on quality and establishes confidence in consumers. But there are reasons to think that a lack of exclusivity for rights of publicity would have little impact in today's environment. Today's purchasers of video games are on average older and more sophisticated than the purchasers in 1983 and they have easy access to online reviews which can help them assess which games to buy and which to avoid. More importantly, rights of publicity are not trademarked rights, which can be used to distinguish which products are and are not officially licensed by the professional athletic organizations that sponsor them.[188] Even under a regime that opts not to carve out an exception for organizations like the NFL, developers seeking to create a professional football simulation would be unable to use the NFL or NFL team logos in advertising or in-game, consequently making purchasers aware that, regardless of the persons being depicted on screen, the game is not an official NFL game. While the business environment in 1983 saw the rampant and unchecked licensing of brands that were attached to inferior products, most businesses no longer see video game licensing as a side

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184. *See* Mark Rochester, *The Video Game Market Crash of 1983*, REAXXION (Nov. 19, 2014), http://www.reaxxion.com/1364/the-video-game-market-crash-of-1983 [http://perma.cc/V5WS-PUGL].

185. Lambie, *supra* note 181.

186. *Id.*

187. *See* J. Eugene Salomon, Jr., Note, *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179, 1197–98 (1987) ("A compulsory license could diminish [monetary] returns because an individual could no longer insure a user of exclusivity.").

188. *Id.*

business without repercussions on the core brand.[189] It was this perception, not the inability to exercise exclusivity, which led to many failures in 1983.

This does not mean that these concerns or the desires of rights holders for exclusivity should be ignored. There are definite advantages to providing a mechanism by which rights can be assigned in an exclusive manner, including ensuring fair pricing and preventing consumer confusion. To the extent possible, a FCLRRP should be designed to facilitate exclusive or quasi-exclusive dealings in rights of publicity.

E. *Presence of Functional Rights Aggregation and Allocation in Professional Sports*

The problems that are currently presented by rights of publicity are both serious and real. The *Hart* and *Keller* decisions represent the death of games that generated billions.[190] Despite the burdens of the system, in the context of professional athletics, the system functions quite well, delivering titles like *NBA 2K14* and *Madden NFL 25* to millions of customers.[191] Because these entities are able to implement uniform take-it-or-leave-it contracts with their players, they are able to aggregate their players' rights of publicity and sell them to game developers like EA and Take-Two Interactive.[192] In order to prevent a FCLRRP from potentially disturbing this currently functional system, a FCLRRP should either provide a mechanism for these functional systems to continue or be careful to ensure that whatever system replaces the current free market negotiations is both as functional and as fair as what currently exists. A FCLRRP that creates efficiencies in some markets while destroying them in others may not be desirable. Pragmatism suggests that, at the very least, a FCLRRP should generate gains in efficiency elsewhere that offset any losses in the rights allocation that currently exists in professional athletics, if the FCLRRP even touches these systems at all.

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189. *See generally* Chad Hadzinsky, *A Look Into the Industry of Video Games Past, Present, and Yet to Come*, CMC SENIOR THESES (2014), http://scholarship.claremont.edu/cmc_theses/842 [http://perma.cc/7CM9-43HE].

190. *Global Weekly Chart*, VGCHARTZ (Mar. 21, 2015), http://www.vgchartz.com/weekly/42085/Global/ [http://perma.cc/NX3S-58Q3].

191. *Id.*

192. *See* Mazique, *supra* note 180.

Preserving the status quo where it is currently functional is not only justified on precautionary or utilitarian grounds: it is a political imperative. The enactment of a FCLRRP would require an act of Congress—a legislative body which in recent history has been less than prolific in its enactment of laws.[193] As discussed above, a FCLRRP would generate value for developers and rights holders alike as it would facilitate works that, under current legal theories and frameworks, simply cannot legally and profitably be produced. But the perception that professional athletic organizations might lose money or control in the process could easily torpedo any chance the act had to be enacted. Justifiably, these organizations will argue that, for them, there is no market failure, and will therefore likely lobby against any regime that jeopardizes their profit from these enterprises. If a proposal for a FCLRRP is to ever leave the pages of academic journals and make it onto the president's desk, it must provide assurances to those with a vested interest that their current arrangements will not be jeopardized.

V. THE PROPOSAL

This article proposes the creation of a Federal Compulsory Licensing Regime for Rights of Publicity ("FCLRRP"). A FCLRRP would allow creators to obtain a compulsory license covering the likenesses depicted in nontransformative works such as simulation sports games, preempting any state level right of publicity laws that might otherwise expose the creator to liability for the depictions in the work. This is not a novel idea as the United States already provides for compulsory licensing for musical works and multiple scholars have proposed such a regime for rights of publicity.[194] But to date, these proposals have been rudimentary. This section synthesizes these works with the concerns highlighted by the *Hart* and *Keller* decisions—the precedent set by existing compulsory regimes and other areas of the law—and the observed free market transactions for rights of publicity to generate a concrete, actionable proposal.

The proposed design reflects both a desire for flexibility and fairness, as well as the functional and political realities that accompany both

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193. *See generally* Drew DeSilver, *Congress Still on Track to be Among the Least Productive in Recent History*, PEWRESEARCHCENTER (Sept. 23, 2014), http://www.pewresearch.org/fact-tank/2014/09/23/congress-still-on-track-to-be-among-least-productive-in-recent-history/ [http://perma.cc/43Z8-3XVC].

194. *See supra* Sections II.D, III.A–D.

enacting and enforcing a compulsory regime of this nature. The proposed FCLRRP favors free market outcomes where possible, and attempts to emulate them where they do not exist. It is designed to limit opportunities for parties to collude, holdout, or otherwise distort the market. It seeks to preserve the status quo where it is functional while also providing a meaningful alternative where it is not functional. Most importantly, it is a complete, concrete proposal. Every element of the system, and the rationale behind it, is detailed such that Congress could both quickly draft a bill enacting the proposal wholesale and thoughtfully consider, debate, and amend any portion of it.

The proposed FCLRRP creates an opt-in regime whereby developers of qualifying nontransformative simulation games who cannot obtain the needed rights of publicity through numerous individual negotiations can elect to use a compulsory license. Developers opting in will have their application published in the Federal Register. After a comment period, allowing other parties to identify defects in the work's eligibility, the work will obtain a compulsory license. The price of this license will be set by statute at 5% of the work's gross revenue. These fees would be placed in escrow until they reach a minimum threshold, at which point the distribution process would begin. Because works will use depictions in differing ways, a committee will design an individualized distribution structure for the fees generated by each work. The proposed distribution schedule will be published in the Federal Register before approval, giving rights holders an opportunity to object much as they do in class actions if they do not find it satisfactory. Once the Copyright Royalty Board approves a distribution schedule, the funds will be distributed to rights holders in accordance with its terms. The rest of this section discusses all these elements in substantial detail.

A. *An Opt-In Regime for Works Which Do Not Qualify for First Amendment Protection*

The proposed FCLRRP would be an opt-in regime under which the developer or artist of a work could opt to follow certain procedures to obtain compulsory licensing for his or her work. While this article has focused primarily on the inefficiencies generated by the *Hart* and *Keller* rulings, which held that EA's video games were not protected as transformative works,[195] all video games receive First Amendment protection[196] and for most such works, this means licensing simply is not necessary. Entirely fictitious works do not implicate right of publicity law at all. But even those who recreate the image or likeness of another are often protected because their depictions are part of a transformative work, fall under the fair use doctrine, or are a parody of the person depicted. These works can continue to rely on these defenses as they have in the past.

An opt-in system also means that for developers who can obtain licenses through traditional means, there is no disruption to their business operations. This greatly reduces the downside risk of the system, as it ensures that where the commercial licensing of rights of publicity currently exists, it will continue to exist in the future.

B. *Protections Associated With Opting Into a Federal Compulsory Licensing Regime for Rights of Publicity*

Before understanding how a FCLRRP would function, it is best to understand what protections a developer of a game or other creative work would receive by opting into the system. The background section of this article has explained how, at least under the majority's interpretation in *Hart* and *Keller*, state-level rights of publicity severely hinder the ability of developers to create works using the likenesses of real persons. A compulsory license under a FCLRRP would provide a way for these developers to license en masse the rights of publicity from the persons whose images it used under certain defined circumstances, greatly reducing their liability from right of publicity suits. Specifically, a FCLRRP would provide that:

The developer of a qualified creative work may acquire a compulsory license for the rights of publicity of persons depicted in that work, and no right of publicity or comparable claim shall be maintained against that developer regarding that work's depictions of persons listed in the developer's completed and approved application for such compulsory license, so long as the developer has otherwise fulfilled its obligations under this statute.

This rule would function in a fairly straightforward manner: rights of publicity would be licensed by a compulsory regime and any efforts to use

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195. Elec. Arts Inc. v. Hart (*Hart Dismissal*), 717 F.3d 141, 170 (3d Cir. 2013), *cert. dismissed*, 135 S. Ct. 43 (2014). *See generally* Elec. Arts Inc. v. Keller, 135 S. Ct. 42 (2014).

196. Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 787 (2011).

state-level rights of publicity laws to bring a claim would be preempted. But it is worth commenting on some of the details of the regime. First, the regime only allows for compulsory licensing for "qualified works." These qualifications mean that the legal landscape remains mostly unchanged. As is detailed below, this means that current games that function under licenses from professional athletic organizations like the NFL will be largely unaffected, although the FCLRRP would allow for such games to expand their scope, say by including historical teams. Second, the proposed act only limits claims based on *that work's* depictions of persons. If the developer uses a person's likeness for advertising or endorsement purposes, even for a work licensed under the FCLRRP, they will have to seek licenses from the individual rights holders or else face liability. Third, this act does not prohibit such actions if the developer fails, through negligence or fraud, to fulfill its obligations under this statute. Hopefully such instances will be rare, but the ability of individuals to bring lawsuits in such instances heavily encourages a developer to dutifully carry out its responsibilities. With these caveats in mind, we turn to the first matter: which works should qualify for compulsory licenses under a FCLRRP?

C. *Works Eligible to Receive a Compulsory License Under a Federal Compulsory Right of Publicity Licensing Regime*

This article, and other contemporary scholarship, has been triggered by the decisions in *Hart* and *Keller*. Naturally, this means that the depictions of current and former athletes in video games present themselves as prototypical examples of the types of works that should be covered. But beyond this, deciding on the bounds of a FCLRRP requires balancing considerations that favor both broad and narrow application. On one hand, constraining the scope of the FCLRRP means that as new technologies emerge, they may unintentionally be left out of the law's protections, slowing growth and necessitating additional legislative action. On the other hand, providing broad applicability risks the act altering the current legal landscape in an unintended way. Moreover, while both video game developers and rights of publicity holders stand to gain from a system that authorizes games like EA's *NCAA Football* series, this may not be true for the economic ecosystems of other works. For example, if the rights of publicity for actors could be licensed under an FCLRRP, actors might stand to lose substantial revenue and would, in turn, oppose the act's passage. Expanding the scope of the act also means expanding the scope of those who might oppose it.

For these reasons, this article proposes defining qualified works as:

an audiovisual work (1) depicting persons from two or more U.S. states (2) whose rights of publicity are owned or have been assigned to at least forty separate entities other than the developer (3) which does not depict the applicable likenesses as part of a set narrative.

As discussed below, the forty-entities requirement limits the FCLRRP to developers who would face genuine hurdles in attempting to license all the rights separately, the minimal diversity requirement helps ensure constitutionality, and the lack of set narrative requirements preserves the political viability of the act by not disrupting the established, functional industries for television and motion pictures. These requirements were also drafted with the understanding that many FCLRRP applications will be approved ex parte. While applications for compulsory licenses will be listed in the Federal Register and may be opposed by a party who believes the requirements of the FCLRRP have not been met, often the Copyright Royalty Board will have to decide on its own accord whether the work meets the requirements. To facilitate this, the requirements were drafted to be as objective as possible. When considered along with all the checks and balances embodied in the FCLRRP this article proposes, these requirements ensure that the system is not unfairly used to bypass fair market dealings.

1. Use of rights of publicity that are owned or have been assigned to at least forty separate entities other than the developer.

Because the need for an FCLRRP is generated in large part by the complexities of attempting to individually license a large number of rights of publicity, a qualification based on the number of rights holders would be desirable. Of course, one could imagine a FCLRRP that allowed for a developer of any copyrightable work to obtain a compulsory license for the right of publicity of any individual or set of individuals. Such a regime might well be functional, but it would be tantamount to government rate-setting for such rights. The impetus for a FCLRRP is not that markets have been setting a rate that is too high or low, but that the market has not, and cannot, set rates where the number of parties is too numerous and the risk of a holdout is too high. In instances where the market can still reasonably function, for example where a developer seeks a license for the depiction of a single person, the FCLRRP should not allow developers to circumvent the market. Conversely, creative works, like those that triggered the lawsuits in *Keller* and *Hart*, would require obtaining licenses from thousands or tens of thousands[197] of individual players and are therefore prime candidates for such a license.

Determining where the line is between licensing obligations that can be reasonably obtained through the market and those that require resort to a compulsory system is a difficult, and in some sense arbitrary, task. However, as addressed above, to qualify for the right to obtain a compulsory option, a copyrightable work must depict the likenesses of persons whose rights of publicity are owned or have been assigned to at least forty entities other than the developer. This figure identifies situations in which licensing the rights through traditional negotiations with all parties is truly a monumental task and comports with current legal jurisprudence concerning numerosity.

Since holdout problems can exist with as few as two rights holders, a person could reasonably argue that simply requiring the presence of multiple rights holders would be sufficient to identify situations in need of a compulsory system.[198] But doing so ignores the reality that deals can be, and are, regularly negotiated under circumstances when multiple parties hold rights necessary for the purchaser to move forward. Rather than set the threshold at the minimum justifiable level, it is better to turn to an area where our legal system already makes determinations about how large a group must be to make assembling their individual rights impractical—that area would be class actions.

Federal Rule of Civil Procedure 23(a) directs courts to certify classes only when they are "so numerous that joinder of class members is impracticable."[199] Courts have developed a large body of law determining precisely how numerous a group must be.[200] These cases have set the

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197. *See* Order Granting Preliminary Approval of Class Action Settlement with Defendant Elec. Arts Inc., 724 F.3d 1268 (9th Cir. 2013) (accepting allegation that class contained "over 100,000 individuals" in granting preliminary approval of the class action settlement).

198. For example, two people might own two adjacent lots that a real estate developer needs to construct a shopping center. If the developer were to purchase one lot, the owner of the other lot gains substantial leverage if he were to refuse the sale entirely.

199. FED. R. CIV. P. 23(a).

200. *See* Jeffrey S. Gutman, *Federal Practice Manual for Legal Aid Attorneys § 7.2*, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW (2016), http://federalpracticemanual.org/node/42#14 [http://perma.cc/K4L2-YESU]; *see also* Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 330 (1980) (suggesting fifteen is too few); Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 357 (3d Cir. 2013) (presuming numerosity at forty); Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (presuming numerosity at forty).

precedent that, in general, classes under fifteen parties are too small and that classes greater than forty parties are sufficiently large.[201] There are exceptions, of course, but as a general rule, if a class is larger than forty parties, it will satisfy Rule 23(a)'s numerosity requirement.[202] Given that there are far fewer holdout concerns for joinder between plaintiffs when a tort has damaged them all, it is sensible to assume that if forty parties are too many, it would also be too many parties to practically negotiate individual licenses with.

And lest one think the analogy improper, it is worth noting that the similarities between right of publicity negotiations and class actions are stronger than they might seem at a glance. In the case of a right of publicity licensing, the developer seeks to gather rights held by numerous entities so that it can generate substantial value—value that cannot be generated by securing rights for only one or a few individuals. In the case of a legal harm against a large number of people, an attorney seeks to gather the claims so that he or she can generate substantial value from a lawsuit, value that cannot be generated by one or a few individuals.[203] Both the developer and the attorney have a legal means of facilitating these outcomes without resorting to specialty law; they can license each right individually or seek the voluntary joinder of all class members respectively. However, at a certain point, our legal system deems the effort required by a class action attorney to gather all those legal claims in a single place too costly and inefficient. At that point, the law allows for the compulsory joinder of all stakeholders.[204] This article proposes allowing developers, under similarly numerous circumstances, to do the same.

While the case law on class actions suggests that requiring forty entities is at the higher end of the legally recognized size at which individual collection of rights is deemed impractical,[205] the comparable

201. *See* Gutman, *supra* note 200; *see also Gen. Tel. Co. of the Nw.*, 446 U.S. at 330 (suggesting fifteen is too few); *Hayes*, 725 F.3d at 357 (presuming numerosity at forty); *Consol. Rail Corp.*, 47 F.3d at 483 (presuming numerosity at forty).

202. *See* Gutman, *supra* note 200; *see also Gen. Tel. Co. of the Nw.*, 446 U.S. at 330; *Hayes*, 725 F.3d at 357; *Consol. Rail Corp.*, 47 F.3d at 483.

203. *See* FED. R. CIV. P. 23(a)(1) (allowing for class certification when "the class is so numerous that joinder of all members is impracticable").

204. *See id.*

205. Gutman, *supra* note 200.

requirement in a FCLRRP is further checked by the ability of rights holders to gather their rights together to disqualify a work from the compulsory licensing system. The forty-entities requirement is about the number of entities who hold the rights, not who generated them. This means that if all, or all but thirty-eight, rights-holders can sell their rights to, or agree to collectively bargain as a member of a single entity, then the compulsory system does not apply. This further helps preserve the free market as the preferred method of rights transfers in the United States and ensures compulsory licenses will only be granted in situations where there are too many parties for negotiation to be practical. The purpose of a federal regime is to prevent the expense of locating all the rights holders and to eliminate the possibility of a holdout. If the rights holders can gather together themselves, much of this task is already accomplished.

2. Presence of minimal diversity.

The FCLRRP would also draw on another requirement from the Class Action Fairness Act: minimal diversity.[206] The legislation would deny a work protection under the FCLRRP if all the persons who were depicted in the work resided in the same state. Unlike the forty-entity requirement, this requirement mostly exists to protect the constitutionality of the legislation. While modern Commerce Clause jurisprudence gives the federal government wide latitude to pass statutes,[207] adding a minimal diversity requirement means that every compulsory license will affect entities in multiple states and thus be firmly within the sphere of interstate commerce. It also allows states who have opted to favor free speech by not enacting a right of publicity statute to promote the use of their citizens and locations in creative works developed in their state. For example, a video game developer creating a crime drama set in a modern-day West Coast city might opt to locate their headquarters and game in Portland rather than Seattle or Los Angeles so that they could depict real people in that city without being subject to any licensing requirements.[208]

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206. 28 U.S.C. § 1332(d)(2) (2011).

207. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 112 (1942).

208. *See Statutes & Interactive Map*, RIGHT OF PUBLICITY, http://rightofpublicity.com/statutes [http://perma.cc/4R99-5R6Q] (demonstrating that while both California and Washington have right of publicity statutes, Oregon does not).

3. Not applicable to depictions used in a set narrative.

This requirement is meant to limit the scope of works covered so that developers do not use the FCLRRP in instances where its application would be inequitable. There is a risk that a developer might attempt to acquire the rights of publicity for an individual by including forty other parties and using the compulsory regime to circumvent fair market negotiations. To borrow an example from Kunath, imagine a developer with advanced CGI capabilities who creates a film starring "Katharine Hepburn twenty years younger."[209] Hepburn is thrilled at the proposal to create the film, but demands a large sum for her right of publicity. Finding the price too high, the developer decides to place fifty other famous people, from various U.S. states, in various minor roles throughout the movie; it then applies for a compulsory license at the default rate. This sort of creative endeavor, which uses numerosity to circumvent fair market dealings for rights of publicity, is not the type of work a FCLRRP would want to promote.

Deciding where to circumscribe the bounds in this regard—where to draw the line between fairly using the system to create products that would otherwise be impossible to license and exploiting it—requires an understanding why the above example seems like an exploitation. It is not because movies should not be covered. Video games hold no special or diminished place in the pantheon of creative expression.[210] It is unfair because (1) the market sets a higher price for the use of a person's image when they are used in a set narrative work; (2) holdout problems are substantially less likely to exist when casting a set narrative work; and (3) set narrative works are more likely to draw on a few prominent depictions disproportionately.

While there is no *standard* budget for casting in set narrative works, there is at least anecdotal evidence that the cost for publicity rights is much higher than that calculated for rights of publicity discussed later in this

209. Kunath, *supra* note 79, at 866.

210. *See* Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 789 (2011) ("Whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears.").

article.[211] For example, the producers of *Unbreakable* dedicated $35 million—out of a $74.2 million budget—to the cost of the cast.[212] The film grossed $248 million worldwide, implying a rate equivalent to 14.1% of gross revenue—a figure nearly three times the default rate for the proposed FCLRRP.[213]

Whatever the cost of obtaining the rights of publicity, works with a set narrative also do not suffer from the holdout concerns faced in creating a historically accurate simulation. While not all narrative works have a single prominent figure, almost all have less than a few dozen characters of note. The FCLRRP is supposed to resolve the practical difficulties that emerge from needing to license a large number of specific people. For example, an accurate simulation of NCAA football requires complete and accurate team rosters from every team depicted. If Slippery Rock's left tackle will not sign a deal, you can no longer have a completely accurate simulation. But when expressing a set narrative, specific persons are rarely required so holdout problems disappear. What if Slippery Rock's left tackle will not agree to be depicted in a story about a Division II team being transferred to Division I and winning the National Championship? The developer can solve this problem by going to Shippensburg or any other Division II team and make the pitch. There is no need for a compulsory licensing regime.

Finally, creative works with set narratives tend to draw on the persons depicted in an intentionally disparate manner. The *leads* get by far the most screen time while *extras* are used only once. While a FCLRRP committee is designed to be flexible, constructing a fair distribution when a few people occupy the vast majority of the work would be more difficult than when avatar presence is more evenly spread. Likely, any distribution would leave either the "stars" or the "extras" feeling undercompensated—compounding the compensation issue addressed above. In short, works depicting set narratives neither need nor benefit from inclusion in a compulsory license system so they should be excluded from its scope.

None of this is to suggest that qualified works cannot or will not have powerful narratives. The limitation is only on the use of compulsory

211. *Hollywood by the Numbers: Unbreakable*, THE SMOKING GUN (Apr. 14, 2000), http://web.archive.org/web/20060905202743/http://www.thesmokinggun.com/hollywood/hollywoodsides/willisunbreakable1.html [http://perma.cc/54KB-C7X3].

212. *Id.*

213. *Unbreakable*, BOX OFFICE MOJO, http://www.boxofficemojo.com/movies/?id=unbreakable.htm [http://perma.cc/GG9B-KN6Y].

licenses for the individuals depicted in set narratives. This in no way limits the powerful emergent narratives generated by the player's interaction with the game or other qualified work. When the player is guiding and generating that narrative by contributing their own actions, the FCLRRP still allows for likenesses to be licensed through its compulsory structure so long as the developer does not orchestrate the narrative to achieve a certain predetermined end or a small set of possible ends.

Even if a developer would like to express a set narrative as part of a greater simulation, he or she may do so by obtaining individual licenses from the persons depicted in the narrative and licensing all other likenesses through the compulsory system. If a developer wants to create a NCAA football simulation but also have a story mode for that Division II underdog story, it can get the necessary licenses for the set narrative elements from the individuals while using the FCLRRP for every other NCAA player. Alternatively, if the set narrative the developer wishes to tell is transformative and it is willing to risk the litigation, the developer need not acquire licenses at all and can instead utilize the First Amendment protection for transformative uses of celebrities' likenesses.

As discussed above, because of the possibility of ex parte approval of a FCLRRP application by the Copyright Review Board, the qualifications for approval are ideally as objective as possible. While the diversity and numerosity requirements are purely objective, determining whether a game depicts listed persons in a set narrative will be a somewhat subjective task. The Copyright Royalty Board is unlikely to need to go on a fact-finding mission to make this determination however. Developers must already prepare "a DVD that captures all pertinent content, including typical gameplay, missions, and cut scenes" for the ESRB rating board.[214] This same content can be provided to the Copyright Royalty Board (under seal) as evidence of the lack of set narrative. Further, as discussed in the previous section, if a developer fails to fulfill his or her obligations under the FCLRRP, an adversely affected rights holder may still sue him or her. Thus, even if the Copyright Royalty Board ends up functioning as a de facto rubberstamp, consequently finding all applications lack a set narrative, there is still a strong incentive for the developer to comply.

D. *Exemption for Qualifying Organizations That Aggregate a Substantial Number of Rights of Publicity*

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214. *See ESRB Ratings Process*, ENTERTAINMENT SOFTWARE RATING BOARD, http://www.esrb.org/ratings/ratings_process.jsp [http://perma.cc/6Q47-4KXS].

For the reasons discussed at length above, the compulsory system is designed with an eye towards achieving both fairness and efficiency. Whether these aims are actualized or not by any implementation of the proposed FCLRRP, its enactment is neither desirable nor feasible if the system does not preserve the functional exchanges made by professional athletic leagues. To that end, this article proposes carving out an exemption for certain qualified organizations applicable to both existing organizations that successfully aggregate rights of publicity and similarly functional organizations that might arise in the future. Such organizations would have to meet three qualifications to be exempt from the compulsory system: (1) they must gather a large number of rights; (2) they must be registered to give developers notice that the rights they possess are not subject to compulsory licensing; and (3) they must be actively engaged in the commercial sale of the rights they have aggregated.

1. Large.

The core motivations behind the compulsory system are reducing the cost developer's burden of gathering rights one-by-one and eliminating the ability of a single rights holder to hold up a developer by refusing to sell a single likeness necessary to complete a set of rights needed for an historically accurate simulation. If organizations were permitted to exclude themselves from the FCLRRP with only a handful of rights of publicity, rights holders would easily circumvent the system. The successful licensing seen with professional athletic organizations is in large part due to the fact that these organizations hold a large number of rights, usually the complete set of rights necessary for a developer to produce a game in a given genre.[215] In order for aggregating organizations to be similarly successful, they must be similarly sized.

While the possession of a large set of rights is a necessary condition for an aggregating organization to be effective, there is no clear indication of how large is large enough. Almost certainly, the necessary size to

215. *See, e.g.*, MADDEN NFL 25 (EA Sports, PlayStation 3/PlayStation 4/Xbox 360/Xbox One/iOS/Android CD-ROM 2013); GRAND THEFT AUTO V (Rockstar Games, Win./PlayStation 3/PlayStation 4/Xbox 360/Xbox One CD-ROM 2013); Brian Mazique, *Building the Perfect Football Game to Coexist with 'Madden'*, FORBES (Mar. 4, 2016, 9:53 AM), http://www.forbes.com/sites/brianmazique/2016/03/04/building-the-perfect-football-game-to-coexist-with-madden/#2140da837d30 [http://perma.cc/2E5M-2AD2].

achieve efficient transactions will vary based on the nature of the bargained-for rights of publicity. The more complete the set of rights is, the better. But what constitutes a complete set will depend on the needs of the developer. As a purely theoretical matter, it might be ideal to require the organization to possess all rights needed by the creator of a qualified creative work, but these needs will likely change from developer to developer and work to work. Thus, it would be difficult, if not impossible, to impose complete aggregation as a condition for exemption. Instead, whatever threshold is set by statute, it must aim to optimize the number of functional structures that would be included in the exemption's purview while minimizing the potential for opportunistic organizations attempting to circumvent rather than complement the FCLRRP.

Whereas contemplation of the theoretical threshold for efficient exchanges does little to suggest a firm number of rights which must be aggregated by a qualifying organization, the political necessity of the exemption is much more illuminating. If the major professional athletic organizations in the United States—the NFL, NHL, MLB, and NBA—are unable to qualify, any attempt to pass the act is doomed to fail.[216] This means that, at a maximum, the threshold must be set such that the number of rights of publicity aggregated by these organizations is sufficient for them to qualify. These organizations all have thirty teams,[217] with the exception of the NFL, which has thirty-two teams.[218] The active roster limits set by these leagues are twenty-three players for the NHL,[219] fifteen

216. *See* Glenn McGraw, *Which Pro Sport Generates The Most Revenue*, FOX SPORTS (May 14, 2014, 6:37 PM), http://www.foxsports.com/buzzer/story/which-pro-sport-generates-the-most-revenue-051414 [http://perma.cc/9QH9-SSTV] (Despite the growing importance of professional soccer in the United States, it is not included in this list because its total revenue—and lobbying ability—is still dwarfed by other major league sports. Moreover, the intellectual property rights of U.S. soccer clubs tend to be organized on a team-by-team basis, rather than league wide); *see also* Delegation of the United States, *Roundtable on Competition and Sports*, 70 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 1, 2 n.4 (2010) (demonstrating that many of these rights of publicity overlap with those held by international organizations); Carolina Pina, *The Role of IP for Athletes and Image Rights*, GARRIGUES 1, 3 www.wipo.int/edocs/mdocs/en/wipo_reg_ip_sport_sin_14/wipo_reg_ip_sport_sin_14_t_11.pdf [http://perma.cc/B4NA-UHKB] (raising questions about whether the MLS would be able to generate the same efficient outcomes as seen with other major professional sports licensing).

217. *Teams*, NBA (2016), http://www.nba.com/teams/ [http://perma.cc/G3KU-7VPT]; *Teams*, NHL (2015), http://www.nhl.com/info/teams [http://perma.cc/BC94-PEAF]; *Team-by-Team Information*, MLB (2016), http://mlb.mlb.com/team/ [http://perma.cc/QGN4-3QR9].

218. *Teams*, NFL (2016), http://www.nfl.com/teams [http://perma.cc/28GB-3XFB].

219. *Hockey Operations Guidelines*, NHL (2015), http://www.nhl.com/ice/page.htm?id=26377 [http://perma.cc/K8SW-VMUN].

for the NBA,[220] twenty-five for the MLB,[221] and fifty-three for the NFL.[222] Thus, the fewest rights of publicity controlled by any existing major professional sports organization in the United States is the 450 players licensable by the NBA.[223]

Given the absence of a compelling justification for setting the threshold elsewhere and the holdup danger possessed when rights holders are exempt from the compulsory system, the number of rights aggregated required to qualify for exemption should be set at 450 likenesses. Undoubtedly, this will be viewed as shameless pandering to the existing interests of these organizations, but in the case of rights of publicity, it is justified. In an otherwise failed system, these professional athletic organizations have produced efficient and functional transactions, licensing the rights to developers who in turn produce profitable products. This is not a situation where the exclusion of these organizations represents a government handout or indirect subsidy. The exclusion instead reflects the recognition that the current system is not a complete failure and an equitable provision that ensures the FCLRRP does not punish those organizations that have been successful simply because others have not been. It is also a precautionary measure that ensures that should the FCLRRP fail to be efficient, functional, or practical, it at least leaves us no worse off than under current law.

2. Registered.

Those organizations wishing to opt out of the compulsory regime will need to register their organizations and the rights of publicity they hold with a central government organization, much as copyrights and

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220. Ira Winderman, *Heat Down to NBA Limit With Five Cuts; Ennis Guarantee Reworked*, SUNSENTINEL (Oct. 24, 2015, 5:26 PM), http://www.sun-sentinel.com/sports/miami-heat/sfl-miami-heat-nba-roster-s102415-story.html [http://perma.cc/DGJ6-LBRJ].

221. Arizona Phil, *MLB Roster Rules*, CUB REPORTER, http://www.thecubreporter.com/book/export/html/3506 [http://perma.cc/7A4H-4DT4].

222. Mike Wobschall, *Roster Rules Refresher: Practices Squad, IR, PUP*, MINN. VIKINGS (Sept. 9, 2015), http://www.vikings.com/news/article-1/Roster-Rules-Refresher-Practices-Squad-IR-PUP/179442f4-7ce6-48e7-a112-441c3718b26e [http://perma.cc/HBD8-RB2N].

223. Thirty teams with a roster of fifteen players would total 450 players, assuming no additional contracted players are off the active rosters.

trademarks are currently registered. Registration is an administrative but important requirement. Under the FCLRRP, the ability to use compulsory licensing to obtain the needed rights of publicity will be presumed, and potential developers will need a way to search the contemplated rights to ensure they are not exempt from compulsory licensing by virtue of being held by a qualified aggregator. Such registration should be digitized to facilitate the search and should include the contract information of the registering organization to facilitate active bargaining for those rights.

3. Active.

Organizations wishing to be exempt from compulsory licensing must be actively involved in licensing those rights. This requirement is necessary lest the exemption for large rights aggregators become a loophole by which individuals could opt out of the system and generate precisely the inefficiencies the system sets out to solve. If an organization was permitted to aggregate rights of publicity and then merely sit on them, refusing to license them to any entity, an individual or other rights holder could join the organization as a method of excluding him or herself from compulsory licensing. Requiring that an organization have the genuine intent of licensing its catalog of rights prevents this behavior.

This article rejects setting formal requirements or tests to determine if an organization is actively engaged in licensing rights. Certainly, such features could be contemplated. For example, Kunath's proposal that each rights holder be statutorily required to agree to a certain number of licenses a year ensures that a rights holder—whether an aggregator or not—is actively engaged in licensing the right(s) of publicity held.[224] Such requirements, however, introduce their own problems that jeopardize the administrability and efficiency of the system. How does one decide which side—the licensor or licensee—is holding up negotiations? And if more than one license is required, what of the gains from exclusivity discussed above? Such requirements would, at the very least, also necessitate the sanctioning of rate court proceedings comparable to those seen with ASCAP to adjudicate situations where one or both sides feel a potential licensing deal was not fairly reached. This, of course, would generate more litigation, precisely what clear rules would be intended to prevent.

This is not to say that the vague, overarching language of being actively engaged in the licensing of those rights would not also generate

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224. Kunath, *supra* note 79, at 904.

litigation. As a practical matter, this litigation would impact and deter those organizations whose efficiency is dubious, while the existing frame used by major professional athletic associations would survive. At worst, the requirement would make it difficult for new rights aggregators to establish themselves, but this is not necessarily bad. Exceptions should remain exceptional. Imposing the requirement that organizations wishing to opt out of the system prove active commercial use of their rights of publicity comparable to that seen in the active licensing by current major professional sports organizations would ensure the FCLRRP allows for the acquisition of rights everywhere except where a truly vibrant and functioning system exists.

E. *Use of a Statutory Default Rate of 5% of Gross Revenue*

This article expresses a preference for fair market dealings where they can be simulated. As detailed above, when a single entity owns, or has been assigned for negotiating purposes, a substantial number of rights of publicity and is actively engaged in licensing those rights, the rate should be negotiated between the developer and the rights aggregator. However, a qualified rights aggregator will not always be present or have all the needed rights of publicity for the developer's current project. In these situations, a default rate of 5% of gross revenue should be used to compensate all, or all other, rights holders. A percentage of gross revenue rate structure aligns the incentives of developers and rights holders and ensures that exorbitant fees do not chill small developers seeking to exercise their constitutional right to speech. While a wide range of default rates could be reasonably argued for, this article finds that a rate of 5% best approximates that which is found in comparable rights markets.

1. Use of a percentage of gross revenue fee structure.

This article proposes that the default rate at which the rights of publicity are licensed be a percentage of gross revenue generated from the sale of the work using the likenesses. While there are many other rate structures seen in both the right of publicity context and in other compulsory licensing schemes, using a percentage of gross revenue has a number of advantages over all alternatives. Unlike a lump-sum fee or a fixed fee per unit sold, a percentage of gross revenue at least loosely rewards more famous persons commensurate with the added value of their fame, accommodates the full range of income generation models seen in interactive entertainment, and ensures that small or individual developers are not excluded from the market.

a. A percentage of a gross revenue model at least loosely rewards more famous persons commensurate with the added value of their fame.

If we think a game title or other work's success is influenced by the fame of the persons whose likeness it portrays—which, to think a person deserves compensation at all for their appearance in these works, we must—then a revenue model should seek to compensate the individuals at least somewhat proportionately with the demonstrated value of their fame. Determining that precise value is a complex task that is discussed in more detail in the distribution section of this article, but only a model based on a percentage of revenue generates value at all commensurate with the influence of the individuals depicted. If a lump-sum price were charged, the value added by an individual's fame would in no way be captured, as any increased sales resulting from the person's notoriety would not translate into additional revenue for the rights holder. While a price-per-unit model would reflect additional marginal sales with additional revenue to the rights holder, it would not capture any increase in the viable sales price for the product. For example, a developer might create two football games using the same engine and mechanics systems, one simulating college football and the other high school football. Both works would qualify for federal compulsory licensing protection, but we might realistically expect that the college football game might be able to command a higher sales price because of its wider appeal and the significantly greater notoriety of its players. Under either a per-unit or lump-sum regime, there would be no corresponding additional compensation to the college-level players even though their fame added more value to the finished product.

b. A *per-unit* model cannot possibly accommodate the full range of income generation models seen in interactive entertainment.

Video games draw on a wide range of revenue generation models. Some developers sell licenses to their games in a traditional fashion that mimics physical goods' sales markets.[225] These developers use physical

225. *See, e.g.*, MADDEN NFL 25 (EA Sports, PlayStation 3/PlayStation 4/Xbox 360/Xbox One/iOS/Andriod CD-ROM 2013); *see also* GRAND THEFT AUTO V (Rockstar Games,

and digital retailers to sell their games for a fixed fee.[226] But this model is hardly ubiquitous in the industry. Historically, arcades have rented the use of games and accompanying equipment by time or plays.[227] While the traditional arcade's prevalence has faded in the twenty-first century, its conceptual successors boom in the form of PC bangs, especially in foreign markets like Korea.[228] These PC bangs rent the use of high-performance computers in dedicated centers, although they generally obtain their licenses for the games themselves on a fixed-fee basis.[229] Many online games charge a monthly subscription fee to generate all or part of their revenue[230] and console manufacturers like Sony and Microsoft offer a subscription service to access the multiplayer content of the games made for their consoles.[231] Increasingly, developers generate revenue through the sale of optional add-on content, sometimes referred to as *downloadable content* or *DLC*.[232] This content can take the form of additional story elements,[233] power-ups for a player's online avatar,[234] or cosmetic

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Win./PlayStation 3/PlayStation 4/Xbox 360/Xbox One CD-ROM 2013) (sold as whole games for in-home gaming consoles).

226. *See* Joost van Dreunen, *A Business History of Video Games: Revenue Models From 1980 to Today*, COLUM. INST. FOR TELE-INFO. 1, 6–7 (2011).

227. *Id.*

228. Will Wei, *What It's Like Inside a 'PC Bang' in South Korea*, TECHINSIDER (Oct. 18, 2015, 10:27 AM), http://www.techinsider.io/south-korea-gaming-pc-bang-2015-10 [http://perma.cc/4TV9-FPBE].

229. Cho Mu-Hyun, *Nexon Halves Royalties From PC Bangs*, KOREA TIMES (Mar. 22, 2013, 5:01 PM), http://www.koreatimes.co.kr/www/news/tech/2016/06/134_1322570.html [http://perma.cc/Z85F-GNFL].

230. *See* van Dreunen, *supra* note 226, at 8–9.

231. *See, e.g.*, MICROSOFT'S XBOX LIVE, http://www.xbox.com/en-US/live [http://perma.cc/3ZGG-GJBB]; *PlayStation Network*, SONY (2016), http://www.playstation.com/en-us/network/ [http://perma.cc/2X6L-EHB5].

232. *See, e.g.*, *Crusader Kings II*, STEAM (2016), http://store.steampowered.com/app/203770/ [http://perma.cc/W9PA-8HZW] (charging base game prices of $39.99, but which has 58 pieces of "DLC" which can be purchased on Steam for a total of $241.43 based on prices viewed on July 24, 2016).

233. *See, e.g.*, THE WITCHER 3: WILD HUNT - BLOOD AND WINE (CD Projekt Red, PlayStation 4/Xbox One/Win. CD-ROM 2016).

234. *See, e.g.*, *Gems*, CLASH ROYALE WIKIA, http://clashroyale.wikia.com/wiki/Gems [http://perma.cc/922B-JXN8].

modifications to a player's online image.[235] Still, others use a combination of the above models to generate revenue, for example charging a fixed fee for a license to the base game, requiring a monthly subscription fee to play the game, and also selling game expansions that unlock additional content for a one-time fee.[236] Unlike mechanical rights for songs that can be realistically tied to physical or digital distribution of copies that can be replayed on-demand, the methods of monetizing games vary too greatly for a system that is dependent on sales, or any other monetization event, to function. Instead, the system must bypass the monetization process, either assigning a price at the outset in the form of a lump sum or at the end in the form of a percentage of gross revenue.

c. Only a percentage-of-revenue model realistically allows for small or individual developers to create games drawing on the likenesses of a large number of persons.

A lump-sum model would require any developer seeking to take advantage of a FCLRRP to front a large sum, excluding new and smaller developers who could not afford the fee. While capital markets could correct this problem, in theory, any lump-sum fee sufficiently large enough to provide meaningful compensation to truly famous persons would also likely put such rights out of the reach of new and unproven developers without creditworthiness or assets to serve as collateral. A per-unit model presents these same developers with a different problem: they are effectively forced to set a minimum price for their works lest they lose money per sale. An independent or individual developer, particularly a new one, will realistically be equipped only to create shorter, less in-depth, and ultimately lower priced, works. A meaningful per-unit price would therefore likewise exclude them from the market.

A percentage of gross revenue model, on the other hand, encourages innovation and risk taking. If the resulting game is a flop, the liability to the licensee is limited by the work's success. If it is a massive success, those rewards are shared with rights holders, but a failure is never compounded by the use of rights of publicity. In this way, a percentage of gross revenue model encourages innovation and competition within the

235. *See, e.g., Champion & Skin Sale: 09.09-09.12*, LEAGUE OF LEGENDS, http://na.leagueoflegends.com/en/news/store [http://perma.cc/W83L-LNH6].

236. *See, e.g.,* WORLD OF WARCRAFT (Blizzard Entm't, Mac/Win. Online 2004).

entertainment industry, facilitating a robust industry and ultimately generating more compensation for rights holders.

If a qualified rights aggregator exists, then that stakeholder is free to negotiate a rate based on any metric, mitigating the risk that the statutory default rate structure will make the creation of works commercially unviable. Like the price itself, the rate structure could be modified during any negotiations with a qualified rights aggregator. This means that if a rate structure based on a percentage of revenue simply was not commercially viable or optimal for a given work or class of works, the parties could set a different one through the use of qualified rights aggregators. For example, if a given work were going to be sold in a traditional per-unit manner, the parties might prefer a flat fee per-unit to avoid the disclosure and accounting required to determine the amount of revenue the work generated. Perhaps a developer might be incentivized to enter a new and risky genre—say, a Major League Ultimate (professional Frisbee) simulator—by agreeing to pay a high royalty but only once sales meet a minimum revenue generation threshold. The ability for the parties to set a full range of royalty options when a qualified rights aggregator is present means that the default rate structure need not be perfect, or even functional, for every possible work: it must merely be practicable for most of them. Among the rate structures seen in both the market and other compulsory regimes, a percentage of revenue model best accomplishes that purpose.

2. The compulsory rate should be set at 5% in light of the rates imposed by other compulsory licensing systems, the rates found in comparable market transactions, and other relevant considerations.

As is the case in any compulsory licensing regime, finding a comparison rate that provides definitive guidance on whether a statutorily imposed rate is reasonable is a difficult, often impossible, task. Still, comparisons to other licensing markets, when taken together, can help ensure that a compulsory licensing regime sets a reasonable rate in light of the value added by the licensed rights. Below, this article reviews possible sources of comparison and concludes that a rate of 5% would be a reasonable default rate for a federal compulsory licensing regime for rights of publicity.

a. Rates charged under existing compulsory licensing regimes.

As noted above, a FCLRRP would not be the first compulsory licensing regime for intellectual property rights in the United States. For more than a decade, the Copyright Royalty Board has gone about the task of determining what rates constitute fair market value under the compulsory licensing regimes for performance rights and mechanical rights.[237] Because these rates reflect not just congressional and judicial performance, but also the rates reached as a result of negotiations with aggregating entities like ASCAP, they provide genuine insight into both the market's and the government's view on what represents a fair rate for intellectual property rights. Further, because the Federal Register also published proposed rates,[238] they are readily available for comparison in a way that the current prices paid for rights of publicity by game developers are not. For these reasons, the rates charged for these intellectual property rights provide solid initial guidance on what an appropriate royalty rate might be for a right of publicity.

i. Rates charged by ASCAP, the largest Performing Rights Organization.

The performance rights for copyrighted musical works are negotiated by three Performing Rights Organizations, as explained in detail in Section III. Of these three Performing Rights Organizations, ASCAP is the largest.[239] Due to recent litigation with Pandora,[240] there is not only accurate and up-to-date information on what these rates are but also a fresh determination of the range of prices that are considered reasonable fair market rates by the Copyright Royalty Board. ASCAP licenses the performance right for its catalog of songs at a rate of 1.7% of gross revenue to radio stations that are part of the Radio Music Licensing Committee ("RMLC").[241] While ASCAP sought a substantially higher rate for

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237. *See generally* Copyright Royalty & Distribution Reform Act of 2004, H.R. 1417, 108th Cong. (2004).

238. *See*, *e.g.*, Determination of Reasonable Rates and Terms for Noncommercial Broadcasting, 77 Fed. Reg. 24662, 24665–67 (proposed Apr. 25, 2012) (to be codified at 37 C.F.R. 381).

239. *See generally 2015 Annual Report*, ASCAP 1 (2015), http://www.ascap.com/about/annualreport.aspx [http://perma.cc/7QJT-CZ9G].

240. *See generally In re* Pandora Media, Inc., 6 F. Supp. 3d 317 (S.D.N.Y. 2014).

241. *See id.* at 326 (stating that the rate paid by RMLC to ASCAP is 1.7% for all its stations, including digital retransmissions and iHeartRadio's customizable experience).

Pandora, arguing that the listener's ability to customize radio stations warranted a higher rate, the recent ruling by the Copyright Royalty Board awarded ASCAP only a modest increase, setting the rate at 1.85%.[242]

Because copyrights on musical works are divided into six separate categories, it is important to understand what right ASCAP is licensing to accurately compare it to a publicity right. ASCAP's right covers the performance of a work, including broadcast performance, which, as explained above, does not give a purchaser unlimited use of a song in any form. ASCAP's licenses cover "spinning" of tracks rather than outright sales. The performance right for music is in many ways analogous to the right of publicity, which covers the *final* representation of a person's likeness, not all, or even any, particular images depicting the same. Like the uses contemplated by video game developers, the right of performance is the right to use the underlying recognizable aspects of the property rather than a precise replication of it.[243] The creative works that have sparked contemporary litigation, such as the NCAA football series, do not seek to show precise recordings or photos of athletes; rather, they seek to use the athlete's likeness to allow customers to play out their own novel games utilizing the developer's engine. Like a band covering another artist's song in a live performance, the developers are seeking to invoke the notoriety captured in the underlying right but are not seeking to replicate the talent or ability of the right holder. And like the musician performing the live cover, a developer contributes his or her own talents and style to create a new, desirable experience for his or her audience. For this reason, the ASCAP rates for performance rights provide a reasonable, if imperfect, benchmark for a right of publicity royalty rate.

ii. Rates set by the Copyright Royalty Board for the mechanical rights to a song or composition.

Another comparison from compulsory licensing regimes for music is the rate set for the mechanical rights to a song. These rights are necessary for a musician who, covering another's song and recording it, wishes to distribute copies of those covers. This rate is currently 9.10 cents per song

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242. *See id.* at 353–57.

243. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–77 (1977) (stating that the First Amendment does not give a third party the right to appropriate a performer's "entire act").

sold.[244] Figures on the average price paid for a distributed song are impossible to gather, but accepting credible estimates that the average song sold in the United States sells for $1.29 on iTunes, this implies a percentage of gross revenue of 7%.[245]

The rate for mechanical rights probably presents an even closer analogy to the rights of publicity sought by game companies than performance rights since games are traditionally (although as addressed above, by no means always) distributed as digital works, just like the songs that carry mechanical licenses. Like recorded covers of other songs, a developer using the likeness of others in an accurate way is capturing the essence of the original while also imparting his own style, a right possessed by those who cover, record, and distribute others' songs. If artists may use the lyrics of another's song and then apply their own talent to create a separate work and pay an effective rate of 7%, it does not seem unreasonable that developers using the factual information and likeness of real players should be allowed to sell their creative works for the same effective fee.

iii. Regulatory rates governing interactive, on-demand streaming services like Spotify.

Services that broadcast musical works to listeners on demand, like Spotify, pay a rate codified at 10.5%.[246] This rate includes *both* the performance and mechanical rights. This rate may provide a reasonable analogy, particularly for those works that rely on a robust multiplayer network and developer-provided services for play. A player of the NCAA football series can go online, select any team (and assorted players and their likenesses), and play a game against an online opponent who has done the same. This is roughly analogous to a person logging onto Spotify and selecting the song he or she wants to hear. Moreover, if we view the distribution of the game as analogous to the mechanical right, and the display of the game to the player as analogous to a performance right, then

244. Dale Kawashima, *An Overview of Mechanical Royalty Rates*, SONGWRITER UNIVERSE, http://www.songwriteruniverse.com/mechanical.html [http://perma.cc/67JM-Y8LC].

245. Sara Yin, *iTunes Store Costs Apple $1.3 Billion Per Year?*, PCMAG (June 14, 2011, 5:21 PM), http://www.pcmag.com/article2/0,2817,2386926,00.asp [http://perma.cc/69XC-796Z].

246. *See* Rates & Terms for Use of Musical Works Under Compulsory License for Making and Distrib. of Physical & Digital Phonorecords, 37 C.F.R. § 385.12(c) (2009).

perhaps the rate that captures this rate jointly—*i.e.*, the rate codified in 37 C.F.R. § 385.12[247]—is a good estimate for a default price under a federal compulsory licensing regime for the right of publicity.

iv. Rates charged by SoundExchange for sound recordings.

Since 1995, sound recording copyright owners ("SRCOs") have held a digital performance right in the broadcasting or other performance of that sound recording. SoundExchange collects royalties from digital broadcasters, like Pandora, and distributes them to SRCOs.[248] SoundExchange's rate structure is complicated, with different policies based on broadcaster size and type.[249] Licenses are a combination of lump-sum minimum fees, per-play fixed rates, and percentage of gross revenue rates,[250] making calculations of comparable effective rates difficult. However, Pureplay Webcasters are charged a minimum of 25% of gross revenue and Small Webcasters are charged a minimum of 10%.[251] Because larger broadcasters are charged a fixed per-play rate, a precise figure cannot be calculated for them.[252] However, a recent court decision noted that Pandora pays over 50% of its gross revenue to SoundExchange.[253]

These figures suggest a much higher rate than do the comparisons to other compulsory licenses. However, of the compulsory regimes for musical copyrights addressed here, SoundExchange is easily the poorest comparison to the use of publicity rights in video games and other creative

247. *Id.*

248. *General FAQ*, SOUNDEXCHANGE (2014), http://www.soundexchange.com/about/general-faq/ [http://perma.cc/NS4F-E3B4].

249. *2016 Rates*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/rates/ [http://perma.cc/3S9P-Z6DU].

250. *See, e.g.*, *Commercial Webcaster 2016 Rates*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/rates/commercial-webcaster [http://perma.cc/EEN6-TA8E].

251. *See Pureplay Webcaster*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/commercial-webcaster/pureplay-webcaster/ [http://perma.cc/TY49-KSM7]; *see also Small Webcaster*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/commercial-webcaster/small-webcaster/ [http://perma.cc/K46K-QAHC].

252. *See Commercial Webcaster 2016 Rates*, *supra* note 250.

253. *See In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 333 (S.D.N.Y. 2014).

works. These rates are charged for the performance of a specific digital recording of a song, not the song itself. There is a clear analogy to the use of images in games, but it is the *developers* who create and distribute the specific digital reproductions of the person's likeness; thus they, not the rights holders, would be the ones collecting comparable fees. Just as it is the record labels, not the songwriters and composers, who earn the revenue from SoundExchange, if an equivalent right were established in the digital replications contained in a game or other work, it would be the developer who would collect the revenue. For this reason, while analogies can appropriately be made between the licenses provided for other musical rights and the license contemplated by a FCLRRP, the rate charged by SoundExchange does not provide sensible guidance for setting a default rate for rights of publicity.

b. Rates found in comparable market transactions.

Besides comparing the proposed rate to those that exist under existing compulsory licensing regimes, it is sensible to compare this rate to existing market transactions for these rights. In theory, such a comparison would provide even more credible guidance than the above regimes, which deal with copyrights for music rather than publicity rights for interactive entertainment. However, in practice, such comparisons are difficult because the lack of publicly available data means that assumptions must be made that, if inaccurate, could result in widely inaccurate calculations. For example, while total sales figures and release prices for video games are publicly available, the average purchase price is not, meaning that calculating gross revenue requires using a rough estimate of average sales price. If these estimates are substantially different from the true figures, then any estimates will be as well.

Further, license agreements for the right to create games using a professional athletic organization's intellectual property do not distinguish (at least publicly) between the various intellectual property rights that are being bundled.[254] When Take-Two Interactive purchases the right to make the *NBA 2K* series, they are purchasing not only the aggregated publicity rights of the players, but also the trademark rights associated with the teams

254. *2013 Annual Report*, TAKE-TWO INTERACTIVE SOFTWARE, INC. 1, 52, http://ir.take2games.com/phoenix.zhtml?c=86428&p=irol-reportsAnnual [http://perma.cc/8V98-JEWQ].

and the organization, the organization's endorsement of the game, and an implicit fee for the aggregation of all these rights.[255] Given the prominence of trademarks associated with professional athletic teams, it is likely that the bulk of the purchase price reflects the value of this right, as well as the endorsement. In the case of the *Madden* series, this price also includes the right to be the exclusive producers of an NFL video game.[256] While this article attempts to offset the value of these other rights based on publicly available information concerning typical trademark licensing rates for these organizations, these estimations introduce further opportunities for inaccuracies.

This is not to say that these estimates provide no value. While the estimates are almost certainly wrong, they are unlikely to have a substantial impact. Even if we think that estimates might be twice or half what the true figure is, the estimated rate still provides a minimum and maximum bound for the fair market rate for rights of publicity. Moreover, if and when Congress sets about the task of codifying a FCLRRP, interested parties would be motivated to correct these estimates if they are grossly incorrect. For example, if in actuality, EA's sports games retail for an average of $55 a unit, this would imply a substantially lower implied percentage of gross revenue rate and it might then be motivated to provide Congress with that information in the hopes that the default rate would be set lower. In short, these estimates are the start of a discussion, not the end of it and, until these estimates are correct, they provide a good-faith estimate of what a fair market rate would be and where Congress should peg a default price.

i. Estimated *NBA 2K14* licensing rate as a percentage of gross revenue.

Take-Two Interactive licenses with the NBA for its *NBA 2K* series.[257] Numbers for the license cost are not publicly available, but according to Take-Two's annual report, the company's total expenditure for *all* licenses in the 2013 fiscal year (the year *NBA 2K14* was produced) was $57.3

255. *Id.*

256. Mike Florio, *EA has Exclusive License from NFL for a "Couple More Years"*, NBC SPORTS (June 20, 2014, 9:54 AM), http://profootballtalk.nbcsports.com/2014/06/20/ea-has-exclusive-license-from-nfl-for-a-couple-more-years/ [http://perma.cc/N5SA-LEPW].

257. Owen S. Good, *NBA 2K is Bigger than Madden Because it Paid for Others' Failures*, POLYGON (Feb. 15, 2015, 7:24 PM), http://www.polygon.com/2015/2/15/8043147/nba-2k-is-bigger-than-madden-because-it-paid-for-others-failures [http://perma.cc/REH2-KUEC].

million.[258] This includes licenses for the company's discontinued NHL and MLB series, liabilities which some estimates put as high as $30 million.[259] That said, to avoid basing any estimates on speculation, let us assume for the moment that the entire $57.3 million went towards the NBA license, realizing that this will mean our estimate will be too high, probably substantially so. To date, *NBA 2K14* has sold over 7 million copies.[260] 959,328 of those copies were sold in the first week of the game's launch (the PS4 and XboxOne releases corresponded with those system's releases).[261] Assuming all units sold in the first week sold for a retail price of $60 and that the remainder of games sold for an average of $45, accounting for some full-price sales but also many sales at a deep discount as the price fell over time, that means the game has grossed $329.4 million to date. This implies an effective percentage of gross revenue rate of *at most* 17.4% for the bundled right of publicity, trademark, and endorsement rights. Now, consider that the standard royalty rate the NBA charges to license their trademarks alone is 13%.[262] This means that the implied rate for the rights of publicity was *at most* 4.4%, and likely much lower. This is suggestive of a rate comparable to rates ASCAP charges for its licenses.

ii. Estimated *Madden NFL 25* licensing rate as a percentage of gross revenue.

A credible estimate for the licensing rate charged by the NFL for the exclusive right to produce an NFL video game is $50 million per year (lump sum).[263] To date, *Madden NFL 25* (the 2014 release in the Madden

258. *Annual Report 2013, supra* note 254, at 39.

259. Good, *supra* note 257.

260. Evan Campbell, *NBA 2K14 is the Best-Selling Sports Game Ever for Take-Two*, IGN (Aug. 5, 2014), http://www.ign.com/articles/2014/08/05/nba-2k14-is-the-best-selling-sports-game-ever-for-take-two [http://perma.cc/8Q45-GQMH].

261. *Global Weekly Chart*, VGCHARTZ (Mar. 21, 2015), http://www.vgchartz.com/weekly/42085/Global/ [http://perma.cc/NX3S-58Q3].

262. Scott Sillcox, *Part 8-An Insider's Guide to the World of Licensed Sports Products: Royalty Rates*, LICENSED SPORTS (Mar. 1, 2012), http://licensedsports.blogspot.com/2012/03/insiders-guide-to-world-of-licensed_2802.html [http://perma.cc/E78S-LNBH].

263. *See* John Gaudiosi, *Madden: The $4 Billion Video Game Franchise*, CNN MONEY (Sept. 5, 2013, 11:51 AM), http://money.cnn.com/2013/09/05/technology/innovation/madden-25/ [http://perma.cc/W9XK-J5DG].

series) sold 5.14 million units worldwide.[264] The release price for the game was $59.99.[265] For an AAA title, initial sales were slow, only moving a million units in the first week.[266] Assuming the initial million all sold for $60 but the remainder sold for an average price of $45, factoring in some sales at sticker price but also many well below it as the price dropped over the year, that places total gross revenue for the game at $246.3 million. This means that the effective percentage of gross revenue rate paid to the NFL was 20.3%. Unlike the NBA, the NFL does not have a publicly available standard licensing royalty rate. But if we assume it is comparable to the NBA's, as well as the NHL's and MLB's, which are 12%, that means that after discounting the implicit rate for the trademarks, EA paid the NFL 7.3% of the game's gross revenue for the rights of publicity of its players and the exclusivity right. Ignoring the exclusivity premium entirely, this suggests a rate comparable to the implicit rate charged for mechanical rights under 37 C.F.R. § 385.12.

iii. Estimated *Hart* and *Keller* settlement agreement rate as a percentage of gross revenue.

Using a settlement agreement to determine the effective royalty rate carries with it a host of challenges, even exceeding those for the *Madden* and *NBA 2K14* licenses. Class action settlements are reached amongst a storm of considerations, including the uncertainty and expense of trial, the risk aversion of the class counsel and the defendant firm, and the lost time-value of money that would result from a protracted trial and appeals process.[267] Still, most of these concerns cut both ways, encouraging both parties to reach an agreement. It would be wrong to suggest that a class action settlement necessarily favors either party, although there is certainly

264. *Global Sales Per Game: Madden NFL 25*, VGCHARTZ, http://www.vgchartz.com/gamedb/?name=Madden+NFL+25&publisher=&platform=&genre=&minSales=0&results=200 (last visited Sept. 17, 2016).

265. *Madden NFL 25*, GAMESTOP, http://www.gamestop.com/ps4/games/madden-nfl-25/109948 [http://perma.cc/JT7Q-LDAR].

266. Erik Kain, *'Madden NFL 25' Sales Down Over Last Year, First Week Still Tops 1M Units*, FORBES (Sept. 5, 2013, 8:46 PM), http://www.forbes.com/sites/erikkain/2013/09/05/madden-nfl-25-down-over-last-year-still-top-1m-units-first-week/#48ec06b47536 [http://perma.cc/TCG6-Y689].

267. *See* Brian W. Warwick, Note, *Class Action Settlement Collusion: Let's Not Sue Class Counsel Quite Yet . . . .*, 22 AM. J. TRIAL ADVOC. 605, 606 (1999).

some public sentiment that they favor defendants and class counsel over actual victims.[268] Moreover, while the NCAA class action settlement agreement may seem a less accurate figure because of the additional distorting motivations for reaching that figure, it also provides a direct comparison. While the rates charged by professional athletic organizations draw a good parallel to that which might be charged by amateur—but nevertheless famous—athletes, the rate actually paid by them is even better. This is particularly true because the settlement covers only rights of publicity, unlike the above agreements which also cover trademark and endorsement rights.

The approved settlement agreement in *Keller* and *Hart* (covering both actions) obligates EA to establish a $40 million settlement fund.[269] This fund covers "[a]ny NCAA Division I football and men's basketball player who was listed on a roster published or issued by a school whose team was included in a NCAA Branded Videogame originally published or distributed from July 21, 2005 through September 3, 2014."[270] EA released 42 titles simulating either NCAA football or basketball during that time period.[271] These forty-two titles sold a total of 24.04 million units

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268. *See id.* ("'Collusion' in the settlement of class action lawsuits refers to action taken by lawyers representing a class to the detriment of the class members, but for the benefit of the attorneys. Recently, numerous magazines and newspapers across the country have been quick to add fuel to the fire raging against such abusive practices, particularly when settlements are involved.").

269. Order Granting Preliminary Approval of Class Action Settlement with Defendant Elec. Arts Inc., 724 F.3d 1268 (9th Cir. 2013).

270. *Id.*

271. *See Electronic Arts*, IGN, http://www.ign.com/companies/electronic-arts [http://perma.cc/2TA7-SDL4]. The titles, listed in descending order of sales, are: NCAA Football 06 (PS2), NCAA Football 07 (PS2), NCAA Football 13 (X360), NCAA Football 14 (X360), NCAA Football 12 (X360), NCAA Football 06 (XB), NCAA Football 10 (X360), NCAA Football 11 (X360), NCAA Football 13 (PS3), NCAA Football 11 (PS3), NCAA Football 10 (PS3), NCAA Football 12 (PS3), NCAA Football 08 (PS2), NCAA Football 14 (PS3), NCAA Football 07 (X360), NCAA Football 09 (X360), NCAA Football 08 (X360), NCAA Football 09 (PS3), NCAA Football 10 (PS2), NCAA March Madness 07 (PS2), NCAA Football 07XB, NCAA March Madness 06 (PS2), NCAA Football 09 (PS2), NCAA Football 2004 (XB), NCAA Football 11 (PS2), NCAA Football 08 (PS3), NCAA Football 07 (PSP), NCAA Basketball 10 (PS3), NCAA Basketball 10 (X360), NCAA Basketball 09 (PS2), NCAA March Madness 08 (PS2), NCAA Football 09 (PSP), NCAA Basketball 09 (X360), NCAA March Madness 06 (XB), NCAA March Madness 08 (X360), NCAA Football 10 (PSP), NCAA March Madness 07 (X360), NCAA Football 09 All-Play (Wii), NCAA Basketball 09 (PS3), NCAA March Madness 08 (PS3), NCAA Football 08 (XB), and NCAA Basketball 09: March Madness Edition (X360).

globally.[272] Release prices for AAA games on major consoles have remained relatively constant at $60 over the time period of the settlement, although like more modern games, the price for all these titles dropped over time.[273] For this reason, this article assumes an average retail sale price per unit of $45, which is consistent with the estimated price used for the *Madden NFL 25* and *NBA 2K14* estimations. This estimate puts total gross revenue for the combined sale of these titles at $1.082 billion and implies a right of publicity royalty rate of 3.7% of gross revenue. This also suggests a fair market rate above that charged by Performing Rights Organizations but still below the regulatory rates for mechanical rights. It is also comparable to any plausible estimate of the implied rate charged by the NBA for the *NBA 2K* series.

c. Considerations of equity in setting a default rate.

Comparisons to existing rates in other compulsory licensing regimes and in observed market transactions should be the principal guide for setting a default rate. Doing so avoids both favoritism and arbitrariness. The fair market value is, if nothing else, fair. That said, it is worth mentioning a few equitable considerations. First, setting any rate and creating an associated FCLRRP leaves athletes and other figures better off than they were before. Under the current system, no matter how it is interpreted, they will get nothing going forward. On the other hand, the developers of these creative works have at least a plausible argument that they are entitled on First Amendment grounds to produce the work without seeking a license from anyone. If this is the case, any system leaves the developers *worse off*. For this reason, there is less concern from an equitable perspective about erring in favor of the developers than there is about erring in favor of the rights holders when setting a rate.

Second, the right of publicity is a fundamentally less important right than copyright, which is what all comparable compulsory licenses govern. Without a right of publicity, our society would still have NCAA athletes,

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272. *Game Database: Global Sales of NCAA Games*, VGCHARTZ, http://www.vgchartz.com/gamedb/?name=NCAA [http://perma.cc/U2JX-ZQEU].

273. All but two of the forty-two titles were released on a major console and the two releases on other platforms (the handheld PSP) also released for $60.00. In fact, the PSP games still command a high price years later with NCAA Football 2010 for the PSP selling for $47.95 on Amazon. *See NCAA Football 10-Sony PSP*, AMAZON, http://www.amazon.com/NCAA-Football-10-Sony-PSP/dp/B001S86IRM [http://perma.cc/F69X-MMBC].

politicians, and pop stars. Indeed, our country functioned until 1953 without such a right[274] and to this day, twenty-one states do not recognize the claim.[275] It is a right that, while perhaps desirable, is not necessary. On the other hand, without a functional copyright system, we would have drastically fewer novels, films, shows, and video games. It is a right that the United States Constitution explicitly empowers Congress to enforce.[276] Seen from this perspective, ensuring that copyright holders receive sufficient compensation under compulsory regimes is a task of vital importance in promoting the continued production of creative works in this country. Thus, it stands to reason that society, and the Copyright Royalty Board specifically, would be comfortable setting and approving higher royalty rates for copyrights than they would for rights of publicity.

Third, while the digital age has seen remarkable innovations in the manner and quality in which music is transmitted, those who license musical works are still fundamentally serving as a middleman, delivering music from creators to listeners virtually unaltered. Without music, services like Pandora and Spotify simply could not exist. Video game developers, on the other hand, use the likenesses of real persons as just part of the content on which their creative works draw. Without their considerable talent and creativity, any production depicting real persons would, at best, be characterized as a fact book. But while a game that simulated a sport might be less appealing if it used randomly generated or fictional players, it would still be a work of value to some consumers. As Judge Bybee notes in his dissent in the case *In re NCAA Student-Athlete Name and Likeness Licensing Litigation*, even in the NCAA Football series, there are enjoyable aspects of the game based entirely on fiction.[277] While a player can control teams based on the team's real-world counterparts, users can also "enter[] 'Dynasty' mode, where the user . . . recruits players from a randomly generated pool of high school athletes, or 'Campus Legend' mode, where the user controls a virtual player from high school through college, making choices relating to practices, academics,

274. *See* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

275. *See generally* THOMAS PHILLIP BOGGESS V, CAUSES OF ACTION FOR AN INFRINGEMENT OF THE RIGHT OF PUBLICITY (2016).

276. U.S. CONST. art. I, § 8, cl. 2.

277. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271–72 (9th Cir. 2013).

and social life."[278] Because developers take on the role of shaping rather than merely transmitting content, and because their works could exist outside the use of any person's likeness, on the balance, it would seem that relative to copyright holders, those who hold a right of publicity should be compensated proportionately less for the compulsory use of these rights.

Fourth, requiring a license for the use of a person's likeness creates a chilling effect on speech. The Supreme Court has unequivocally ruled that video games, like all forms of literature, are protected speech under the First Amendment.[279] The higher the required payment, the more that speech is suppressed. For this reason, this article joins other scholars in advocating that the requirement payment be reduced accordingly. In "The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages," Matthew Savare argues that ideally, works of entertainment should have First Amendment protection from rights of publicity claims, but that even if we do not provide them this protection outright, courts should at least discount damage calculations by the "percentage of the questionable speech that is transformative."[280] Because the works covered by a FCLRRP will likely be wide-ranging, a default rate would not be able to incorporate a precise percentage reduction, if one could be calculated for an individual work at all. But this does not mean free speech considerations should be cast aside. At the very least, any default rate that would meaningfully deter a substantial amount of speech should be strongly suspect.

All of these equitable considerations suggest that those who possess rights of publicity should receive less compensation than the above comparisons otherwise suggest.

d. All of the above suggest that a default rate of 5% would appropriately compensate rights holders for the use of their likeness within a nontransformative creative work.

Five percent is a reasonable default rate. As shown above, reasonable comparisons, both from other compulsory regimes and from the market, suggest an effective rate of between 1.7% and 10.5%. A rate of 5% sets the

278. *Id.*

279. Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 786 (2011).

280. Matthew Savare, Comment, *The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages*, 11 UCLA ENT. L. REV. 129, 185 (2004).

rate at a level that is both within the range seen in compulsory licensing regimes and between the estimated rate paid to the NBA and the NFL. Because the estimates for these real-world royalty rates are both very likely overestimates (because of the licensing price overestimate for the NBA license and the exclusivity agreement tied into the NFL license), a rate of 5% is probably even on the high end when compared to the best available real world comparisons. It is also higher than the implicit rate generated by the *Hart* and *Keller* settlement. Still, given the ability of both rights holders and developers to negotiate more appropriate (perhaps lower) rates when a qualified rights aggregator can be established, the 5% figure provides a workable baseline that will allow both developers to create works and rights holders to be compensated in the event fair market negotiations are not possible.

F. *Distribution Structure*

This article's proposed FCLRRP separates the creation of a distribution structure from the rate of payments. Whereas the rate of payments concerns how much money is contributed to the pool of funds, the distribution structure concerns how players will be compensated from that pool. Unlike for the rate of compensation, where this article proposes no court involvement or oversight—with rates either set by statute or negotiated independently with qualified rights aggregators—issues of distribution simply should not be left to such inflexible devices. The creative works conceivably covered by this regime are wide ranging. Even just considering our current conception of *video games*, it could cover simulations of sporting events, military battles, political campaigns, and the daily lives of the Hollywood elite.[281] It would be foolhardy to create a single distribution regime by statute or regulation for all these diverse situations if we want to fairly compensate each right holder commensurate with the contribution that the right holder actually made to the game or other work.

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281. Examples of video games that already wade into this area (whether or not they yet use the precise likenesses of real people) are the "NCAA Football" series, the "Close Combat" series, "President Forever 2016," and "Kim Kardashian: Hollywood." NCAA FOOTBALL SERIES (EA Sports, PlayStation 3/Xbox 360 CD-ROM 2014); CLOSE COMBAT (Microsoft, Mac/Win. CD-ROM 1996); PRESIDENT FOREVER 2016 (270soft, Mac/Win. Dwnld. 2016) (path: http://270soft.com/us-election-games/president-election-game-2016/> Get it Now!> President Infinity>Buy Now); KIM KARDASHIAN: HOLLYWOOD (Glu Mobile, Web browser/Mac/iOS/Android Dwnld. 2014).

Moreover, doing so would ignore the vast array of individual metrics that may be available for a given work. Most titles with online multiplayer capability—that is, most big releases—keep detailed metrics on player activity.[282] It is often possible to track play-time, team selection, customization rates, win percentages, etcetera.[283] Built with creating a compensation structure in mind, these games could keep even more detailed statistics that could be used to create a distribution based on the *actual*, rather than purely *theoretical*, value that an individual's likeness contributed to the game. Any statutory or regulatory system would have to appeal to the lowest common denominator of data available for any work. Instead, it is better to have a system comparable to that found in the compulsory regime for cable television retransmission rights or in class action settlement agreements, where payments can be made in accordance with the nature of the underlying rights holders and the available information.

For the above reasons, and more discussed in detail below, this article proposes that the distribution regime be governed as follows: once the pool of collected royalties reaches a certain monetary value, the game developer will propose a committee of experts. After a period for comment by rights holders, the Copyright Royalty Board will approve or reject the proposed committee. Once a committee is approved, the committee will set a distribution regime in accordance with guiding principles meant to ensure a fair and equitable distribution for rights holders. This proposed distribution structure will be publicly filed and, after a period for comment by rights holders, will be approved or rejected by the Copyright Royalty Board. Once a distribution structure is approved, it will be administered in accordance with its terms.

1. Need for a monetary trigger prior to appointment of the committee and distribution of the fund.

Creating a distribution regime that fairly compensates rights holders and administering that regime will carry costs, including the public expense of court time. It is only sensible to go about a task when the benefits outweigh the costs. Many creative works opting into this licensing regime

282. *See* Extra Credits, *Extra Credits: Metrics*, YOUTUBE (May 10, 2012), http://www.youtube.com/watch?v=nqGcXOksFGg [http://perma.cc/FTQ4-C5NA].

283. *Id.*

will ultimately generate trivial or nonexistent royalty funds from which rights holders can draw. Requiring that a distribution regime be set only after the fund is of a sufficient size helps ensure that the process is cost-justified. This process is already used by existing compulsory licensing regimes.[284] For example, SoundExchange will delay, or withhold entirely, payments to artists and publishers that do not meet certain specified thresholds.[285] A FCLRRP would be justified in doing the same.

This article proposes a minimum threshold to trigger committee appointment of $200 per likeness depicted in the work or $200,000 total, for works depicting over 1,000 likenesses, adjusted annually for inflation. This is substantially above the minimum payout level of $10.00 that SoundExchange requires for a distribution (although below the $250.00 level in which SoundExchange delays payments).[286] And while it is above ASCAP's minimum payment thresholds, which are set at either $1.00 or $100.00 depending on whether artists opt for electronic or physical payment respectively, ASCAP requires members to pay a $50.00 fee to even register, effectively imposing a minimum lifetime earnings of $50 prior to distribution.[287] But unlike a work licensed under the FCLRRP, SoundExchange and ASCAP already have a structure and system for distribution in place. In contrast, a committee appointed by the FCLRRP would not only need to distribute funds, but also design and implement the infrastructure for such a distribution. While SoundExchange and ASCAP both have much lower minimum payments, their total revenue volume is far in excess of the $200,000.00 figure, allowing them to recoup the cost of designing and implementing a distribution system.[288] Requiring a $200 per

284. *See General FAQ*, *supra* note 248.

285. *See id.* ("SoundExchange offers a monthly royalty payment program for 1) those that are signed up to receive electronic payments, 2) and have royalties due of at least $250. Artists and labels that do not meet the minimum monthly threshold will continue to be paid on our regular, quarterly schedule (March, June, September, and December) under the organization's existing guidelines. To receive a quarterly payment, you must have accrued at least $10 ($100 for a paper check) in royalties before a scheduled distribution. If you are under the threshold, SoundExchange will hold your royalties until you accrue enough royalties.").

286. *Id.*

287. *See Join ASCAP*, ASCAP (2015), http://www.ascap.com/join/ [http://perma.cc/YJF3-NQF2].

288. In 2014, SoundExchange collected $774 million in fees. *See Working With SoundExchange*, SOUNDEXCHANGE, http://www.soundexchange.com/wp-content/uploads/2015/02/SX-Infographic_as-of-2.13.151.jpg [http://perma.cc/7UMR-V39Z].

likeness minimum makes it more likely that any applicable fund will not be entirely consumed by administrative expenses and will result in actual, substantive payments to rights holders.

Moreover, in both compulsory licensing regimes and other areas of law, there are monetary minimums which demonstrate a preference for dealing with claims of meaningful value. While SoundExchange will distribute payments to rights holders once they reach the $10.00 threshold, an entity can only acquire the rights to SoundExchange's catalog for a minimum payment of $500.00.[289] Similarly, while ASCAP rates vary by the size and type of entity, the lowest advertised price on their website is $365.00 a year (for individually owned cafés with occupancy under 50 persons).[290] The law modifies or limits rights in other areas based on the financial interest at stake, often with minimum thresholds far above those suggested for a FCLRRP. For example, to obtain diversity jurisdiction, the amount in controversy must be over $75,000.00[291] and to qualify under the Class Action Fairness Act, a class's total claim must exceed $5,000,000.00.[292] In light of these figures, requiring a fund size of $200.00 per class member or $200,000.00 total is reasonable to ensure the system is both efficient and generates meaningful returns to rights holders.

2. Committee composition.

The approved final committee will need to be composed of individuals who are capable of designing an effective, fair, and equitable distribution regime. Just as the nature of the works opting into a FCLRRP will differ, so too will the distribution committee, who will represent an array of skills and talents. However, this article identifies three skill sets that will be necessary for any committee to possess if it is to effectively design and administer a distribution structure: a person who is intimately

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289. *See Commercial Webcaster 2016 Rates*, *supra* note 250.

290. *Get an ASCAP Music License Restaurants, Bars & Grills*, ASCAP (2015), http://www.ascap.com/licensing/types/restaurant-bar-grill-tavern/restaurant-bar-grill-tavern-individual/restaurant-bar-grill-tavern-individual-a.aspx [http://perma.cc/PY3Z-PAJH].

291. 28 U.S.C. § 1332 (2011).

292. *See generally* Jared R. Friedmann et al., *Class Action Fairness Act of 2005 (CAFA): Overview*, THOMSON REUTERS: PRACTICAL LAW 1, http://www.cozen.com/Templates/media/files/ClassActionFairnessActof2005CAFA.pdf [http://perma.cc/3LFU-MFQA].

familiar with the work, statistics, and other metrics kept regarding it, a person intimately familiar with the industry or activity in which the depicted persons gained their notoriety, and a person familiar with the legal rules surrounding compulsory licensing regimes and the FCLRRP in particular. Additionally, this article outlines sensible requirements for ensuring the committee maintains impartiality.

a. The need for a committee member who is intimately familiar with the work, statistics, and other metrics.

One of the primary advantages of individually designing distribution regimes for each work is that the regimes can use the full range of data available from a given work to ensure the distribution is as fair and efficient as possible. Without knowledge of the metrics available, however, a committee can do nothing but resort to the basic and imprecise metrics seen in the *Keller* settlement agreement.[293] The requirement that the developer appoint a member who has this familiarity and knowledge will allow the committee to carry out its purpose. In theory, this could also be accomplished by having the developer provide a comprehensive list and guide for the metrics kept which would aid the committee. However, doing so introduces the risk that the list is tailored to indicate preferred distributions (i.e., to rights holders with whom the developer has other business relationships). It would also introduce the possibility of undue delay as the committee may ask for clarification and interpretation. Or worse, a proposed regime might be impossible to implement due to a misinterpretation regarding the metrics available to the committee. Requiring the appointment of a member with this knowledge substantially reduces these risks and ensures that if the final distribution structure is unfair or inefficient, it is not because of a lack of knowledge of the statistical capabilities available to the committee.

A developer will also be required to tender any data it gathers from users of the licensed work if the committee ultimately deems it necessary to generate the fairest and most efficient distribution possible. If deemed appropriate by the Copyright Royalty Board, the actual data may be kept under seal to protect trade secrets or confidential business information. The nature of the data used and how it is used in calculating each right holder's share of the royalty pool will have to be public so that meaningful

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293. Order Granting Preliminary Approval of Class Action Settlement with Defendant Elec. Arts Inc., 724 F.3d 1268 (9th Cir. 2013).

comments can be made prior to the Copyright Royalty Board approving the distribution structure.

b. The need for a person intimately familiar with the industry or activity in which the depicted persons gained their notoriety.

The right of publicity seeks to ensure compensation for individuals when others use their likeness to harness their notoriety.[294] It protects against misappropriation of a person's likeness so the person may receive commercial value for it.[295] To a large extent, the committee will implicitly or explicitly set about the task of determining the commercial value of individual likenesses relative to one another, which as noted above, is no easy task. To do this in a nonarbitrary way, it is important that the committee understand how the individuals depicted acquire and maintain their fame and what draws consumers to some likenesses over others. As large, comprehensive data sets on user activity continue to grow, the importance of this aspect will grow less important as measurements of actual desirability replace theoretical ones. But the committee will ultimately have to make subjective judgments. For example, committees will have to judge questions such as these: "How much does having an historically accurate second string contribute to the consumer's enjoyment relative to just having the starting players be accurate?" or "In a political campaign simulator where many players run Barack Obama's campaign, what is the value of being able to face his historically accurate opponents, John McCain and Mitt Romney, rather than randomly generated, fictional political opponents?" Without at least one member of the committee who understands the underlying workings of the industry or activity in which the depicted individuals engage, these judgments are less likely to reflect the realities of the likeness's publicity, and consequently, the fairness of the distribution regime is jeopardized.

c. The need for a person familiar with the legal rules surrounding compulsory licensing regimes, and the FCLRRP in particular.

As a legally mandated body subject to oversight and approval by the Copyright Royalty Board, the committee will need to understand both the

294. BOGGESS, *supra* note 275, at 84.

295. *Id.*

practical realities and options before it and its legal duties and obligations. As case law develops over time, this role will grow in importance. To ensure that the committee fully understands its duties and to ensure that any proposal is unlikely to violate the statutory or common law requirements of the FCLRRP, a member of the committee should be familiar with the functioning of compulsory licensing in the United States and the functioning of the FCLRRP in particular. Having such a person will also foster communication between the Copyright Royalty Board and the committee in the event the initial distribution proposal is rejected or questioned.

d. General requirements for committee member appointment to ensure impartiality.

If the distribution of collected royalties is to be fair, it is important that the committee members be impartial. To facilitate this, this article proposes two additional requirements in respect to an appointment: (1) no committee member or their immediate family shall have any pecuniary interest in the distribution; and (2) that less than half of the committee be composed of employees of the developer.

i. No committee member or their immediate family shall have any pecuniary interest in the distribution.

This limitation is fairly common sense. If members have a direct pecuniary interest in the outcome of the distribution—for example, if they are rights holders—this may influence how they structure the distribution. Namely, such members will want to afford themselves favorable treatment. In the case of a FCLRRP, this also means that those employed by an organization that holds rights of publicity used in work cannot serve on the committee; otherwise, they might be motivated to direct a disproportionate distribution towards the set of rights held by their company. It is especially important that representatives of organizations that license other intellectual property ("IP") rights be excluded from the committee. Since developers pay for other IP rights, but are not financially impacted by the distribution scheme, there is an obvious opportunity for collusion where the holder of multiple IP rights grants a lower price on the nonpublicity rights in exchange for favorable treatment in regard to distribution, resulting in increased profits for the developer and certain rights holder at the expense of other rights holders. Even without an explicit quid pro quo, there would be a strong incentive for any employees of the developer to cede to their business partner's wishes in the distribution phase. Preventing stakeholders or their agents from serving on the committee reduces the likelihood of such self-interested behavior.

ii. Less than half of the committee shall be composed of employees of the developer.

As explained above, there is a natural opportunity for those with existing business relationships with developers to collude at the distribution stage of the FCLRRP. Even if there is no stakeholder who engages in other transactions with the licensee, the distribution should reflect a theoretical fair market, not the whims of the developer. For this reason, a majority of the committee should be independent third parties rather than current or recent employees of the developer. Employees of the developers should not be excluded entirely—they likely hold valuable information as to the metrics available to the committee and may also provide insight into the developer's customer base. Mandating that third parties comprise a majority of the committee means that developers will not be able to force their wishes on rights holders without convincing independent entities that the proposed distribution is fair and equitable.

3. Committee compensation and administration expenses.

Committee members will need to be paid a reasonable wage and there will likely be other expenses associated with distributing compensation to rights holders. When the Copyright Royalty Board considers a proposed distribution committee, it will consider the proposed compensation for the proposed members as part of that determination. While the Copyright Royalty Board can serve as a check on the reasonableness of any fees charged, a FCLRRP should lay out who will bear these expenses. How these expenses are allocated influences the incentives of both the developer (in respect to who is appointed and how well the committee is paid), and the rights holders (in regard to their expressed preferences in the form of comments and challenges at the approval stages). To best align these incentives with the goal of creating a fair and efficient system, this article proposes that administrative costs be taken out of the fund directly, that the salaries for any committee members who are current or recent employees be borne by the developer, and that compensation for third-party committee members be borne primarily by the royalty fund with partial payments from the developer at high salary ranges.

a. Administrative expenses borne by the royalty fund.

Increasing precision increases cost. One of the issues a committee will have to grapple with is how to fairly distribute royalties to rights holders while also ensuring that the administration of that distribution does not swallow most, or all, of the fund, resulting in low compensation for members in real terms. If the developer bore the administration cost even in part, rights holders would be incentivized to demand a higher level of precision in determining distribution amounts than might be cost-justified. By taking these expenses out of the fund, as SoundExchange does in distributing royalties to its rights holders,[296] rights holders will need to balance the desire for a comprehensive distribution structure with the desire to limit administrative expenses. Further, there is little reason to think that the committee, even those employed by the developer, would have an interest in seeing the fund go to administrative expenses rather than rights holders. If anything, they would seek to generate goodwill with rights holders, which would incentivize them to reduce these costs. For these reasons, the cost of administering the distribution will be borne by the fund.

b. Committee members who are current or recent employees of the developer will be compensated by the developer.

If employees of the developer are compensated by the fund even in part, there would be an incentive for the developer to pay them a high salary, rewarding them for past and future service without bearing the full cost of that compensation. Moreover, the FCLRRP is designed to transfer funds from developers to rights holders in exchange for the value that the rights holders generate. If developers could then recover that money by appointing their employees to the committee, it would create the perception that that purpose was being thwarted. This must be weighed against the risk that developers will be reluctant to nominate qualified employees for the committee if they bear the full cost since the developer receives no

296. 17 U.S.C. § 114 (2010).

direct benefit from appointing a competent committee member. This incentive is somewhat cabined by the fact that they are obligated, as a condition of opting into the FCLRRP, to provide at least one committee member with intimate knowledge of the creative work.

Additionally, because the developer still bears a portion of the expenses for third-party committee members,[297] there will be instances in which the developer will choose to appoint an employee when doing so is vastly more cost-efficient than a third-party alternative. For example, a developer would still prefer to appoint in-house counsel familiar with compulsory licensing regimes who was paid $50 an hour over a lawyer from a large law firm who was familiar with the same but charges $600 an hour. Given the above concerns with direct payment of developer employees, any committee member who is a current or recent employee of the developer shall be compensated entirely by the developer.

c. Committee members who are not current or recent employees of the developer will be compensated by the royalty fund up to a reasonable cap, after which the developer will compensate them.

Aligning the incentives for the payment of third-party committee members is a difficult task. On the one hand, if the developer bears the entire cost or even part of it, he or she will appoint the cheapest individuals to serve on the committee. Because the fund is only distributed to rights holders, the developer has no direct interest in ensuring that a distribution plan is fair or efficient and, in turn, no incentive to ensure the committee members are effective and competent. On the other hand, if the fund bears the entire cost, developers may appoint overqualified individuals or appoint members based on nepotistic considerations. While the Copyright Royalty Board can serve as a check against the appointment of overqualified or simply overpriced committee members, ideally the cost structure would also motivate the developer to make appropriate appointments. Based on these considerations, the full cost of third-party committee members will be deducted from the royalty fund up to 2% of the fund's value, thereby eliminating the incentive for a developer to select only the most cost effective members. To the extent total compensation exceeds 2% of the fund's total value, the fund will bear 90% of the cost and the developer will bear 10%, creating an upward bound check on the cost of committee members without eviscerating the incentive for developers to appoint well-

297. *See infra* Section V.F.4.a–b.

qualified individuals to ensure a fair and efficient distribution regime will be created.

4. Guiding principles for constructing a distribution structure.

While the hallmark of the FCLRRP's distribution structure is flexibility, allowing the regime to apply to the full range of creative works currently in existence and yet to come, the committee will need guidance in designing an effective regime. One might think of dozens of principles that could be codified in a FCLRRP to help guide the committee. Or one might favor no legislative directive in this regard, allowing instead for a robust case law to develop over time and serve that function. This article neither advocates a particular position on how these principles will be best enacted nor outlines a complete list of what those principles should be. This section does, however, suggest some concepts that might reasonably serve as a starting place for committees faced with the task of developing a distribution structure.

a. The committee should favor distribution based on demonstrated value rather than theoretical calculations of a likeness's worth.

The amount of data collected by modern day developers on the use of their games is mind-boggling. For example, a multiplayer first-person shooter will track the number of games played, number of games won, how often and for how long players use given weapons, characters, special abilities and other games features, whether a player uses an audio headset, whether, how, and how often he or she communicates with other players, whether and how often he or she mutes other players, who he or she plays with and for how long, etcetera.[298] In other areas of law and in academia, a resort to theoretical or derivative models is the first and only resort. But this need not be the case under a FCLRRP. The value of a given depiction can be very closely approximated or determined by the actual consumer experience. Persons whose avatars are played more can be compensated more. This does not remove subjective calculations. For example, the committee will still need to decide relative valuation questions. For example, how to value the avatars the player selects to play versus the avatars he seeks to play against versus the avatars and likenesses that are incidentally or randomly presented. But this data does mean guesswork

298. *See* Extra Credits, *supra* note 282.

can be largely eliminated.

b. The committee should favor the establishment of a fixed distribution ratio after the qualified creative work has been released for a year.

The wide availability of precise and massive data on player usage might tempt a committee to fluctuate the distribution over time as use fluctuates. It might seem sensible to distribute any revenues with current usage similar to the music industry model. The problem is, unlike in the music industry, fees are not collected by use but rather as a percentage of gross revenue for the qualified creative work. For works using a traditional AAA video game revenue generation model, the revenue will be very frontloaded and may also spike as additional downloadable content is released. Under a current usage model, revenue would be distributed disproportionately to those people whose likeness is used early on by purchasers or otherwise used in the months that revenue spikes occurred.

This process will not only inaccurately depict the value the player gets from the array of depicted likenesses, it will favor established, known persons. A new player may select a famous team or player to start his game. Later, in an effort to up the challenge of the game or simply explore the work more deeply, the player may start selecting lesser-known avatars. The ability to replay the game over and over as novel characters was part of the value captured in the initial purchase price, but may not be demonstrated until months later. Thus, the committee should not pursue distribution until an adequate sample of consumer usage data can be captured.

Of course, if the committee waited until the full life-cycle of the game expired, a process that could take a decade or more, the rights holders would be denied timely and relevant distributions. Further, while the data available to developers today is unfathomably large, its collection has a cost. Often, this cost is very low, but if a distribution structure mandates payments based on this data, the developer would need to continue to collect the data, perhaps for long after it was profitable for the company to do so. Both of these concerns suggest that there needs to be a timely end date to the collection of metrics for distributions.

This article suggests that this time period be a year from the games release, at which point additional distributions from additional revenue (if any) will be made in the same proportion as the original distribution. This provides enough time to gather data on player usage over a substantial period of play without burdening the developer with a long time period to guarantee metric collection. A year should also be long enough for the committee to structure the system in the event there is protracted debate or comments in opposition to the proposed distribution plan. There is nothing that necessitates a year over any other viable time frame, but it seems a sensible time horizon for a committee to aim for, balancing both the interest in collecting a complete and representative data set and the interest of distributing the funds in a timely manner.

c. The committee need not locate every rights holder, but for those not located, his or her distribution should be held for a substantial period of time in case he or she emerges to claim it.

Because administrative expenses will be borne entirely by the fund, expenses associated with locating and notifying rights holders will necessarily mean a lower total distribution to the group. While class action jurisprudence favors delivering actual notice to all potential claimants and, barring that, providing constructive notice through publication, this article eschews those preferences in the FCLRRP context. Instead, distributions should be made automatically to any rights holder for whom sufficient information is available and when that information is unavailable, the establishment of a website allowing depicted persons to register and claim their funds should be sufficient.

When sufficient information is available, distributions should be made without requiring registration or notice to individual rights holders. Often, this information is available. As game series develop, many of the persons depicted will likely remain the same year to year and the previous information acquired for the distribution of funds can be used again. While the developer is unlikely to have all the necessary information, there is no sound reason that it needs all of this information for the system to operate effectively. Payments that can be made should be made.

For those rights holders who cannot have a payment automatically transferred to them because of a lack of information, a claims website where the rights holders can register and receive electronic payments should be established. Both ASCAP and SoundExchange require registration from their members and require providing the information required for electronic transfer to take advantage of a lower minimum threshold for distribution.[299] When necessary to pay administrative costs, these organizations may even appropriate funds from old, unclaimed accounts, essentially causing an artist who is not proactive in registering to forfeit compensation.[300]

Many areas of law favor those who actively monitor and enforce their rights. This preference is demonstrated in the availability of statutes of limitations and laches defenses.[301] While the precise nature of the right of publicity varies from state to state, both statutes of limitations and laches defenses have been applied to right of publicity claims in some states.[302] These defenses are also found in the commensurate intellectual property rights of copyright and trademarks.[303] Given the preference for the affirmative assertion of rights of publicity and comparable intellectual property rights under compulsory licensing regimes, committees should not prioritize outreach to rights holders.

This is not to say the claims of those who do not register quickly should be entirely forfeited, as they often are in the class action context. Because the full set of rights of publicity depicted are known to the committee, there is no need to impose deadlines in an effort to determine the class size or composition. Compensation can (and should) also be calculated with no input from the rights holders, so the use of a deadline as a tool for the expedient release of information is also unnecessary in the FCLRRP context. Unlike many areas of the law, there is no need for a statute of limitations defense or laches defense to prevent surprise to a defendant. Since the developer will already be opting into the system, it will be aware of its liability from the outset. Given these differences,

299. *See Direct Deposit and Royalty Thresholds*, ASCAP (2015), http://ascap.com/members/payment/payment.aspx [http://perma.cc/4SDW-53QK]; *see also General FAQ*, *supra* note 248.

300. *General FAQ*, *supra* note 248.

301. Blair v. Nev. Landing P'ship, 859 N.E.2d 1188, 1193 (Ill. App. Ct. 2006).

302. *See id.* at 1192 (dismissing a right of publicity case with prejudice because it was brought outside the statute of limitations); State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 100 (Tenn. Ct. App. 1987) (finding a defense of laches was a triable issue of fact for the jury in a right of publicity suit).

303. *See* Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985) (barring a trademark claim after a ten-week delay under a laches theory). *But see* Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1972 (2014) (ruling that the clearly defined statute of limitations for copyrights renders the laches defense inapplicable to copyright claims); *see also* Robert C. Scheinfeld, *Laches in Trademark Infringement: How Long Can You Sleep on Rights?*, 251 N.Y. L.J. 1, 2 (2014).

payments should simply be held until they are claimed. While a committee need not waste royalty funds searching for missing rights holders, there is little reason to penalize them for their delay.

VI. CONCLUSION

The FCLRRP laid out in this article is a comprehensive proposal for a concrete problem. Undoubtedly, it is imperfect. But the perfect need not be the enemy of the good. The precedents set by *Hart* and *Keller* mean that until there is a change in the law, video games that are desired by consumers and potentially profitable to developers and rights holders alike will not be produced. This article's compulsory regime would not only leave all parties better off but would also better effectuate the principles that underlie rights of publicity laws. It does not reassign rights: it facilitates their exchange. And while it may not be the only solution, it is the only one to date that proposes a change in the law that goes beyond simply legislating one of *Hart* and *Keller's* dichotomous outcomes and further presents a detailed, fully actionable regime that fosters the production of creative works.