
THE MEDIUM IS THE MESSAGE: DIGITAL AESTHETICS AND PUBLICITY INTERESTS IN INTERACTIVE ENTERTAINMENT MEDIA

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Recent application of the right of publicity doctrine to interactive media has led to inconsistent rulings and uncertainty as to the doctrine's scope when pitted against First Amendment considerations. These recent court decisions have inadequately explained the disparate application of legal principles, raising serious free speech concerns for expressive activities with other emerging interactive media platforms such as virtual reality. However, these recent decisions have unveiled discernible principles that help explain the disparate approach of the right of publicity doctrine to new interactive media.

This Article articulates the assumptions guiding the disparate application of the right of publicity doctrine. This Article begins with a historical overview of the right of publicity doctrine and the various approaches adopted by the courts. It will then focus attention on the transformative work test and address the recent analytical pivot—from a holistic examination of the interactive work “as a whole” to a myopic focus on the individual avatar—by employing a natural rights theory argument to explain the courts’ narrow approach to transformativeness. Furthermore, this Article makes the case that the courts’ discordant doctrinal treatment of interactive entertainment media is premised in the misplaced notion that the medium lacks artistry and authorial signature (i.e., interactive games are not art, but rather craft). Finally, this work advances the argument that while today’s interactive games present rich historical and pedagogical content, courts have failed to adequately apply common law and statutory exemptions that not only include

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news, but works of fiction, entertainment, public affairs, and sports accounts, from right of publicity liability.

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INTRODUCTION

The late film critic Roger Ebert once wrote an entry in his popular blog with the headline: “Video Games Can Never Be Art.”¹ To bolster his argument, Ebert asserted in his entry that “[n]o one in or out of the field has ever been able to cite a game worthy of comparison with the great poets, filmmakers, novelists and poets.”² Art is distinguished from games, according to Ebert, because games incorporate rules, objectives and the goal of winning.³ In other words, the *interactivity* of the

1. Roger Ebert, *Video Games Can Never Be Art*, ROGER EBERT’S J. (Apr. 16, 2010), <http://www.rogerebert.com/rogers-journal/video-games-can-never-be-art> [<https://perma.cc/2T4T-TBJE>].

2. *Id.* Ebert writes “poets” twice in the quoted sentence.

3. *See id.*

medium—with set rules and objectives—diminishes it as a work of critical attention; remove the interactivity, and the medium may be considered art. Moreover, Ebert regarded a work of art as the creation of *one* artist.⁴ In other words, interactive games lack an *authorial* voice—an *auteur*⁵—which also diminishes them as a work of critical attention. Ebert’s view of the medium is not an uncommon one: it is a view shared by many cultural critics and many members of the judiciary who have recently transformed the right of publicity doctrine into a messy confusion of approaches, and one that fails to adequately account for First Amendment considerations.

Akin to a property interest, the right of publicity allows individuals to control their name, identity, or likeness when it has been appropriated for commercial purposes or otherwise without their consent. Previously, right of publicity suits have arisen from static images or likenesses of individuals in commercials, television broadcasts, and even baseball trading cards. However, recent application of the doctrine to interactive media—video games in particular—has led to inconsistent rulings and uncertainty as to the doctrine’s scope when pitted against First Amendment considerations. Although lower courts have employed several different First Amendment tests in right of publicity cases, the transformative use test is the most popular test applied to interactive entertainment content. While a holistic approach to the transformative use test has been applied to traditional media, several courts have recently abandoned the holistic approach when evaluating realistic depictions in interactive digital games. A holistic approach determines if the interactive work—as the sum of its parts—contains significant transformative and creative elements. Several courts have favored a single identity-specific approach. In addition, courts have failed to recognize the informational,

4. *See id.*

5. As a theoretical concept in cinema studies, auteur theory holds that the film director is the primary creative force in a cinematic work. *See* MARILYN FABE, *CLOSELY WATCHED FILMS: AN INTRODUCTION TO THE ART OF NARRATIVE FILM TECHNIQUE* 121 (10th Anniv. ed. 2014) (noting the origin of the theory can be attributed to French New Wave directors and critics who attributed authorship to film: “[D]espite film’s status as primarily a commercial entertainment medium, it could potentially be an art form as powerful in its means of expression as literature or poetry. In order to propose filmmaking as an art, however, there had to be an artist, a central consciousness whose vision is inscribed in the work.”).

historical, and pedagogical components of today's interactive media, further weakening First Amendment protection for such new media platforms. Recent court decisions have inadequately explained the disparate application, and this uneven application of legal principles raises serious free speech concerns for expressive activities with other emerging interactive media platforms, including augmented and virtual reality.

Despite these shortcomings, decisions have unveiled discernible principles that help explain the disparate approach of the right of publicity doctrine to new interactive video games. This Article uncovers the underlying principles and articulates the assumptions guiding the incongruent application of the doctrine. It begins with a historical overview of the right of publicity doctrine and the various approaches adopted by the courts. It then focuses on the transformative use test and addresses the recent analytical pivot with the transformative use test—from a holistic examination of the work to a myopic focus on the individual identity—by employing a natural rights theory argument to explain the courts' narrow approach to transformativeness. Although courts have concluded interactive games are expressive works “entitled to the protection of free speech as the best of literature,”⁶ this Article makes the case that the courts' discordant doctrinal treatment of interactive games is premised in the misplaced notion that the medium lacks artistry and *authorial* signature (i.e., interactive games are not *art*, but rather *craft*). Finally, this Article advances the argument that while today's interactive games present rich historical and pedagogical content, courts have failed to adequately apply common law and statutory exemptions that would shield not only news content, but works of fiction, entertainment, public affairs, and sports accounts from right of publicity liability.

I. A HISTORICAL PRIMER

While the early development of the right of publicity

6. *Interactive Dig. Software Ass'n v. St. Louis Cty.*, 329 F.3d 954, 958 (8th Cir. 2003); *see also* *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (“Like the protected books, plays and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices That suffices to confer First Amendment protection.”).

doctrine began under the shadows of the right to privacy, the doctrine subsequently morphed into a right that today protects the economic value of one's name, persona, or performance. This Part reviews the historical foundations and expansion of the right of publicity, starting with its origin as a right within the right to privacy. It then proceeds to address the First Amendment implications that spawned from the development of the right of publicity doctrine.

A. *The Antecedent to the Right of Publicity: Privacy*

The right of publicity is rooted in the right to privacy. In an 1890 *Harvard Law Review* article, Samuel Warren and Louis Brandeis called attention to how “recent inventions and business methods,” such as instantaneous photographs and newspapers, have led to the increased encroachment on one's privacy, whereby “what is whispered in the closet shall be proclaimed from the house-tops.”⁷ Over the years, the right to privacy subsequently developed into four distinct tort claims.⁸ One was the “appropriation for the defendant's advantage of the plaintiff's name or likeness,”⁹ the precursor to today's statutory and common law right of publicity claim. Thus, in order to seek relief for the appropriation of one's identity, plaintiffs were required to assert a claim under the right of privacy.¹⁰ Adopting Warren and Brandeis's theories of “the right to be let alone,”¹¹ the Supreme Court of Georgia, in 1905, recognized the right to privacy from the unauthorized use of an individual's photograph without his or her consent.¹² However, during the tort's early development, courts were not inclined to extend the invasion of privacy claim beyond emotional harm,

7. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

8. The four privacy tort claims are: (1) Intrusion upon the plaintiff's seclusion or solitude; (2) Public disclosure of embarrassing facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. See William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

9. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (AM. LAW INST. 1995); see also Prosser, *supra* note 8.

10. See 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:23 (2d ed. 2016) (stating the right of privacy as “historical antecedent” of the right of publicity); Prosser, *supra* note 8.

11. Warren & Brandeis, *supra* note 7, at 193.

12. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 79–80 (Ga. 1905).

and courts were unwilling to recognize a public figure or celebrity's claim for mental distress when their identities widely inhabited the public sphere.¹³

It was not until 1953, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, that the term "right of publicity" was first coined in relation to a cause of action by an individual in asserting a property right in his or her own image and identity.¹⁴ In *Haelan Labs*, the parties to the suit were two rival chewing gum companies that used baseball cards for promotional purposes; the cards featured the names and images of major league players.¹⁵ The dispute arose after both chewing gum companies contracted with the same baseball player to use the player's photograph with their respective promotional baseball cards.¹⁶ The plaintiff argued that it had contracted with the ballplayer for exclusive rights to use the ballplayer's image in connection with the sale of plaintiff's gum.¹⁷ However, the defendant argued that this invasion of privacy right was "no more than a release" of liability that plaintiff would have incurred in using the ballplayer's image and that this right is "personal, not assignable."¹⁸ The court rejected the defendant's contention and held that an individual has a publicity or "pecuniary" value in his or her image, and this right can be made exclusive (i.e., assignable).¹⁹ Furthermore, the court pointed out that this right extends beyond recovery for emotional injury to include commercial compensation for the unauthorized use of one's likeness.²⁰

In the years since the *Haelan Labs* decision, a majority of

13. See MCCARTHY, *supra* note 10, § 1:25 (noting the differences between the "right to be left alone" and the right to profit from one's own identity, and how early court interpretations of the invasion of privacy limited its scope to emotional injury of private persons).

14. 202 F.2d 866, 868 (2d Cir. 1953) ("This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."); MCCARTHY, *supra* note 10, § 1:26 (noting that Circuit Judge Jerome Frank in *Haelan Labs* was the first to coin the term "right of publicity").

15. See *Haelan*, 202 F.2d at 867.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 868.

20. *Id.* at 868-69.

states have recognized this relatively new proprietary right to one's likeness and identity. At least thirty-one states currently recognize the right of publicity either through an explicit statute or through the state common law.²¹ Some states, like California, recognize the right under both the common law and by explicit statute, providing broad protection for one's identity and likeness.²² Moreover, about twenty-three states recognize a right of publicity in the identity of a deceased person.²³ Today, the right of publicity's legal reach has extended beyond the parameters of the right of privacy to afford individuals the right to control their names, likenesses, and other indicia of identity, from commercial exploitation. A widely publicized case stemming from a Samsung advertisement in the early 1990s reflects the expansive breadth of the right of publicity. In *White v. Samsung Electronics America, Inc.*, the challenged advertisement incorporated a vision for the future: a robot, dressed in a blonde wig and gown to resemble show host Vanna White, on the set of Wheel of Fortune.²⁴ This robot, posing next to the recognizable game board of the popular game show, was legally determined to be an appropriation of White's "identity."²⁵ However, for several circuit judges, the panel majority's decision marked a further expansion of this property right and perhaps "overprotection" of celebrities' identities.²⁶ The right of publicity has thus evolved into a right that protects the economic value of a performance or persona when others seek to capitalize off an individual's identity in a

21. See MCCARTHY, *supra* note 10, § 1:24 nn.2, 3.

22. See CAL. CIV. CODE. § 3344 (2017); Kareem Abdul Jabbar v. General Motors Corp., 85 F.3d 407 (9th Cir. 1996); *White v. Samsung Elecs. Am.*, 971 F.2d 1395 (9th Cir. 1992).

23. See Erik W. Kahn & Pou-I "Bonnie" Lee, "*Delebs*" and *Postmortem Right of Publicity*, 8 LANDSLIDE, no. 3, Jan. 2016.

24. 971 F.2d at 1396.

25. *Id.* at 1399.

26. See *id.* at 1405 (Alarcon, J., dissenting) (noting that "an attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women, especially in southern California . . . [t]hey are not unique attributes of Vanna White's identity"); see also *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting) ("The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to *remind* the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; . . . but simply to evoke the celebrity's image in the public's mind."), *denying petition for reh'g.*

commercial context. However, subsequent development of the right of publicity in the postmodern era saw the doctrine clash with the First Amendment, particularly in the context of non-commercial speech.

*B. The Development of the Right of Publicity Doctrine:
Enter the First Amendment*

The Supreme Court has addressed the right of publicity in only one case: *Zacchini v. Scripps-Howard Broadcasting Co.*²⁷ There, the Court considered the intersection of the right of publicity and the First Amendment with regard to a news broadcast of a human cannonball performance set at a fair.²⁸ A television station had filmed the plaintiff's entire performance stunt, and the Court held that by broadcasting the entire performance, the station had violated the plaintiff's right of publicity.²⁹ The First Amendment did not shield the station because according to the Court, the right of publicity is akin to a property interest and serves to incentivize such performances: "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment."³⁰ However, the Court in *Zacchini* acknowledged the narrow grounds that the plaintiff's right of publicity claim was decided on: the televised recording of an entire performance that the plaintiff "ordinarily gets paid to perform."³¹ Outside this narrow context of broadcasting an entire performance, the Supreme Court has not addressed the scope of the right of publicity when pitted against expression protected by the First Amendment.

Following the Court's decision in *Zacchini*, right of publicity lawsuits have been brought over a wide range of non-commercial speech, including songs,³²

27. 433 U.S. 562 (1977).

28. *Id.* at 575-76.

29. *Id.*

30. *Id.* at 573.

31. *Id.* at 573 n.10 ("Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.").

32. See, e.g., *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003).

prints,³³ paintings,³⁴ comic books,³⁵ video games,³⁶ and films.³⁷ Since the Supreme Court has considered the right of publicity in only one case (*Zacchini*), lower courts have been left with very little guidance on the scope of the right of publicity when balanced against First Amendment concerns. As a consequence, courts across the country have failed to apply a consistent approach, and instead have applied divergent approaches to right of publicity claims including: the *Rogers* test, the predominant purpose test, ad hoc balancing, and the transformative use test.

In *Rogers v. Grimaldi*, the Second Circuit established a right of publicity test—often referred to as the *Rogers* test or the relatedness test—which derives its principles from trademark law and was designed to prevent consumer confusion.³⁸ This test was adopted when actress Ginger Rogers brought suit against the producers of the Fellini film, *Ginger and Fred*, a fictional film about two cabaret performers who imitate Rogers and Fred Astaire and become famously known as “Ginger and Fred.”³⁹ With regard to addressing the right of publicity claim, the court fashioned a test that sought to determine whether an expressive work is “wholly unrelated’ to the individual” or a “disguised advertisement for the sale of goods or services or a collateral commercial product.”⁴⁰ Even

33. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009).

34. See, e.g., *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003).

35. See, e.g., *Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

36. See, e.g., *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013); *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015).

37. See, e.g., *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) (arising from depictions in the 2008 Oscar-winning film, *The Hurt Locker*). Furthermore, this is not an exhaustive list, but rather a list of examples where right of publicity lawsuits have arisen in the context of non-commercial, protected speech.

38. 875 F.2d 994, 999 (2d Cir. 1989). Rogers brought a claim under both the Lanham Act and common law right of publicity. *Id.* With regard to the Lanham Act claim, Rogers asserted that viewers would be misled that Rogers either endorsed the film or that the work was about her. *Id.* However, the court held that the Lanham Act should only apply to artistic works “where the public interest in avoiding consumer confusion outweighs the public interest in free expression.” *Id.* The court then applied a modified version of the Lanham Act test to Rogers’s common law right of publicity claim. *Id.*

39. See *id.* at 996–97 (the central characters of the film are known for their imitations of Rogers and Astaire).

40. *Id.* at 1004–05.

though the title of the film used Rogers's name, the court held that Rogers's right of publicity was not infringed upon because the celebrity's name was "clearly related" to the content of the movie, and her name was not deceptively used to advertise for "the sale of goods" or some other commercial purpose.⁴¹

More recently, in *Parks v. LaFace Records*, the Sixth Circuit imported the *Rogers* test to a right of publicity claim asserted by civil rights icon Rosa Parks against LaFace Records and hip-hop duo OutKast.⁴² Parks's claim of infringement under the Lanham Act and the right of publicity stemmed from OutKast's use of her name for a song title on the album *Aquemini*.⁴³ Parks's right of publicity claim mirrored the Lanham Act claim, and the court applied the *Rogers* test to conclude that her claim presented a "genuine issue of material fact" as to whether the title of the song is "wholly unrelated" to the content of the song and whether the title is a "disguised commercial advertisement."⁴⁴

In contrast to the *Rogers* relatedness approach, the predominant use test—first introduced in *Doe v. TCI Cablevision*—asks whether a work "exploits the commercial value of an individual's identity" or whether the work predominantly is an expressive comment on or about a celebrity.⁴⁵ Thus, if the predominant purpose of the challenged work is commercial, then the work is not entitled to First Amendment protection.⁴⁶ In *TCI Cablevision*, the Missouri Supreme Court examined a comic book author's use of a villainous character, Antonio "Tony Twist" Twistelli, named after a professional hockey player, Anthony "Tony" Twist.⁴⁷ In

41. *Id.* (explaining that the film's title, *Ginger and Fred*, is clearly related to the content of the movie, even though the title also shares the same name as plaintiff Ginger Rogers; and finding that the use of "Ginger" in the title was not a disguised advertisement for the sale of goods or services or a collateral commercial product).

42. 329 F.3d 437 (6th Cir. 2003).

43. *Id.* at 441–42.

44. *Id.* at 461 (noting that as with the Lanham Act claim, the court had to conduct a balancing of interests—Parks's property right in her own name versus the freedom of artistic expression).

45. 110 S.W.3d 363, 374 (Mo. 2003).

46. *Id.*

47. *See id.* at 367 (noting that the comic book's author, Todd McFarlane, admitted in an interview that the comic book character "Tony Twist" in the comic series "Spawn" was named after professional hockey player Tony Twist due to Twist's reputation as an enforcer).

balancing Twist's property interests in his own name and identity against the comic book author's First Amendment interests in free expression, the court rejected both the transformative use test⁴⁸ and the *Rogers* test as being too rigid, concluding such tests operated to preclude claims whenever the "use of the name and identity is [in] any way expressive, regardless of its commercial exploitation."⁴⁹ Instead, the court analyzed whether the prevailing purpose of using Twist's identity was more commercial or expressive.⁵⁰ However, unlike the *Rogers* test, this subjective approach requires courts to determine an expressive work's predominant or "primary" purpose, leaving courts with wide discretion and the increased likelihood of inconsistent rulings. The test's subjective nature has been criticized, and in *Hart v. Electronic Arts, Inc.*, the Third Circuit recently declined to adopt the test, noting that it was "subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning critics."⁵¹

Several Circuits have also employed an ad hoc balancing approach to right of publicity claims. In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, the Tenth Circuit examined whether a parody trading card company infringed on the publicity rights of major league baseball players by producing trading cards that featured humorous caricatures of the players.⁵² The Tenth Circuit analyzed the importance of the

48. For further discussion of the Transformative Use test, see *infra* Section II.B.

49. *TCI*, S.W.3d at 374.

50. *Id.* ("If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight." (quoting Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471, 500 (2003))). Ultimately, the court held McFarlane's work could be found to infringe on Twist's right of publicity, noting that the "Tony Twist" character was "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression." *Id.*

51. 717 F.3d 141, 154 (3rd Cir. 2013); see also Joseph Gutmann, *It's in the Game: Redefining the Transformative Use Test for the Video Game Arena*, 31 CARDOZO ARTS & ENT. L.J. 215, 221 (2012) (noting that the predominant use test does not provide adequate guidance for determining what "predominant" means when evaluating the expressive features of a work).

52. 95 F.3d 959 (10th Cir. 1996).

card company's First Amendment rights and the consequences of its limitation against the effect of infringement on the players' rights of publicity.⁵³ The court first addressed the consequences of restricting Cardtoon's use of the players' identities and held that in order to effectively comment on or criticize society, parodists such as Cartoons need access to celebrities' identities because "[r]estricting the use of celebrity identities restricts the communication of ideas."⁵⁴ With regard to society's interest in protecting the players' publicity rights, the court concluded that both the economic and noneconomic justifications were outweighed in the context of parody.⁵⁵

Furthermore, the Eighth Circuit also applied a case-by-case approach in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.* to determine whether an online fantasy baseball site infringed on players' rights by incorporating the use of their names and statistics in its games.⁵⁶ Citing *Zacchini*, the court noted that a state law right of publicity claim "must be balanced against [F]irst [A]mendment considerations," and held that the fantasy baseball game's use of players' names and statistics was protected under the First Amendment.⁵⁷

Moreover, in *Toffoloni v. LFP Publishing Group, LLC*, the Eleventh Circuit reviewed a right of publicity claim by the estate of a former model and professional wrestler, Nancy Benoit, for the postmortem publication of nude photographs

53. *See id.* at 972 ("This case instead requires us to directly balance the magnitude of the speech restriction against the asserted governmental interest in protecting the intellectual property right.").

54. *See id.*

55. *See id.* at 973–76. The court addressed the economic justifications (incentives for creativity, efficient allocation of resources, and the protection against consumer deception) and the noneconomic justifications (natural rights, the enjoyment of the fruits of one's labor, and the prevention of emotional injuries) against the context of the cards' intent to comment on society via parody. *Id.* After balancing these interests, the court concluded that such justifications "break down in the context of parody, where the right to profit from one's persona is reduced to the power to suppress criticism." *Id.* at 976.

56. 505 F.3d 818 (8th Cir. 2007).

57. *Id.* at 823. The Eighth Circuit recognized C.B.C.'s protected use of players' names and statistics by pointing out that: (1) the information used by C.B.C. in its games is readily available to the public; (2) C.B.C.'s use of players' names, statistics, and other biographical data is "expressive" and due First Amendment protection; and (3) C.B.C.'s use of names and other info would not impair players' incentives to be productive professionally or mislead consumers. *See id.* at 823–24.

alongside a brief biography in *Hustler Magazine*.⁵⁸ The court adopted a “fact-sensitive” balancing approach between the competing constitutional rights of privacy and publicity, and the freedom of the press.⁵⁹ Applying this balancing approach, the Eleventh Circuit held that the “brief biography” was “merely incidental” to the late model’s nude photos within the context of the publication, it was neither newsworthy nor of public concern, and it also “impaired ‘the commercial exploitation’ of Benoit’s image.”⁶⁰

Finally, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the Supreme Court of California introduced the transformative use test, which imports principles from copyright law into the right of publicity context.⁶¹ *Comedy III* centered on an artist’s sale of T-shirts and lithographic prints that bared the artist’s literal charcoal drawing of the Three Stooges.⁶² According to the *Comedy III* court, “[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility.”⁶³ The court added that this property right is not a right of censorship, but a right to prevent others from misappropriating a celebrity’s economic value in their fame or identity.⁶⁴ Although the *Comedy III* court decided against importing the fair use doctrine⁶⁵ in its entirety, the court decided to import the first

58. 572 F.3d 1201 (11th Cir. 2009).

59. *Id.* at 1207–08 (“The Constitution directs no hierarchy between [the freedom of speech and of the press, as well as the right to privacy]. Thus, courts are required to engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole.”).

60. *Id.* at 1210–13.

61. 21 P.3d 797 (Cal. 2001).

62. *Id.*

63. *Id.* at 804. The court notes that considerable “money, time and energy” are often required before one can develop a reputation or identity from which one can seek an economic return. According to the court, the Three Stooges exemplify this kind of “creative labor” that was able to brand their comedy and bring forth significant commercial value to their identities. *Id.* at 804–05.

64. *Id.* at 807.

65. Fair use is a legal doctrine that promotes expressive work by permitting unlicensed use of copyright-protected work in certain circumstances. Section 107 of the Copyright Act provides the statutory framework to determine the question of fair use, and calls for the consideration of four factors: (1) purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole; (4) effect of the use upon the potential market for or value of the

fair use factor—“the purpose and character of the use”—in order to reconcile the competing interests of one’s right of publicity and another’s expressive use with an inquiry as to whether the new work is “transformative.”⁶⁶ The inquiry presented in *Comedy III* is whether the new work or product *as a whole* has been transformed with the addition of other elements beyond the imitation or depiction of the celebrity:

Another way of stating the inquiry is whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness. And when we use the word “expression,” we mean expression of something other than the likeness of the celebrity.⁶⁷

Several courts have applied the transformative use test, but the doctrine is relatively undeveloped.⁶⁸ In *Winter v. DC Comics*, the California Supreme Court reaffirmed the transformative use test when it applied the test to comic books containing characters that evoked musician brothers Johnny and Edgar Winter.⁶⁹ After analyzing the degree of transformativeness in the challenged comic books, the court held that the works contained significant creative elements, “transform[ing] them into something more than mere celebrity likenesses.”⁷⁰

Similarly, in *ETW Corporation v. Jireh Publishing, Inc.*,

copyrighted work. See *More Information on Fair Use*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/more-info.html> (last visited Mar. 17, 2018) [<https://perma.cc/E6RP-82MR>].

66. *Comedy III Prods., Inc.*, 21 P.3d at 808.

67. *Id.* at 809.

68. See *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003); *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006); *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011); see also *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013); *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015). For further discussion of *Hart*, *Keller*, and *Davis*, see *infra* Part III.

69. *Winter*, 69 P.3d at 479.

70. *Id.*

the Sixth Circuit employed the transformative use test to the sale of prints that included an image of a painting that featured a panorama of Tiger Woods's golf victory at the 1997 Masters Tournament.⁷¹ *ETW* claimed that the prints violated Woods's right of publicity, but the Sixth Circuit held that the work consisted of more than a mere "literal likeness of Woods."⁷² Instead, the court concluded that the work included a variety of images in addition to Woods's image, "which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event."⁷³ Since the work contained substantial transformative elements in addition to literal depictions of Woods, the court held that the work was entitled to the full protection of the First Amendment.⁷⁴

The courts in *Comedy III*, *Winter*, and *ETW* incorporated the transformative use test and applied a consistent balancing approach to reconcile expressive works and the right of publicity. In each case, the transformative use test was applied to the new work—in its *entirety*—and was analyzed in order to determine if the work (again, as a whole) contained substantial transformative elements. Recently, however, this holistic approach to the transformative use test has been inexplicably discarded in several right of publicity disputes in favor of a single identity-only approach applied to interactive media platforms, such as digital video games.

Moving forward, this Article will center its analysis on the transformative use test and the doctrinal shift from a holistic approach to a narrow, single identity/avatar approach. It will then address the implications of the disparate treatment of interactive entertainment on creative expression and the public interest.⁷⁵

71. *ETW*, 332 F.3d at 936.

72. *Id.*

73. *Id.* at 938.

74. *See id.*

75. *See infra* Part III.

II. THE FREEDOM OF EXPRESSION TRUMPED BY DIGITAL AVATARS: REALISTIC DEPICTIONS IN EXPRESSIVE AND INTERACTIVE WORK

Today's video games are capable of displaying stunning visual detail. Thanks to advances in digital technology, including motion-capture technology and faster processors pursuant to Moore's law,⁷⁶ games can now depict realistic facial and bodily movements with uncanny precision. Corresponding with the rising popularity of digital games, innovations in both hardware and software have resulted in an increasingly immersive gaming experience. The advances in augmented and virtual reality will not only deepen the immersive experience for users, but also expand the reach of interactive digital media in our daily lives. Today, about half (49 percent) of American adults play video games on a computer, television, game console, or portable device.⁷⁷ While "shooter" games represent the largest market share of game units sold, sports games account for 13.2 percent of game units sold; *Madden NFL 16* was the second-highest-selling game of 2015.⁷⁸ Coinciding with this rise in popularity are the rising revenues of the gaming industry: in 2015, total revenues in the U.S. were \$23.5 billion, a 5 percent increase over 2014.⁷⁹

As the technology becomes more advanced and the popularity of games increases, the number of right of publicity suits for realistic images depicted in this evolving platform are also likely to increase. Thus far, courts have applied the transformative use test to realistic digital depictions as a First

76. Named after Intel co-founder Gordon Moore, who predicted in 1965 that the number of transistors in a microprocessor would double every two years. See Stephen Shankland, *Moore's Law: The Rule That Really Matters in Tech*, CNET (Oct. 15, 2012), <https://www.cnet.com/news/moores-law-the-rule-that-really-matters-in-tech/> [<http://perma.cc/9TU5-NUK7>] (noting how the speed of chip advancements continues to support Moore's original thesis).

77. See Maeve Duggan, *Gaming and Gamers*, PEW RESEARCH CTR. (Dec. 15, 2015), <http://www.pewinternet.org/2015/12/15/gaming-and-gamers/> [<https://perma.cc/FH9Z-G7DB>].

78. ENTMT SOFTWARE ASS'N, ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY (2016), <http://www.theesa.com/wp-content/uploads/2016/04/Essential-Facts-2016.pdf> [<https://perma.cc/46J3-LVP5>] (showing that "shooter" games accounted for 24.5 percent of all game units sold, with *Call of Duty: Black Ops III* as the most popular game sold in 2015).

79. Chris Morris, *Level Up! Video Game Industry Revenues Soar in 2015*, FORTUNE (Feb. 16, 2016), <http://fortune.com/2016/02/16/video-game-industry-revenues-2015/> [<https://perma.cc/4ZDJ-SYK2>].

Amendment shield to right of publicity claims, but the results have been inconsistent. As the dominant approach to resolve right of publicity claims, the transformative use test has been utilized to determine if the work—as a whole—is transformative, but courts have recently applied the test narrowly, focusing more on the individual identity and determining if the context is similar to that which brought the individual public prominence. This shift in the transformative use analysis when applied to interactive digital entertainment sets a precedent that could have a profound impact on emerging interactive media if widely applied. What remains unsettled is whether this narrow application of the transformative use test is limited to the specific context of interactive digital sports games or interactive entertainment media generally.

This Part first surveys existing caselaw on the application of the transformative use test to video games and then explores the underlying principles and unique characteristics that help explain the disparate application of the transformative use test doctrine on this interactive medium. Moreover, Part III will address two additional (and underdeveloped) First Amendment considerations to the right of publicity: the public interest and sports account exemptions.

A. *Video Games and Realistic Depictions: What Is Transformative?*

Just as literary and cinematic works are fully protected by the First Amendment, video games are also a fully protected genre of expression.⁸⁰ However, recent cases involving digital games and right of publicity claims reveal the disparate treatment of realistic depictions in expressive works based on the media platform, the level of interactivity, and the degree of control a user has over another's identity or likeness. This Section will review some of the pertinent video game cases that

80. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices That suffices to confer First Amendment protection."); *see also* *Gravano v. Take-Two Interactive Software, Inc.*, 37 N.Y.S.3d 20, 22 (N.Y. App. Div. 2016) (citing *Brown*, 564 U.S. at 790) (noting that video games such as the popular *Grand Theft Auto* series are protected works of fiction and satire).

demonstrate a lack of legal coherence when balancing the right of free expression with the right of publicity.

In *Kirby v. Sega of America, Inc.*, a California appellate court held that a video game character that allegedly appropriated several attributes of the lead singer of the 1990s band “Dee-Lite” was sufficiently transformative and thus protected by the First Amendment.⁸¹ The lead singer, Kirby, claimed that Sega had misappropriated the singer’s likeness and identity with a video game character named “Ulala.”⁸² The plaintiff claimed that she owned a “unique public identity” combining retro and futuristic visual styles with unique costumes and lyrical expression, and by featuring Ulala in the game *Space Channel 5*, Sega had misappropriated her likeness and identity.⁸³ Addressing Sega’s First Amendment defense under the transformative test, the court noted that the plaintiff and Ulala did share some similar physical characteristics and clothing, and even recognized that “Ulala” is a “phonetic variant of ‘ooh la la,’ a phrase often used by Kirby and associated with Kirby.”⁸⁴ However, the court held that Ulala was not just an imitative character and that Sega had added several elements to the Ulala character relating to her costumes, hairstyles, and her role in the game, making the game’s use of the character “transformative.”⁸⁵

Five years later, another California appellate court addressed a right of publicity claim involving video game avatars that were alleged to be misappropriating the identities of musicians and found the game’s use to be not transformative.⁸⁶ In *No Doubt v. Activision Publishing, Inc.*, the music group No Doubt contested Activision’s use of their avatars in the game *Band Hero*, which included both fictional characters designed by Activision and digital representations of “real-life rock stars.”⁸⁷ Although No Doubt licensed its

81. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006).

82. *Id.* at 613.

83. *Id.* at 609–11.

84. *Id.* at 613.

85. *Id.* at 616. Unlike the plaintiff, who is the lead singer of a musical group, Ulala is a twenty-fifth-century space reporter. Also, the court noted that whether the Ulala character conveys any expressive meaning is irrelevant to a First Amendment defense. *Id.* at 616–17.

86. *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).

87. *Id.* at 401–02. According to the court, the game allows players to simulate

members' likenesses and several No Doubt songs for use in the game, the game included a feature that permitted players to use avatars of No Doubt band members to perform any of the songs included in the game.⁸⁸ Moreover, the avatars could also be manipulated to engage in cross-gender singing or to perform solo.⁸⁹ The court had to resolve whether the use of No Doubt's likenesses constituted "protected First Amendment activity involving an artistic work" or the commercial misappropriation of their identities.⁹⁰ Applying the transformative use test, the court held that Activision's use of the avatars was nothing more than "exact depictions of No Doubt's members doing exactly what they do as celebrities."⁹¹ Interestingly, the court cites *Comedy III* for the proposition that even literal reproductions can nonetheless be "transformed" into expressive works based on the *context* into which the image is placed.⁹² The band members' avatars were within a digital context where they can be manipulated to perform a variety of songs, in different voices, and in a variety of venues (including outer space)—either with other band members or performing alone. Yet this context, along with the other creative elements in the game, was found to be insufficiently transformative. In sum, the court focused narrowly on the depiction of the individual characters to determine the level of transformativeness, as opposed to the context of the work as a whole.

In *Keller v. Electronic Arts, Inc.*, the Ninth Circuit upheld a right of publicity claim by Samuel Keller, a former college quarterback, by rejecting game developer Electronic Arts's (EA) defense of transformative use for using his likeness in the video game *NCAA Football*.⁹³ The game allowed users to control

performing in a rock band in time with popular songs. *Id.* at 401. Players can choose from a variety of avatars and can embody a guitarist, singer, or drummer. *Id.* As players advance in the *Band Hero* game, they can "unlock" characters and use such avatars to play a variety of songs, including songs made famous by other artists. *Id.*

88. *Id.* at 402.

89. *Id.*

90. *Id.* at 406.

91. *Id.* at 406–11.

92. *Id.* at 410 (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001)) (noting, for example, that the Andy Warhol silkscreens featuring celebrity images through "careful manipulation of context," convey an ironic message about the "dehumanization of celebrity" through reproductions of celebrity images).

93. 724 F.3d 1268 (9th Cir. 2013).

avatars of college football players and was designed to replicate each football team as accurately as possible, including a player's height, weight, skin tone, home state, and actual jersey number.⁹⁴ Relying on the holdings of earlier California cases that addressed the transformative use test,⁹⁵ the Ninth Circuit held that EA's use of Keller's likeness did not contain significant transformative elements.⁹⁶ The court concluded that Keller's claim was more aligned with the facts in *No Doubt* than *Kirby* and *Winter* because Keller's physical characteristics in *NCAA Football*, like the members of No Doubt in *Band Hero*, were replicated and users could manipulate the avatars in the same activity for which they have achieved fame.⁹⁷ The court rebutted EA's argument that the game as a whole should be analyzed to determine whether the work was transformative, and instead adopted the approach in *No Doubt* (i.e., focusing narrowly on the individual avatars), reasoning that avatars that appear in a game irrespective of the many other creative elements (design of sets, narrative structure, storylines, etc.) do not sufficiently transform them.⁹⁸ The fact that the No Doubt band members' avatars in *Band Hero* "remain at all times immutable" in contrast to users' ability to alter the characteristics of avatars in *NCAA Football* also had no bearing on the court's analysis of transformativeness.⁹⁹ On par with the California court's narrow focus on the individual avatars in *No Doubt*, the Ninth Circuit reserved its transformative analysis to the realistic football player avatars, while discounting the many other creative elements of the game in its totality.

94. *Id.* at 1271. The court notes that in order for EA to create virtual versions of the college game experience, EA sent detailed questionnaires to team equipment managers in order to match any "unique, highly identifiable playing behaviors." *Id.*

95. *See id.* at 1274–75 (citing *Comedy III*, 21 P.3d at 797, *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003), *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607 (Cal. Ct. App. 2006), and *No Doubt*, 122 Cal. Rptr. 3d at 397, as guidance towards the application of the transformative use test).

96. *Id.* at 1276.

97. *Id.*

98. *Id.*

99. *See id.* at 1277 ("Though No Doubt certainly mentioned the immutability of the avatars, we do not read the California Court of Appeal's decision as turning on the inability of users to alter the avatars. The key contrast with *Winter* and *Kirby* was that in those games the public figures were transformed into 'fanciful, creative characters' or 'portrayed as . . . entirely new character[s].'" (citing *No Doubt*, 122 Cal. Rptr. 3d at 410)).

Similarly, the Third Circuit addressed an identical challenge by another former college quarterback, Ryan Hart, against EA for allegedly violating his right of publicity under New Jersey law and held that the transformative use test did not protect EA's unlicensed use of college football players' likenesses.¹⁰⁰ In *Hart v. Electronic Arts, Inc.*, Hart claimed that EA replicated his likeness in the *NCAA Football* game series, including his biographical and career statistics.¹⁰¹ The court engaged in a balancing inquiry between safeguarding free expression on one hand, and adopting a property interest theory to the right of publicity on the other.¹⁰² After surveying a variety of analytical frameworks that have been applied to this balancing inquiry, the Third Circuit adopted the transformative use test, focusing on "identity," which the court asserted as encompassing both the player's likeness and his biographical information, in order to determine whether the digital avatar was sufficiently transformed.¹⁰³

After concluding that the digital avatar matched Hart's physical characteristics and biographical information, the court considered the context within which the avatar was found and determined that other expressive elements in the game, such as the ability to play in different venues or manage a football program under the "Dynasty mode," played no factor in the transformative inquiry.¹⁰⁴ Moreover, the Third Circuit considered the user's ability to alter the avatar's appearance and held that the mutability of the avatar—like the avatars in *Keller*—was insufficiently transformative.¹⁰⁵ Thus, the ability

100. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

101. *Id.* at 146–47.

102. *Id.* at 151–52.

103. *Id.* at 153–58 (declining to adopt the predominant use test and *Rogers* test). The court reviewed the predominant use test and concluded that it is "subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics." *Id.* at 154. The court also rejected the *Rogers* test, pointing out that while it may have use in trademark-like right of publicity cases, the test is unfit for cases that require nuanced balancing of the right of free expression and the right to control one's own identity. *Id.* at 157.

104. *Id.* at 166, 168 n.44 (noting that the digital Ryan Hart did what the actual Ryan Hart did in college: he played college football, with all the trappings of a college football game, and the digital sights and sounds of this context did not alter or transform Hart's identity).

105. *See id.* at 168 (stating that the realistic depictions of players and heightened realism of the game is central to its appeal and "central to the core of the game experience" which therefore discounts the alteration of the avatars in its

to make minor alterations to the avatars, including adding different hairstyles, faces, performance statistics, or uniform accessories, did not sufficiently transform the likeness of the player. Furthermore, the court dismissed the argument that other creative elements, irrespective of the avatar's realistic depiction, were so numerous that the game as a whole should be considered transformative.¹⁰⁶ According to the court, “[d]ecisions applying the Transformative Use Test invariably look to how the *celebrity's identity* is used in or is altered by other aspects of a work.”¹⁰⁷

In contrast with the above decisions, the court in *Noriega v. Activision/Blizzard, Inc.*, dismissed former Panamanian dictator Manuel Noriega's right of publicity claim against game company Activision, ruling that Activision's use of Noriega's likeness was in fact transformative.¹⁰⁸ Noriega asserted that Activision unlawfully misappropriated Noriega's image and likeness by portraying him as an antagonist and “the culprit of numerous fictional heinous crimes” in the popular game *Call of Duty: Black Ops II*.¹⁰⁹ Yet in *Call of Duty*, the game realistically portrays Noriega as himself, in a context where Noriega gained infamy for a litany of criminal acts as the dictator of Panama.¹¹⁰ Noriega himself is the primary objective

transformative use analysis).

106. *Id.* at 169. *Compare id.*, with *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011) (holding that the ability for users to perform as band members in outer space was insufficient for a finding of transformativeness); *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013) (noting that Jim Brown's likeness is “artistically relevant” to the *Madden NFL* games that aim to recreate NFL games under a *Rogers* test analysis); and *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015) (holding that the individual avatars of former professional football players were not transformative, while declining to review whether the work as a whole was transformative). *But see* *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149 (Cal. Super. Oct. 27, 2014) (holding that Activision/Blizzard's realistic depiction of Noriega in several scenes in the video game *Call of Duty: Black Ops II*, was transformative).

107. *Hart*, 717 F.3d at 169 (explaining that wholly unrelated elements do not bear on this inquiry). The court further discussed the proposition that “transformative or creative contributions” should focus on elements or techniques that affect the celebrity identity. *Id.* (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001)).

108. *Noriega*, 2014 WL 5930149.

109. *Id.* at *1. The game is a fictional “first person shooter game” where users can assume the role of a special operations soldier placed in warfare scenarios. The context of the game is divided into two campaigns, one set during the Cold War and the other set in 2025. *Id.* at *5.

110. *See id.* at *3–5 (devoting a significant portion of the order to a summary of

in one of the fictional missions within the context of the historical military campaign: the 1989 Operation Just Cause, where U.S. military forces were sent to Panama in order to apprehend Noriega.¹¹¹

Instead of focusing on a single character or avatar's likeness, like the cases aforementioned, the court in *Noriega* reviewed the transformativeness of the entire "multi-faceted" game, citing the fact that Noriega's character appears in two of the eleven "missions" and is one of more than forty-five characters, including other historical figures.¹¹² Interestingly, the court cited the fact that the game developer devoted two years, invested \$100 million, and employed over 250 designers to produce the game, as further evidence that Activision's use of Noriega's likeness was "transformative."¹¹³ Moreover, the court highlighted the fact that players can never *assume* Noriega's character identity or control its movements; in other words, unlike the character depictions in *No Doubt*, *Keller* and *Hart*, the Noriega character is a static, or non-interactive, video game depiction.¹¹⁴ According to the court, however, the evidence presented compelled the conclusion that Noriega's depiction was not the "very sum and substance" of the work and that the multi-faceted game was a product of defendants' own expression.¹¹⁵ Similarly, in *Gravano v. Take-Two Interactive*,¹¹⁶ Lindsay Lohan sued the makers of *Grand Theft Auto V*, claiming that a character in the game, "Lacey Jonas," misappropriated Lohan's likeness. Although the court did not address the transformative use test, the court found the

the uncontroverted evidence which shows Noriega to be a notorious public figure, including his role in protecting drug traffickers, engaging in money laundering, and overturning election results).

111. Memorandum of Points and Auths. in Support of Defendants' Special Motion to Strike Plaintiffs Complaint Under the California Anti-SLAPP Statute CAL. CIV. CODE §§ 425.16, *et seq.*, at 5, *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149 (Cal. Super. Oct. 27, 2014).

112. *Noriega*, 2014 WL 5930149 at *5 (noting that the Noriega character appears in the two missions for only a matter of minutes, voices less than thirty lines, and that defendants do not use the Noriega character in any marketing or advertising of the game).

113. *Id.*

114. *See id.* at *3 (citing several undisputed facts, including the fact that "players of the game can never assume the Noriega character's identity, control its movements or experience gameplay through its eyes").

115. *See id.*

116. *Gravano v. Take-Two Interactive Software, Inc.*, 37 N.Y.S.3d 20, 22 n.2 (N.Y. App. Div. 2016).

creative elements in the game dispositive, ruling in favor of the game maker and holding that the “game’s unique story, characters, dialogue . . . render it a work of fiction and satire.”¹¹⁷ This case is worth highlighting because the “Lacey Jonas” character is also a static, non-interactive depiction, and the court’s analysis focused on the overall creative elements of the game as opposed to the narrow focus on the “Lacey Jonas” avatar.

The analytical scope of the transformative test by the *Noriega* court therefore represents a significant departure from previous right of publicity cases involving realistic depictions of individuals. As this discussion of previous video game right of publicity cases reveal, courts have myopically focused on the transformative nature of the individual avatars, irrespective of the creativity and transformative nature of the work as a whole. Yet the *Noriega* court’s analysis appears to mark a return to the holistic analytical framework originally outlined in *Comedy III*. However, what is distinguishable about the use of Noriega’s avatar centers on the degree of interactivity and control the user has over the avatar.

In the latest right of publicity case addressing realistic avatars in a video game, *Davis v. Electronic Arts, Inc.*, the court’s analysis reverts back to the narrow focus of the avatars and away from the holistic analysis of an expressive work as adopted in *Noriega* and *Comedy III*.¹¹⁸ In *Davis*, the Ninth Circuit revisited the issue of transformative use when former NFL players asserted claims for right of publicity against EA’s alleged use of their likenesses in *Madden NFL*.¹¹⁹ Although EA paid the licensing arm of the NFL Players Association to use current players’ likenesses, EA did not secure consent from former players that are featured on “historic teams.”¹²⁰ The

117. *Id.*

118. *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015).

119. *Id.*

120. *See id.* at 1176 (“For example, *Madden NFL* includes as a historic team the 1979 Los Angeles Rams that played in that year’s Super Bowl. Vince Ferragamo, a plaintiff in this action, was a quarterback on the 1979 Rams. He is Caucasian and was listed in the 1979 Rams media guide as a 26 year-old, six-foot three-inch, 207-pound third-year NFL player.”). The characteristics of the avatars in *Madden NFL* are identical to those found in *NCAA Football*. The court notes that while players on the historic teams are not identified by name or photograph, each avatar is described by his position, years in the league, height, weight, skin tone, and relative skill level in different aspects of the sport. *Id.*

court pointed out that like *NCAA Football*, *Madden NFL* replicates players' physical characteristics and allows users to manipulate the avatars in "the performance of the same activity for which they are known in real life—playing football for an NFL team."¹²¹ The Ninth Circuit then dismissed EA's argument that the court in *Keller* erred by focusing on whether the individual avatars were transformed, rather than the work as a whole: "[a]bsent 'intervening higher authority,' however, we are bound by the factually indistinguishable holding in *Keller*."¹²²

Like the depictions in *Keller*, *Hart*, and *No Doubt*, the verisimilitude of the individual avatars in *Davis* was a critical element in the court's decision to conclude that game designers had misappropriated plaintiffs' likeness. Yet, the realistic avatars of (infamous) public figures like Noriega and Lindsay Lohan have been found not to violate the right of publicity when an evaluation of the entire work is considered, as opposed to a narrow focus on a single avatar.¹²³ However, what is distinguishable about *No Doubt*, *Davis*, and its sports game progeny is the degree of control the user has over a realistic avatar. A user can virtually *embody* the avatar of quarterback Sam Keller or a No Doubt band member within an interactive platform. As opposed to a static character who appears in a few scenes as part of a game's storyline—such as Manuel Noriega in *Call of Duty: Black Ops II*—a user in *NCAA Football* can take control of an avatar's movements or manipulate band member avatars to play any song solo or alongside others in *Band Hero*. So the most critical distinction that sets these

121. *Id.* at 1178.

122. *Id.*

123. See *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149 (Cal. Super. Oct. 27, 2014); *Gravano v. Take-Two Interactive Software, Inc.*, 37 N.Y.S.3d 20, 22 n.2 (N.Y. App. Div. 2016) ("This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire." (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) for the proposition that video games, like protected books and movies, are entitled to First Amendment protection, before addressing the game's creative features as a whole)). *But see* *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758 (E.D. Mich. 2008) (addressing a right of publicity claim stemming from the use of a band's song in the video game *Guitar Hero Encore: Rock the 80s*). The court concluded that the work was expressive because it "allows players to customize their game play experience, contains large amounts of original artwork, and requires complex synchronization so that the audio and visual elements of the [g]ame line up with a player's manipulation of the controller." *Id.* at 766.

video game cases apart is the *control* a user has over another's identity or likeness.

B. Games that People Play: Subjects of Public Interest, Public Affairs, or Sports Accounts?

The First Amendment considerations in right of publicity cases are not limited just to the creative or expressive qualities of the work. Works that are connected to newsworthy and entertainment interests are also protected. The Restatement (Third) of Unfair Competition § 47 outlines exemptions to the misappropriation of one's name, likeness, or other indicia of identity that are used "for purposes of trade," including the use of one's identity for news reporting, entertainment, and works of fiction and nonfiction.¹²⁴ Moreover, many states that recognize the right in the common law or by statute include broad exemptions to liability beyond just news, including public affairs and even sports accounts.¹²⁵ Since several recent interactive game decisions (e.g., *Davis, Keller*) have addressed the public interest and public affairs defenses under California common law and statutory law, this Section will focus on California law in addressing the application of the public interest, public affairs, and sports account limitations to the interactive digital game context.¹²⁶

Under California's right of publicity statute, the use of another's name, voice, or likeness "in connection with any *news, public affairs, or sports broadcast or account*" is exempt

124. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (AM. LAW. INST. 1995).

125. See, e.g., CAL. CIV. CODE § 3344 (d) (2017) ("For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 314–15 (Cal. Ct. App. 2001) (noting that the public interest or newsworthiness defense has been construed broadly to protect the valid exercise of First Amendment rights); *Messenger v. Gruner + Jahr Printing and Publ'g*, 208 F.3d 122, 123 (2d Cir. 2001) (noting that New York courts have consistently held that right of publicity claims "do not apply in circumstances involving newsworthy material or material in the public interest").

126. While several other states incorporate similar First Amendment limitations vis-à-vis public interest, newsworthiness, or public affairs, this Section will primarily focus on the doctrinal limitations under California common law and statutory law.

from the statute's reach.¹²⁷ Although there is little caselaw directly on point, the common law "public interest" defense appears to closely resemble a "newsworthiness" exemption prescribed in the statutory right of publicity claim.¹²⁸ Several cases implicitly equate news with matters in the public interest.¹²⁹ However, under the statutory framework, "news" has been distinguished from "public affairs" or "sports account." In *Dora v. Frontline*, the appellate court articulated a bright line: "[w]e presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute."¹³⁰

Furthermore, the term "public affairs" was intended to mean something less important than news, such as information about interesting real-life occurrences and events that do not necessarily rise to the level of "newsworthy."¹³¹ For instance, in *Gionfriddo v. Major League Baseball*, retired professional baseball players alleged that Major League Baseball (MLB)

127. CAL. CIV. CODE § 3344(d) (emphasis added).

128. *Gionfriddo*, 114 Cal. Rptr. 2d at 313 ("The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press." (citing *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 443 (Cal. 1953))); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792 (Cal. Ct. App. 1993) ("Publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable."); see *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 350 (Cal. Ct. App. 1983) (holding that the public interest defense "extends to almost all reporting of recent events," as well as publications about "people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities"); see also *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010) (holding that the public interest defense is linked to the publication or reporting of newsworthy items).

129. See *Dora*, 18 Cal. Rptr. 2d at 794 (reviewing the *Eastwood* decision, which involved the former Civil Code § 3344, and the *National Enquirer*-defendant's argument that a story in its paper was "news" and therefore exempt by statute; and concluding that: "It appears that the court equated news with matters in the public interest, . . . a proposition we do not dispute"); *Eastwood*, 198 Cal. Rptr. at 349.

130. *Dora*, 18 Cal. Rptr. 2d at 794.

131. *Id.* The court further defines the scope of "public affairs," noting that it must be related to real-life occurrences, and "[a]s has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about things, people, and events that affect it." *Id.*

violated their rights of publicity by displaying “factual data concerning the players, their performance statistics, and verbal descriptions and video depictions of their play” during game broadcasts on MLB’s website and in videos documenting baseball’s history.¹³² Under the common law right of publicity, the court held that MLB was simply making historical facts available and that the “recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial public interest.”¹³³ In consideration of the sport’s “pervasive influence on our culture,” the court also found the challenged uses qualified as “public affairs” within the meaning of section 3344 of California’s statute.¹³⁴ Interestingly, the court did not categorize the challenged uses under a “sports account” exemption under section 3344, and instead attributed the uses as falling under the scope of “public affairs.” As to the scope of the “sports account” exemption, a recent federal court decision is informative to the present analysis.

In *Lightbourne v. Printroom, Inc.*, a former college football player filed a class action complaint against defendant Printroom, an online photo vendor, asserting violations of California’s common law and statutory rights of publicity for the unauthorized sale of the players’ images on defendant’s online photo stores.¹³⁵ There, the plaintiffs’ likenesses were sold as stand-alone images of the players by sport and year, but Printroom argued that the photos constituted “sports accounts” because they were taken during collegiate sporting events and therefore gave the viewer an account of what took place at the event.¹³⁶ However, the court held that because the players’ likenesses were not used “as part of a larger effort to convey information,” Printroom’s use did not satisfy section 3344(d)’s requirement that the “likenesses be used ‘in connection with’ a news, public affairs or sports *account*.”¹³⁷ Deductively, since

132. 114 Cal. Rptr. 2d 307, 314–15 (Cal. Ct. App. 2001).

133. *Id.* at 315.

134. *Id.* at 318–19.

135. No. SACV 13-876-JLS (RNBx), 2014 WL 12597108 (C.D. Cal. Sept. 8, 2014).

136. *Id.* at *1–3.

137. *Id.* at *3 (quoting CAL. CIV. CODE § 3344(d)). Moreover, the court noted that defendant’s argument that the photos gave the viewer “an account of what took place at a sporting event” was “at odds with case law defining ‘accounts’ in the context of Section 3344(d).” *Id.*

“sports account” is enumerated in addition to “news” under the statute, one’s likeness used in connection with a sports account would not need to be categorized as news. Thus, in order to qualify as a public affairs or sports account exemption, the use of one’s likeness must include more than just appropriation; it must also be connected to the *sharing or dissemination of information*.

It is hard to ignore the fact that the transformative use test has been adopted—with inconsistent results—as the dominant approach to evaluate realistic digital depictions. The survey of the relevant case law on the right of publicity in the video game context reveals that the scope of the analysis has shifted. The courts have migrated away from a holistic analysis of the work in favor of a narrow application, focusing primarily on the transformativeness of a single identity or avatar. Additional First Amendment protections have been lost in the shuffle, including adequate consideration of public interest, public affairs, and sports account exemptions to liability. The next Part unveils the assumptions precipitating the disparate treatment of the medium and the reluctance by the courts to grant adequate First Amendment protections to video games. Furthermore, the case is made that sports games at the center of the disputes in *Keller* and *Davis* have the characteristics to qualify as a sports or public affairs account.

III. THE MEDIUM IS THE MESSAGE: ART, AESTHETICS, AND FREE SPEECH LIMITATIONS

What other reasons could account for why realistic depictions in interactive digital gaming are being treated differently from traditional forms of speech, such as film or works of literature? Why do courts appear hesitant, if not reluctant, to conclude that interactive video games that emulate realism are “artistic,” or at least are a medium of expression deserving the same degree of protection as traditional media? Are they qualitatively different as a medium of expression? The late Supreme Court Justice Antonin Scalia found this endeavor of judging what is artistic impossible: “[I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada,

and art in the replication of a soup can.”¹³⁸ Furthermore, what has led courts to dismiss the medium as a platform able to address issues of public interest, public affairs, or even sports accounts—exempted uses that do not violate the right of publicity in several jurisdictions, including California? This Part uncovers the assumptions underlying the courts’ disparate treatment of interactive entertainment and the courts’ hesitancy to grant First Amendment protection to video games.

A. *Embodying a Realistic Avatar from a Natural Rights Perspective: Not Transformative?*

The video game cases discussed in Section II.A, reveal an inconsistent application of the transformative use test first outlined by the California Supreme Court in *Comedy III*.¹³⁹ Instead of an examination of the expressive work as a whole, courts recently have focused narrowly on the single avatar; if the game depicts a pop singer or athlete with realistic digital precision, the representation has been found to be insufficiently “transformative.” Although the court in *Comedy III* outlined a holistic examination of lithographs bearing the likenesses of a comedy act,¹⁴⁰ digital avatars that evoke realism are reviewed under a narrow lens of legal scrutiny.

From a qualitative perspective, recent interactive game decisions confirm that the user’s *embodiment* of the individual avatars triggers this narrow approach to the court’s analysis. Warren and Brandeis would perhaps find this degree of manipulation over one’s identity unconscionable, let alone beyond any reasonable parameters with “the right to be let alone.”¹⁴¹ A natural rights theory to one’s identity also suggests that this degree of manipulation and embodiment has impacted the direction of the court’s transformative analysis. Under a Lockean theory, the economic value of one’s identity should be attributed to the celebrity because one’s identity is inextricably tied to the self. According to Locke, one has property in one’s self, one owns “his own Person [and] nobody has any right to [it] but himself.”¹⁴² The moral basis for Locke’s Natural Rights

138. *Pope v. Illinois*, 481 U.S. 497, 504 (1987).

139. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

140. *See id.*

141. *See Warren & Brandeis, supra* note 7.

142. JOHN LOCKE, *THE TWO TREATISES OF CIVIL GOVERNMENT* 217 (A. Millar

theory is based not on the labor itself, but instead stems from the ownership one has in his or her self.¹⁴³ Therefore, one has a property right in her own person and, accordingly, in the labor of her body, including the right to exclude others from the possession of her body and to control the character of her labor.¹⁴⁴

Nothing evinces more complete relinquishment or appropriation of one's identity by another than for a user to control an avatar. As a right historically rooted in the right to privacy—"the right to be let alone"¹⁴⁵—an argument can be made that the embodiment of an avatar simulacrum, and the control afforded to users in interactive games, overly infringes on an individual's right to control how their identity is used and represented. The majority in *Hart* recognized the right of publicity's origins in privacy and its property interest orientation, asserting that the right "is to protect the property interest that an individual gains and enjoys in his identity."¹⁴⁶ However, this property rationale evokes a Lockean natural rights theory centered on the premise that an owner has the liberty to use her property ("identity" or "likeness") in any way she sees fit and the power to have others refrain from interfering with her property.¹⁴⁷ J. Thomas McCarthy contends that the "natural rights of property" justify the policy rationale behind the right of publicity, asserting that "nothing is so strongly intuited as the notion that my identity is *mine*—it is my property to control as I see fit."¹⁴⁸ Yet as one commentator

et. al. eds., 1764) (1689) (according to Locke, labor itself does not confer ownership rights, it is simply the means for conferring them).

143. *See id.*

144. *See id.*

145. *See* Warren & Brandeis, *supra* note 7, at 193.

146. *See* *Hart v. Elec. Arts., Inc.*, 717 F.3d 141, 151 (3d Cir. 2013).

147. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1550–52 (1993) (summarizing Lockean entitlements to property, including the liberty to consume the property and use it harmlessly, the power to transfer the property, and a right to exclude anyone whose entrance or interfering use she wishes to oppose); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989); *see also* A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 68–78 (1992) (explaining the principles behind Locke's theory of natural rights).

148. MCCARTHY, *supra* note 10, § 2:1; *see also* ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 34 (2009) (noting the differences between the rights of privacy and publicity, and contending that the right of publicity protects an "individual's

points out, even if celebrities play a role in creating the value of their identity, complete dominion over one's identity creates little, if any, incentive for the individual to develop her skills.¹⁴⁹

Irrespective of the economic or commercial appropriation rationales, a user's embodiment of an avatar of one's likeness in a non-commercial context overly disrupts the right to control one's identity, perhaps justifying the approach adopted by courts to focus narrowly on the single avatars and concluding that they are insufficiently transformative. Although an individual may not own the rights "to her own life story," the embodiment of one's likeness perhaps infringes too deeply into one's ability to control how her identity is used and shaped, even in a non-commercial or newsworthy context. Furthermore, this analytical pivot in the video game context also raises questions about the cautious approach courts have adopted when addressing First Amendment limitations and common law and statutory exemptions to the right of publicity in new mediums of speech, such as interactive gaming. The next section will further explore these issues.

B. Medium Bias: "Video Games Can Never Be Art"

In 1936, cultural critic Walter Benjamin wrote that the advent of new technologies, including film and photography, had transformed the way art was perceived.¹⁵⁰ According to Benjamin, human perception is determined by historical circumstances, and the effect of modernity and mechanical reproduction on art is a loss of "aura" or originality and authenticity: our ideas of art change with technology and reproducibility.¹⁵¹ A similar sentiment also drives the disparate treatment of interactive digital media when compared to traditional media modes of expression. Digital depictions in interactive media are perceived to lack an "aura" and digital depictions in games are viewed as mere reproducible realities that offer entertainment and sensory stimuli. Has the age of

persona").

149. See Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

150. See Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS (Hannah Arendt ed. 1969) (1935).

151. *Id.*

digital reproduction influenced the perception of this digital interactive medium?

In 2016, the Ninth Circuit reviewed Army Sergeant Jeffrey Sarver's lawsuit related to the Oscar-winning film *The Hurt Locker*, in which Sarver argued that the film's main character was based on his life and experience as a bomb disposal expert and that he did not consent to such use.¹⁵² The court ruled against Sarver, concluding that the film was fully protected by the First Amendment, "which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into *art*, be it articles, books, movies, or plays."¹⁵³ Interestingly, the Ninth Circuit never addressed the transformative use test, and instead analyzed *The Hurt Locker* as a protected work of art, created by artists who took "the raw materials" of Sarver's life and transformed them into a work of cinematic expression. Sarver's case is just a recent example of how fictionalized accounts of the lives of *real* individuals, including accounts completely speculative in nature, have been protected under the First Amendment, especially if the work informs or entertains the public through a traditional media platform.¹⁵⁴ Here, unlike in the interactive video game context, the entire work is evaluated, so why does the right of publicity yield to the First Amendment in this cinematic context but not to interactive digital games?

As some scholars have pointed out, the right to portray real individuals in traditional media has been reinforced by social policies centered on First Amendment principles.¹⁵⁵

152. Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016).

153. *Id.* at 905 (emphasis added). Although the Ninth Circuit cites *Comedy III* and references the transformative use test doctrine, the court declined to apply the defense to this case. *Id.* Instead, the court reviewed Sarver's right of publicity claim through an economic lens, concluding that *The Hurt Locker* was not speech proposing a commercial transaction, nor did Sarver "make the investment required to produce a performance of interest to the public." *Id.* (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977)).

154. *See id.* The Ninth Circuit concluded that the film was not speech proposing a commercial transaction, but artistic speech protected by the First Amendment. *See* *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 455 (Cal. 1979) (barring a right of publicity action based upon the unauthorized exhibition of a "fictionalized version" of Valentino's life on television, upon the conclusion that such right "expires upon the death of the person so protected"); *Hicks v. Casablanca Records & Fireworks*, 464 F. Supp. 426 (S.D.N.Y. 1978) (fictionalized account of an incident in Agatha Christie's life).

155. Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal*

Scholars Peter Felcher and Edward Rubin note that the primary principles center on the purpose of the portrayal: “If it serves an informative or cultural function, it will be immune from liability; if it serves no function but merely exploits the individual portrayed, immunity will not be granted.”¹⁵⁶ The authors categorize depictions that are primarily designed for artistic or entertainment purposes to include fictionalized history, motion pictures, stage, and television simulations of real events.¹⁵⁷ However, digital games can often serve both an informative and an entertainment function. While the Supreme Court has previously articulated that the basic principles of free speech do not vary with a new and different communication medium,¹⁵⁸ the disparate treatment of realistic depictions in the digital game context, as opposed to more traditional forms of expression (e.g., films, books), reflect a medium bias that discounts the many expressive facets of the medium. Courts are therefore reluctant to provide interactive digital games with the same degree of First Amendment deference found in traditional mediums of expression, such as film or literature. As Circuit Judge Ambro (in dissent) noted in *Hart*, “applying the Transformative Use Test in the manner done by my colleagues creates a medium-specific metric that provides less protection to video games than other expressive works.”¹⁵⁹

One theory that explains this disparate treatment is premised in the notion that interactive digital games lack artistry or creativity—that games are not an *art*, but rather a *craft*, centered on skill. Granted, the distinction between the two is often a slippery one at best. Randall Bezanson underscores the difficulty that arises when courts are tasked with judging the quality of “art” with his case study of a

of Real People by the Media, 88 YALE L.J. 1577, 1596 (1979).

156. *Id.* at 1596. According to the authors, these two principles account for court decisions regarding media portrayals more consistently than any rules that can be stated solely in terms of the rights of privacy and publicity. *Id.*

157. *See id.* at 1598 (“The First Amendment protection granted to such works may be based on both their informative and cultural functions. To some extent, they share with news the function of informing the public about real people and events. Such works, however, also constitute an important part of the intellectual and creative activity that our society values very highly.”).

158. *See Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

159. *Hart v. Elec. Arts., Inc.*, 717 F.3d 141, 174 (3d Cir. 2013) (Ambro, J., dissenting).

currency artist's detailed copies of currency drawn from the hand of an individual: Is it a work of art or just skill?¹⁶⁰ Some of Roy Lichtenstein's most famous artwork includes works of appropriation: close copies, but not exact reproductions, of comic book panels. What makes the late film director Stanley Kubrick an "artist" or *auteur*,¹⁶¹ but film director Peter Berg merely a "craftsman"? Moreover, for a work to be considered "art," does the work need to consist of more than just "skill and beauty"? According to Bezanson, "[a]rt produces re-representation; it fosters interaction between the sense and the sensible, faith and reason, sensuousness and cognition. Art produces truth, in the sense that it produces new ways of seeing and believing and feeling."¹⁶² Works of art therefore encompass more than skill and aesthetic pleasure; they create transformative experiences and fresh ways to capture and express life. Ultimately, however, it is perhaps social and cultural constructs that determine whether a particular medium is deemed artistic and deserving of the full scope of First Amendment protection. As Bezanson notes, courts have adopted a cultural and political view of art, grounded in a class structure of economic and social order: "[T]he question 'What is art' is, surely, a culturally grounded one, and the answer, too, is often culture and time specific."¹⁶³

If artistic expression is determined by social and cultural norms and characteristics, the principles that underpin the degree of copyright protection to the video game medium is perhaps informative to this analysis.¹⁶⁴ Video games have been granted copyright protection under U.S. law, but the protection is largely limited to the computer code and the audiovisual

160. RANDALL P. BEZANSON, ART AND FREEDOM OF SPEECH, 261–75 (2009). The author analyzes the case of J.S.G. Boggs, a currency artist who has been charged numerous times for the crime of counterfeiting. *Id.* Boggs's work elicits questions as to whether his rendition of bills is merely mechanical reproduction—a skill—or a representation of art.

161. See *supra* note 5 and accompanying text.

162. BEZANSON, *supra* note 160, at 257.

163. *Id.* at 270.

164. The issue of copyright preemption and the right of publicity is one that goes beyond the scope of this Article. For more scholarship on these issues, see Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002); Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165 (2010); Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157 (2015).

representations of that code.¹⁶⁵ While elements of original expression may be protected, general ideas are not, and video games incorporate both expression and ideas, including game rules and mechanics.¹⁶⁶ Thus, many aspects of a video game, including graphical depictions of characters and background images, are protectable in piecemeal fashion—separate from the work as a whole.¹⁶⁷ Perhaps the limited copyright protection for video game design reflects the reluctance of courts to find such work, as a whole, “creative,” and that game design lacks authorial signature vis-à-vis *auteur* theory found in traditional media platforms like motion pictures. Greg Lastowka notes that the interactive dynamic of video games has historically posed problems for copyright law and contends that from the perspective of copyright law, this interactive nature makes players like authors, and therefore, undermines the authorial status of the game creator.¹⁶⁸ Today’s interactive digital games further complicate the degree of authorship attributed to games and their expressive quality because the games include rich detail of characters, original music scores, and intricate story lines that increasingly cloud the aesthetic distinctions between interactive games and traditional media.¹⁶⁹

According to Lastowka, because of the increased degree of

165. See 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.18[H][3][b] (2015) (“[O]ne who copies a video game through copying its copyrighted computer program has clearly engaged in copyright infringement. . . . [T]he display of images on a video game screen is itself separately copyrightable as an audiovisual work.” (emphasis omitted)).

166. *Id.* § 2.18[H][3][a].

167. See Christopher Lunsford, *Drawing a Line Between Idea and Expression in Videogame Copyright: The Evolution of Substantial Similarity for Videogame Clones*, 18 INTELL. PROP. L. BULL. 87, 99 (2013).

168. See Greg Lastowka, *Copyright Law and Video Games: A Brief History of an Interactive Medium*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 495 (Matthew David & Debora Halbert eds., 2015).

169. *Id.* at 515 (“With some notable exceptions, like *Tetris*, very few of today’s most popular games are characterized by the geometric simplicity of *Pong* or *Breakout*. While simple games, such as *Triple Town* and *Tetris*, are still popular, many games today have very rich and detailed creative assets and stories, making it that much easier for courts, like the Supreme Court in *Brown*, to narratologically equate video games with motion pictures.”); see also Robert VerBruggen, *Games People Play*, 25 ACAD. QUEST 552, 556 (2012) (“Another side effect of technological developments is that today’s video games are capable of telling a story—not the primitive tale of Mario trying to rescue his princess, and not the long-winded, text-based tales of old computer games, but truly engrossing stories, often advanced through cinematic cutscenes.”).

interactivity found in modern games, players who author game modifications and build elaborate avatars, objects, and environments are doing more than just choosing a pre-authored sequence of events established by the game's code.¹⁷⁰ They are creating individual works of authorship as part of the video game's performance. So how could such thin copyright protection of video games inform recent right of publicity cases that include realistic depictions? The judicial short shrift to the creative elements of the video game—the work as a whole—for purposes of transformativeness in right of publicity cases appears to mirror the thin copyright protections afforded to game designs. The focus on individual avatars, as opposed to the work holistically, aligns with how courts have historically attributed copyright protection to individual expressive elements (e.g., source code) in a game separate from the game design as a whole. Interactive authorship in digital games also poses a disruptive element in determining authorial design and the scope of copyright protection, leaving courts to perceive the medium as insufficiently artistic when there is no discernible author. As today's most immersive entertainment medium, interactive games are vehicles for expression on two fronts: the authoritative signature of the designer and the user or game player who can create his or her own narrative. However, as a medium without the static or fixed narrative structures found in traditional media, courts are more inclined to find interactive digital games to be no greater than the sum of their parts in right of publicity claims.

C. *Interactive Historical Fiction: Are Interactive Entertainment and Public Affairs / Sports Accounts Mutually Exclusive?*

Many of today's Hollywood films can be categorized as docudramas or dramas based on fact.¹⁷¹ Such films include historical information that is expressed in an entertaining way,

170. Lastowka, *supra* note 168, at 518. Lastowka further notes that players create works of authorship that directly incorporate and depend upon the software of the video game, either with or without the permission of the game developer. *Id.* “[M]any players today use third-party software and technologies to copy and reproduce particular elements of video games.” *Id.* at 520.

171. See Geoffrey Cowan, *The Legal and Ethical Limitations of Factual Misrepresentation*, 560 THE ANNALS OF THE AM. ACAD. OF POLI. AND SOCIAL SCI. 155 (1998).

fusing the elements of entertainment and fact-based representation, and are fully protected under the First Amendment. But while films and television dramas are provided broad free speech protection, recent court decisions have dismissed the historical-informational qualities of video games—a medium that also provides both entertainment and factual information—that would qualify its use of another’s likeness as a public affairs or sports account.

In *Davis*, as in *Keller*, EA argued that the plaintiffs’ right of publicity claims were barred by both the common law public interest defense and the statutory “public affairs” exemption under California Civil Code Section 3344(d).¹⁷² Citing the majority’s rejection of EA’s reliance on these defenses in *Keller*, the court in *Davis* found *Madden NFL* to be indistinguishable from *NCAA Football*, noting “it is a game, not a reference source” or a “publication of facts” about professional football.¹⁷³ Furthermore, as the majority in *Keller* acknowledged, while there has been some legal guidance as to which types of subject matter fall under “public interest” or “public affairs,” there is much less guidance as to when the communication constitutes a publication or reporting.¹⁷⁴ Both the *Davis* and *Keller* courts dismissed the historical-informational aspects that have been interwoven with the entertainment and interactive qualities of the game, asserting that the games are not a “means for obtaining information about real-world football games.”¹⁷⁵ Yet Judge Thomas, in his dissent in *Keller*, argued that *NCAA Football* is afforded additional protection under the First

172. See *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172, 1178–79 (9th Cir. 2015) (“Under the common law public interest defense ‘no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it’ [citing *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2009)] Under the statutory ‘public affairs’ exemption, the right of publicity recognized in California Civil Code § 3344(a) does not apply to the ‘use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account.’ Cal. Civ. Code §3344(d).”).

173. *Id.* at 1179; *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268, 1283 (9th Cir. 2013) (“EA’s video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games. . . . Put simply, EA’s interactive game is not a publication of facts about college football; it is a game, not a reference source.”).

174. See *Keller*, 724 F.3d at 1282.

175. See *Davis*, 775 F.3d at 1179 (“It ‘is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games.’” (quoting *Keller*, 724 F.3d at 1283)).

Amendment “because it involves a subject of substantial public interest: collegiate football,” and since this subject is a matter of public interest, “the use of the images of athletes is entitled to constitutional protection, even if profits are involved.”¹⁷⁶

However, even if the players’ likenesses used in games such as those found in *Keller* and *Davis* do not rise to the level of “news,” their use should qualify as a sports or public affairs account. These games provide users with more than just interactive entertainment and player ratings of actual players. Like the challenged uses of the players’ depictions in videos and websites in *Gionfriddo*, the challenged uses with these interactive works impart historical information and address public issues in conjunction with their role-playing function. For example, in *NCAA Football*, users can take part in the simulated process of student athlete recruitment and gain insight into student athlete daily life—all interlaced with an entertainment dynamic involving interactivity.¹⁷⁷ *Madden NFL* also incorporates many informative elements interwoven with its game playing, including an “NFL Greats” roster and a Franchise Mode where players can simulate the management experience of an NFL “front office” and gain a greater understanding of the free agency process.¹⁷⁸ Although the challenged uses in *Gionfriddo* included actual depictions of players, the games here, as interactive historical fiction, showcase digital depictions of actual players, past and present, on historical teams—that is factual data not tied to an advertisement or a “message to buy,” but instead encompassing mere bits of football history, in which there is great public interest at both the collegiate and professional levels.

The sophistication of today’s games is not limited just to their technology; interactive games employ sophisticated narratives and scripted sequences. By exploiting the rich detail

176. *Keller*, 724 F.3d at 1284 (citing *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997)).

177. *Id.* at 1285–86 (“At its essence, EA’s *NCAA Football* is a work of interactive historical fiction. Although the game changes from year to year, its most popular features predominantly involve role-playing by the gamer . . . The virtual player decides which position he would like to play, then participates in a series of ‘tryouts’ . . . The player chooses among the colleges, then assumes the role of a college football player. He also selects a major, the amount of time he wishes to spend on social activities, and practice—all of which may affect the virtual player’s performance.”).

178. See *Video Game: Madden NFL 16* (Electronic Arts 2015).

and cinematic quality of today's interactive media, many video games are designed to immerse users in a historic context, be it cityscapes, military battles, or sports games, that can also serve to inform users about historical accounts. Video game author Robert VerBruggen contends, "many video games impart knowledge about the world and history—for example, the *Assassin's Creed* series introduces players to historical figures (including Leonardo Da Vinci) via a Dan Brown-style conspiracy story, and many strategy games are based on historical conflicts."¹⁷⁹ The cinematic qualities and linearity of an interactive game like *Assassin's Creed* are compelling. While users do control the movements of game characters, many sequences resemble scenes from films; users push a button and watch a cinematic cut scene unfold. It is *not* a coincidence that so many of today's movies are based on interactive games: the games are the original source material—many of which are immersed in historical fiction. In sum, today's interactive game medium is morphing more toward an interactive movie medium that can convey a large breadth of information, and the legal implications, including First Amendment limitations and statutory exemptions, need to be re-examined and appropriately applied in order to properly balance proprietary rights with creative and informative expression.

*D. Harmonizing an Effective Approach to the Right of
Publicity in Interactive Digital Gaming*

Once a medium like digital gaming or other interactive entertainment is categorized or perceived as mere craft or "low art," the expressive elements in the work are undoubtedly (and perhaps unfairly) discounted. This same sentiment has captured the logic of several court decisions and has led to inconsistent approaches to right of publicity claims in interactive entertainment media. This has resulted in conditions that support greater individual property rights to one's likeness or identity, including the embodiment of a realistic avatar, as opposed to a holistic evaluation of the "game as a whole." In the absence of U.S. Supreme Court guidance on the issue, a uniform approach to the right of publicity needs to be adopted, and this Section offers a balanced approach that

179. VerBruggen, *supra* note 169.

harmonizes individual property rights in one's identity and likeness with First Amendment principles that protect expressive activity, including realistic depictions in digital gaming.

Since the transformative use test has been widely adopted and remains the dominant approach,¹⁸⁰ courts should therefore adopt (or return to) the holistic framework of the transformative work test articulated by the California Supreme Court in *Comedy III*. This approach strikes an appropriate balance between First Amendment considerations and individual property right concerns. It is also focused on whether the speaker has added material beyond just the "likeness of the speaker"¹⁸¹ and whether the work—in the aggregate—has been transformed. So when courts review right of publicity claims in digital gaming, courts should return to the central question: is the work as a whole predominated by transformative elements? The crux of the analysis should hinge on a *holistic* examination of whether the creative elements of the work in question predominate over commercially imitative or realistic depictions.¹⁸² The focus of analysis should not just target or be narrowly limited to the individual persona that is depicted (as in *Hart* and *Keller*); rather, the analysis should measure the creative elements of the video game as a whole in order to determine if it is "transformative."¹⁸³

Courts should employ a sliding scale to the factors outlined

180. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (citing a long line of cases that have that adopted the transformative use test); see also *supra* Section II.B.

181. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

182. See *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 410 (Cal. Ct. App. 2011) (noting that "even literal reproductions of celebrities may be 'transformed' into expressive works based on the context into which the celebrity image is placed").

183. The *Comedy III* court articulated five considerations to determine whether transformation occurred: (1) the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) the work is primarily the defendant's own expression if the expression is something other than the likeness of the celebrity; (3) the literal and imitative or creative elements predominate in the work; (4) the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) an artist's skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity's fame. 21 P.3d. at 809–10.

in *Comedy III*¹⁸⁴ when examining an imitative depiction. For instance, the greater the prominence of one's persona in a game with few creative elements, the less likely it is just a "raw material" to be synthesized and vice versa. To focus on just the realistic depictions or persona of individuals, whether or not incidental to a body of work, not only treats the analysis myopically, but also shortchanges the expressive qualities and the First Amendment protection that digital gaming should be afforded. Perhaps the courts' unwillingness to afford the medium the same First Amendment deference as docudrama films and literature reflects the medium bias¹⁸⁵ addressed above: the less "artistic" a medium is perceived, the less deference afforded to the creative qualities of the work, and the less likelihood for transformativeness.

Furthermore, the "public interest" exemption to liability should be construed more liberally instead of limiting protection to speech categorized as "newsworthy" or to mediums that function solely to report or publish information. While the scope of common law or statutory exemptions pursuant to the public interest is a state-specific matter, where such exemptions are recognized (such as California) courts should incorporate common law and statutory exemptions broadly when there is a strong nexus between an individual's persona, name, or likeness, and a matter of significant public interest. States like California interpret the public interest exemptions broadly, to include not only news, but also "public affairs" and "sports accounts," yet some courts have interpreted the public interest exemptions narrowly, to include only reporting or publishing of factual data.¹⁸⁶ Construing the public interest exemptions so narrowly confines the use of individual personas and names to media that is designed solely to "convey information"¹⁸⁷ and overly limits First Amendment

184. *See id.*

185. *See supra* Section II.B.

186. *See Keller v. Elec. Arts, Inc.*, 724 F.3d 1268, 1283 (9th Cir. 2013).

187. *See Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001) (recognizing that the First Amendment must "be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press"); *Lightbourne v. Printroom, Inc.*, No. SACV 13-876-JLS (RNBx), 2014 WL 12597108 at *3 (C.D. Cal. Sept. 8, 2014) (holding that in order for California's "news, public affairs, or sports account" exemptions to apply, the likenesses must be used "as part of a larger effort to convey information").

protection for the creative activity found in digital gaming—which often provides both entertainment and historical information—much like today’s Hollywood docudramas.¹⁸⁸

As Judge Thomas noted in *Keller*, the game *NCAA Football* involves the game of college football, a subject of “substantial public interest,” and is “a work of interactive historical fiction,” interlacing creative elements and historical data in an interactive entertainment medium.¹⁸⁹ Much of the information used in “interactive historical fiction” games like *NCAA Football* also include information readily available to the public, a use protected by the First Amendment.¹⁹⁰ While the games cited throughout this Article are designed to provide entertainment, as the Eighth Circuit in *C.B.C.* noted, speech that entertains, like speech that informs, is protected by the First Amendment because the line between the informing and the entertaining is too elusive.¹⁹¹ Courts should recognize that the digital gaming medium can serve to entertain while providing historical information on subjects of significant public interest and public affairs, and the common law and statutory exemptions should not be interpreted to hold them to be mutually exclusive.

CONCLUSION

Recent court decisions deciding the fate of today’s right of publicity controversies in interactive media will likely have a profound impact on future iterations of the medium, including augmented and virtual reality. However, recent court decisions reveal a judicial reluctance to recognize interactive digital games as anything more than mere games that lack the qualities attributed to traditional media to be able to comment on public affairs, serve as a sports account, or to be categorized

188. Films like *The Express* (2008) (a Hollywood “biopic” on former Syracuse football player Ernie Davis, the nation’s first black Heisman winner) or *Moneyball* (2011) (a sports docudrama that recounts the 2002 Oakland Athletics’s unorthodox strategies to field a competitive team) offer content “based on a true story” but packaged as cinematic entertainment, with factual distortions and fictional elements throughout the work.

189. *Keller*, 724 F.3d at 1284–85.

190. See *C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d 818 (8th Cir. 2007) (holding that a fantasy baseball game company’s use of players’ information readily available to the public is protected by the First Amendment).

191. *Id.* at 823.

as historical fiction. Whether this unwillingness to apply common law and statutory exemptions is limited by the genre (e.g., sports) or applied to the entire medium has yet to be answered. Perhaps interactive digital games and the next generation of augmented and virtual reality are just subjects beholden to modern cultural conditions that prescribes what art is: “a reflection of valued skills and aesthetic experiences given special stature through the norms and characteristics of a specific culture—a reflection of relationships of primary values and power and social organization.”¹⁹² For now, several courts have determined that the medium is more *craft* than *art*, more *game* than *reference or information source*.

Moreover, recent court decisions have also failed to satisfactorily account for common law “public interest” defenses and statutory exemptions to right of publicity claims. Exemptions for “public affairs” or “sports accounts” have been given little consideration with interactive entertainment, even though, as this article has argued, many interactive digital games offer more than just realistic depictions, but also address historical facts and public issues as part of their entertainment dynamic. While it remains to be seen whether the entire interactive medium or just the sports game genre will be treated as a platform incapable of addressing issues of public interest or public affairs, recent cases provide little confidence that a public interest defense will prove fruitful for similar interactive entertainment.

The disparate treatment of interactive entertainment outlined above reveals a failure to adopt a consistent approach to the right of publicity and to adequately balance free speech and public interest concerns to a medium deserving of fair First Amendment consideration. Further guidance by the U.S. Supreme Court is needed to address the First Amendment limitations to right of publicity claims. Alternatively, lower courts could adequately acknowledge the creativity and expressive qualities of the medium. Until then, however, the current state of the right of publicity doctrine applied to interactive digital entertainment poses a significant danger to expressive activity in modern and emerging interactive technologies, leaving the creative industries in a state of uncertainty.

192. BEZANSON, *supra* note 160, at 269.