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Games Are Not Coffee Mugs: Games and the Right of Publicity, 29 Santa Clara Computer & High Tech. L.J. 1 (2012)

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ARTICLES

GAMES ARE NOT COFFEE MUGS: GAMES AND THE RIGHT OF PUBLICITY*

William K. Ford† and Raizel Liebler††

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I. INTRODUCTION

Are games more like coffee mugs, posters, and T-shirts, or are they more like books, magazines, and films? For purposes of the right of publicity, the answer matters. The critical question is whether games should be treated as merchandise or as expression. Three classic judicial decisions, decided in 1967, 1970, and 1973, held that the defendants needed permission to use the plaintiffs' names in their board games.¹ These decisions judicially confirmed that games are merchandise, not something equivalent to more traditional media of expression.² As merchandise, games are not like books; instead, they are akin to celebrity-embossed coffee mugs. To borrow a British term, games are "mere image carriers."³ Although the last of these three judicial decisions disclaimed any intent of offering a "hard and fast rule,"⁴ three consecutive losses in three different courts offered a plausible basis for predicting how future courts would respond to similar claims involving games.⁵ These three decisions confirmed the "settled order of things": a license is required to use someone's name or likeness (or identity) in a game.⁶ The leading treatise on the right of publicity⁷ and the *Restatement (Third) of Unfair Competition*⁸ subsequently endorsed the results in these cases.

1. Uhlender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970); Palmer v. Schonhorn Enters., Inc., 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); Rosemont Enters., Inc. v. Urban Sys., Inc., 340 N.Y.S.2d 144 (Sup. Ct. 1973), *aff'd as modified*, 345 N.Y.S.2d 17 (App. Div. 1973).

2. While the use of *media* as a singular noun is now widely accepted, the use of *mediums* as the plural of *medium* is not, unfortunately. See BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 531 (3d ed. 2009).

3. See GILLIAN BLACK, PUBLICITY RIGHTS AND IMAGE: EXPLOITATION AND LEGAL CONTROL 37 (2011).

4. *Rosemont Enters.*, 340 N.Y.S.2d at 147.

5. See, e.g., 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 7:26 (2d ed. 2012) ("The cases have held that unpermitted use of identity in a board game is an infringement of the right of publicity and is not immunized by First Amendment free speech considerations.").

6. Petition for a Writ of Certiorari at 8, Major League Baseball Advanced Media v. C.B.C. Distrib. and Mktg., Inc., 553 U.S. 1090 (2008) (No. 07-1099), 2008 WL 515858.

7. 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 7:30 (2d ed. 2009) ("I feel that the cases involving the unpermitted use of the identities of nonpolitical celebrities are correctly decided.").

8. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmts. b, c, and Reporter's Notes to cmt. b (1995).

In 2007 the United States Court of Appeals for the Eighth Circuit upset the settled order of things. In *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media*,⁹ the Eighth Circuit held that the use of professional baseball players' names and statistics in fantasy baseball games is protected by the First Amendment, the right of publicity notwithstanding.¹⁰ Some courts are resisting further erosions of the right of publicity.¹¹ The issue remains substantially unsettled with multiple courts now considering whether permission is needed to use the identities of athletes in video games.¹²

We argue that the rule produced by the three classic cases is an anachronism. The licensing custom created—or at least reinforced—by these decisions should carry no weight. These cases were questionable when decided. They are even more so now.

The gaming medium has evolved significantly over the past four decades, calling into question the longstanding treatment of games for purposes of the right of publicity. One early case described the defendant's game as a mere "commodity familiar to us all," "an entertaining game of chance, the outcome of which is determined by maneuvering tokens on a game board by the throw of the dice."¹³ Until recently, the leading treatise, McCarthy's *The Rights of*

9. *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

10. *Id.* at 824.

11. See *Davis v. Elec. Arts, Inc.*, No. 10-3328, 2012 WL 3860819 (N.D. Cal. Mar. 29, 2012); *Keller v. Elec. Arts, Inc.*, No. 09-1967, 2010 U.S. Dist. LEXIS 10719, at *13-18, *21-22 (N.D. Cal. Feb. 8, 2010); *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018, 1018 (Ct. App. 2011).

12. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011); Notice of Appeal, *Brown v. Elec. Arts, Inc.*, No. 09-1598 (C.D. Cal. Oct. 22, 2009); Class Action Complaint and Demand for Jury Trial, *Bishop v. Elec. Arts, Inc.*, No. 09-4128 (N.D. Cal. Sept. 4, 2009); Class Action Complaint and Demand for Jury Trial, *Keller v. Elec. Arts, Inc.*, No. 09-1967 (N.D. Cal. May 5, 2009). *Keller* and *Bishop* are among numerous consolidated cases pending in the Northern District of California that include both right of publicity and antitrust claims. See Order Consolidating Cases, Addressing Discovery Matters, Modifying Case Schedule, and Requiring Parties to Provide an Estimate of the Length of Trial, In re NCAA Student-Athlete Name & Likeness Licensing Litig., Nos. 09-1967, 10-0632, 11-0388, 11-4938, 2012 U.S. Dist. LEXIS 70631 (N.D. Cal. May 21, 2012); Second Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. 09-1967 (N.D. Cal. May 16, 2011); Order Granting Plaintiffs Samuel Michael Keller's and Edward C. O'Bannon, Jr.'s Joint Motion to Consolidate Actions, *Keller v. Elec. Arts, Inc.*, No. 09-1967 (N.D. Cal. Jan. 15, 2010).

13. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973), *aff'd as modified*, 345 N.Y.S.2d 17 (App. Div. 1973).

Publicity and Privacy, agreed. McCarthy suggested that commercially produced games are largely unexpressive and mostly childish.¹⁴ *Chutes & Ladders* and *Candy Land* are the models for this understanding of the medium.¹⁵ Tedious, uncreative games marketed to children may not evoke much First Amendment sympathy against right of publicity claims, but since the three cases were decided in the late 1960s and early 1970s, several categories of commercial games have become significant, including historical wargames, role-playing games, video games, Eurogames,¹⁶ and other “hobby” games. Games in these categories do not constitute a few odd counter-examples to the same well-known games seen on retail shelves year after year, but many *thousands* of counter-examples. And unlike outmoded stereotypes of games, adults play these games too.

These games communicate ideas, allowing players to interact with fiction and non-fiction, fantasy and history. Game designer Jane McGonigal thinks games can change the world.¹⁷ Her claim is unlikely to have ever been made about coffee mugs, but one need not go as far as McGonigal to recognize that games are a significant medium of expression. The Supreme Court’s recent decision in *Brown v. Entertainment Merchants Association* recognized the expressive similarities of video games to books, plays, and movies.¹⁸ Arguably, *Brown* moved at least video games out of the merchandise category and into the same category as more traditional media of expression.¹⁹ Games in general, however, are ready to be considered alongside other expressive works. While it is possible for a particular

14. In older editions of his treatise, McCarthy noted the existence of some political games, but he emphasized “childhood board games, puzzles, card games, and the like . . .” 2 MCCARTHY (2009), *supra* note 7, § 7:30. See also J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 7.7[D] (1993).

15. See James Ernest, *Candy Land*, in FAMILY GAMES: THE 100 BEST 45, 45 (James Lowder ed., 2010) (“Grown-ups, especially gamers, love to hate *Candy Land*. The game is frequently invoked as a prime example of a mindless, terrible design.”).

16. The less familiar category of Eurogames is more fully described in Part IV.A.3.

17. JANE MCGONIGAL, REALITY IS BROKEN: WHY GAMES MAKE US BETTER AND HOW THEY CAN CHANGE THE WORLD (2011). See also Jane McGonigal, *Gaming Can Make a Better World*, TED (Feb. 2010), http://www.ted.com/talks/jane_mcgonigal_gaming_can_make_a_better_world.html.

18. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

19. Some sources very casually treat even video games as merchandise. See generally Malla Pollack, *Litigating the Right of Publicity: Your Client’s Face Was on the News, Now It’s on T-Shirts and Video Games*, 119 AM. JUR. TRIALS 343 (2011).

game to be a mere image or identity carrier, games are often much more. For purposes of the right of publicity, games are not like coffee mugs and should not be treated as such.

II. BACKGROUND

A. *Origins of the Right of Publicity*

The standard account of the right of publicity begins with Samuel Warren and Louis Brandeis' 1890 article in the *Harvard Law Review*, "The Right to Privacy."²⁰ Warren and Brandeis were worried about changes in the newspaper business and claimed that these changes led to the press exceeding "the obvious bounds of propriety and of decency" by reporting the private details of peoples' lives, details with no connection to any legitimate public interest.²¹ They noted that developments in photography led to the unauthorized publication of images of private persons.²² They claimed the proliferation of gossip lowers social standards and crowds out coverage of more important matters.²³ In response to these problems, Warren and Brandeis argued that a "right to be let alone" or a *right of privacy* could be distilled from the case law to protect people from the publication of private matters with no public relevance.²⁴ Much of Warren and Brandeis' article was a "strained and historically sterile reading of a single decision,"²⁵ but in taking this approach, they found a judicial hook for courts to provide some protection for privacy, beyond that already provided under property and contract law.²⁶ There

20. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). An article published earlier that same year was much more eloquent on this topic, but it was not directed to the courts. See E.L. Godkin, *The Rights of the Citizen: IV.—To His Own Reputation*, SCRIBNER'S MAG., July 1890, at 58, 59.

21. Warren & Brandeis, *supra* note 20, at 195-96.

22. *Id.* at 195.

23. *Id.* at 196.

24. *Id.* at 193, 206.

25. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 655 (1991). See also Herbert Spencer Hadley, *The Right to Privacy*, 3 NW. L. REV. 1, 1 (1894) ("The arguments advanced [by Warren and Brandeis] . . . were largely based upon certain *dicta* of Sir Knight Bruce in the celebrated case, *Prince Albert v. Strange*.").

26. Post, *supra* note 25, at 648 ("Basically, recognition of the right to privacy means that the law will take cognizance of an injury, even though no right of property or contract may be involved and even though the damages resulting are exclusively those of mental anguish.")

were limits, however. Among the most important limitations, Warren and Brandeis said, “The right to privacy does not prohibit any publication of matter which is of public or general interest.”²⁷ They also said the right does not apply to facts individuals publish about themselves or consent to have published about themselves.²⁸

Warren and Brandeis’ article was a success. Multiple courts referenced their article.²⁹ Although the New York Court of Appeals rejected their argument,³⁰ other courts accepted it.³¹ As evidenced by legislative enactments in California (1899)³² and New York (1903),³³ Warren and Brandeis likely tapped into a wider public sympathy to place some restrictions on the press. Courts, however, still needed to extract the right of publicity from the right of privacy. The critical step occurred when courts acknowledged that some appropriations of a person’s identity are not offensive to a person’s privacy interests, but instead to a person’s economic interests.

In 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,³⁴ the United States Court of Appeals for the Second Circuit explicitly recognized that many famous people are more concerned about controlling their publicity than protecting their privacy.³⁵ Professional baseball players granted Haelan Laboratories an exclusive right to use their photographs on baseball cards marketed with chewing gum.³⁶ Haelan claimed Topps Chewing Gum infringed

(quoting *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 299 (1952))).

27. Warren & Brandeis, *supra* note 20, at 214.

28. *Id.* at 218.

29. See, e.g., *Smith v. Doss*, 37 So. 2d 118, 120 (Ala. 1948) (citing Warren & Brandeis, *supra* note 20); *Cason v. Baskin*, 30 So. 2d 635, 638 (Fla. 1947) (en banc) (same); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 74 (Ga. 1905) (same); *Brents v. Morgan*, 299 S.W. 967, 970 (Ky. 1927) (same); *Themo v. New England Newspaper Publ’g Co.*, 27 N.E.2d 753, 753 (Mass. 1940) (same); *Schuyler v. Curtis*, 15 N.Y.S. 787, 788 (Sup. Ct. 1891) (same); *Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 384 (Sup. Ct. 1937) (same).

30. See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

31. See, e.g., *Cason v. Baskin*, 20 So. 2d 243, 250-52 (Fla. 1944) (en banc); *Pavesich*, 50 S.E. at 74, 77.

32. See An Act of Feb. 23, 1899, 1899 Cal. Stat. 28 (codified at CAL. PENAL CODE § 258 (West 1899) (repealed 1915)) (restricting the publication of portraits and caricatures).

33. See An Act of Apr. 6, 1903, 1903 N.Y. Laws 308 (restricting the unauthorized use of the name or picture of any person for the purposes of trade).

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

35. *Id.* at 869.

36. *Id.* at 867.

on its exclusive rights when Topps produced competing baseball cards to sell with its gum.³⁷ New York law controlled, but New York's statutory right of privacy could not be assigned to a third party.³⁸ If players could not assign their rights to Haelan, then Haelan could not claim an injury against Topps.³⁹

In *Haelan*, Judge Jerome Frank's opinion for the court recognized that many famous people are not trying to maintain private lives free of publicity; publicity usually does not cause these people any mental distress.⁴⁰ Although these people want publicity, they want to be paid for the public uses of their names and likenesses.⁴¹ Judge Frank noted that celebrities seek to receive money for "authorizing advertisements,"⁴² but celebrities will not have much luck licensing their identities unless they have the right to prevent unauthorized uses.⁴³ In a prediction that proved inaccurate,⁴⁴ Judge Frank said New York common law recognized an assignable right outside of the New York's Civil Rights Law, one that "might be called a 'right of publicity.'"⁴⁵

Haelan not only provided the name for the right of publicity, it also treated baseball cards as merchandise rather than as expression.⁴⁶ Judge Frank's opinion actually described the case largely in terms of advertising,⁴⁷ suggesting the court viewed baseball cards as secondary

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 868.

41. *Id.*

42. *Id.*

43. *Id.*

44. See *Stephano v. News Group Publ'ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) ("Since the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy, which, as noted, is exclusively statutory in this State, the plaintiff cannot claim an independent common-law right of publicity."). See also *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 585-86 (2d Cir. 1990) (discussing the right of publicity under New York law).

45. See *Haelan Labs.*, 202 F.2d at 868 ("We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph . . .").

46. The *Restatement (Third) of Unfair Competition* includes *Haelan* as an example of a merchandise case. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 Reporter's Notes to cmt. b (1995).

47. See *Haelan Labs.*, 202 F.2d at 868 ("For it is common knowledge that many prominent persons (especially actors and ball-players) . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances,

to the chewing gum, a dated view of baseball cards even in 1953. Originally, baseball cards may have been a promotional gimmick to sell gum,⁴⁸ but gum ceased to be the primary product long ago, maybe even before the *Haelan* decision. According to one study of baseball cards, “Cards produced after World War II were not used to sell another product but were sold as products in and of themselves.”⁴⁹ Many years later, the gum largely disappeared.⁵⁰ Whatever Judge Frank’s view of the case might have been had he viewed baseball cards as desirable purchases by themselves rather than as promotional incentives to sell gum, *Haelan* is now understood as a case about merchandise.⁵¹ As such, *Haelan* supports treating merchandise like advertisements.

While the rights of privacy and publicity often blur together,⁵² with the right of publicity potentially overtaking or eclipsing the right of privacy,⁵³ the better view may be to recognize a distinct privacy right associated with mental harm and a publicity right associated with economic harm.⁵⁴ Because game designers are more likely to use the identities of famous people who are primarily concerned about

displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.”).

48. See DAVE JAMIESON, *MINT CONDITION: HOW BASEBALL CARDS BECAME AN AMERICAN OBSESSION* 49 (2010).

49. JOHN BLOOM, *A HOUSE OF CARDS: BASEBALL CARD COLLECTING AND POPULAR CULTURE* 4 (1997).

50. *Id.* at 17-18.

51. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. b (1995).

52. William Prosser contributed to this blurring by including both the rights of privacy and publicity under the heading of a privacy tort called “appropriation.” William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). See also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (“The ‘appropriation’ tort as described by Prosser and the Restatement, Second, of Torts subsumes harm to both personal and commercial interests caused by an unauthorized exploitation of the plaintiff’s identity.”). Cf. 1 MCCARTHY (2012), *supra* note 5, at § 5:61 (“But did William Prosser view his category of ‘appropriation’ privacy as primarily focusing upon an injury to human dignity and feelings or upon an injury to a commercial property right in human identity? . . . Prosser was somewhat equivocal as to the nature of the interest and injury involved here . . .”).

53. See Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 214 (1999).

54. See 1 MCCARTHY (2012), *supra* note 5, §§ 5:60-5:67; Herman Miller, Inc. v. Palazzetti Imps. and Exps., Inc., 270 F.3d 298, 325 (6th Cir. 2001). Professor Kahn rejects the use of the term “mental harm” here, instead describing it as dignitary, spiritual, or philosophical harm. See Kahn, *supra* note 53, at 240.

economic rather than mental harm, the right of publicity will be emphasized here. Even so, similar rules govern both types of claims.⁵⁵ For the most part, the outcome of the First Amendment analysis should not change whether a claim is for a violation of the right of publicity or a violation of the right of privacy.⁵⁶

B. Current Law

State law, rather than federal law, governs the right of publicity. The majority rule in the United States is that certain uses of someone's name or likeness or "identity"—uses that are commonly labeled "commercial uses" or "uses for purposes of trade"—require that person's consent. In the leading treatise on the topic, McCarthy describes the right of publicity as "a right inherent to everyone to control the commercial use of identity and persona . . ."⁵⁷ The *Restatement (Third) of Unfair Competition* defines it as the right to prevent the appropriation of "the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade . . ."⁵⁸ According to McCarthy's most recent count, thirty-one states have recognized the right of publicity either by statute or common law or both.⁵⁹ Only two

55. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) ("The distinction between the publicity and privacy actions, however, relates primarily to the nature of the harm suffered by the plaintiff; similar substantive rules govern the determination of liability."); *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1446 (11th Cir. 1998) ("The commercial appropriation right of privacy is similar, but not identical, to the right of publicity recognized in a number of jurisdictions.")

56. See 2 MCCARTHY (2012), *supra* note 5, §§ 7:4 ("[T]his is an advertising use not immunized by the First Amendment from either invasion of appropriation privacy or infringement of the right of publicity."), 7:14 ("This is a 'news' story immune under the First Amendment from any liability for invasion of privacy or infringement of the right of publicity."), 8:45 ("[I]t is not an actionable 'appropriation' invasion of privacy to use plaintiff's name or picture when it bears a reasonable connection to a news story or social commentary in the media."). See also *Maheu v. CBS, Inc.*, 201 Cal. App. 3d 662, 676 (Ct. App. 1988) ("As do other torts involving invasion of the right of privacy, the tort of appropriation of name and personality, whether labeled a form of intrusion into privacy or a publicity right, invokes constitutional protections."); *Rosemont Enters., Inc. v. Random House, Inc.*, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968) ("Just as a public figure's 'right of privacy' must yield to the public interest so too must the 'right of publicity' bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest."), *aff'd mem.*, 301 N.Y.S.2d 948 (App. Div. 1969).

57. 1 MCCARTHY (2012), *supra* note 5, § 1:3.

58. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

59. 1 MCCARTHY (2012), *supra* note 5, § 6:3.

states, Nebraska and New York, have rejected the right of publicity as a matter of common law, but both of these states have statutory provisions.⁶⁰ Sometimes, as in New York, the right of publicity is labeled a right of privacy,⁶¹ a variation due to the fact that the right of publicity's origin lies in a broader right of privacy.⁶²

Federal law does not recognize a right of publicity, but it does recognize an analogous unfair competition claim under the Lanham Act. In part, 15 U.S.C. § 1125 provides a person with a cause of action against someone who uses his or her name "on or in connection with any goods or services" that is likely to cause consumer confusion about the "affiliation, connection, or association" between the parties or confusion about "sponsorship" or "approval."⁶³ A Lanham Act claim requires more than the unauthorized use of someone's name or likeness in connection with goods or services. Unlike a right of publicity claim, a Lanham Act claim requires the likelihood that consumers will be confused about the nature of the commercial relationship between two parties.⁶⁴ Disclaimers *may* protect against a successful Lanham Act claim because they prevent consumer confusion,⁶⁵ but they will not protect against a right of publicity claim.⁶⁶

The statutes from Indiana and Washington deserve special mention. In a nationally integrated economy, where goods are routinely sold nationwide, a use of a person's identity in a game creates a potential problem under both states' laws. The scope of Indiana's law is especially broad; McCarthy describes it as "one of the most sweeping right of publicity statutes in the nation."⁶⁷ Both

60. *Id.*

61. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009); *Stephano v. News Group Publ'ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) ("[T]he 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy . . .").

62. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

63. 15 U.S.C. § 1125(a)(1) (2012). This provision also refers to confusion about the "origin" of goods or services.

64. *Id.* § 1125(a)(1)(A); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

65. Courts do not always find disclaimers sufficient. See *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1212-13 (C.D. Cal. 1998).

66. See, e.g., *Food Scis. Corp. v. Nagler*, No. 09-1798, 2010 U.S. Dist. LEXIS 112072, at *25-27 (D.N.J. Oct. 20, 2010).

67. 1 MCCARTHY (2012), *supra* note 5, § 6:59.

statutes protect individuals from unauthorized uses of their identities, whether they are living or deceased and without regard to their states of domicile. Most states apply the law of the deceased individual's domicile at the time of death to determine whether the individual has a post-mortem right of publicity.⁶⁸ The right of publicity is usually understood as a property right; therefore, whether someone's right of publicity passes to his or her heirs at death depends on whether the individual's state of domicile at death recognizes a post-mortem right of publicity.⁶⁹ New York, for example, does not recognize a post-mortem right of publicity.⁷⁰ Hence, there is no publicity right to pass to one's heirs if one dies a domiciliary of New York.⁷¹

Although constitutionally problematic,⁷² both Indiana and Washington depart from the majority rule for the post-mortem right of publicity.⁷³ The Indiana statute applies to acts occurring within the state "regardless of a personality's domicile, residence, or citizenship"⁷⁴ and can pass by operation of a state's laws of intestate succession "regardless of whether the state recognizes the property rights set forth" in the statute.⁷⁵ Moreover, the protection of the Indiana statute lasts 100 years after a person's death, among the longest defined post-mortem periods in the United States.⁷⁶ Arguably,

68. *Id.* § 11:15.

69. *See id.*; *see also* Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd., 766 F. Supp. 2d 1122, 1137 (W.D. Wash. 2011) (collecting cases).

70. *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009); Pironc v. MacMillan, Inc., 894 F.2d 579, 585 (2d Cir. 1990).

71. *See* Milton H. Greene Archives v. Marilyn Monroe LLC, 692 F.3d 983, 991-92 (9th Cir. 2012).

72. *See Experience Hendrix*, 766 F. Supp. 2d at 1134-43 (holding, in a suit between two private parties, that the State of Washington's departure from the majority rule violates the Due Process Clause, the Full Faith and Credit Clause, and the Commerce Clause). The case is now on appeal to the Ninth Circuit. *See* Amended Notice of Appeal to the Ninth Circuit Court of Appeals, Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd., No. 09-0285 (W.D. Wash. Oct. 20, 2011).

73. *See Experience Hendrix*, 766 F. Supp. 2d at 1138 ("Indiana is the only state other than Washington that attempts by statute to disregard the law of the domicile.").

74. IND. CODE ANN. § 32-36-1-1(a) (2012).

75. *Id.* § 32-36-1-16(6).

76. *Id.* § 32-36-1-8(a). Oklahoma's statutory protection also lasts 100 years, but it applies only to someone who died "within fifty (50) years prior to January 1, 1986." OKLA. STAT. tit. 12, § 1448(G)-(H) (2012). Nebraska's statute does not state any limit on the duration for the post-mortem right of publicity. *See* NEB. REV. STAT. § 20-208 (2012); 2 MCCARTHY (2012), *supra* note 5, § 9:28.

the right of publicity of everyone who died anywhere in the world as far back as 1912 is protected by Indiana's statute.⁷⁷ Washington's statute is similar to Indiana's in terms of protecting someone's post-mortem right of publicity, but with a shorter period of protection.⁷⁸

Generally speaking, three types of uses of someone's identity are relevant to the right of publicity: (1) advertising uses, (2) merchandising uses, and (3) traditional expressive uses.⁷⁹ Advertising uses generally require permission.⁸⁰ Traditional expressive uses generally do not. In the interest of preventing conflicts with the First Amendment, consent is usually not required to use someone's name or likeness for news or entertainment purposes in newspapers, magazines, books, television programs, or films.⁸¹ A line of older

77. See *Donovan v. Bishop*, No. 09-275, 2010 U.S. Dist. LEXIS 110204, at *15-16 (S.D. Ind. Oct. 14, 2010) ("Bishop claims that because Major Taylor died in Illinois and was apparently domiciled there at the time of his death, Illinois substantive law should apply. . . . The fact that Major Taylor died elsewhere is, according to the Statute, unimportant."). Some decisions treat Indiana's rule as consistent with the majority rule for the post-mortem right of publicity, but they do so without any analysis of the statutory language. See *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 n.12 (9th Cir. 2012) ("[Appellant CMG Worldwide] asserts that Indiana's 1994 Right of Publicity Act, Ind. Code §§ 32-36-1-1 to -20, posthumously vested [Marilyn] Monroe's estate and, hence, Monroe LLC with Monroe's right of publicity. Indiana choice-of-law rules dictate that in resolving these state law claims we must apply the law of Monroe's domicile, New York, as controlling on all substantive matters related to the estate and disposition of property."); *CMG Worldwide, Inc. v. Upper Deck Co.*, No. 08-761, 2008 U.S. Dist. LEXIS 85497, at *14 (S.D. Ind. Oct. 22, 2008) ("[N]o Indiana property rights are implicated by this case as [the plaintiff] has not established that any of the [relevant baseball players] were domiciled in Indiana at the time of each of their respective deaths.").

78. According to Washington's statute, "The property right does not expire upon the death of the individual or personality, regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right." WASH. REV. CODE § 63.60.010 (2012). The statute repeats this point six times for good measure. See *Experience Hendrix*, 766 F. Supp. 2d at 1141. Provided an individual's identity had commercial value at his or her death and the individual died no more than fifty years before January 1, 1998, the statute provides seventy-five years of protection. See WASH. REV. CODE § 63.60.020(2) (2012); WASH. REV. CODE § 63.60.040(2) (2012). For someone whose identity lacked commercial value at the time of death, he or she must have died no more than ten years before January 1, 1998 and the period of protection is only ten years. See WASH. REV. CODE § 63.60.020(1) (2012); WASH. REV. CODE § 63.60.040(1) (2012).

79. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995); Michael P. Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 129 (1993).

80. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (1995).

81. *Id.* § 47 cmt. c.

New York cases prohibits fictionalized uses of someone's identity without permission,⁸² but courts often resist finding infringement in these situations or find that the First Amendment provides a defense.⁸³ Recent New York cases either allow fictionalized uses of someone's identity so long as the person's identity has some "real relationship" to the larger work and is not an "advertisement in disguise"⁸⁴ or go further and hold that New York's privacy law does not even apply to fictional works.⁸⁵

Merchandising uses occupy a somewhat difficult middle ground between advertising uses and traditional expressive uses, but following *Haelan*, courts treat merchandising uses as commercial uses or uses for purposes of trade.⁸⁶ Therefore, consent is usually required to use someone's identity on a coffee mug or other item of merchandise, such as a poster or T-shirt. Where a literal celebrity likeness appears on a piece of merchandise, the "sum and substance" of the expressive portion of the work is the celebrity likeness.⁸⁷ The expressive contribution of the producer of the coffee mug, poster, or T-shirt is negligible or non-existent. Unless the merchandise is political in nature, courts are unusually unsympathetic to claims that

82. See *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (N.Y. 1967); *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913); *Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382 (Sup. Ct. 1937). On the *Spahn* case, see generally Ray Yasser, *Warren Spahn's Legal Legacy: The Right to Be Free from False Praise*, 18 SETON HALL J. SPORTS & ENT. L. 49 (2008).

83. See, e.g., *Tyne v. Time Warner Entm't Co.*, 336 F.3d 1286 (11th Cir. 2003); *Matthews v. Wozencraft*, 15 F.3d 432, 439-41 (5th Cir. 1994); *Esch v. Universal Pictures Co.*, No. 09-2258, 2010 U.S. Dist. LEXIS 140543, at *16-21 (N.D. Ala. Nov. 2, 2010); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003); *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal. Rptr. 2d 207 (Ct. App. 1997); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177 (Utah 1954); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. d (1995); 2 MCCARTHY (2012), *supra* note 5, § 8:76.

84. See *Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549, 554 (N.Y. 2000); *Yasin v. Q-Boro Holdings, LLC*, 910 N.Y.S.2d 766 (Sup. Ct. 2010) (unpublished table decision). Similar reasoning explains the outcome in *Doc v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (en banc), where the defendants used the name of hockey player Tony Twist in a fictional story in a comic book without permission. While a reader could have viewed the use of Twist's name as partly commenting on Twist, the defendants claimed that the use of his name "was not a parody or other expressive comment or a fictionalized account of the real Twist." *Id.* at 374. So they lost.

85. See *Costanza v. Scinfeld*, 719 N.Y.S.2d 29, 30 (App. Div. 2001) ("[W]orks of fiction do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade' . . .").

86. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

87. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809-10 (Cal. 2001).

the First Amendment allows the unauthorized use of someone's identity on merchandise.⁸⁸

The status of games under the right of publicity depends on what qualifies as a "commercial use" or a "use for purposes of trade." The *Restatement* defines uses on merchandise as uses for purposes of trade and specifically mentions posters, buttons, and "other memorabilia" as examples of merchandising uses.⁸⁹ The Reporter's Note to this section explicitly refers to games as examples of merchandising uses and cites the three classic board game cases discussed below,⁹⁰ *Palmer v. Schonhorn Enterprises, Inc.*,⁹¹ *Uhlaender v. Henricksen*,⁹² and *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*⁹³ While highly persuasive, the various *Restatements* are usually not binding,⁹⁴ and as the right of publicity is a state law doctrine, the status of games could vary from state to state. No state statute, however, explicitly deals with games. For example, California's statute refers to uses of someone's identity "on or in products, merchandise, or goods."⁹⁵ Illinois' statute refers to an individual's right to control uses for "commercial purposes,"⁹⁶ defined in part to include uses "on or in connection with the offering for sale or sale of a product, merchandise, goods, or services."⁹⁷ Indiana's statute is very similar to Illinois' in this respect.⁹⁸ New York's statutes prohibit uses "for purposes of trade" without explicitly referencing merchandise.⁹⁹ This

88. See *Frazier v. Boomsma*, No. 07-8040, 2007 U.S. Dist. LEXIS 72427, at *40-48 (D. Ariz. Sept. 27, 2007) (T-shirts); *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (posters). As for giving publicity rights to politicians, see Shubha Ghosh, *On Bobbling Heads, Paparazzi, and Justice Hugo Black*, 45 SANTA CLARA L. REV. 617 (2005).

89. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. b (1995).

90. See *id.* § 47 Reporter's Notes to cmt. b.

91. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

92. *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

93. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144 (Sup. Ct. 1973), *aff'd as modified*, 345 N.Y.S.2d 17 (App. Div. 1973).

94. There are exceptions, such as the one in the Virgin Islands Code. See V.I. CODE ANN. tit. 1, § 4 (2012). Whether a statute adopted in 1957 makes a *Restatement* published in 1995 binding is an interesting question, but it is not one we will take up here. See *In re Manbodh Asbestos Litig. Series*, 47 V.I. 215, 227-37 (Super. Ct. 2005).

95. CAL. CIV. CODE §§ 3344(a), 3344.1(a)(1) (West 2012).

96. 765 ILL. COMP. STAT. 1075/10 (2012).

97. 765 ILL. COMP. STAT. 1075/5 (2012).

98. See IND. CODE ANN. § 32-36-1-2 (2012).

99. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2009).

lack of specificity leaves it to courts to determine whether games should be treated as merchandise or expression. Decades ago, the three classic game cases provided an initial answer to this question. Before turning to those cases, however, we will briefly consider the justifications for the right of publicity.

C. *Justifying the Right of Publicity*

Whether it makes sense to treat uses in games as commercial uses requires some consideration of the reasons for the right of publicity. The justification for the right of publicity is the subject of substantial controversy.¹⁰⁰ The *Restatement* concedes that the arguments for protecting the right of publicity are weaker than the arguments for protecting other kinds of intellectual property.¹⁰¹ The dominant arguments are tied to either an economic rationale or a Lockean natural rights rationale. Both have probably played a role in the development of the right of publicity.

An economic argument is that the right of publicity provides incentives to create a commercially valuable identity, but this argument is not widely accepted. There are many benefits, including monetary benefits, to celebrity status separate from the revenue tied to the right of publicity.¹⁰² Even if there is a small incentive effect, the social benefits tied to the cheaper exploitation of celebrity identities likely outweigh a small increase in the number of celebrities. More competitors offering fantasy baseball to consumers without passing on the cost of licensing fees is preferable, we think, to a tiny increase, in the fullness of time, in the number of professional athletes.

This economic argument is more compelling in the advertising context. Separate from the value of endorsements—and false

100. See, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1162 (2006) (arguing that the right of publicity has an “absence of any clear theoretical foundation”); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 389 (1999) (“The timing is propitious for an overhaul of the right of publicity. Existing doctrine remains in a state of disarray that leaves room for wrongs without remedies, despite its characterization as a field of ‘settled’ law, with a ‘self-evident’ philosophical basis.”) (citation omitted).

101. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995).

102. See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996); Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 110-12 (1994); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. 35, 77-78 (1998).

endorsements are already prohibited by the Lanham Act—another value of using a celebrity’s identity in an advertisement is to grab people’s attention.¹⁰³ Overuse of a celebrity’s identity in advertising is a possible consequence if consent is not needed and could eventually drive the celebrity’s advertising value to zero. In terms of advertising value, the name and likeness of popular celebrities would quickly be overexploited.¹⁰⁴ Professor Mark Grady extends this same reasoning to merchandising uses, worrying that overexposure to celebrities on T-shirts, posters, coffee mugs, and other similar uses will dissipate the value of a celebrity’s name or likeness.¹⁰⁵ If Grady is right, then we should expect celebrities to actively avoid saturating the market with merchandise to avoid overexposure. Grady offers no examples of this occurring, and it is difficult to think of any plausible examples where extensive celebrity merchandising might have threatened the value of the celebrity’s identity. The famous 1976 Farrah Fawcett poster may be a rare, plausible example of celebrity merchandise becoming so ubiquitous that overexposure was a risk,¹⁰⁶ but it does not say much for this argument if overexposure *through merchandise* is so rarely a danger.

Although many commentators rely on an economic analysis, a Lockean natural rights analysis is also relevant to the right of publicity. McCarthy suggests commentators are reluctant to rely on what sound like “visceral feelings of fairness,”¹⁰⁷ but like Melville Nimmer, McCarthy argues courts should not ignore widely held beliefs, even when it is difficult to find an economic rationale in support of them.¹⁰⁸ Nimmer put it this way: “It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy

103. See, e.g., BONNIE L. DREWNIANY & A. JEROME JEWLER, CREATIVE STRATEGY IN ADVERTISING 12 (10th ed. 2011) (“Celebrities attract attention and help cut through the clutter of other ads.”).

104. See *Cartoons*, 95 F.3d at 975; RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 258 (1981).

105. Grady, *supra* note 102, at 119-20.

106. See Leslie Bennetts & Jonathan Becker, *Beautiful People, Ugly Choices*, VANITY FAIR, Sept. 2009, at 302.

107. See J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1711 (1987).

108. *Id.*

considerations.”¹⁰⁹ Multiple judicial decisions echo this view,¹¹⁰ sometimes asserting as a general principle of intellectual property law that people should not reap where they have not sown.¹¹¹ Even if we accept that celebrities and other individuals are entitled to the fruit of their labors, Professor Grady notes that this principle fails to explain cases where celebrities do not prevail even though someone has benefited in some way from using their names or likenesses.¹¹² The Lockean explanation may provide a starting point, but it does not clearly explain when there are countervailing policy considerations. On the other hand, the economic analysis poorly explains the application of the right of publicity rule to merchandise, suggesting both the economic and Lockean justifications contribute something to the justification for the right of publicity. Other interests, however, are at stake as well, including the protection of speech. Courts end up balancing these competing interests.

III. THE RIGHT OF PUBLICITY APPLIED TO GAMES

A threshold question for applying the right of publicity to games is what counts as a game, a question that even philosophers have struggled with.¹¹³ Like Professor Ian Bogost, we are content to refer to games in their “loose and popular sense.”¹¹⁴ We think games should be taken out of the merchandise category. This requires identifying objects of actual or potential litigation as games, but we are not aware of a lawsuit that has called for a judge to agonize over whether a particular object actually qualifies as a game, and we are not going to worry about borderline examples in this article. All of the

109. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS 203, 216 (1954).

110. See *McFarland v. E & K Corp.*, No. 4-89-727, 1991 U.S. Dist. LEXIS 1496, at *4 (D. Minn. Jan. 17, 1991); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn.1970).

111. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918); *State ex rel. Elvis Presley Int’l Mem’l Found. v. Crowell*, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987); DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 155 (2009).

112. See Grady, *supra* note 102, at 108-09.

113. See BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE AND UTOPIA* (Broadview Press 2005) (1978); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 66 (G. E. M. Anscombe trans., 2d ed., reprinted 1997). See also Greg Lastowka, *Rules of Play*, 4 GAMES & CULTURE 379 (2009).

114. IAN BOGOST, *UNIT OPERATIONS: AN APPROACH TO VIDEOGAME CRITICISM* xiii (2006).

action in this area of the law involves objects that are easily recognizable as games. Our examples in this article should also be easily recognizable as games. We are not concerned with all games or game-related equipment, however. We are not concerned with sporting goods like baseball bats and gloves, even though they are used for various outdoor games and are able to display a person's identity. When Honus Wagner authorized J.G. Hillerich & Son to stamp his autograph on baseball bats in 1905 or when subsequent players authorized sporting goods manufacturers to do the same thing,¹¹⁵ the result is a narrow commercial message of endorsement. We are not arguing that game producers should be able to communicate false messages of endorsement, though our favored rule inevitably tolerates some consumer confusion when names and likenesses are used within artistic works for expressive purposes.

The games of interest to us are ones where someone's name or likeness can feasibly be incorporated into the game and where there is some expressive value to doing so that goes beyond a message of endorsement. The relevant games fall into two broad categories. The first consists of parlour or table games. These can be broken down into various subcategories, such as dice games, card games, board games (including war games), and role-playing games. The second broad category consists of computer and video games. Except when noting some historical developments in this article, the reader should consider the phrase "video game" to refer to arcade games, console games, and computer games. Of these various types of games, board games offer the earliest examples of licensing issues and litigation.

A. Licensing Rising

Game designers have included people's name and likenesses in games for well over a century. Early English games focused on education, such as *Royal Genealogical Pastime* (1791), a race across shield-shaped spaces associated with fifty-two different monarchs.¹¹⁶ The two earliest known games produced in the United States matched

115. See DENNIS DEVALERIA & JEANNE BURKE DEVALERIA, HONUS WAGNER: A BIOGRAPHY 140 (1996); BOB HILL, CRACK OF THE BAT: THE LOUISVILLE SLUGGER STORY 44 (2002).

116. JAMES J. SHEA AS TOLD TO CHARLES MERCER, IT'S ALL IN THE GAME 60-61 (1960); Caroline G. Goodfellow, *The Development of the English Board Game, 1770-1850*, 1 BOARD GAMES STUDIES 70, 70 (1998).

the educational themes of the English competition, as indicated by their titles: *Traveller's Tour Through the United States* (1822) and *Traveller's Tour Through Europe* (1822).¹¹⁷ Many games published throughout the Nineteenth Century were educational, with history and geography being popular topics, but by the 1880s, current events became popular topics too.¹¹⁸ With games incorporating trivia and current events, it is no surprise that game designers even in the nineteenth century used the names and likenesses of individuals. An early example is *Bulls and Bears: The Great Wall Street Game* (1883), a "subtle commentary on the making of financial empires at the public's expense," which included caricatures on the board of three investors in the railroad industry: William Henry Vanderbilt, Jay Gould, and Cyrus Field.¹¹⁹ *Autograph Authors* (1886) was an educational card game incorporating contemporary authors' identities, most prominently Mark Twain.¹²⁰ Similarly, Admiral Winfield Scott Schley appeared in *Schley at Santiago Bay* (1899).¹²¹ And Theodore Roosevelt appeared in *Roosevelt at San Juan* (1899).¹²² We do not know whether the publishers of these games licensed the uses of these individuals' names and likenesses, but it seems unlikely, especially in a critical game like *Bulls and Bears*.

At least some licensing did occur in the nineteenth and early twentieth centuries. Experts on baseball memorabilia have identified three player endorsed baseball games from the nineteenth century.¹²³ Professional baseball player Charles Louis Zimmer, for example, endorsed *Zimmer's Baseball Game* (c. 1894).¹²⁴ Parker Brothers

117. See Bruce Whitehill, *Game Evolution . . . Spinning Into the 21st Century*, KNUCKLEBONES, Nov. 2005, at 32, 34.

118. See Bruce Whitehill, *American Games: A Historical Perspective*, 2 BOARD GAMES STUDIES 116, 125-27 (1999).

119. See MARGARET K. HOFER, THE GAMES WE PLAYED: THE GOLDEN AGE OF BOARD & TABLE GAMES 82-83 (2003).

120. *Id.* at 66.

121. *Id.* at 100.

122. *Id.* at 101.

123. MARK W. COOPER WITH DOUGLAS CONGDON-MARTIN, *BASEBALL GAMES: HOME VERSIONS OF THE NATIONAL PASTIME, 1860S-1960S*, at 23-29 (1995). Cooper identifies three nineteenth century and numerous twentieth century games as player-endorsed, but it is unclear how he determined that the game publishers actually licensed the use of the players' names and likenesses. In some cases, his discussion makes clear the use was indeed licensed, but in other cases it's unclear whether he just assumed there was a license.

124. *Id.* at 23-27.

began licensing celebrity identities at least as early as the 1920s. As examples, Parker Brothers licensed Charles Lindbergh's name (or nickname) for a series of games.¹²⁵ Parker Brothers also licensed the use of Eddie Cantor's name and likeness for *Eddie Cantor's Tell It to the Judge*.¹²⁶

When these games were published, it was an open question whether incorporating someone's name or likeness in a game required permission. Even if publishers did obtain licenses, it would not necessarily mean they were legally obligated to do so,¹²⁷ but a trilogy of cases from the late 1960s and early 1970s held in favor of licensing, providing a strong basis for describing licensing as "the settled order of things" in the game industry.

B. Licensing Victorious

Courts eventually extended *Haelan's* rule for baseball cards and the right of publicity to games. Trading cards, whether of the baseball variety or otherwise, do communicate information, such as sports statistics, but baseball cards are treated as a non-traditional medium of expression. Despite the informative content of many baseball cards, the traditional rule treats them like coffee mugs, posters, and T-shirts.¹²⁸ Rightly or wrongly, trading card publishers will ordinarily need a license to use someone's name or likeness.¹²⁹ Courts came to a similar conclusion about games in 1967, 1970, and 1973. As the history of these cases demonstrates, the culture of licensing celebrity identities began to flourish in the mid-1960s, but the gaming medium began to flourish later, in the 1970s. The head start for licensing practices likely worked to the advantage of the proponents of

125. See PHILIP E. ORBANES, *THE GAME MAKERS: THE STORY OF PARKER BROTHERS FROM TIDDLEDY WINKS TO TRIVIAL PURSUIT* 72 (2004).

126. See *id.* at 71-72; Whitchill, *supra* note 118, at 120. It is unclear whether Parker Brothers published *Eddie Cantor's Tell It to the Judge* in the 1920s or the 1930s. The copy owned by one of the authors does not have a year on the box or on any of the game components.

127. Although it comes from a copyright case, the predictable "but see" is Judge Kevin Duffy's statement that no one would ask to license copyrighted material unless one was legally obligated to get permission to use it. See *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 184 (S.D.N.Y. 1991). Obviously, Judge Duffy ignored the possibility that parties might seek a license just to avoid costly litigation.

128. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 Reporter's Notes to cmt. b (1995).

129. *But see Aldrin v. Topps Co.*, No. 10-9939, 2011 U.S. Dist. LEXIS 110800 (C.D. Cal. Sept. 27, 2011). This case is discussed *infra* at the end of Part V.B.

licensing.

1. *Palmer v. Schonhorn Enterprises, Inc.* (N.J. Super. Ct. 1967)

The first of the three classic cases, *Palmer v. Schonhorn Enterprises*,¹³⁰ involved an obscure board game about professional golf, called *Pro-Am Golf*, and two pioneers of sports licensing, Arnold Palmer and Mark McCormack.¹³¹ Irwin P. Schonhorn designed and illustrated *Pro-Am Golf*, and formed Schonhorn Enterprises, Inc. in 1965 to market the game.¹³² It was probably Mr. Schonhorn's only game design and Schonhorn Enterprises' only published game.¹³³ Schonhorn's attorney at the time recalls the company printing only a small number of copies, perhaps as few as 50 or 100, and then selling some of these copies to bookseller Brentano's, Inc.¹³⁴ Schonhorn incorporated the names and profiles of twenty-three famous golfers into the game without their permission, including Arnold Palmer, Gary Player, Doug Sanders, and Jack Nicklaus.¹³⁵ Despite its limited availability, these four players somehow found out about the game and became plaintiffs in a lawsuit filed against Schonhorn Enterprises on June 26, 1967 in the Superior Court of New Jersey.¹³⁶ The court acted quickly, granting the plaintiffs' motion for summary judgment and an injunction on July 5, 1967.¹³⁷

Among the twenty-three golfers in the game, there is a simple explanation for why Palmer, Player, Sanders, and Nicklaus turned out to be the four plaintiffs: they shared Mark McCormack as an agent.¹³⁸

130. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

131. *See id.* at 459.

132. *See* Business Entity Status Report for Schonhorn Enterprises, Inc., BUSINESS RECORDS SERVICE, DIVISION OF REVENUE AND ENTERPRISE SERVICES, STATE OF NEW JERSEY, <https://www.njportal.com/DOR/businessrecords/Default.aspx> (follow "Business Entity Status Reports" hyperlink, then follow the on-screen instructions).

133. Telephone Interview with Roger M. Kahn, former attorney for Schonhorn Enterprises (July 21, 2011). Schonhorn currently has no entries in the board game database at www.boardgamegeek.com.

134. *Id.*

135. *Palmer*, 232 A.2d at 459.

136. *Golfers Sue; Refuse Use of Their Names*, CHI. TRIB., June 27, 1967, at D3.

137. *Palmer*, 232 A.2d at 459.

138. *See* JONATHAN CLAY & TOM SMITH, MY BEST DAY IN GOLF: CELEBRITY STORIES OF THE GAME THEY LOVE 125, 127-28 (2003); Jack Batten, *Cashing in on the Hero Image*,

McCormack founded International Management Group, now IMG Worldwide, a global leader in licensing both endorsements and trademarks,¹³⁹ but he got his start by booking matches for golfers in the mid-1950s.¹⁴⁰ Several of them asked McCormack to find product endorsement opportunities to “earn a few extra bucks.”¹⁴¹ At least some of the golfers already had endorsement deals with sporting goods manufacturers; McCormack negotiated better deals when it was time to renew these contracts.¹⁴² In 1960 Arnold Palmer asked McCormack to become his agent,¹⁴³ the origin of IMG Worldwide.¹⁴⁴ He subsequently signed Gary Player, Jack Nicklaus, and Doug Sanders.¹⁴⁵

McCormack’s licensing efforts for athletes, particularly Palmer, were unprecedented: “There is no angle [McCormack] overlooks, no opportunity he ignores, no product from athletic supports to after-shave lotion he doesn’t investigate for possible endorsement.”¹⁴⁶ Games were included in these deals in the 1960s.¹⁴⁷ At least for

WINDSOR STAR WEEKEND MAG., Jan. 11, 1975, at 8 (describing McCormack as the North American “pioneer” in athlete product endorsements); Lloyd Shearer, *Mark McCormack: He Makes Golfers Rich*, PARADE, June 16, 1963, at 6.

139. See, e.g., David Guo, *College Fans Show Allegiance with the Coffee in Their Mug*, PITTSBURGH POST-GAZETTE, Aug. 2, 2007, at W4 (“[Collegiate Licensing Co.] is the industry leader and represents nearly 200 colleges, universities, bowl games, athletic conferences, The Heisman Trophy and the NCAA, its Web site says. Recently, the company got even bigger, becoming a division of IMG Worldwide, the sports and entertainment marketing powerhouse whose speakers list includes Peyton Manning, Tiger Woods, Joe Montana and Arnold Palmer, who was the firm’s first client in 1960.”).

140. Shearer, *supra* note 138, at 7.

141. *Id.*

142. *Id.*

143. McCormack said it was 1960 in a 1963 interview. See *id.* He said it was 1959 in a 1967 book. See MARK H. MCCORMACK, *ARNIE: THE EVOLUTION OF A LEGEND* 18, 26, 95 (1967).

144. See E.J. Schultz, *Arnold Palmer Takes a Swing at Positioning His Brand for Future*, ADVERTISING AGE, Dec. 5, 2011, at 1 (“Mr. Palmer’s marketing machine first gained steam in 1960, when he paired with agent Mark McCormack, who went on to found legendary sports agency IMG.”); *About Us*, IMG WORLD, <http://www.imgworld.com/about-us.aspx> (last visited Oct. 18, 2012) (“Founded in 1960 with a handshake between Mark McCormack and golf legend Arnold Palmer, IMG has grown into a global operation.”).

145. Shearer, *supra* note 138, at 7.

146. *Id.* at 7. McCormack’s 1967 book strongly suggests that his aggressive licensing of Palmer’s name did not begin until November 1, 1963. See MCCORMACK, *supra* note 143, at 95-96, 98-99, 108, 110. However, Shearer’s article makes clear that McCormack was aggressively licensing Palmer’s name before November 1963.

147. See *Arnold Palmer’s Indoor Golf Course* (Marx Toys c. 1968). The publication date

Palmer at this time, endorsement and licensing income was likely greater than his income directly from playing golf.¹⁴⁸ While Palmer acknowledges prior examples of athletes endorsing products,¹⁴⁹ he claims to be “the first athlete to parlay his success in sports into a lucrative corporate empire” through branding and licensing.¹⁵⁰ The existence of games like *Pro-Am Golf* would not have prevented Palmer and other athletes from endorsing “official” games, but these games would have competed with the official ones. The *Palmer* case was an opportunity for a leader of sports licensing to reduce the competition from unendorsed, unofficial games.

Most of what we know about *Pro-Am Golf* comes from the court’s opinion. The outside of the box featured a lithographic drawing of an unnamed golfer, his caddy, and assorted spectators.¹⁵¹ No golfers were named on the outside of the box.¹⁵² A caption on the box said:

PRO-AM GOLF GAME. 18 Championship holes. Profiles and playing charts of 23 famous golfers. Yardage ruler. Ball markers. Tee. Flag. Score cards. Dice. AS CHALLENGING AND EXCITING AS GOLF ITSELF.¹⁵³

The twenty-three sheets inside the box labeled “Profile and Playing

of *Arnold Palmer’s Indoor Golf Course* is unclear. See History of Indoor Golf, M.I.GOLF, <http://www.miniindoorgolf.com/about/history> (last visited Oct. 18, 2012). The information on the box indicates a licensed use of Palmer’s identity. Specifically, Palmer’s signature appeared just below the word “OFFICIAL.” There is at least one other game for which there was probably a license. We do not know for sure, but the prominent use of Palmer’s name and likeness on *Arnold Palmer’s Inside Golf* game suggests there was a license. See *Arnold Palmer’s Inside Golf* (David Bremson Co. 1961).

148. John Cunniff, *Off-Course Business Enterprises Make Golfing Sport of Kings*, MERIDEN JOURNAL, June 16, 1967, at 17 (“Palmer has made more money on the golf course than any man before him, about \$800,000. But his off-the-course earnings from distributing, licensing and endorsing products is very likely much greater.”).

149. See ARNOLD PALMER WITH JAMES DODSON, A GOLFER’S LIFE 301 (1999) (“Contrary to what some people think, Arnold Palmer and Mark McCormack didn’t invent the concept of sports marketing . . .”).

150. *Arnold Palmer Enterprises*, ARNOLDPALMER.COM, http://www.arnoldpalmer.com/BUSINESS/ap_enterprises.aspx (last visited Oct. 19, 2012).

151. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 459 (N.J. Super. Ct. Ch. Div. 1967).

152. *Id.* at 462.

153. In context, “Pro-Am Golf” might have just been part of the court’s description of the game. It was not necessarily the title, but according to the attorney for Schonhorn Enterprises, it may have been the title. See Telephone Interview with Roger M. Kahn, *supra* note 133.

Charts” were the problem.¹⁵⁴ The court said the profiles contained the names of the players and facts about them. The court did not explain whether or how these facts affected the game play. There were already several sports games designed around athletes’ real-world performances, such as *National Pastime*,¹⁵⁵ *APBA Baseball*,¹⁵⁶ *Strat-O-Matic Baseball*,¹⁵⁷ and *APBA Golf*.¹⁵⁸ Like *Pro-Am Golf*, *APBA Golf* included actual professional players, including Palmer, Player, Sanders, and Nicklaus. We do not know whether APBA’s use of these players’ names was licensed, but the APBA game did attempt to reflect these golfers’ real-world performances in the game.¹⁵⁹ It therefore made a difference in *APBA Golf* which golfer a player selected and these differences were supposed to be tied to real-world performances. We do not know whether this was also true in *Pro-Am Golf*.

The Superior Court of New Jersey held that Schonhorn Enterprises violated the golfers’ rights of privacy without explicitly referring to the right of publicity.¹⁶⁰ The court said the rule was clear that “a person is entitled to relief when his name has been used without his consent, either to advertise the defendant’s product or to enhance the sale of an article.”¹⁶¹ Echoing the Supreme Court’s comment in *International News Service v. Associated Press* (1918) about not allowing someone to reap where others have sown,¹⁶² the

154. *Palmer*, 232 A.2d at 459.

155. See Scott Lehotsky, *How We Got Here: Basic APBA History*, APBA J., Nov. 30, 2000, at 14, 15; Pete Simonelli, Scott Lehotsky & Eric Naftaly, *APBA’s “Grandfather,” Clifford Van Beek*, APBA J., Nov. 30, 2000, at 16. The two articles disagree on the year Clifford Van Beek published *National Pastime*, the former claiming 1930 and the latter 1931. See also U.S. Patent No. 1,536,639 (filed Sept. 17, 1923) (issued May 5, 1925).

156. *APBA Baseball Game* (APBA Game Co. 1951). The history of APBA is covered in Lehotsky, *supra* note 155.

157. See Hal Richman, *Strat-O-Matic Baseball* (Strat-O-Matic 1961). See also GLENN GUZZO, *STRAT-O-MATIC FANATICS: THE UNLIKELY SUCCESS STORY OF A GAME THAT BECAME AN AMERICAN PASSION* (Andrew Yankech ed., 2005).

158. J. Richard Seitz, *APBA Golf Game* (APBA Game Co. 1962).

159. See *id.*; see also Patent No. 3,260,526 (filed July 16, 1963) (issued July 12, 1966) (“Simulated Golf Game”); *APBA Presents Professional Golf!* (APBA Game Co. 1985) (advertising flyer) (“[T]hirty-two of the greatest golf pros of all time perform for you with their woods, irons and putters in astonishingly characteristic fashion, in regard to both accuracy and distance!”).

160. *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 461 (N.J. Super. Ct. Ch. Div. 1967).

161. *Id.*

162. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918) (“In doing this

state court added that “a person has the right to enjoy the fruits of his own industry.”¹⁶³ The court mentioned several examples from the case law of unauthorized uses found to violate someone’s right of privacy, such as the sale of a locket containing a photograph of an actress and the sale of popcorn and gum with pictures of baseball players.¹⁶⁴ The use of the golfers in *Pro-Am Golf* was not an advertising use, but Schonhorn Enterprises acknowledged the obvious: the use of actual golfers made the game more marketable.¹⁶⁵ Publishers of magazines and books permissibly profit by publishing the biographical information of athletes and others without their permission. Doing so makes magazines and books more marketable. Sports sections in newspapers are more marketable because they provide information about real players rather than made-up ones. The court recognized all of this,¹⁶⁶ but it conceived of the dissemination of news and information narrowly.¹⁶⁷ In the court’s view, news and information are disseminated in newspapers and books, not in games. Games are merely “articles,” said the court, another way of saying games are merchandise.

2. *Uhlaender v. Henricksen* (D. Minn. 1970)

About three years after *Palmer*, two more games suffered a similar fate in *Uhlaender v. Henricksen*.¹⁶⁸ This time it was baseball, not golf. Some developments with the professional baseball players’ union explain the timing. Players formed the Major League Baseball

defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant’s members is appropriating to itself the harvest of those who have sown.”).

163. *Palmer*, 232 A.2d at 462.

164. *Id.* at 461.

165. *Id.* at 459.

166. *Id.* at 461-62.

167. The evolution of the courts’ narrow views of what speech is protected from a privacy or publicity claim is explained in Diane Lechner Zimmerman, *Amicus Curiae Brief of 73 Law Professors in Support Defendant/Appellee Jireh Publishing, Inc. for Affirmance*, 22 WHITTIER L. REV. 391 (2000).

168. *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970). See generally J. Gordon Hylton, *The Major League Baseball Players Association and the Ownership of Sports Statistics: The Untold Story of Round One*, 17 MARQ. SPORTS L. REV. 87 (2006).

Players Association (MLBPA) in 1954,¹⁶⁹ but it was not until Marvin Miller became executive director of the MLBPA in 1966 that it became an effective union.¹⁷⁰ One of Miller's earliest accomplishments was starting a group licensing program for players' names and likenesses.¹⁷¹ According to Richard Moss, the MLBPA's legal counsel, the MLBPA's licensing efforts applied to "tie-ins with commercial products," including baseball cards and mail order baseball board games.¹⁷²

In 1966 several players alerted Moss to the existence of unlicensed baseball games published by various companies.¹⁷³ The MLBPA first contacted the Strat-O-Matic Game Company, Inc., the publisher of *Strat-O-Matic Baseball*.¹⁷⁴ Hal Richman, the founder and owner of Strat-O-Matic "had always known that only a game with the real players could succeed."¹⁷⁵ The MLBPA offered Strat-O-Matic two options: cease using players' names, which was not a viable option for Strat-O-Matic, or obtain a license and pay a royalty. The MLBPA's initial proposal would have required payments that Strat-O-Matic could not afford, up to ten percent of sales from its baseball game with a minimum annual royalty of \$25,000.¹⁷⁶ Strat-O-Matic's

169. See ROBERT F. BURK, MUCH MORE THAN A GAME: PLAYERS, OWNERS, & AMERICAN BASEBALL SINCE 1921, at 120 (2001); *Major Leaguers Form Group, Set Demands*, MILWAUKEE SENTINEL, July 13, 1954, at part II, p. 4 ("Big league baseball players Monday organized formally into a group known as the Major League Baseball Players' Association . . .").

170. See BURK, *supra* note 169, at ix, 146-47.

171. See *id.* at 152; MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL 146-48 (1991) (discussing the origins of the group licensing program); Thomas Stinson, *The Perfect Union? Players Association's Remarkable Record Changed Baseball*, ATLANTA J.-CONST., Sept. 1, 2002, at 1F ("[The MLBPA's] licensing and endorsement practices were historic."). As of February 1970, the group licensing program included all but three major league players. See Transcript of Proceedings at 6-8, *Uhlender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (No. 5-70 Civ. 8) [hereinafter Transcript of Proceedings] (direct examination of Richard M. Moss).

172. Transcript of Proceedings, *supra* note 171, at 8 (direct examination and cross-examination of Richard M. Moss). Revenues from the group licensing program began at about \$60,000 in 1967 and then climbed to about \$270,000 in 1967 and \$400,000 in 1969. *Id.*

173. *Id.* at 12.

174. GUZZO, *supra* note 157, at 117.

175. *Id.* Cf. A.G. Halberstadt, *Real Players in Baseball Strategy!*, 1 ALL-STAR REPLAY no. 3, c. 1978 at 3, 3 ("Avalon Hill's *Baseball Strategy* has always been the best face-to-face baseball game around. About the only thing that prevented it from being absolutely perfect was the fact that until now the game lacked real players.").

176. GUZZO, *supra* note 157, at 118.

attorney had no experience in intellectual property law, and apparently Strat-O-Matic accepted that the law was against it,¹⁷⁷ but Richman did convince Miller of the value of Strat-O-Matic Baseball for professional baseball, arguing that it “deepened fans’ knowledge and interest” in professional baseball through its use of statistics.¹⁷⁸ The MLBPA then decided to offer Strat-O-Matic a much more attractive deal of five percent of gross sales with a minimum royalty of \$2,500 per year. Strat-O-Matic accepted.¹⁷⁹ The MLBPA later made the same deal with other publishers,¹⁸⁰ but some publishers could not afford even these more favorable terms and went out of business.¹⁸¹

The MLBPA contacted the publishers of *Negamco’s Major League Baseball* and *Big League Manager* in early 1967.¹⁸² According to the court, both games included about 500 to 700 players and both games used the players’ actual names.¹⁸³ Both games also made use of the players’ real world statistics.¹⁸⁴ The court implied that the game reported these statistics,¹⁸⁵ but it is more accurate to say that the game designers used the statistics, through some formula, to create new game-related ability ratings for the players.¹⁸⁶ *Negamco’s Major League Baseball*, for example, assigned pitching, batting, and fielding scores for each player based on their real world performances. In part, the box top promoted the following features:

“Players’ ability individually rated”

177. *Id.* at 120-21.

178. *Id.* at 120.

179. *Id.* at 121. *See also* Supplemental Points and Authorities, Exhibit “A” at 2, *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (No. 5-70 Civ. 8) (contract between Strat-O-Matic Game Co., Inc., and the MLBPA).

180. *See* Transcript of Proceedings, *supra* note 171, at 6-8, 20-21, 34-35 (direct examination and cross examination of Moss).

181. *See* GUZZO, *supra* note 157, at 122.

182. *See* Transcript of Proceedings, *supra* note 171 at 12 (direct examination of Moss).

183. *See Uhlaender*, 316 F. Supp. at 1278.

184. *Id.*

185. *See id.* (referring to “the use of the baseball players’ names and statistical information”).

186. Affidavit of Keith T. Henricksen at 1, *Uhlaender*, 316 F. Supp. 1277 (No. 5-70 Civ. 8) (“The statistical information which is used for the purpose of developing the symbols by which the games are played is available at practically any book store or newsstand at a small price, and such information can also be obtained free from each of the major leagues upon request.”).

“True-to-life performances in hitting and pitching”

“Based on official major league results and statistics”

“New player ratings available every year”¹⁸⁷

Unlike Strat-O-Matic, the publishers of *Major League Baseball* and *Big League Manager* took the position that they did not need to enter into a licensing agreement with the MLBPA.¹⁸⁸ The lawsuit followed.

Major league players, represented by Minnesota Twin Ted Uhlaender and the MLBPA, sued the publishers for misappropriation, which the court treated as a claim for infringement of the players’ rights of publicity.¹⁸⁹ The plaintiffs said that the defendants were exploiting the players’ accomplishments for “commercial profit” and interfering with the players’ rights to profit from their “own talent and hard work.”¹⁹⁰ In their filings, the plaintiffs discussed the *Palmer* decision at length, noting the “obvious” similarity with that case.¹⁹¹

The district court agreed with the plaintiffs and enjoined the defendants from any use of the players’ names or likenesses in any games.¹⁹² The court did not explain why games are different than news articles, but it did describe the games as commercial uses of the players’ names.¹⁹³ The defendants claimed:

The value of the game does not lie in the use of the baseball players’ names, nor would anyone buy the game for the purpose of obtaining this statistical information. The value of the game lies in the way the information is put together for the purpose of playing the game.¹⁹⁴

This is partly right, but as Hal Richman recognized, the names of the players clearly add value to these games.¹⁹⁵ Another important part of

187. *Negamco’s Major League Baseball* (Negamco 1959). The box top, which we quote in the main text, bears a copyright date of 1959. The team rosters of this edition are labeled the 1967 edition. The edition was therefore marketed as the 1967 edition.

188. See Transcript of Proceedings, *supra* note 171, at 12 (direct examination of Moss).

189. *Uhlaender*, 316 F. Supp. at 1281-83.

190. Supplemental Points and Authorities at 6, *Uhlaender*, 316 F. Supp. 1277 (No. 5-70 Civ. 8).

191. *Id.* at 4-6.

192. See *Uhlaender*, 316 F. Supp. at 1279; Order Discharging Order to Show Cause For Contempt, *Uhlaender*, 316 F. Supp. 1277 (No. 5-70 Civ. 8).

193. See *Uhlaender*, 316 F. Supp. at 1283.

194. Affidavit of Keith T. Henricksen, *supra* note 186, at 1.

195. GUZZO, *supra* note 157, at 117. See also James J.S. Holmes & Kanika D. Corley,

the game, however, is the way the names and statistics are creatively incorporated into the game play, a point the court did not address. Instead, it quoted *Palmer* at length.¹⁹⁶ As in *Palmer*, the district court explained that celebrities invest considerable time to make their names valuable and are therefore entitled to the fruits of their labors.¹⁹⁷ The defendants reaped where they had not sown, or so the court thought; therefore, the defendants lost.

As a postscript to the court's decision, the defendants responded to the court's injunction by replacing the players' names with an appropriate number of blank spaces, which customers could fill in with the players' names.¹⁹⁸ The court noted that the correct names could be determined by consulting team rosters in newspapers or other publications, including one published by one of the defendants called *All Sports Digest*.¹⁹⁹ The court did not discuss Richard Moss's testimony earlier in the proceedings when he said that the MLBPA would pursue only those game publishers who used players' names.²⁰⁰ While the court said it was "not altogether an open and shut question," it decided the defendants were not in contempt of court; however, the defendants did assure the court that issues of *All Sports Digest* would no longer be included with the game.²⁰¹ Apparently, the defendants could leave blank spaces to fill in the players' names, but they could not provide the missing information themselves.

While *Uhlaender* contributed to the tradition of licensing in the game industry, it may also have contributed to a limitation on when a

Defining Liability for Likeness of Athlete Avatars in Video Games, 34 L.A. LAW. 17, 20 (May 2011) ("It seems ludicrous to question whether video game consumers enjoy and, as a result, purchase more EA-produced video games as a result of the heightened realism associated with actual players.").

196. *Uhlaender*, 316 F. Supp. at 1281-82.

197. *Id.* at 1282.

198. See Order Discharging Order to Show Cause For Contempt, *supra* note 192, at 3.

199. *Id.* at 3-4.

200. See Transcript of Proceedings, *supra* note 171, at 37 (redirect examination of Richard Moss). The question was not precise and was perhaps only about games with completely fictional players. Moss was asked, "Are there baseball games on the market which are sold either [by] mail or over the counter whereby the player can play baseball but there are no names of Major League baseball players used?" Moss responded in the affirmative and was then asked if the MLBPA would seek a licensing arrangement with the manufacturers. Moss responded, "No, if they don't use players' names, we do not." *Id.*

201. See Order Discharging Order to Show Cause For Contempt, *supra* note 192, at 4.

license is needed, though the issue remains in dispute today.²⁰² Like the defendants in *Uhlaender*, future publishers also made it feasible to identify “nameless” players. Sports Illustrated Games published a relevant example in 1973, *All-Time All Star Baseball*. A customer submitted a question to Sports Illustrated’s *Game Talk* newsletter, asking why some players’ names were omitted from the game. Sports Illustrated Games answered as follows:

Legal problems. We did not have clearance to use the names of a few of the stars in the game but, rather than substitute players of lesser stature, we included the statistics for each of the “nameless” stars. Since they are listed in alphabetical order with their stats accurate and intact—baseball experts (like you and your dad!) should be able to quickly tell who most of them are.²⁰³

The letter writer was indeed able to identify the players. Along with the question, the writer had noted, “My father and I figured out who most of them were anyway!”²⁰⁴ The legal problems with the game apparently persisted, however, and the publisher discontinued it.²⁰⁵

3. *Rosemont Enterprises, Inc. v. Urban Systems, Inc.* (N.Y. Sup. Ct. 1973)

Rosemont Enterprises, Inc. v. Urban Systems, Inc.,²⁰⁶ is the final member of the trilogy of classic game cases. *Rosemont* was not about multiple professional athletes appearing in games without a license, but about a single individual, Howard Hughes. Specifically, Hughes objected to his appearance in *The Howard Hughes Game*, a game loosely based on his life.²⁰⁷ The winner of the game was the first player to collect \$2.5 billion,²⁰⁸ “the estimated amount of the Hughes’ fortune.”²⁰⁹ Both the bottom of the game box and the Study Guide included with the game stated that Howard Hughes did not endorse

202. See *infra* Part V.B.

203. *Chalk Talk*, 1 GAME TALK no. 3, at 2 (Sports Illustrated c. 1972).

204. *Id.*

205. See Bob Biscontini, *All-Time All Star Baseball—10 Years Later*, 4 ALL-STAR REPLAY no. 6, 1983 at 10.

206. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144 (Sup. Ct. 1973), *aff’d as modified*, 345 N.Y.S.2d 17 (App. Div. 1973).

207. See Steve Yahn, *Namesake Challenges “Hughes Game” Marketer*, THE BLADE (Toledo, Ohio), Nov. 2, 1972, at 59.

208. *The Howard Hughes Game* (Family Games 1972) (page 26 of the Study Guide).

209. *Id.* (page 20 of the Study Guide).

the game²¹⁰ and that the game was “designed to teach players about the life and business ventures of Mr. Hughes.”²¹¹ Toward that end, the Study Guide included not only the rules of play, such as the rules for purchasing injunctions to block other players, but it also included the background on Hughes’s business ventures like the Hughes Tool Company, the Gulf Brewing Company, and Hughes Aircraft.

The game’s publisher likely exaggerated the game’s educational value. One game reviewer thought the game implicitly suggested it could teach players to be financially successful. It is in that light that the reviewer’s harsh conclusion makes more sense: “Entertaining this game may be; educational it definitely is not.”²¹² Whether it was entertaining or not,²¹³ the game clearly incorporated an assortment of Hughes-related facts into the game. These facts could be found in the Study Guide, on the board, and in the so-called Rumor and Dead Giveaway cards drawn during the game. These cards even cited sources for the facts. With reference to the September 7, 1962 issue of *Life* magazine,²¹⁴ for example, one Dead Giveaway card said, “You’ve piloted a plane around the world in 91 hours. Collect \$400,000,000.”²¹⁵

Presumably, publishing the Study Guide by itself would have been protected by the First Amendment from a right of publicity challenge. After all, it was a book, a traditional medium of expression. But because this particular booklet came with a board, tokens, and other playing pieces, the court viewed the defendants as “selling a commodity, a commercial product, an entertaining game of

210. *Id.* (inside cover of the Study Guide).

211. *Id.* (page 2 of the Study Guide).

212. Roger Verhulst, *Betcha \$2 Billion This Isn't How Howard Hughes Got His*, CHI. TRIB., Nov. 3, 1972, at B3. *See also* John B. Wood, *Pass GO, Collect Hughes Fortune*, BOS. GLOBE, Oct. 2, 1972, at 1, 15 (describing the game as “straightforward neo-Monopoly”).

213. Although some might think that *The Howard Hughes Game* is a bad game, for purposes of the present discussion, it should not matter whether the game is any good. Just as we should be nervous about judges judging the quality of art, we should be nervous about judges judging the quality of a game. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903). *Cf.* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 808 (2005) (“This Article will show that art is in fact regulated in multiple ways. Art is not apart from the law. This Article will first prove that courts are forced to decide the ‘What is art?’ question on a regular basis. Significantly, however, courts try hard not to do so.”) (footnote omitted).

214. *See* Thomas Thompson, *Riddle of an Embattled Phantom: A Playboy Who Turned into a Secretive, Besieged and Lonely Man*, LIFE, Sept. 7, 1962, at 20, 22.

215. *The Howard Hughes Game*, *supra* note 208.

chance, the outcome of which is determined by maneuvering tokens on a game board by the throw of the dice.”²¹⁶ According to the court, the defendants were not “disseminating news” or “educating the public” because the use of Hughes’s name and biographical information was “not legitimate to the public interest.”²¹⁷ The information was “merely the medium used to market a commodity familiar to us all in its varied types and forms.”²¹⁸ The court cited both *Palmer* and *Uhlaender* and said it had “no difficulty” concluding that the defendants violated New York law.²¹⁹

The *Rosemont* court said it was not offering a “hard and fast rule,” adding that each case must be decided on its own merits, balancing the interest in free expression with the “preservation of inviolate personality and property rights.”²²⁰ However, the court said one of the factors to consider in the balance is the medium.²²¹ The Appellate Division affirmed the trial court in a brief, one-paragraph opinion, noting that the game did “not rise to the status of an expression entitled to unrestricted dissemination”²²² Clearly, both the trial and appellate court viewed games as a disfavored medium. Combined with *Palmer* and *Uhlaender*, *Rosemont* was strike three for treating games like other media of expression.

C. *The Settled Order of Things*

Prior to the *Palmer*, *Uhlaender*, and *Rosemont* trilogy, game publishers could not easily predict whether they could legally incorporate the names and likenesses of individuals into games without permission, though some publishers probably assumed that litigation could result from unlicensed uses, especially when it involved athletes or other celebrities. These three cases significantly increased the risks of unlicensed uses. Despite its formal lack of precedential authority, even a single trial court decision can influence

216. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973), *aff’d as modified*, 345 N.Y.S.2d 17 (App. Div. 1973).

217. *Id.*

218. *Id.*

219. *Id.* at 146-47.

220. *Id.* at 147.

221. *Id.* (“Among the relevant factors . . . are the media used . . .”).

222. *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 345 N.Y.S.2d 17, 17 (App. Div. 1973).

industry licensing practices.²²³ Three separate decisions from three courts in different jurisdictions would surely make a cease-and-desist more threatening.²²⁴ While there is no systematic evidence of their impact,²²⁵ this trilogy of cases at least contributed to the development of a “settled” rule for games, one giving game publishers good reason to worry that *both* litigation and liability would result from the unauthorized use of someone’s identity.

A variety of sources endorsed or at least accepted *Palmer*, *Uhlaender*, and *Rosemont*. The *Restatement (Second) of Torts* cited *Palmer* and *Uhlaender* with approval as examples of invasions of the right to privacy.²²⁶ While it did not explicitly mention games, other sources did. With citations to all three cases, a set of ALI-ABA course materials in 1977 confidently stated: “a person’s likeness cannot be appropriated for use in a game or in connection with a novelty item with the purpose of enhancing the marketability of the item.”²²⁷ Other early sources described games as merchandise in the same category as posters and T-shirts.²²⁸ More notably, early editions of McCarthy’s

223. See, e.g., KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 132-41 (2011) (discussing the impact of *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991), on sampling in the music industry).

224. Only the New York decision was affirmed by an appellate court, and its decision is binding state-wide. See *People v. Turner*, 840 N.E.2d 123, 127 (N.Y. 2005); *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919-20 (App. Div. 1984). Decisions of federal district courts are not binding on other courts or even within the same federal district court. See *Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 967 (8th Cir. 2009); *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990). The same rule applies to trial court decisions in the New Jersey state courts. *Raubar v. Raubar*, 718 A.2d 705, 707 n.3 (N.J. Super. Ct. Ch. Div. 1998) (collecting cases); *May Stores Shopping Ctrs., Inc. v. Hartz Mountain-Free Zone Ctr.*, 392 A.2d 251, 254 (N.J. Super. Ct. Ch. Div. 1978); *Mazza v. Ins. Co. of N. Am.*, 372 A.2d 1374, 1376 (N.J. Super. Ct. Law Div. 1977); *Ferraro v. Ferro Trucking Co.*, 179 A.2d 74, 76 (N.J. Super. Ct. Law Div. 1962).

225. Hylton claims *Uhlaender* “played a central role in the development of the American law of the right of publicity.” Hylton, *supra* note 168, at 108. Counterfactually, if the defendants had prevailed in *Uhlaender*—especially if the defendants subsequently prevailed in a decision by the Eighth Circuit—it would have been a very high-profile and early defeat for treating games as merchandise. A licensing tradition for games might never have developed.

226. See RESTATEMENT (SECOND) OF TORTS § 652C Reporter’s Note to cmt. B (1977).

227. Ronald L. Panitch, *Recent Developments in the Right of Publicity*, 1 ALI-ABA COURSE MATERIALS J. no. 6, 1977 at 111, 115-16.

228. See Charles W. Grimes & Gregory J. Battersby, *The Protection of Merchandising Properties*, 69 TRADEMARK REP. 431, 434-35, 454, 455 (1979); Ellen P. Winner, *Right of Identity: Right of Publicity and Protection for a Trademark’s “Persona,”* 71 TRADEMARK REP. 193, 199 n.35 (1981).

treatise on *The Rights of Publicity and Privacy* endorsed the outcomes in all three cases.²²⁹ McCarthy included his endorsement of these cases through the 2009 edition of his treatise in an “author’s comment.”²³⁰ In 1995, the *Restatement (Third) of Unfair Competition* took a similar position as McCarthy on the status of games and supported this position with citations to the three cases.²³¹ More recent sources often accept the necessity of licensing in the gaming context without question.²³²

Although there are exceptions, licensing individuals’ identities for games is now common. Game publishers sometimes seek permission for even minor uses of a person’s name, such as a small homage to rock musician and hunter Ted Nugent in the video game *Gears of War*.²³³ Unsurprisingly, game publishers do not always seek permission. They probably worry less about using the names and likenesses of politicians and other government officials (or their close

229. See MCCARTHY (1993), *supra* note 14, at § 7.7[A], [D].

230. Compare 2 MCCARTHY (2009), *supra* note 7, § 7:30 (“Specific products—Author’s comment: should the unpermitted use of personal identity in games or posters be constitutionally immune?”), with J. THOMAS MCCARTHY, 2 THE RIGHTS OF PUBLICITY AND PRIVACY § 7:30 (2d ed. 2010) (designated as “Reserved”). Although McCarthy still includes his opinion on the fantasy sports cases, he removed his “author’s comment” on the board game cases in the editions after 2009. See 2 MCCARTHY (2012), *supra* note 5, § 7:27 (“Specific products—Internet fantasy sports”); § 7:30 (designated as “Reserved”).

231. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. b (1995).

232. See S. GREGORY BOYD & BRIAN GREEN, BUSINESS & LEGAL PRIMER FOR GAME DEVELOPMENT 188 (2007) (“Publicity rights are important in the game context in a few instances. First, using a person in a game or to advertise a game usually requires that person’s permission. The same is true for using a person’s voice or other recognizable characteristic.”); TRACY FULLERTON WITH CHRISTOPHER SWAIN & STEVEN S. HOFFMAN, GAME DESIGN WORKSHOP 429 (2d ed. 2008) (“By licensing recognizable characters, personalities, music, or other entertainment properties and integrating them into a game, publishers can increase its exposure and sales . . .”); RICHARD C. LEVY & RONALD O. WEINGARTNER, THE TOY AND GAME INVENTOR’S HANDBOOK 277-78 (2003) (discussing celebrities and personalities as among the properties that must be licensed).

233. *Gears of War* includes a 20-point “achievement” called “The Nuge,” which can be earned by killing 100 opponents with a bow that fires explosive arrows. See Dan “Shoc” Hsu, *War Journal*, ELECTRONIC GAMING MONTHLY no. 209, Nov. 2006, at 97, 106 (“‘On behalf of Ted Nugent, I authorize Microsoft to incorporate the expression “The Nuge” into its *Gears of War* game.’ So reads a legal letter from the rocker/hunter/gun nut’s lawyer to the *Gears* team.”); *Gears of War* (Microsoft Game Studios 2006) (page 27 of the game manual) (thanking Ted Nugent, “inspiration for ‘The Nuge’ achievement”). Don McGowan, a former senior attorney for Microsoft Game Studios, confirmed that Nugent authorized the reference in *Gears of War*. See E-mail from Don McGowan, former Senior Attorney, Microsoft Corporation, to author (July 12, 2012) (on file with author).

equivalents).²³⁴ The publisher of the *Wafflin' Willy* board game,²³⁵ for example, did not seek the approval of Bill Clinton, Hillary Clinton, Al Gore, Ruth Bader Ginsburg, Janet Reno, Kimba Wood, Lani Guinier, Rush Limbaugh, and several other individuals to use their identities in a game lampooning Clinton's presidency.²³⁶ One of *Wafflin' Willy's* designers explained that he viewed the game as analogous to a *Saturday Night Live* sketch for which permission would not be needed.²³⁷ There are likely other, less politically-oriented games where publishers do not seek permission because the likelihood of litigation seems unlikely. Although many video games are sold in large quantities, many non-electronic games are produced in such small quantities that litigation might not be worth it to potential plaintiffs. Potential plaintiffs might not even become aware of an obscure game marketed only to gaming hobbyists.

D. Licensing Falling

The rule represented by the three classic game cases stood largely unquestioned in the courts until the United States Court of Appeals for the Eighth Circuit decided *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media*.²³⁸ An earlier decision involving the alleged use of Kieren Kirby's identity in Sega's *Space Channel 5* video game may have weakened the rule somewhat, but it did not seriously challenge it.²³⁹ In *C.B.C.*, however,

234. See William T. Gallagher, *Strategic Intellectual Property Litigation, the Right of Publicity, and the Attenuation of Free Speech Lessons From the Schwarzenegger Bobblehead Doll War (and Peace)*, 45 SANTA CLARA L. REV. 581, 582 (2005) (noting that Arnold Schwarzenegger's bobblehead lawsuit "was virtually unprecedented for a sitting politician"); David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651, 651 (2005) (describing Schwarzenegger's bobblehead lawsuit as rare).

235. See Kevin Russell & Kelly Meeks, *Wafflin' Willy* (Right Angle 1993).

236. Telephone Interview with Kevin Russell (March 27, 2012).

237. *Id.*

238. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007).

239. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607 (Ct. App. 2006). Kirby, better known as Lady Miss Kier, was the lead singer of the band Deee-Lite, and while the main character in *Space Channel 5* probably was inspired by aspects of Kirby's "retro-funk" musical persona, the character in the game departed from Kirby in various ways. See *id.* at 616. As Kirby was just the "raw material" for a new character, the court held that the First Amendment provided a complete defense. See *id.* at 614. Kirby essentially claimed control of more than her identity.

the Eighth Circuit faced the settled rule head-on and rejected it. In this case, C.B.C. Distribution and Marketing sought a declaratory judgment from the Eighth Circuit saying that it could use Major League Baseball players' names and statistics without a license in operating fantasy baseball games. C.B.C. offered its paid fantasy baseball services online and by e-mail, mail, and telephone. As explained by the court:

Before the commencement of the major league baseball season each spring, participants form their fantasy baseball teams by "drafting" players from various major league baseball teams. Participants compete against other fantasy baseball "owners" who have also drafted their own teams. A participant's success, and his or her team's success, depends on the actual performance of the fantasy team's players on their respective actual teams during the course of the major league baseball season.²⁴⁰

The parties agreed that Missouri law applied, and the court did not question this point.²⁴¹ While the district court inexplicably thought that C.B.C. did not use the players' identities, the Eighth Circuit correctly disagreed.²⁴²

The Eighth Circuit accepted that C.B.C. infringed the players' rights of publicity under Missouri law,²⁴³ but it held that the First Amendment provided a defense. The court began with the unpersuasive argument that because the information used in fantasy baseball is in the public domain (perhaps for copyright purposes²⁴⁴), it would be "strange" if the First Amendment did not allow C.B.C. to use it.²⁴⁵ The central question in the case, however, was whether a person's name or likeness is protected from an unauthorized use in a

She claimed control of too much content beyond her identity, too much content that is a combination of female, retro, funky, and groovy. Thus, Kirby's loss did not seriously challenge the established rule.

240. *C.B.C. Distrib.*, 505 F.3d at 820-21.

241. *See id.* at 821. *See also* 2 MCCARTHY (2012), *supra* note 5, § 11:7 ("[T]he law of the forum state and the state where the infringement occurred is apparently favored, although there is little consistency in the case law.").

242. *C.B.C. Distrib.*, 505 F.3d at 822.

243. *See id.* at 822-23.

244. *See* 1 MCCARTHY (2012), *supra* note 5, § 5:43 ("One is not the 'author' of one's face, no matter how much cosmetic surgery has been performed. Either God, fate, or our parents' genes 'authored' this 'work.'").

245. *C.B.C. Distrib.*, 505 F.3d at 823.

game, just as it would be from an unauthorized use in an advertisement. The court assumed an answer to this question and then said it would be strange to provide a different answer. McCarthy, who disagrees with the outcome in *C.B.C.*, is right to dismiss this particular argument.²⁴⁶

More importantly, the court recognized that *C.B.C.* provided an interactive game for the use of the major league baseball players' information. Fantasy baseball is tied very closely to real world events and relies heavily on the use of statistics and other information. *C.B.C.* provided this information as part of its service.²⁴⁷ The court recognized the significant value of this information to the public, even if *C.B.C.* provided it as part of an entertainment service.²⁴⁸ According to McCarthy, "The court appeared to place a commercial fantasy sports Web site in the same category as the sports section of a newspaper or magazine."²⁴⁹ McCarthy's position is that the *game element* of *C.B.C.*'s service made the service ineligible for First Amendment protection from a right of publicity claim.²⁵⁰ According to this view, *C.B.C.* could presumably continue to provide the same factual information about baseball players that it was providing—and even charge for it—but it needed to do so without a game attached to the information. *C.B.C.* needed to provide the information "only in ways *traditionally* protected by the First Amendment."²⁵¹ Put another way, facts plus newsprint is one thing; facts plus a game is a coffee mug.

246. See 2 MCCARTHY (2012), *supra* note 5, § 7:27.

247. Compare CBC's Statement of Uncontroverted Facts ¶ 21, *C.B.C. Distrib. & Mkg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (No. 05-0252) ("CBC's website provides up-to-date information, including statistical information, on each player to assist customers in selecting and trading players on their fantasy teams."), *aff'd*, 505 F.3d 818 (8th Cir. 2007), with Defendant Major League Baseball Players Association's Response to Plaintiff's Statement of Uncontroverted Facts ¶ 21, *C.B.C. Distrib.*, 443 F. Supp. 2d 1077 (No. 05-0252) ("Uncontroverted, except that the incidental services offered by CBC are not at issue in this action; further, such services are not necessary as stated, as CBC fantasy team owners can obtain current information about their players' performances from a variety of sources, including newspapers, electronic media and the Internet.").

248. See *C.B.C. Distrib.*, 505 F.3d at 823.

249. 2 MCCARTHY (2012), *supra* note 5, § 7:27.

250. See *id.*

251. Patrick K. Thornton & Christopher James, *Down Two Strikes, Is Major League Baseball Already Out?: How the 8th Circuit Balked to Protect the Right of Publicity in C.B.C. v. MLB*, *Advanced Media*, 50 S. TEX. L. REV. 173, 198 (2008) (emphasis added).

After the *C.B.C.* decision, a similar result followed in a district court case in the Eighth Circuit involving the National Football League players.²⁵² The law is not settled, however, as it is uncertain how other circuits will resolve similar cases now pending before them. The next section explains why the other circuits should continue what the Eighth Circuit started and how they should go about doing it.

IV. GAMES AS AN EXPRESSIVE MEDIUM

Games are routinely expressive in ways that implicate First Amendment concerns. There is a First Amendment interest in protecting speech that communicates information and speech that is entertaining.²⁵³ Games can do both. They inform. They tell stories. Sometimes games make political arguments. Games often feature words, either written or spoken, but courts interpret the First Amendment to protect more than just words.²⁵⁴ Music is protected even in the absence of lyrics.²⁵⁵ Early cases involving video games denied First Amendment protection to them on the ground that they failed to communicate or express ideas,²⁵⁶ but recent decisions, most notably the Supreme Court's decision in *Brown v. Entertainment Merchants Association*, recognize that at least video games are entitled to First Amendment protection. In *Brown*, the Supreme Court said:

252. See *CBS Interactive, Inc. v. NFL Players Ass'n, Inc.*, 259 F.R.D. 398, 419 (D. Minn. 2009).

253. See *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.").

254. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995); *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

255. See *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Reed v. Vill. of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983); *Morris v. 702 E. Fifth St. HDFC*, 778 N.Y.S.2d 20, 23 (App. Div. 2004).

256. See *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609-10 (Mass. 1983).

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.²⁵⁷

Brown strongly suggests that at least video games have graduated from merchandise to a recognized medium of expression, one equivalent to more traditional forms of expression, but the issue is not purely academic once we move beyond video games. The gaming medium is more than just video games and a few classic board games like *Monopoly*. While there are exceptions—bingo’s claim as expressive speech is not very compelling,²⁵⁸ nor is *Pong*’s²⁵⁹—games are a vibrant form of expression. Games in general are ready to graduate from merchandise to expression and be treated like other forms of expression, something courts continue to resist.

There is a long tradition, one not limited to the United States,²⁶⁰ of using games for educational purposes, to communicate cultural values, and even to teach in a more explicit sense. The most common examples are simple children’s games similar to *Chutes & Ladders*. While hardly a well-known game today, *The Mansion of Happiness* (1843) illustrates the emphasis placed on moral education in early American games. In this game, a spinner sent players along a track towards the center of the board, a “place of peace and virtue” and “bosomy young maidens.”²⁶¹ Along the way, players could land on spaces representing assorted virtues or vices. Virtues like purity and

257. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011). See also *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1096, 1101 (9th Cir. 2008) (agreeing that “a producer of a video game in the ‘Grand Theft Auto’ series has a defense under the First Amendment against a claim of trademark infringement”).

258. See *There To Care, Inc. v. Comm’r of the Ind. Dep’t of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994).

259. See Jon M. Garon, *Playing in the Virtual Arena: Avatars, Publicity, and Identity Reconceptualized Through Virtual Worlds and Computer Games*, 11 CHAP. L. REV. 465, 472-73 (2008) (“[T]he makers of *Pong* had no point of view being espoused by their square ball or simple paddles”) (italics added).

260. See, e.g., Haim Grossman, *War as Child’s Play: Patriotic Games in the British Mandate and Israel*, 9 ISRAEL STUDIES 1 (2004) (discussing the history of Israeli board games through the Six Day War).

261. David Wallace Adams & Victor Edmonds, *Making Your Move: The Educational Significance of the American Board Game, 1832 to 1904*, 17 HIST. EDUC. Q. 359, 370 (1977).

honesty allowed a player to move an extra space towards the center. Less virtuous spaces thwarted the player's advance. Sabbath breakers, for example, went to the pillory and lost three turns. Drunkards moved backwards twenty-five spaces. According to game historian Bruce Whitehill, many other games published through the 1890s used similar mechanics to teach the benefits of good behavior, with the virtuous propelled forward to the goal and the non-virtuous sent backward.²⁶²

The original version of *The Game of Life* offered a simple message similar to *The Mansion of Happiness*. A century before *The Game of Life*, Milton Bradley, the founder of the Milton Bradley Company, published *The Checkered Game of Life* (1860), his first game.²⁶³ According to the patent, the game was "susceptible of being so arranged as to impart useful and instructive facts, or to impress moral truths upon the minds of those engaged in the play."²⁶⁴ The rules said the game is "intended to present the various vices and virtues in their natural relation to each other."²⁶⁵ The design of the board, for example, emphasized Bradley's ideas of success. Poverty was located near the starting space of Infancy because, as explained by Professors David Adams and Victor Edmonds, "poverty early in life is no disadvantage. But poverty of one's own fault is a different matter"²⁶⁶

The Game of Life, the modern version of *The Checkered Game of Life*, tones down the moralism of its nineteenth century predecessors, but it is not without a message. Historian Jill Lepore calls the 1960 edition "a lesson in Cold War consumerist conformity."²⁶⁷ At the start, each player is represented by a car with either a blue or pink peg in the driver's seat. There are five empty seats in the car for a spouse and children. Carpooling and public

262. See Whitehill, *supra* note 118, at 119-22. The virtues were not necessarily religiously oriented. Some games emphasized secular success, such as *Office Boy*, the goal of which was to reach the space marked Head of the Firm. See Adams & Edmonds, *supra* note 261, at 377-79.

263. SHEA, *supra* note 116, at 11, 48-49. Milton Bradley went into business in 1858. He incorporated the Milton Bradley Company in 1884. *Id.* at 35, 125.

264. U.S. Patent No. 53,561 col.1 (issued Apr. 3, 1866).

265. Adams & Edmonds, *supra* note 261, at 375 (quoting from *The Checkered Game of Life: An Official Reproduction of the Milton Bradley Original* (East Longmeadow, Mass., 1970)).

266. *Id.*

267. Jill Lepore, *The Meaning of Life*, NEW YORKER, May 21, 2007, at 38.

transportation are not an option. On the first turn, a player must choose to start college or a career.²⁶⁸ Needless to say, there are no communes or kibbutzim in *Life* to upset the conformity noted by Lepore. Shortly after the start of the game, players must stop to get married. While the rules are silent on whether this marriage must be opposite- or same-sex, marriage is required. Subsequently, one must buy a house (probably in the suburbs) and, depending on the results on the spinner, children are likely to follow. Drew Chappell, a lecturer and playwright, describes the inevitable benefits of marriage and children in the game as “insidious in its normalization of the traditional family structure.”²⁶⁹ Chappell describes the game as offering “a linear track paralleling middle-class adult life events.”²⁷⁰ Not all of the events are typical, however. There is a chance to find buried treasure, swim the English Channel, become President, and (separate from becoming President) win a Nobel Peace Prize.²⁷¹ After the players retire either to Countryside Acres or Millionaire Estates, the players count up their money. The player with the most money wins.²⁷² *Life* has a message. Whether one approves or not, the game is steeped in what are often described as traditional American middle-class values.

Many games do not contain obvious moral teachings. Like the modern *Game of Life*, most games are probably more subtle in terms of the values they communicate. Occasionally, a game makes a clear announcement of its point of view. After explaining how it is a “space game of free market exploration and exploitation,” the box for the board game *Trailblazer* (1981) declares, “Libertarians will love it.”²⁷³ But an explicit political or ideological orientation is rare.

Although McCarthy recognized the existence of games with expressive content, including games that teach and even some political games, he still thought games should be treated as merchandise. But why? It is difficult to find a clear answer. A cranky

268. *The Game of Life* (Hasbro 2002) (page 3 of the Instructions).

269. Drew Chappell, *Success Through Excess: Narratives and Performances in Board and Card Games*, in CHILDREN UNDER CONSTRUCTION: CRITICAL ESSAYS ON PLAY AS CURRICULUM 277, 284 (Drew Chappell ed., 2010).

270. *Id.*

271. *See The Game of Life*, supra note 268.

272. *See id.* (page 6 of the Instructions).

273. *Trailblazer* (Mctagaming 1981).

broadside against modern toys published in 2004 by English author Anthony Horowitz is extreme, but his viewpoint illustrates common notions about the gaming medium:

The best games are generally the oldest. *Monopoly*, still the world bestseller, was invented in 1934. Barbie (currently engaged in a fight-to-the-death with a more delinquent gang of Bratz) can be described quite literally as a little old lady. She first appeared in 1959. Then there's Lego (1934), *Cluedo* [or *Clue*] (1947), *Scrabble* (1948), *Risk* (1959) and *Uno* (1971). Even *Trivial Pursuit*, arguably the last great board game, celebrates its quarter-century this year. There's still Etch A Sketch (invented 1960) scratching away at aluminium powder and glass beads and leaving behind traces of old pictures the more it is used. And dozens of games still rely on a device invented in 700 bc: a pair of dice.²⁷⁴

It is somewhat unusual to treat Barbies, Legos, and Etch-A-Sketches as games,²⁷⁵ but the few actual games Horowitz considers the best are among the handful of well-known classics. *Trivial Pursuit*, the most recent game he considers great, is twenty-five years old. And he thinks only *dozens* of games rely on dice, presumably because the known universe of games to him is in the dozens. Horowitz is not alone in this respect.

For many people, the board game category likely means two groups of games. The first group consists of the classic core of games, mostly games people play as children. These games are the few titles that many people would likely recognize and think of as representing almost the entirety of the board game category. There are probably about two dozen titles in this category, starting with several non-proprietary games: chess, checkers, backgammon, and maybe cribbage and pachisi (or *Parcheesi*, the branded version). Among proprietary games, *Monopoly* (1935) has long dominated all others. Sears' 1947 Christmas catalog labeled *Monopoly* "America's most

274. Anthony Horowitz, *Gifts Rapped*, THE SPECTATOR, Jan. 24, 2004 (italics added).

275. Similarly, write-ups of the *Palmer* case in the *American Trial Lawyers Association News Letter* referred to *Pro-Am Golf* as a "Toy Game." See *Privacy—Unconsented Commercial Use of Well-Known Sports Figures' Names, Biographical Data, & Reputations in Contents of Toy Game Held Actionable*, 11 AM. TRIAL LAWYERS ASS'N NEWS LETTER, Apr. 1968, at 118. While there are Lego board and video games, Horowitz is referring to the bricks in general. See, e.g., Jane Clifford, *Games to Add to the Toy Chest*, SAN DIEGO UNION-TRIB., Nov. 25, 2000, at E4.

popular Game!”²⁷⁶ Decades later it remains dominant.²⁷⁷ Other titles people are likely to think about are *Sorry!* (1934), *Chutes & Ladders* (1943),²⁷⁸ *Stratego* (1947), *Clue* (1948), *Scrabble* (1948), *Candy Land* (1949), *Risk* (1959), *Life* (1960), *Battleship* (1967), *Othello* (1975),²⁷⁹ *Trivial Pursuit* (1981), and just a few others.²⁸⁰ All of these games are marketed year after year, decade after decade.²⁸¹ Journalists often assume (probably correctly) that their readers would be unfamiliar with any board games beyond these few well-known titles.²⁸²

276. SEARS, ROEBUCK & CO., CHRISTMAS BOOK 187 (1947).

277. See PHILIP E. ORBANES, MONOPOLY: THE WORLD’S MOST FAMOUS GAME—AND HOW IT GOT THAT WAY (2006); Steve Jackson, *Monopoly*, in FAMILY GAMES: THE 100 BEST, *supra* note 15, at 230; Scott Nicholson, *Board Games with Scott 070—Breaking Up the Monopoly*, YOUTUBE (Nov. 21, 2010), <http://www.youtube.com/watch?v=ATnXloqRfdA> (illustrating *Monopoly*’s dominance of the medium); UNDER THE BOARDWALK: THE MONOPOLY STORY (Toastic Productions 2010). As a more fanciful example of *Monopoly*’s international dominance of the board game category, a copy of the *Game of Life* (also known as *The Roulette of Life*) is immediately mistaken for *Monopoly* in an episode of the 2009 Korean television drama, *Man Who Can’t Get Married* (alternatively translated as *He Who Can’t Marry*). See 결혼 못하는 남자 (KBS Broadcast 2009) (episode 3).

278. *Chutes & Ladders* is Milton Bradley’s edition of *Snakes & Ladders*, a much older game.

279. *Othello* was published in the United States in 1975. Its history is covered in Darren Watts, *Othello*, in FAMILY GAMES: THE 100 BEST, *supra* note 15, at 245.

280. Other games people are likely to think of are *Mouse Trap* (Ideal 1963), *Operation* (Milton Bradley 1965), *Pictionary* (Western Publishing 1985), *Connect Four* (Milton Bradley 1974), *Scattergories* (Milton Bradley 1988), and several branded card or dice games typically marketed with board games, including *Mille Bornes* (Parker Bros. 1954), *Yahtzee* (Milton Bradley 1956), and *Uno* (Merle Robbins 1971).

281. See, e.g., FAO SCHWARZ, TOYS CATALOG 123 (1967).

282. See, e.g., Joe Blundo, *Board-Game Changers*, COLUMBUS DISPATCH, Dec. 10, 2011, at D1 (“If you haven’t ventured beyond *Monopoly* and *Scrabble* in a few years, you might be surprised by what’s out there.”) (italics added); Douglas Brown, *Board Games Flying Past “Go,” Collecting Fans*, DENVER POST, Dec. 24, 2009, at 1D (“People around the world still get together, face to face, in basements and living rooms, where they pick cards and roll dice and move little pieces around stiff squares of cardboard. And now it’s more than just the classics, like *Sorry* and *Risk*.”) (italics added); N.R. Kleinfield, *Masters of the (Tabletop) Universe*, N.Y. TIMES, Apr. 5, 2009, at L11 (“They don’t play grand old staples like *Monopoly* or *Life*, games they dismiss as glaringly short on brain-consumption and too heavily reliant on dice throws or wheel spinning. Instead, they find sybaritic pleasure in possibilities most people have never heard of, especially the relatively recent influx of so-called designer or Eurogames . . .”) (italics added); Leon Neyfakh, *Quest for Fun: Sometimes the Most Addictive New Technology Comes in a Simple Cardboard Box*, BOS. GLOBE, Mar. 11, 2012, at K1 (“The kind of games that Spak and Liberty design have little in common with classic titles like *Monopoly* and *Risk*, and even less with *Candy Land* and *Mouse Trap*.”) (italics added); Gill South, *Boards for the Bored*, N.Z. HERALD, June 26, 2011, http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=10734774 (“Games

The second group of board games consists of ephemera, games based on popular films, television programs, or celebrities. At least as early as 1956, the Sears' Christmas catalog²⁸³ devoted space to "New TV Games," such as *Adventures of Lassie*.²⁸⁴ In the 1966 Christmas catalog,²⁸⁵ the selection included such games as *Get Smart*,²⁸⁶ *Man from U.N.C.L.E.*,²⁸⁷ and *The Beatles Flip Your Wig Game*.²⁸⁸ In the 1976 JCPenney Christmas catalog,²⁸⁹ licensed titles included *Space: 1999*,²⁹⁰ *The Bionic Woman*,²⁹¹ *Six Million Dollar Man: Bionic Crisis*,²⁹² and *Happy Days*.²⁹³ The selling point of these games is primarily the licensed material, not the game play. These games are likely to be tedious, uncreative, and appeal mainly to younger consumers. While people may recognize at least some of these games, they are easily forgettable.²⁹⁴

While McCarthy's tone was quite different than Horowitz's, his explanation (through 2009) for why he agreed with the holdings in *Palmer*, *Uhlaender*, and *Rosemont* suggests a similar and also inadequate view of the gaming medium. McCarthy's basic point was that games are not a traditional medium of expression. McCarthy acknowledged that games can nevertheless communicate information, but he did so by implying that games largely do so for the benefit of children: "We are all familiar with childhood board games, puzzles, card games, and the like that are designed to teach as well as

have moved on from *Monopoly* and *Cluedo* [*Clue* of old.]) (italics added); Ralph Vigoda, *The Game's Afoot for Area Group*, PHILA. INQUIRER, Jan. 1, 2001, at B01 ("Members and guests of the Eastern Pennsylvania Gaming Society, they have come to play games, part of a monthly ritual for a group of men—and a couple of women—who are mostly approaching, or firmly entrenched in, middle age. You will not find *Monopoly* or *Parcheesi* here.") (italics added).

283. SEARS, ROEBUCK & CO., CHRISTMAS BOOK 288 (1956).

284. Lisbeth Whiting, *Adventures of Lassie* (1955).

285. SEARS, ROEBUCK & CO., CHRISTMAS BOOK 570-71 (1966).

286. *Get Smart* (Idcal 1965).

287. *The Man From U.N.C.L.E.* (Idcal 1965).

288. *The Beatles Flip Your Wig Game* (Milton Bradley 1964).

289. JCPENNEY, CHRISTMAS CATALOG 391 (1976).

290. *Space: 1999* (Milton Bradley 1976).

291. *The Bionic Woman* (Parker Bros. 1976).

292. *The Six Million Dollar Man: Bionic Crisis* (Parker Bros. 1975).

293. *Happy Days* (Parker Bros. 1976).

294. See Don Greenwood, *Gaming as Sport*, KNUCKLEBONES, Nov. 2005, at 76 (discussing how he concluded in his youth that "the mainstream offerings one commonly found in department stores were more often than not so much pabulum for the masses").

entertain.”²⁹⁵ There was barely an acknowledgment of games that might appeal to adults, of games that might go beyond the basic moral lessons of *Chutes & Ladders*. The only exceptions to the general rule McCarthy supported were for board games dealing with politics. He noted that commentators who criticize the three classic cases mainly point to games about the political process.²⁹⁶ In the interest of protecting political speech, McCarthy did not support holding the publishers of political games liable, but he thought the use of other celebrities should not be permitted because “board games and wall posters featuring these celebrities are not traditional media in which ideas are conveyed and should usually be viewed as more exploitive than informational or educational.”²⁹⁷

Were someone to conceive of the entire gaming medium in terms of the two categories of board games described above, McCarthy’s long-standing position might make sense. According to this view, the medium is dominated by a small number of classic titles. Most new games are simply old games in slightly different form.²⁹⁸ To the extent games have something to say, they are overwhelmingly repeating the same thing year after year. Indeed, the fact that several of the classic titles are constantly re-themed, most notably *Monopoly*,²⁹⁹ reinforces the view that games are largely exploitative licensing opportunities. And games are mostly childish anyway. The exceptions—the games that might appeal to adults—are exceedingly rare and mainly consist of a few political games, which are forgotten and obscure anyway. The gaming medium is therefore unworthy of respect. As the next section demonstrates, however, much has

295. 2 MCCARTHY (2009), *supra* note 7, § 7:30.

296. One commentator McCarthy cites refers to the game *Who Can Beat Nixon?* (Dynamic Design Indus. 1970). See 2 MCCARTHY (2009), *supra* note 7, § 7:30 (citing James M. Treccc, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 666 (1973)).

297. 2 MCCARTHY (2009), *supra* note 7, § 7:30.

298. See, e.g., Jill Lepore, *The Meaning of Life*, NEW YORKER, May 21, 2007, at 38, 40 (“Like most ‘new’ games, the *New Game of Human Life* [1790] was an old game tarted up.”) (*italics added*).

299. There is an enormous range of rethemed editions of *Monopoly*. See, e.g., *Monopoly: Nintendo* (USAopoly/Hasbro 2006); *Monopoly: Rudolph the Red-Nosed Reindeer* (USAopoly/Hasbro 2006); *Monopoly: Star Wars* (Hasbro 1996). Retheemed editions also include ones based on real people. See, e.g., *Monopoly: Alan Turing* (Bletchley Park/Winning Moves 2012); *Monopoly: Metallica* (USAopoly/Hasbro 2011); *Monopoly: John Wayne* (USAopoly/Hasbro 2010).

changed in the gaming medium since the courts decided *Palmer*, *Uhlaender*, and *Rosemont*. We do not think the cases were rightly decided at the time, but insofar as they set a general rule, they have become increasingly indefensible since they were decided. The general or “settled” rule reflects an understanding of games in terms of a few dozen classic games, but it ignores the many *thousands* of other games that make the settled rule an anachronism.

A. *The Gaming Medium Is More than Monopoly*

A multi-decade industry custom of licensing supported by several cases likely carries some weight with courts, even when courts are not bound by these older decisions. Indeed, the custom probably counts for more than the cases. A judicially cautious approach is to respect the industry’s long-standing experience with licensing and endorse the status quo.³⁰⁰ But sometimes a fresh look at an issue is needed.³⁰¹ As the status quo of treating games as merchandise owes much to three cases that predate significant developments in the gaming medium, a fresh look is warranted here. When those three cases were decided, the gaming medium was primitive by today’s standards. Games with adult appeal achieved some significant success back then, but they hardly dominated the medium.³⁰² Historical wargames were still in their infancy (and lacked clear appeal for adults in the 1960s³⁰³). Role-playing games did not

300. See Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1568-70, 1579-87 (2010); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (Dover Publ’ns 1991) (1881).

301. See HOLMES, *supra* note 300, at 5.

302. See Malcolm Allen, *Games for Adults “Can Be Lot of Fun,”* BALT. SUN, Mar. 13, 1966, at H1; Joe Babinsack, *By the Book*, KNUCKLEBONES, May 2007, at 22 (discussing the history of 3M’s bookshelf game line from 1962 to 1976); Sid Sackson, *Do Not Pass Go, Do Not Dispose of Solid Waste*, CHI. TRIB., Dec. 6, 1970, at U3.

303. *The General*, Avalon Hill’s in-house magazine, reported in 1965 that most wargamers were in their late teens. See Louis Zocchi, *How to Meet Competition*, 2 THE GENERAL no. 1, May 1965, at 9. In the first two years of publishing *The General*, 1964-1965, Avalon Hill appointed regional editors around the country to contribute articles, and many of these editors were of high school age. See Brooklynite, *Victor Madeja, Editor for Middle Atlantic*, 1 THE GENERAL no. 2, July 1, 1964, at 4 (age 17); *Central Editorship to Daniel Hughes, History Bug*, 1 THE GENERAL no. 2, July 1, 1964, at 9 (age 17); *Hilary Smith Appointed South Atlantic Editor*, 1 THE GENERAL no. 1, May 1, 1964, at 2 (age 17); *New Editors Appointed to Staff*, 2 THE GENERAL no. 1, May 1965, at 2 (announcing three to four new high school age editors and one college age editor). One editor described himself “as the only sixteen year old Field Marshal in the world.” *Pacific Coast Editorship to Basketballer—Jon Perica*, 1 THE GENERAL no. 1,

exist. Eurogames had not become a significant part of the medium. And commercial video games, the types of games most likely to be familiar to people beyond the childhood classics, first appeared between the decisions in *Uhlaender* and *Rosemont*. There are other types of games as well, such as commercial card games,³⁰⁴ but a brief history of commercial wargames, role-playing games, Eurogames, and video games should be sufficient to establish that the medium has evolved significantly since the 1970s.

1. Wargames

The wargaming industry started slowly in the 1950s and 1960s, but as the market grew and became more competitive, it later achieved “exponential growth in the early 1970’s.”³⁰⁵ Wargaming for military or recreational purposes goes back much further in time,³⁰⁶ but members of the hobby wargaming industry typically trace its start either to the publication of Charles S. Roberts’s game *Tactics* in 1954³⁰⁷ or the publication of Roberts’s later games *Tactics II* and

May 1, 1964, at 4. The customer base (and the industry) matured, however. See JAMES F. DUNNIGAN, *THE COMPLETE WARGAMES HANDBOOK* 223 (rev. ed. 1992) (“Taken as a group, wargamers were relatively young 10 years ago, when 52 percent were under age 22. Today, only a few percent are that young . . .”); Alan Emrich, *The Fall and Rise of Wargaming*, *FIRE & MOVEMENT* no. 67, Aug. 1990, at 57, 58 (describing the demographics of readers who responded to the magazine’s feedback surveys as follows: none were 21 years old and under, 17% were 22-27 years old, and 83% were 28 or more years old).

304. While there are other types of card games, collectible card games, which are marketed much like baseball cards, represent a significant subcategory of games. By 2003 there were approximately 130 different collectible card games in English and over 100,000 different cards. See JOHN JACKSON MILLER & JOYCE GREENHOLDT WITH JASON WINTER, *SCRYE COLLECTABLE CARD GAME CHECKLIST AND PRICE GUIDE* 13 (2d ed. 2003).

305. Redmond A. Simonsen, *Opening Moves*, *MOVES* no. 56, Apr.-May 1981, at 2.

306. See H.G. WELLS, *LITTLE WARS* (University Microfilms 1966) (1913); Richard Brooks, *Foreword* to JOHN CURRY, *THE FRED JANE NAVAL WARGAME* (Lulu.com 2008) (1898); Stephen B. Patrick, *The History of Wargaming*, in *WARGAME DESIGN* 1, 2-9 (1977).

307. Remarkably, authoritative sources disagree about when Roberts published *Tactics*. Roberts said he designed the game in 1952 and published it in 1954. See Charles S. Roberts, *The Founding Years*, *C3I MAGAZINE* no. 25, 2011 at 32. Long after Roberts had left the company, Avalon Hill reported in a company history—one emphasizing the “correct recording of game releases”—that Roberts published *Tactics* in 1952: “Commercial board wargames originated in 1952 with the publication of TACTICS by Charles S. Roberts.” *Time Line*, in *THE AVALON HILL GENERAL: INDEX AND COMPANY HISTORY* 5 (1980). A few years after publishing this history, however, Avalon Hill said *Tactics* “was copyrighted in an edition of only 2000 copies in 1954 . . .” *Tactics*, 20 *THE GENERAL* no. 6, 1984, at 3 (advertisement). We view 1954 as correct. A pre-1954 game that resembles the wargames later published by Roberts, at least in appearance, is a very obscure game designed by Arthur Renals. See Arthur Renals, *War Tactics*

Gettysburg in 1958.³⁰⁸ In 1958, Roberts incorporated the Avalon Hill Company, later known as the Avalon Hill Game Company, with the intent to publish not just wargames, but a range of games for adults, a market he thought the established publishers like Milton Bradley and Parker Brothers were largely ignoring.³⁰⁹ From the beginning, Avalon Hill published a range of games,³¹⁰ but it became known primarily for its wargames and for creating the commercial wargaming industry.³¹¹

While there are variations, traditional board wargames are characterized by the use of maps overlaid with hexagons, numerous cardboard counter playing pieces, assorted charts, and complex rules.³¹² They are designed to represent actual or fictional battles or wars, with combat resolved through dice rolls and combat results tables.³¹³ *Tactics II* includes an instruction book with sixteen pages of rules (some optional), a 28 by 22 inch mapboard (with squares rather than hexes), and 88 counters total (44 for each side).³¹⁴ At the other end of the spectrum, *War in the Pacific* includes an 88 page rulebook, seven 22 by 34 inch strategic maps, several tactical maps, and

or Can Britain Be Invaded? (Arthur Renals c. 1911). Few copies are known to exist, but the Imperial War Museum in London, England (<http://www.iwmcollections.org.uk>) has two catalog entries for the game, EPH 2701 and EPH 2702. Renals' game predates *Tactics*, but it did not generate a commercial wargaming industry.

308. See NICK SCHUESSLER & STEVE JACKSON, *GAME DESIGN VOLUME 1: THEORY AND PRACTICE* 3 (1981) ("Dating hobby wargaming from about 1960, with the issue of *Tactics II*, it's remarkable how far the field has progressed in such a short time."); Rodger B. MacGowan, *F&M Wargaming Biography: Charles S. Roberts*, *FIRE & MOVEMENT* no. 56, 1988, at 16 (describing the formation of the Avalon Hill Company in 1958 as the "'official' founding of board wargaming").

309. See Roberts, *supra* note 307, at 32 ("Let me emphasize that *Avalon Hill* was not founded to pioneer in wargaming. I was convinced that there was a market for realistic games of specialty format, designed to appeal to those who enjoy intellectual challenges and prefer competition wherein skill is a primary virtue.").

310. See generally Rex A. Martin, *Cardboard Warriors: The Rise and Fall of an American Wargaming Subculture, 1958-1998*, at 202 (August 2001) (unpublished Ph.D. dissertation, Pennsylvania State University), *microformed on* UMI Microform 3020503 (Univ. Microforms Int'l).

311. See *id.* at 202-10, 229-37 (describing the beginning of the commercial wargaming industry).

312. See generally BEGINNER'S GUIDE TO STRATEGY GAMING (1986) (a special publication of *Fire & Movement* magazine); SPECIAL EDITION # 1 (1990-91) (published by Cummins Enterprises).

313. See generally BEGINNER'S GUIDE TO STRATEGY GAMING, *supra* note 312; SPECIAL EDITION # 1, *supra* note 312.

314. See Charles S. Roberts, *Tactics II* (Avalon Hill 1958).

approximately 9000 counters.³¹⁵ Playing times for these games are often longer than typical mass-market games.³¹⁶ Some games that are closely related to traditional wargames depart from the standard formula in various ways, such as dropping the hex grid,³¹⁷ substituting generic plastic pieces for the more detailed cardboard counters,³¹⁸ or departing from the emphasis on combat between military units.³¹⁹ Wargames can have any sort of theme, whether tied to hypothetical events,³²⁰ science fiction,³²¹ fantasy,³²² horror,³²³ or other genres, but the largest category of wargames is based on historical events.

Avalon Hill's sales were good in the early 1960s.³²⁴ The company received good publicity from a variety of media sources, including *Life*³²⁵ and *Playboy*.³²⁶ Some of its games appeared in mass-

315. See Kevin Kiff, *War in the Pacific* (Decision Games 2d ed. 2006). The rules are available at <http://www.decisiongames.com/html/e-rules.html>.

316. See, e.g., John Edwards, Alan R. Moon & Richard Hamblen, *Fortress Europa* (Avalon Hill 1980) ("Six Hours and Up") (box bottom); Randy Heller, *Bitter Woods: The Battle of the Bulge* (Avalon Hill 1998) ("From 4 hours for the tournament scenario to 8+ hours for the entire game") (box bottom); Nick Karp, *Vietnam 1965-1975* (Victory Games 1984) ("From 6 hours for a short scenario, to 100 or more hours for an entire campaign.") (box bottom); John Prados & Donald Greenwood, *Rise and Decline of the Third Reich* (Avalon Hill 3d ed. 1974) ("4-12 hours dependent on scenario played") (box bottom). An example at the extreme end is Richard Berg's *The Campaign for North Africa* (SPI 1979). The estimated playing time for the campaign game with ten players is 1000+ or 1200+ hours (as the box and the rules differ in their estimates). See Bob Campbell, *The Campaign for North Africa*, PHOENIX MAG. no. 24, Mar.-Apr. 1980 at 9, 10.

317. See, e.g., Mark Herman, *Washington's War* (GMT Games 2010). As another departure from the traditional wargame, the game incorporates event cards into the game play.

318. See, e.g., Larry Harris, Jr., *Axis & Allies* (Milton Bradley 2d ed. 1987).

319. See, e.g., Ananda Gupta & Jason Matthews, *Twilight Struggle* (GMT Games 2009). According to one review, "*Twilight Struggle* focuses on the two major players of the Cold War, the United States and the Soviet Union The game offers an educational look into this historical era and does so in a fun, but tension-filled game of interactive action." Zev Shlasinger, *Twilight Struggle*, in HOBBY GAMES: THE 100 BEST 335, 335 (James Lowder ed., 2007).

320. See, e.g., James F. Dunnigan, *MechWar '77* (SPI 1975); James F. Dunnigan, *The Next War* (SPI 1978).

321. See, e.g., Randall C. Reed, *Starship Troopers* (Avalon Hill 1976).

322. See, e.g., Howard Barasch & Richard Berg, *War of the Ring* (SPI 1977); Greg Costikyan & Eric Goldberg, *Swords & Sorcery* (SPI 1978); Grant Dalgliesh & Tom Dalgliesh, *Wizard Kings* (Columbia Games 2000).

323. See, e.g., John H. Butterfield, *Dawn of the Dead* (SPI 1978).

324. See DUNNIGAN, *supra* note 303, at 147. See also MacGowan, *supra* note 308, at 16.

325. See John Ferris, *Go Join Othello in Venice*, LIFE, Nov. 25, 1966, at 30 (reviewing Henry Scott, *The Game of Shakespeare* (Avalon Hill 1966)).

326. *Playboy's Gifts for Grads and Dad*, PLAYBOY, June 1965, at 151, 153.

market stores³²⁷ and catalogs.³²⁸ But Avalon Hill was still nurturing a hobby in its infancy. From 1967 to 1969, it published only one new wargame title per year.³²⁹ Things changed in the 1970s.

For years, Avalon Hill faced little competition,³³⁰ but in 1969 James Dunnigan founded a competing wargame publisher, Simulations Publications, Inc. (SPI).³³¹ With Avalon Hill and SPI leading the way, many smaller companies entered the market. Figure 1 illustrates the growth in wargame publishing from 1958 to 2008 using data from four different sources. These sources show that hobby wargaming established itself after the courts decided the three classic right of publicity game cases.³³² And while it is a small industry,³³³ they show that it is prolific for its size. The total number of published wargames is in the thousands. Wargaming is not a footnote to what should really be a discussion of *Monopoly* and other childhood games.³³⁴

327. See Emrich, *supra* note 303, at 57 (“Twenty-five years ago you could walk into many toy stores (‘chains’ of retail outlets), look on the game shelves, and see *Monopoly* next to *Scrabble* next to *Gettysburg* next to *Clue*, etc.”) (italics added).

328. See, e.g., FAO SCHWARZ, *supra* note 281, at 123. Four Avalon Hill games appeared on a list of “well known games.”

329. *Time Line*, *supra* note 307, at 8-9.

330. See Patrick, *supra* note 306, at 19-20.

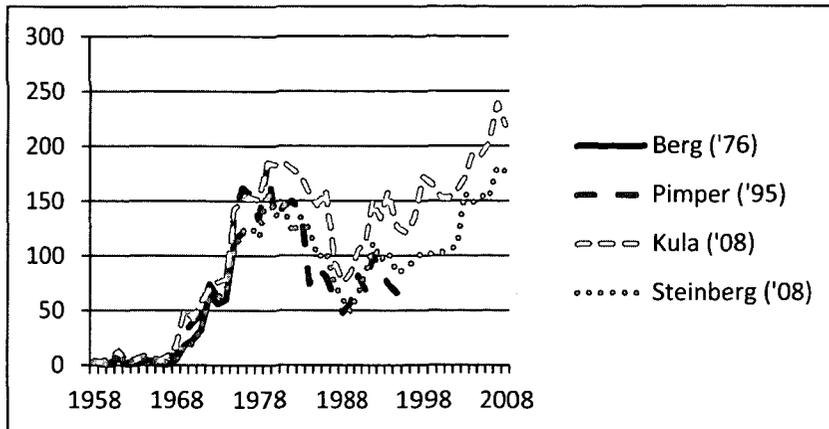
331. See DUNNIGAN, *supra* note 303, at 148-50; Patrick, *supra* note 306, at 20-25. Avalon Hill referred to SPI as its “first serious competitor.” *Time Line*, *supra* note 307, at 9.

332. See Luc Olivier, *The History of Wargames* (pt. 3), SIMULACRUM no. 25, Oct.-Dec. 2005 at 40, 42 (“The 1970s were really the start of the Hobby in the USA.”).

333. See DUNNIGAN, *supra* note 303, at 169-70 (“Sales patterns indicate that at its peak in the late 1970s, there were only a few hundred thousand historical wargamers in the nation. There were about as many throughout the rest of the world. As of the early 1990s, sales patterns indicate that there are probably only about 100,000 paper gamers still active.”); Don Greenwood, *The Avalon Hill Philosophy* (pt. 161), 29 THE GENERAL no. 2, 1994, at 4 (“For some time now, we have been struggling with dwindling boardgame sales. . . . [T]he younger generation has voted overwhelmingly with their entertainment dollars for the electronic media.”); Redmond A. Simonsen, *Opening Moves*, MOVES no. 45, June-July 1979, at 2, 3 (providing a non-scientific “personal estimate of the gamer population” at 150,000).

334. See Matthew Kirschenbaum, *War Stories: Board Wargames and (Vast) Procedural Narratives*, in THIRD PERSON: AUTHORIZING AND EXPLORING VAST NARRATIVES 357, 359 (Pat Harrigan & Noah Wardrip-Fruin eds., 2009) (explaining why a “contemporary ludologist” should be interested in board wargames).

Figure 1. Annual Number of Wargame Titles Published
(1958-2008)³³⁵



335. These data are not limited only to historical wargames, nor are they limited only to the traditional hex and counter wargames. The four sets of numbers vary for a variety of reasons. Deciding what games to include as wargames is one major factor that causes variation. Many people would disagree with classifying at least some of the entries in these databases as wargames. Other factors that contribute to the variation are whether to list multiple editions of the same game separately, whether to include supplements and expansions for a game, and whether to include titles published outside the United States. The Berg data come from Richard H. Berg, *Wargame Directory and a Suggested Library of Games*, in *WARGAME DESIGN*, *supra* note 306, at 148, 149-58. Berg acknowledges omitting about 100 titles he considered too obscure to be worth including. Entries for 1977, the year SPI published Berg's list, are incomplete and therefore excluded. The Pimper data come from annual totals published in an issue of *Simulacrum*. See *Three Essential Reference Resources*, *SIMULACRUM*, Oct. 1998, at 19, 20. The Kula data come from John Kula, *The Simulacrum Games Database* (Aug. 15, 2011 update) (Excel spreadsheet on file with author). The Kula entries include a numerical indication of his confidence in the data. According to Kula, a "2 or less suggests that the game was never published; a value of 5 recognizes that the game was published more or less as noted; a value of 9 or more indicates that I have personally held the game in my hands and verified every piece of information." *Id.* Only entries with a '5' or higher are represented in the Figure. The Steinberg data come from Robert Steinberg, *INTERNET WARGAMES CATALOG* (7th ed. 2009). He tried to include "just board wargames," even though he acknowledges a "few family type games" remain in the database. *Id.* at 2. Any entry in one of these sources without a date of publication was excluded. For anyone who checks the Pimper data in *Simulacrum* and wonders why another data set in that article appears to be missing from Figure 1, note that those data are based on an earlier edition of the *Internet Wargames Catalog*, that is, an earlier version of Steinberg's data. See *Three Essential Reference Resources*, *supra*, at 20.

2. Role-Playing Games

While the 1970s saw the maturation of commercial wargames, it also saw the creation of tabletop role-playing games. Role-playing games debuted in 1974 with the publication of Gary Gygax's and Dave Arneson's *Dungeons & Dragons (D&D)*, the game that created the commercial role-playing game industry.³³⁶ Richard Garfield, the creator of the first collectable card game, *Magic: The Gathering*, claims it is "not a stretch to call *D&D* the most innovative game ever."³³⁷ *D&D* in its various forms, including *Advanced Dungeons & Dragons (AD&D)*, was also among the most controversial games of all time due to its supernatural content. *D&D* products were accused of promoting the occult and even causing suicides, torture, rape, and murder.³³⁸ *D&D* of course survived, as did the role-playing genre it created.

D&D grew out of miniature wargaming,³³⁹ but it departed from traditional miniature wargames in several important ways. In *D&D*, players control individual characters rather than entire units. *D&D* also emphasizes a narrative that goes beyond a battle or even a sequence of battles. While solo play is possible in *D&D* and other role-playing games,³⁴⁰ multiple players ordinarily work together cooperatively. A referee or judge, called a "dungeon master" in *D&D*

336. See GARY GYGAX, *ROLE-PLAYING MASTERY* 20 (1987). Arneson's contribution to *D&D* was the subject of controversy and litigation. In one interview, Arneson declined to elaborate on his contribution to the game, claiming that doing so would violate a settlement agreement. See CIRO ALESSANDRO SACCO, *HUNTERS OF DRAGONS* 207-08 (2010) (interviewing Dave Arneson). See also *id.* at 179 (interviewing Gary Gygax about Arneson's contribution).

337. Richard Garfield, *Dungeons & Dragons*, in *HOBBY GAMES: THE 100 BEST*, *supra* note 319, at 86, 87. Arneson notes that "there were no other games like [*D&D*] on the market," and it was rejected by two publishers, including Avalon Hill. Dave Arneson, *My Life and Role-Playing*, *DIFFERENT WORLDS*, June-July 1979, at 6, 7.

338. See JACK T. CHICK, *DARK DUNGEONS* (1984), available at http://www.chick.com/reading/tracts/0046/0046_01.ASP; RICK JONES, *STAIRWAY TO HELL* 95-105 (1988); Greg Toohey, *Christianity and Dungeons & Dragons*, *BREAKOUT! MAGAZINE*, Apr.-May 1987, at 13.

339. On the origins of *Dungeons & Dragons*, including its development out of the *Chainmail* game, see GYGAX, *supra* note 336, at 17-20; SACCO, *supra* note 336, at 11-19, 179, 207-208; Arneson, *supra* note 337, at 6. For a recent and exhaustive history of the game, see generally JON PETERSON, *PLAYING AT THE WORLD* (2012).

340. See, e.g., Matthew Costello, *The Thing in the Darkness*, *FANTASY GAMER*, Dec.-Jan. 1984, at 11 (solo adventure for *Call of Cthulhu*); Jeff Grubb, *Maze of the Riddling Minotaur* (TSR 1983) (solo adventure for *Dungeons & Dragons*); Bruce Nesmith, *Thunder Over Jotunheim* (TSR 1985) (solo adventure for *Marvel Super Heroes*).

and a “game master” in many other role-playing games, describes the environment and controls the enemy characters. The game master’s goal is not to defeat the other players, but to referee an adventure story the players develop within the system of rules provided by the game.³⁴¹

The number of role-playing game products is easily in the thousands. Over twenty years ago, game designer Lawrence Schick catalogued over 250 different tabletop role-playing game systems and numerous supplements.³⁴² While some of these role-playing game systems include only a single publication, others include numerous supplements, such as rulebooks, campaign settings, and adventure modules. Thousands of role-playing games and supplements are now published in downloadable form.³⁴³ The settings for these games or supplements are not confined to fantasy. They instead run from ancient history to the distant future and can involve super heroes, spies, gunslingers, paranormal investigators, and other action-oriented occupations.³⁴⁴ As with wargames, role-playing games represent a substantial subcategory of the gaming medium, one that did not even exist until after the courts decided the three classic game cases.

3. Eurogames

Eurogames—or “Euro-style” or “designer” games—represent a more recent category of games to achieve prominence in the American market.³⁴⁵ The growth of this category of games is usually tied to the publication of Klaus Teuber’s *The Settlers of Catan* in 1995.³⁴⁶ *Settlers* is a board game about resource management on a

341. See Gary Gygax, *Dungeons & Dragons: What It Is and Where It Is Going*, DRAGON no. 22, Feb. 1979, at 29, 29; *Let the Games Begin: A Profile and History of Adventure Gaming*, in DUNGEONS & DRAGONS (New Line Home Video 2001).

342. See LAWRENCE SCHICK, HEROIC WORLDS: A HISTORY AND GUIDE TO ROLE-PLAYING GAMES (1991).

343. See, e.g., DRIVETHRURPG, rpg.drivethrustuff.com (last visited Oct. 20, 2012) (“The Largest RPG Download Store!”); RPGNOW, www.rpgnow.com (last visited Oct. 20, 2012) (“The Leading Source for Indie RPGs”).

344. See generally SCHICK, *supra* note 342.

345. See Chappell, *supra* note 269, at 290 (“[The Settlers of Catan] had tremendous popular appeal and began what could be termed a ‘Euro revolution’ in the board game hobby.”).

346. See *id.*; Richard Dansky, *The Settlers of Catan*, in HOBBY GAMES: THE 100 BEST, *supra* note 319, at 265, 265; STEWART WOODS, EURO GAMES: THE DESIGN, CULTURE AND PLAY OF MODERN EUROPEAN BOARD GAMES 71-73 (2012).

fictional island for up to four players (or six with an expansion).³⁴⁷ It has sold over eighteen million copies worldwide in more than thirty languages.³⁴⁸ While *Settlers* is not the first Eurogame,³⁴⁹ it has had a tremendous impact on the medium. Like *Monopoly*, *Settlers* now receives a standard mention in the occasional articles by journalists about board games.³⁵⁰ It is often described as the gateway game to the many Eurogames that followed it³⁵¹ and as largely responsible for a revival of the non-electronic gaming medium.³⁵²

The term Eurogame is slightly misleading. Not all of them originate in Europe.³⁵³ Nor are the lines all that clear between Euro- and non-Eurogames. Despite the slipperiness of how the category is defined, several indicators of these games are commonly noted. Unlike traditional mass-market American games, Eurogame designers are not semi-anonymous. Instead, like the authors of books, their names are typically emphasized on the outside of the box. Professor Stewart Woods describes the “hallmarks” of Eurogames as “an emphasis on abstracted system over theme, a relatively short and clear ruleset, manageable playing time, and a lack of player elimination.”³⁵⁴

347. Klaus Teuber, *The Settlers of Catan* (Mayfair Games English ed. 1996).

348. See Klaus Teuber, *Foreword to REBECCA GABLE, THE SETTLERS OF CATAN* vii, viii (Lee Chadayne trans., AmazonCrossing 2011) (2003) (novel based on the board game).

349. See, e.g., Klaus Teuber, *By Hook or Crook* (Avalon Hill English ed. 1991).

350. See, e.g., Blake Eskin, *A New Board Game for the Ages?*, HOUS. CHRON., Dec. 3, 2010, at 4; Kleinfeld, *supra* note 282, at LI1; Seth Schiesel, *The PC Generation, Back to the Board*, N.Y. TIMES, Apr. 10, 2003, <http://www.nytimes.com/2003/04/10/technology/the-pc-generation-back-to-the-board.html>.

351. See, e.g., Charlie Gates, *New “Less Hostile” Games Give Monopoly Run for Its Money*, THE PRESS (Christchurch, N.Z.), May 6, 2009, at 8 (“The best-selling title, *Settlers of Catan*, is described by [a game retailer] as the ‘gateway game.’”); Ryan Smith, *Adventure . . . in a Box?*, REDEYE, Jan. 9, 2012, at 18 (referring to the *Settlers of Catan* as the “proverbial gateway drug of Euro-style games”).

352. See Dansky, *supra* note 346, at 265 (“It is reasonably safe to say that if it were not for *The Settlers of Catan*, you might not be reading this book right now. Seriously. It’s that important.”). See also Doug Bucl, *Get Your Move On*, TAMPA TRIB., Aug. 12, 2005, at 20; Yu Lei, *The Games People Play Even in the Video Age, Many Still Prefer a Board, Dice and Good Company*, PITTSBURGH POST-GAZETTE, Oct. 14, 1997, at D1; Neyfakh, *supra* note 282, at K1; William Weir, *A Board Gamer’s Heaven*, HARTFORD COURANT, Mar. 20, 2009, at C1 (describing *Settlers of Catan* as starting “the whole board game revival”).

353. See, e.g., Alan R. Moon, *Ticket to Ride* (Days of Wonder 2004).

354. See Woods, *supra* note 346, at 35. See also SCOTT NICHOLSON, EVERYONE PLAYS AT THE LIBRARY 56 (2010); Lewis Pulsipher, *The Essence of Euro-Style Games*, THE GAMES J., Feb. 2006, available at <http://www.thegamesjournal.com/articles/Essence.shtml> (last visited Oct. 20, 2012). Woods offers a more detailed examination of the characteristics of Eurogames in

The number of games plausibly classified as Eurogames is unclear, partly due to the difficulty in classification, but the number is not trivial. Several hundred new games are now released annually in Essen, Germany at the largest European game show.³⁵⁵ Many of these games are also published in the United States.

4. Video Games

Video games, based on their sales figures, are likely of greater prominence than the other categories of games previously discussed.³⁵⁶ Video games are not, of course, entirely distinct from those categories. Video game versions of wargames, role-playing games, and Eurogames are among the many thousands of video game titles.³⁵⁷ Like these other categories of games, video games largely postdate the three classic right of publicity cases. Commercial video games appeared in 1971 with the release of *Computer Space* in arcades,³⁵⁸ followed by the release of Magnavox's *Odyssey* home gaming console in mid-1972.³⁵⁹ More notably, Atari released the industry's first blockbuster in 1972, the arcade game *Pong*.³⁶⁰

Although early commercial video games were often little more than variations of *Pong* or "animated shooting galleries,"³⁶¹ games designed for home computers could offer longer game play and make

his book, but these details are beyond the scope of this article. See WOODS, *supra* note 346, at 79-119.

355. See, e.g., *Neuheitenschau der mit Internationalen Spieltage SPIEL '11, INTERNATIONALE SPIELTAGE SPIEL*, (Oct. 2011), <http://www.internationalcspieltage.de/Neuheiten2011.pdf> (last visited April 29, 2012) (listing new releases for the 2011 show).

356. Hiawatha Bray, *Old-School Fans of Dice and Pen*, BOS. GLOBE, Apr. 7, 2012, at 5.

357. See, e.g., Brian Reynolds & Klaus Teuber, *Catan* (Big Huge Games 2007) (Xbox Live version of *Settlers of Catan*); *Third Reich PC*, 30 THE GENERAL no. 6, 1996, at 41 (advertising the computer game as a "[f]aithful adaptation of our popular WWII Strategy Board Game").

358. STEVEN L. KENT, THE ULTIMATE HISTORY OF VIDEO GAMES 30-34 (2001).

359. See RALPH H. BAER, VIDEOGAMES IN THE BEGINNING 75 (2005).

360. See MARTIN CAMPBELL-KELLY, FROM AIRLINE RESERVATIONS TO SONIC THE HEDGEHOG: A HISTORY OF THE SOFTWARE INDUSTRY 269, 272 (2003); TRISTAN DONOVAN, REPLAY: THE HISTORY OF VIDEO GAMES 29-37 (2010); KENT, *supra* note 358, at 43, 46.

361. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579-80 (7th Cir. 2001) ("[I]f the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge.").

more use of text.³⁶² Commercial role-playing games for computers, as Professor Matt Barton documents, appeared in the late 1970s.³⁶³ Commercial text adventures, such as *Zork*, also appeared around the same time.³⁶⁴ *Zork* led to a successful line of interactive text adventures published by Infocom throughout the 1980s.³⁶⁵ There were political games around this time as well. *President Elect* offered an opportunity in 1981 to simulate actual presidential elections from 1960 to 1980 as well as the upcoming 1984 election.³⁶⁶ While more recent games with elaborate graphics may have convinced the courts that video games deserve First Amendment protection, commercial video game publishers have offered more than primitive shooting galleries since the 1970s.

The number of unique commercial video game titles published over the years is likely into five figures, generating billions in revenue. Although the number of unique titles in the database is unclear, the *MobyGames* database includes over 69,000 games on 131 platforms.³⁶⁷ The *Killer List of Video Games* contains over 4,400 arcade games.³⁶⁸ These games generate far more revenue than other types of games. According to the NPD Group, the video game industry generated approximately \$16 billion in sales in 2011, compared to approximately \$2 billion for tabletop games and puzzles.³⁶⁹

The billions in revenue in the video game industry provide more resources (and motivation) for litigation, and courts have already

362. See BILL LOGUIDICE & MATT BARTON, *VINTAGE GAMES* 371 (2009); NICK MONTFORT, *TWISTY LITTLE PASSAGES: AN APPROACH TO INTERACTIVE FICTION* 121-22 (paperback ed. 2005).

363. See MATT BARTON, *DUNGEONS AND DESKTOPS* 47-62 (2008).

364. See LOGUIDICE & BARTON, *supra* note 362, at 371; MONTFORT, *supra* note 362, at 121.

365. MONTFORT, *supra* note 362, at 119-68.

366. See Russell Sipe, *The Political Apple*, 1 *COMPUTER GAMING WORLD*, Nov.-Dec. 1981, at 23, 23.

367. See *MobyStats*, MOBY GAMES, http://www.mobygames.com/moby_stats (last visited Nov. 8, 2012). Games released on multiple platforms are counted once per platform, so there are not 66,000 unique games in the database. Nevertheless, the number of unique games is likely substantial and in the thousands.

368. See *About Us*, INT'L ARCADE MUSEUM, <http://www.arcade-museum.com/aboutus.php> (last visited June 19, 2012). See also Carl Therrien, *Video Games Caught Up in History*, in *BEFORE THE CRASH: EARLY VIDEO GAME HISTORY* 9, 10-13 (Mark J.P. Wolf ed., 2012).

369. See Bray, *supra* note 356, at 5.

recognized the First Amendment interests in protecting expression in video games.³⁷⁰ This does not mean courts have stopped treating video games like merchandise, but courts *should* stop. Video game designers, like the designers of other games, do have something to say.

B. Game Designers Have Something to Say

The expressive content of the most well-known games, such as *Chutes & Ladders* and *The Game of Life*, has still not persuaded at least some courts and commentators to move games out of the merchandise category, but as we explained in the previous subsection, there are many thousands of other games. We will briefly consider the expressive elements of two types of games that go beyond the *Monopoly* paradigm: wargames and role-playing games. Wargames and role-playing games emphasize different things. Wargames tend to emphasize non-fiction and history; role-playing games tend to emphasize fiction and stories.³⁷¹ Wargames can therefore be seen as closer to informative speech and role-playing games to entertaining speech. This is a simplification, of course, because some wargames are based in fantasy, while some role-playing games are based in history.³⁷² Both types of games can inform, and both can be entertaining. However, wargames and role-playing games are not interchangeable, which makes these two types of games useful examples of how game designers communicate through games in different ways.

370. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (“California correctly acknowledges that video games qualify for First Amendment protection.”); *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1101 (9th Cir. 2008) (“[W]e conclude that Rockstar’s modification of ESS’s trademark is not explicitly misleading and is thus protected by the First Amendment.”).

371. See Montc Cook, *The Game Master and the Role-Playing Game Campaign*, in *THIRD PERSON: AUTHORIZING AND EXPLORING VAST NARRATIVES*, *supra* note 334, at 97, 97 (“At the heart of every role-playing game campaign lays a story.”). Kirschenbaum claims there are stories to be found in wargames, but he seems to accept that they still fall short of role-playing games. In terms of storytelling, wargames are “much closer” to role-playing games than some other board games, but the two types of games are not equivalent. See Kirschenbaum, *supra* note 334, at 358. Indeed, the more interesting wargaming stories he describes depend on extensive *post-game* embellishments of what happened during the game. See *id.* at 367-68.

372. See discussion *supra* Part IV.A.2.

1. Wargames

As we explained in Section IV.A.1, the traditional board wargames pioneered by Avalon Hill use maps overlaid with hexagons, cardboard counter playing pieces, assorted charts, and complex rules to represent actual or fictional battles or wars. Historical facts are often essential elements of these games. Whether Avalon Hill's early titles involved military topics or not, the stated emphasis was on realism. Avalon Hill's three publications from 1958 prominently displayed the following assurances on the box tops:

Tactics II: "Now YOU command an ARMY GROUP in this REALISTIC WAR GAME"³⁷³

Gettysburg: "Now YOU fight the Civil War Battle in this REALISTIC GAME"³⁷⁴

Dispatcher: "Now YOU be a RAILROAD DISPATCHER in this REALISTIC GAME"³⁷⁵

Gettysburg is more typical of the wargame genre than the ahistorical *Tactics II* (or *Dispatcher*, which is not a wargame).³⁷⁶ As the name suggests, *Gettysburg* portrays an historical battle, using a map of the actual location and counters representing actual units that participated in the battle. According to game designer Lou Zocchi, "It's hard now to fathom just how radical a design concept *Gettysburg* boasted."³⁷⁷ While primitive compared to the later standards of the industry, *Gettysburg* still took history seriously in a way that was unusual for a game.³⁷⁸ Similar games meant to portray specific events followed, including games based on more recent battles or campaigns, like *D-Day* (1961), *Afrika Korps* (1964), *Midway* (1964), and *Battle of the Bulge* (1965).

As Professor Rex Martin puts it, wargames "must evoke but not

373. Roberts, *Tactics II*, *supra* note 314.

374. Charles S. Roberts, *Gettysburg* (Avalon Hill 1958).

375. Charles S. Roberts, *Dispatcher* (Avalon Hill 1958).

376. See Roberts, *Tactics II*, *supra* note 314 (a battle between the generic Red and Blue armies with 1950s era units).

377. Lou Zocchi, *Gettysburg*, in *HOBBY GAMES: THE 100 BEST*, *supra* note 319, at 130, 131.

378. Redmond A. Simonsen, *Opening Moves*, *MOVES* no. 48, Dec.-Jan. 1980, at 2, 2 ("Avalon Hill's *Tactics II* and *Gettysburg* had some of the attributes of historical games . . . but were nevertheless only crude impressions of operational level military action.').

emulate the past,³⁷⁹ but there has been a long-running debate in the industry about whether the game elements or the historical elements are more important.³⁸⁰ The question is often framed in terms of emphasizing playability over realism or vice versa.³⁸¹ At one extreme are players for whom “the historical accuracy of a game is merely an interesting side note, something that adds variety and color to the content.”³⁸² At the other extreme are players for whom “the primary value derived from the wargame . . . is other than game playing!”³⁸³ The players “want the game to be a moveable-quantifying illustration of military history.”³⁸⁴ Most players’ interests are probably somewhere in-between these two extremes as they seek a meaningful degree of both playability and realism.

Some game publishers have emphasized playability, others realism. Although Avalon Hill originated the emphasis on realism, it was typically described as leaning more towards the playability camp and SPI was described as leaning more towards the realism or simulation camp.³⁸⁵ Current game publishers vary as well. But even games emphasizing playability can promote genuine interactions with

379. Martin, *supra* note 310, at 109.

380. See, e.g., SCHUESSLER & JACKSON, *supra* note 308, at 3 (Introduction by Steve Jackson describing the nature of his collaboration with his co-author on the book: “We argue a lot—usually with me shouting ‘Playability!’ at him, and him shouting ‘Realism!’ back—but that just keeps us both in line.”); John Hill, *Designing for Playability*, MOVES no. 14, Apr.-May 1974, at 18 (“One of the hardest problems facing any war game designer is the careful balancing between playability and realism.”).

381. See, e.g., PHILIP SABIN, *SIMULATING WAR: STUDYING CONFLICT THROUGH SIMULATION GAMES 19-30* (2012); *The Avalon Hill Philosophy* (pt. 163), 29 THE GENERAL no. 4, 1994, at 4, 56 (discussing the importance of playability versus realism in an interview with game designer Joe Balkoski); Jack Greenc, Jr., *The 1974 Gaming Renaissance*, MOVES no. 19, Feb.-Mar. 1975, at 26, 27 (“The two (still poorly defined) philosophies of playability versus historical realism continue to evolve.”); Hill, *supra* note 380, at 18 (“One of the hardest problems facing any war game designer is the careful balance between playability and realism.”).

382. Michael J. Simonds, *Wargamer and Historian: Two Gaming Archetypes*, MOVES no. 36, Dec.-Jan. 1978, at 27, 27.

383. Kevin Zucker, *The Image of Battle*, FIRE & MOVEMENT no. 9, Nov.-Dec. 1977, at 7.

384. *Id.*

385. See Simonsen, *supra* note 378, at 2, 3 (“SPI was largely responsible for re-defining hobby games as *simulations*.”); Stuart K. Tucker, *The Avalon Hill Philosophy* (pt. 170), 30 THE GENERAL no. 4, 1996, at 4, 4 (“One of the reasons I like working for Avalon Hill is that it has been pursuing vigorously the goal of playability.”); *The Avalon Hill Philosophy* (pt. 163), *supra* note 381, at 4, 56 (“I guess I do find wargamers putting themselves in two camps: the ‘SPI/Victory Game’ school versus the ‘Avalon Hill’ school.”).

history. Richard Berg, a game designer and leading game reviewer,³⁸⁶ described Avalon Hill's *Squad Leader*³⁸⁷ as "historical junk food."³⁸⁸ One of the best-selling wargames of all time, *Squad Leader* likely fails as a realistic simulation of tactical infantry combat in World War II—a conclusion the game's designer would likely agree with.³⁸⁹ Nevertheless, said Berg, "there is much that is accurate, and informative, in *Squad Leader*."³⁹⁰ In Avalon Hill's magazine, *The General*, the designers and playtesters of a sequel to *Squad Leader* once extensively debated its historical details.³⁹¹ As this type of debate suggests, historical research is a major part of producing many wargames.³⁹² Sometimes this research focuses on small details, but

386. See Tom Shaw, *The Dugout*, 3 ALL-STAR REPLAY no. 4, 1981 at 2, 2 ("[Berg] is a prolific game reviewer and is probably the most quoted literary persona in the gaming industry."); *Avalon Hill Philosophy* (pt. 67), 15 THE GENERAL no. 1, May-June 1978, at 2, 2 ("I recognize Richard [Berg] as perhaps the best critic the hobby has yet to uncover."). Cf. Patrick A. Flory, *An Interview with James Dunnigan*, CAMPAIGN no. 79, May-June 1977, at 4, 5 ("Flory: A lot of people get upset about [Berg's] reviews in *Moves*.").

387. John Hill, *Squad Leader* (Avalon Hill 1977).

388. Richard Berg, *Forward Observer: The Playwar Philosophy #37*, MOVES no. 37, Feb.-Mar. 1978, at 32. Cf. Ray Winninger, *Squad Leader*, in HOBBY GAMES: THE 100 BEST, *supra* note 319, at 288, 290 ("By exaggerating, oversimplifying, and abstracting, [*Squad Leader*] provides a decent primer on World War II infantry tactics . . .").

389. See Roger MacGowan, *F&M Interview with John Hill*, FIRE & MOVEMENT, Sept.-Oct. 1980, at 42, 44. According to the designer of *Squad Leader*, "The whole hobby of wargaming is one gigantic fudge. In absolutely no way can we simulate the horror and fear and confusion of a battlefield." *Id.* Nevertheless, even Hill agreed that there is a range of realism that can be achieved in a wargame, though he saw that range as narrow: "On a realism scale of 1 to 10, the highest possible rating we can hope for with paper and cardboard is a 2." *Id.*

390. Berg, *supra* note 388, at 32.

391. J. M. Collier, *Glass Anvil: A Dissenting View of G.I.: Anvil of Victory*, 20 THE GENERAL no. 1, May-June 1983, at 24-27; Don Greenwood, *The G.I. Design Team Replies*, 20 THE GENERAL no. 1, May-June 1983, at 28-29; Bob McNamara, *Rechecking Our Sources*, 20 THE GENERAL no. 1, May-June 1983, at 29; Jon Mishcon, *Speaking from the Playability Viewpoint*, 20 THE GENERAL no. 1, May-June 1983, at 29. Comments about whether the game short-changed an American Sherman tank relative to a German Panzer IV tank is an example of the level of detail that can be of interest to wargame designers and players: "To summarize the PzKpfw IVH/Sherman M4 comparison, the former had a more powerful gun, better optics, a vision cupola, and a lower height; is it really any surprise then that its first shot kill probability is significantly higher than the M4's?" McNamara, *supra*, at 32.

392. See David C. Isby, *Research: Sources and Materials*, in WARGAME DESIGN, *supra* note 306, at 118, 118-127 (explaining the importance of research in producing a wargame and how to go about it). Game designers got better at this research over time. See *The Avalon Hill Philosophy* (pt.2), 3 THE GENERAL no. 6, Mar.-Apr. 1967, at 2, 3 ("And because [*D-Day*] was designed back in the early days of Avalon Hill, we were guilty of the innocent sin of naivety. We simply regarded one book as the ultimate source and didn't bother to cross-reference its material with any others.").

wargames can have informative (and entertainment) value even when they are not extremely detailed.³⁹³

While all historical wargames involve the creation of alternative histories to some degree, these games can further depart from history without losing their status as historical wargames. Wargames can be used to simulate significant events that might have occurred, that is, to simulate “what if” events. *Britain Stands Alone* explores an alternative history where Germany defeated the Royal Air Force in the Battle of Britain in 1940 and then invaded England.³⁹⁴ *Liberty Roads*, a game about the liberation of France after D-Day, can be supplemented with a module to simulate an allied invasion of occupied France in 1943.³⁹⁵ Even these games maintain an important tie to history.

Given the importance of history to these games, the use of the names and likenesses of living or deceased individuals can add significant value to a game by improving the ability of the game to evoke the past. Avalon Hill’s *Gettysburg* is an early example where the names of military officers appeared on the playing pieces.³⁹⁶ Many later games followed suit. As two notable examples, the names and likenesses of American General George S. Patton and German Field Marshall Erwin Rommel have been used in many games. Sometimes their names appear in the title of a game.³⁹⁷ Sometimes their names or likenesses appear elsewhere on a game’s box.³⁹⁸

393. See SABIN, *supra* note 381, at 19-46.

394. James Werbaneth, *Britain Stands Alone* (GMT Games 1994). The only counter that uses someone’s name and likeness in this game is one for Winston Churchill.

395. Yves Le Quellec, *Roundhammer 1943* (Hexasim 2011); Nicholas Rident & Yves Le Quellec, *Liberty Roads* (Hexasim 2011). This game includes several counters that use someone’s name and likeness, including one for General Patton. *See id.*

396. See Roberts, *Gettysburg*, *supra* note 374.

397. See, e.g., Craig Besinque, *Rommel in the Desert* (Columbia Games 1982); Roger Damon, *Rommel’s Panzers* (Metagaming 1978); Eric R. Harvey, *Patton’s First Victory: Tunisia, 1943* (Decision Games 2010); Harry Rowland, *Patton in Flames* (Australian Design Group 2001); Bruce Shelley, *Patton’s Best* (Avalon Hill 1987); Dan Verssen, *Field Commander: Rommel* (Dan Verssen Games 2008); Vance von Borries, *Rommel’s War* (L2 Design Group 2011).

398. See, e.g., Vance von Borries, *Kasserine* (GMT Games 2001) (Rommel’s name and likeness on the box cover); S. Craig Taylor, Jr., *Battle of the Bulge* (Avalon Hill 1991) (Patton’s likeness on the box cover); Danny S. Parker, *Hitler’s Last Gamble* (3W Inc. 1989) (Patton’s likeness on the box cover); Larry Harris, Jr., *Axis & Allies* (Milton Bradley 2d ed. 1987) (Rommel’s and Patton’s likenesses on the box cover); Berg, *The Campaign for North Africa*, *supra* note 316 (Rommel’s likeness on the box cover); Jim Dunnigan, *PanzerArmee Afrika*

Sometimes they appear on the playing pieces.³⁹⁹ Under Indiana's statute, Patton's estate potentially has a veto on the use of Patton's identity in these games through 2045.⁴⁰⁰ Even Rommel is apparently covered through 2044.⁴⁰¹ Under *Palmer, Uhlaender*, and the recent decisions involving sports video games, even the use of Patton and Rommel on just one of many playing pieces likely violates their post-mortem rights of publicity. Rommel's estate may have little interest in enforcing his right of publicity.⁴⁰² General Patton's estate, on the other hand, is actively interested in licensing.⁴⁰³

2. Role-Playing Games

Professor Jennifer Grouling defines role-playing games as "a type of game/game system that involves collaboration between a small group of players and a gamemaster through face-to-face social activity with the purpose of creating a narrative experience."⁴⁰⁴ The

(Avalon Hill 1982) (Rommel's name and likeness on the box cover); Charles S. Roberts, *Afrika Korps* (Avalon Hill 1964) (Rommel's name and likeness on the box cover).

399. See, e.g., Randy Heller, *Bitter Words: The Battle of the Bulge* (Avalon Hill 1998) (including Patton's name and likeness on one of the 320 counters and a picture of this particular counter on the back of the box); Douglas Niles, *World War II: European Theater of Operations* (SPI 1990) (including Patton's name on one of the 1200 counters and additional military leaders' names on other counters).

400. See discussion *supra* Part II.B.; IND. CODE ANN. § 32-36-1-8(a) (2012).

401. See IND. CODE ANN. § 32-36-1-8(a) (2012); 2 MCCARTHY (2012), *supra* note 5, § 11:15 ("Statutes in both Indiana and Washington were worded in a way that they could be read to apply the law of those states to find a post mortem right of publicity even if a person died domiciled in another state or nation, so long as some infringing uses occurred in that state.") (footnotes omitted).

402. Most people would likely view it as unseemly for Rommel's heirs to attempt to profit from his military service to the Third Reich. See generally DAVID FRASER, KNIGHT'S CROSS: A LIFE OF FIELD MARSHALL ERWIN ROMMEL (1993).

403. See *Business and Licensing Opportunities*, OFFICIAL WEBSITE OF GENERAL GEORGE S. PATTON, JR., <http://www.generalpatton.com/oppurtunities/index.html> (last visited Oct. 20, 2012). General Patton's family, through his grandchild, is registered with the California Secretary of State as the claimant for his publicity rights. See California Registration of Claim as Successor-in-Interest, File No. 2002-001 for General George S. Jr. Patton, CAL. BUS. PORTAL, CAL. SEC'Y OF STATE, http://www.sos.ca.gov/business/sf/sf_siisearch.htm (search for "Patton").

404. JENNIFER GROULING COVER, THE CREATION OF NARRATIVE IN TABLETOP ROLE-PLAYING GAMES 168 (2010). The predominant purpose of a game may be something other than entertainment. An important purpose of the tabletop role-playing game *DragonRaid* was to promote Christian teachings. According to the back of the box, *DragonRaid* "offers hours of enjoyment while teaching participants to resist sin, counter deceptive arguments, memorize Scripture, and build moral and spiritual character." Dick Wulf, *DragonRaid* (Adventure Learning System 1984). A promotional sheet included in the box says "you practice the wisdom

books published for a role-playing game provide at least the rules, which tend to be more flexible than in other games,⁴⁰⁵ but they can also provide the narrative for one or more game sessions. The core rulebooks provide the basic system of rules for the game.⁴⁰⁶ Optional rulebooks can provide additional characters, abilities, creatures, and equipment.⁴⁰⁷ While these books provide the game system, the system requires a narrative environment to work. The narrative can take place in a detailed and sizable geographic region, such as an entire kingdom, or the narrative can take place in a smaller setting limited to what is needed for a single adventure, such as an isolated dungeon.

The gamemaster can create the required narrative adventure from scratch or purchase a published one. As with any other medium, the published adventures can vary in their narrative quality. The extent to which a narrative goes beyond just a series of battles depends on both the author of the particular adventure and the players. Some adventures, especially in *D&D* or *AD&D*, lean towards the “hack and grab” style and take place in rather generic environments.⁴⁰⁸ Other adventures have more complex settings and plots and may involve a series of episodic developments.⁴⁰⁹ Regardless of how the adventure

of the Bible” in the game. *Id.* (emphasis added).

405. COVER, *supra* note 404, at 49; GYGAX, *supra* note 336, at 88-90; GARY GYGAX, *ADVANCED DUNGEONS & DRAGONS PLAYERS HANDBOOK 7-8* (TSR Games 1979); GARY ALAN FINE, *SHARED FANTASY: ROLE-PLAYING GAMES AS SOCIAL WORLDS* 8, 10 (1983); Rick Krebs & Mark Acres, *GangBusters* (TSR Hobbies 1982) (“Remember that [the game master is] an interpreter and adaptor of the rules not a slave to them. No set of rules could possibly cover every situation that could arise in either real life or in a *GangBusters* campaign game.”) (italics added) (page 55 of the rulebook); *Star Wars: The Roleplaying Game* at 26 (West End Games 1987) (“When the rules do not specifically cover a situation, [the game master is] expected to decide what happens.”) (page 26 of the rulebook).

406. See, e.g., GARY GYGAX, *ADVANCED DUNGEONS & DRAGONS DUNGEON MASTERS GUIDE* (TSR Games 1979); GYGAX, *PLAYERS HANDBOOK*, *supra* note 405.

407. See, e.g., Peter Adkison et al., *The Primal Order* (Wizards of the Coast 1992) (“*The Primal Order* is what is called a capsystem—a system of rules designed to be an extension of any game system on the market [such as the *Palladium Role-Playing Game*]”); JAMES M. WARD WITH ROBERT J. KUNTZ, *DEITIES & DEMIGODS* (TSR Games Lawrence Schick ed., 1980) (“*Cyclopedia of Gods and Heroes from Myth and Legend*”).

408. See, e.g., Rick Swan, *Horror on the Hill*, *FANTASY GAMER* no. 6, June-July 1984, at 42, (reviewing Douglas Niles, *Horror on the Hill* (TSR 1983)) (describing the creatures in an abandoned monastery as “the usual assortment,” the dungeon as “pedestrian,” the other settings as lacking in surprises, and concluding that “there’s no real motivation for the player-characters to press on” in this adventure).

409. See, e.g., Ari Marmell & Scott Fitzgerald Gray, *Dungeons & Dragons: Tomb of Horrors* (Wizards of the Coast 2010) (“This adventure is not a single set of encounters designed

is written, the depth of the narrative's development during a game session depends in large part on the players. One early *AD&D* module warns readers that it was "designed for thinking players," adding that imaginative and thoughtful play would be more rewarding.⁴¹⁰ Such players will "derive the satisfaction of seeing the various layers of the plot peel away as the real meaning of each clue is discovered."⁴¹¹ Players who treat the setting as a mere "monster-slaying territory," by contrast, will find the module "dull and unsatisfactory."⁴¹²

D&D's use of a fantasy setting reduces the relevance of real-world individuals to the game,⁴¹³ but numerous role-playing game systems use settings where actual individuals are relevant. For example, a *Generic Universal Role-Playing System (GURPS)* supplement provides background information on assorted "legends of the Old West," such as Wild Bill Hickok, Jesse James, and Judge Roy Bean.⁴¹⁴ Other *GURPS* supplements provide the background and game-related statistics on a wide variety of historical figures that can be used in any *GURPS* campaign, as the players see fit.⁴¹⁵ Similarly,

to be run consecutively. Instead, its structure allows you to weave Accrerak's schemes throughout an ongoing campaign by presenting four separate adventures intended for different levels.") (page 4 of the rulebook); Erik Mona et al., *The 30 Greatest D&D Adventures of All Time*, 18 *DUNGEON*, Nov. 2004, at 68, 81 (discussing Gary Gygax, *Queen of the Spiders* (TSR 1986)).

410. Dave J. Browne with Don Turnbull, *The Sinister Secret of Saltmarsh* (TSR Hobbies 1981) (page 4 of the rulebook).

411. *Id.* (same page)

412. *Id.* (same page). A capsule summary of *The Sinister Secret of Saltmarsh* on a list of the top 30 *D&D* (or *AD&D*) adventures similarly explained, "Although this adventure has a fair amount of dungeon exploration, the primary focus is on atmosphere and investigation." Mona et al., *supra* note 409, at 72. For similar examples, see Thomas M. Brooks, *Against the Cult of the Reptile God*, *FANTASY GAMER* no. 1, Aug.-Sept. 1983, at 35 ("This module requires characters who can think and use diplomacy and tact. Players who like the 'hack and grab' dungeons will not like this module.") (reviewing Douglas Niles, *Against the Cult of the Reptile God* (TSR Hobbies 1982)); Thomas M. Brooks, *Beyond the Crystal Cave*, *FANTASY GAMER* no. 1, Aug.-Sept. 1983, at 35 ("Overall, the module is a breath of fresh air to those trapped in hack-and-grab dungeons.") (reviewing Dave J. Browne, Yom Kirby & Graeme Morris, *Beyond the Crystal Cave* (TSR Hobbies 1983)).

413. The only real-world person we know of who appears in a *Dungeons & Dragons* or an *Advanced Dungeons & Dragons* module is Arnold Schwarzenegger; however, he appears on the cover not as himself, but as Conan. See David Cook, *Conan Unchained!* (TSR 1984) (adventure module for *Advanced Dungeons & Dragons*); Ken Rolston, *Conan Against Darkness!* (TSR 1984) (same).

414. See Ann Dupuis et al., *Old West: Adventure on the American Frontier* at 100-08 (Steve Jackson Games 2d ed. 2000) (*GURPS* Supplement).

415. See PHIL MASTERS, *GURP'S WHO'S WHO 1: 52 OF HISTORY'S MOST INTRIGUING*

Gangbusters,⁴¹⁶ a role-playing game set in the 1920s, includes assorted criminals and law enforcement agents like John Dillinger, Al Capone, and Elliot Ness.⁴¹⁷ Dillinger, who is referenced in several other games, such as *Dillinger*,⁴¹⁸ *The Godfather*,⁴¹⁹ *The Godfather II*,⁴²⁰ and *Amazing Heists: Dillinger*,⁴²¹ is notable not only because he is covered by the Indiana statute through 2034, but because Dillinger's estate, like Patton's estate, actively seeks to enforce his post-mortem right of publicity.⁴²²

While the background information on these people is available from conventional sources, the game-related statistics are not. These types of statistics, such as strength or intelligence scores, are needed to make real people useful as characters within the game setting. The authors of these games or supplements must therefore make judgments about the relative abilities of the individuals they include in their games, a task that would be more difficult if the individuals (or their estates) had a veto on how the individuals could be portrayed.

CHARACTERS (Steve Jackson Games 1999); PHIL MASTERS, GURP'S WHO'S WHO 2: MORE OF HISTORY'S MOST INTRIGUING CHARACTERS (Steve Jackson Games 1999). All of the historical figures in these two books are deceased, but some died recently enough to be a potential source of litigation. Albert Einstein, for example, is included in the first edition. The Hebrew University of Jerusalem claims ownership of Einstein's right of publicity and does litigate alleged infringements. See generally Hebrew Univ. of Jerusalem v. Gen. Motors, LLC, No. 10-03790, 2012 U.S. Dist. LEXIS 36048 (C.D. Cal. March 16, 2012).

416. Krebs & Acres, *Gangbusters*, *supra* note 405. See also Ken Rolston, *Expanding the Genre of RPGs*, DRAGON no. 76, Aug. 1983, at 72.

417. Krebs & Acres, *Gangbusters*, *supra* note 405, at 61-63. John Dillinger continues to serve as a character in many expressive works and even serves as an inspiration for the names of several artists. For example, there are three bands with the name Dillinger: a Canadian hard rock band and two more well-known bands, the punk band Dillinger Four and the metalcore/mathcore band The Dillinger Escape Plan. Additionally, an arrest photograph for John Dillinger serves as the publicity photo for the recent single *Public Enemy #1* by Megadeth (2012).

418. Richard H. Berg, *Dillinger* (BSO Games 2002) (card game).

419. *The Godfather* (Electronic Arts 2006) (video game).

420. *The Godfather II* (Electronic Arts 2009) (video game).

421. *Amazing Heists: Dillinger* (Gamers Digital 2009) (video game).

422. See *Dillinger, LLC v. Elec. Arts, Inc.*, 795 F. Supp. 2d 829 (S.D. Ind. 2011); *Complaint for Declaratory Relief, Elec. Arts, Inc. v. Dillinger, LLC*, No. 09-3965 (N.D. Cal. Aug. 27, 2009); *Complaint for Declaratory Relief, Gamers Digital, Inc. v. Dillinger, LLC*, No. 09-03204, 2009 WL 4563658 (D. Minn. Nov. 17, 2009); *Phillips v. Scalf*, 778 N.E.2d 480 (Ind. Ct. App. 2002).

C. Games Can Be Serious

Many games are surely closer to “popcorn” movies or typical television shows, meaning they are entertaining without saying anything serious or challenging.⁴²³ Does this mean games are simply too inferior a medium to warrant the same treatment as traditional media of expression? Should they not be considered in the same category as books, television shows, or films, which all have at least the capacity for seriousness, even if most of them fall short? The unease about incorporating some topics into games might be considered evidence for the medium’s inferiority. As an example, while war is a suitable topic for books, historical wargames sometimes generate concerns about the suitability of war, or at least certain aspects of war, for a game.⁴²⁴

Reading about the history of war may seem quite different to some from “playing” war. Richard Berg expressed this concern in a discussion of his own wargame design, *Geronimo*.⁴²⁵ The game simulates the Indian Wars in the Western half of the United States from 1850 to 1890.⁴²⁶ Berg anticipated objections to dealing with a situation often viewed as “legalized genocide”:

Now let’s face it, folks, this is a hobby where we use cardboard to represent killing people. There are people who think that doing so is morally wrong regardless of what the “war” is. Even for people who do not think that the study of conflict is wrong, the Indian wars are a bit more difficult, a bit closer to home. However, it *did* happen, and we felt that it was very important that the player not only be aware of that, but understand why. The game mechanics, therefore, go to great lengths to show just how you, as a person, can get into that sort of mindset.⁴²⁷

423. See ANNA ANTHROPY, RISE OF THE VIDEOGAME ZINESTERS 3 (2012) (“Mostly, videogames are about men shooting men in the face.”).

424. See, e.g., Alan Emrich, *Wargame Bonding*, 25 THE GENERAL no. 1, 1988 at 38 (“Misunderstood from the beginning, our nonwargaming friends would (only sometimes) jokingly refer to us as ‘warmongers’ after hearing us discuss campaigns during lunch or seeing us draw up perfect plans in the library.”); Mark T. Paul, *Letter to the Editor*, 20 THE GENERAL no. 5, 1984, at 45 (“I agree that some subjects of war should be avoided and that many companies have delivered some products of questionable taste.”).

425. Richard H. Berg, *Geronimo* (Avalon Hill 1995).

426. See *id.*

427. Richard H. Berg, *Random Acts of Violence: Design and Play Theory for Geronimo*, 30 THE GENERAL no. 6, 1996, at 9, 9 (emphasis added).

Game designers do not necessarily include an element in a historical game just because the element was historically present. Like television shows and films, games are often sanitized in various ways. Berg suggested, however, that any type of game about the Indian Wars, no matter how sanitized, might provoke unease. We are not aware of any controversy over *Geronimo*, but a more recent board war game also involving Native American history did generate controversy.

Unlike *Geronimo*, *King Philip's War*⁴²⁸ resulted in a small protest before the game was even completed and published.⁴²⁹ *King Philip's War* is about the conflict between colonists and Native Americans in New England from 1675 to 1676, which was named for a leader of the Wampanoag tribe called King Philip by the English.⁴³⁰ According to John Poniske, a social studies teacher and the game's designer, the purpose of the game was "to increase knowledge and interest in this little-known, but highly influential, chapter of our country's history."⁴³¹ In response to hearing about the proposed game, a member of the Mashpee Wampanoag tribe said, "It's pretty disturbing to think that they would actually make a game of a very horrific history that started with the King Philip's War."⁴³² Similarly, a historian for the Pocasset Wampanoag tribe said, "To make a game out of [King Philip's War] is to diminish the sacrifice that these people had to go through at that time."⁴³³

A cold response to these criticisms is that the designer *did* make a game on this topic, demonstrating that game designers can make games on difficult topics, even if it may be offensive to some to do so. The example of *King Philip's War*, however, offers a more positive outcome, one that further reinforces the expressive value of the game. Julianne Jennings, a cultural anthropologist and member of the Nottoway tribe who helped organize the protest against the game,

428. See John Poniske, *King Philip's War* (Multi-Man Publishing 2012).

429. See Paul Davis, *Tribal Members Protest Planned Board Game*, PROVIDENCE J., Mar. 21, 2010.

430. See Poniske, *King Philip's War*, *supra* note 428 (page 15 of the Rules of Play).

431. *Id.* (page 16).

432. Stephanie Vosk, *War Game Draws Fire From Tribes*, CAPE COD TIMES, Mar. 20, 2010, available at <http://www.capccodonline.com/apps/pbcs.dll/article?AID=/20100320/NEWS/3200324> (quoting Jim Peters, executive director of the Massachusetts Commission on Indian Affairs and a member of the Mashpee Wampanoag tribe).

433. *Id.* (quoting Ellic Page, historian for the Pocasset Wampanoag tribe of Fall River).

subsequently discussed the matter on a radio show with Poniske.⁴³⁴ Jennings did not advocate cancelling the game's publication. She explained that she was mainly concerned with the historical accuracy of the game, a concern often shared by wargame players and designers—including Poniske.⁴³⁵ Although some of those critics who objected to the game apparently remained unconvinced of the game's educational value,⁴³⁶ the discussion between Jennings and Poniske indicated there was common ground between them related to providing good quality information about the history of King Philip's War.⁴³⁷

Despite some limits, games are extraordinarily varied in the topics they cover, including many difficult topics. There are thousands of games about various wars and military conflicts, including nuclear war.⁴³⁸ There are also games that deal with other unpleasant topics, such as organized crime,⁴³⁹ pandemics,⁴⁴⁰ terrorism,⁴⁴¹ and even the death of a child.⁴⁴² *Liberia: Descent into Hell*,⁴⁴³ a game about the Liberian Civil War, 1989-1997, is full of

434. See *SpookySouthcoast* (WBSM AM1420 radio broadcast Mar. 27, 2010), <http://www.spookysouthcoast.com/Archive/Archive2010.html> (interviewing Professor Juliann Jennings and John Poniske).

435. See *id.*

436. See Poniske, *King Philip's War*, *supra* note 428 (“[O]n three occasions attempts to contact the council represented by the protestors were made, but it would appear that media hype has poisoned any possibility of further discussion.”) (page 16 of the Rules of Play).

437. See Eric Tucker, *Settlers-vs.-Indians Board Game Rankles Tribes*, *LOWELL SUN*, Apr. 15, 2010; *SpookySouthcoast*, *supra* note 434.

438. See, e.g., Douglas Malcwicki, *Nuclear War* (Flying Buffalo 1965).

439. See, e.g., David B. Bromley, *Family Business* (Mayfair Games 1989) (card game); *Mafia II* (2K Games 2010) (video game); Thorsten Gimmler, *Gangster* (Mayfair Games 2007) (board game); *The Godfather: The Game* (Electronic Arts 2006) (video game).

440. See, e.g., Matt Leacock, *Pandemic* (Z-Man Games 2008); Charles Ryan, *Pandemic*, in *FAMILY GAMES: THE 100 BEST*, *supra* note 15, at 248, 249 (“The premise of *Pandemic* is pretty straightforward: Several diseases are spreading globally, and the players must stop them. . . . *Pandemic's* theme tells its own story.”); Steven Barsky, *Plague!* (B&B Productions 1991); Richard H. Berg, *Plague!* in *HOBBY GAMES: THE 100 BEST*, *supra* note 319, at 244, 244-45 (“*Plague!* is a theme game, but, unlike far too many ‘Euros,’ the game is actually about the theme. . . . Basically, each player is trying to become the first to pick up 99 plague victim bodies with his wagon and get them dumped into the burial sites. Sounds like *Chutes & Ladders* for the demented, but it is far from that.”).

441. See, e.g., Volko Ruhnke, *Labyrinth: The War on Terror, 2001-?* (GMT Games 2010) (board game).

442. See David Cage, *Heavy Rain* (Sony Computer Entertainment 2009) (video game).

443. R. Ben Madison & Wes Erni, *Liberia: Descent into Hell* (Fiery Dragon 2008).

unpleasantness. Abstract death is common in games, but *Liberia: Descent into Hell* also includes child soldier units, a rule for cannibalism, and a random event involving sex slaves.⁴⁴⁴ *Liberia: Descent into Hell* is not the only game based around modern humanitarian crises or even genocide. Some of these games, such as *Darfur is Dying* (about the crisis in the Sudan) and *Hush* (about the 1994 Rwandan genocide),⁴⁴⁵ are not intended for commercial gain but to promote awareness of the crises. In *Darfur is Dying*, the player first chooses a character to forage for water while avoiding the Janjaweed militia. A player who chooses an adult male is told to choose again because an adult male caught outside of the camp by the militia would likely be killed. A player who chooses a woman or a child is told the severe consequences of capture while foraging. Women and girls risk abuse and rape. Boys risk abuse, capture, and even death.⁴⁴⁶ Players can also perform various tasks in a refugee camp. The game, according to the website, “offers a faint glimpse of what it’s like for the more than 2.5 million who have been internally displaced by the crisis in Sudan.”⁴⁴⁷

While unpleasant topics are sometimes dealt with comically, such as the beheading of French nobles in the card game *Guillotine*,⁴⁴⁸ other games are serious. The beginning of the video game *Heavy Rain* depicts the death of the main character’s son and the devastating effect that it has on his life. There is nothing light-hearted about it. One reviewer describes *Heavy Rain* as an example of the gaming medium maturing. Regarding the beginning of the game, the reviewer said, “We were taken from the heights of effortless bliss to the depth of total loss, all with an impact and emotional engagement that’s rare

444. See *id.* (page 7 of the rulebook (“Kids, Men and Vets”), page 23 of the rulebook (“Cannibalism”), Random Events Table (“Corsican Mafia sex slaves”)). This game also makes use of the names of two Americans, i.e., Pat Robertson (“right-wing televangelist”) and Jimmy Carter (“[r]oving ambassador of American naïveté”). *Id.* (Random Events Table).

445. See IAN BOGOST, HOW TO DO THINGS WITH VIDEOGAMES 18-23 (2011).

446. See Susana Ruiz, Ashley York, Mike Stein, Noah Keating & Kellec Santiago, DARFUR IS DYING, <http://www.darfurisdying.com> (last visited Oct. 21, 2012). See also Clark Boyd, *Darfur Activism Meets Video Gaming*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/5153694.stm> (last updated July 6, 2006).

447. *About the Game*, DARFUR IS DYING, <http://www.darfurisdying.com/aboutgame.html> (last accessed April 29, 2012).

448. See Paul Peterson, *Guillotine* (Wizards of the Coast 1998).

from a game, rivaling the best movies and contemporary fiction.”⁴⁴⁹

Sensitive events are probably less likely to be incorporated into a game when the event is recent. “Recent” in this context, however, may mean very recent. *Labyrinth: The War on Terror, 2001-?* includes a scenario that begins on September 12, 2001,⁴⁵⁰ but unlike *Guillotine*, *Labyrinth* is not a light-hearted game. Similarly, *Battle for Baghdad* involves military and political maneuvering in Baghdad around 2003-2008.⁴⁵¹ *Saturday Night Live* took only three weeks after the events of September 11, 2001 to return to comedy.⁴⁵² Games probably need longer than a few weeks, but games can still address fairly recent events that are sensitive.

Some people will inevitably consider these or other games to be in bad taste. In the designer’s notes to *Liberia: Descent into Hell*, R. Ben Madison briefly discusses the problematic subject matter of the game:

The Liberian story is as horrific and tragic as any that has ever been told. I felt initially that to turn all this into a game was in bad taste. [Game designer] Brian Train helpfully reminded me that the whole hobby is in such execrable bad taste that one more game wouldn’t hurt.⁴⁵³

While this particular justification for the game does not speak well of the medium, it can also illustrate how even those in the game industry struggle with the question of how to deal with horrific or sensitive topics.⁴⁵⁴ Some topics do not translate well to the gaming medium,⁴⁵⁵

449. Gary Steinman, *Heavy Rain: The Game Has Changed*, PLAYSTATION: THE OFFICIAL MAGAZINE no. 30, Mar. 2010, at 66, 67. See also CHRIS MELISSINOS & PATRICK O’ROURKE, THE ART OF VIDEO GAMES 207 (2012) (“Director David Cage wanted to make a game that would force the player to ‘play the story’—one that would make the story essential, not simply a convenient reason for the players to engage in action.”).

450. Ruhnke, *Labyrinth*, *supra* note 441 (page 16 of the Rules of Play).

451. See Joseph Miranda, *Battle for Baghdad* (MCS Group 2009).

452. See Ted Goumelos & Viveca Greenc, *Introduction: Popular Culture and Post-9/11 Politics*, in A DECADE OF DARK HUMOR: HOW COMEDY, IRONY, AND SATIRE SHAPED POST-9/11 AMERICA xi, xii (Ted Goumelos & Viveca Greenc eds., 2011).

453. Madison & Erni, *Liberia*, *supra* note 443 (page 44 of the rulebook).

454. See *Unnecessary*, BOARDGAMEGEEK, <http://boardgamegeek.com/thread/370368/unnessesary> (last visited Oct. 21, 2012) (forum discussing *Liberia: Descent into Hell*).

455. See, e.g., M.-Niclas Heckner, *Deleting Memory Space: The Gaming of History and the Absence of the Holocaust*, in IMMERSIVE GAMEPLAY: ESSAYS ON PARTICIPATORY MEDIA AND ROLE-PLAYING 184, 197-98 (Evan Torner & William J. White eds., 2012) (section entitled

but the number of topics that commercial game companies avoid because the topics are unsuitable for games may be relatively few in number. Much depends on how the topic is handled.

Games are not a unique medium in terms of struggling with certain topics; even the traditional media of expression face similar questions. Games are perhaps somewhat analogous to comedy in this regard. While both games and comedies (in various forms) can inform and persuade, both are often conceived in terms of amusement. Like games, some topics are more challenging to incorporate into comedy.⁴⁵⁶ Can anything about World War II be funny?⁴⁵⁷ Even if it's about a prisoner-of-war camp?⁴⁵⁸ What about September 11th as the topic?⁴⁵⁹ Or nuclear war?⁴⁶⁰ Comedy, of course, can and does address these and other difficult topics. Sometimes the comedy is truly in bad taste, but humor can serve various purposes—and different people will have different reactions to the same attempts at humor.⁴⁶¹ The gaming medium is not alone in facing difficult questions about the suitability of some topics for the medium, or at least questions about how to handle them. As a practical matter, the gaming medium does take on many sensitive topics; it is hardly confined to the world of *Candy Land*.

D. Game Processes Can Contribute to the Expressive Value of Games

Why should combining a game process with a simple moral teaching (as in *Chutes & Ladders*), a story (as in *Dungeons & Dragons*), history (as in *Squad Leader*), sports (as in *Madden NFL*) or any other expressive content transform the expression into the

“Cultural Capital and Legitimacy of the Messenger: Why We Can’t Play Anne Frank”).

456. See, e.g., PAUL LEWIS, *CRACKING UP: AMERICAN HUMOR IN A TIME OF CONFLICT* 1-2 (2006).

457. See, e.g., 1941 (Universal Pictures & Columbia Pictures 1979); *THE PRODUCERS* (Embassy Pictures 1968) (*Springtime for Hitler*); *TO BE OR NOT TO BE* (United Artists 1942).

458. See generally ROBERT R. SHANDLEY, *HOGAN’S HEROES* (2011). Some people mistakenly thought *Hogan’s Heroes* was a show about a concentration camp. See ROBERT CLARY, *FROM THE HOLOCAUST TO HOGAN’S HEROES* 172-73 (2001).

459. See generally Gislinde Kuipers, “Where Was King Kong When We Needed Him?”: *Public Discourse, Digital Disaster Jokes, and the Functions of Laughter after 9/11*, in *A DECADE OF DARK HUMOR*, *supra* note 452, at 20.

460. See *DOCTOR STRANGELOVE* (Columbia Pictures 1964).

461. See Kuipers, *supra* note 459, at 20.

equivalent of a face or a name on a coffee mug? Perhaps whatever point the game designer makes could instead be made with an article, book, television show, or film.⁴⁶² Skeptics of the value of games may think the game element is just a way to sell other objects with the expression, such as boards, tokens, or video game controllers, but adding a game process to other forms of expression can make the content expressive in a substantively different way. As Ian Bogost explains, the addition of game processes can enhance the expressive capacity of a work. Bogost uses the term “procedural rhetoric” to describe “the practice of using processes persuasively”⁴⁶³ or “authoring arguments through processes.”⁴⁶⁴ He posits that the use of procedural elements to make arguments is particularly suited to the computerized processes in video games, but his point also applies to other types of games.⁴⁶⁵ In general, focusing on only a game’s words or text misses a potentially important element of a game’s expression.⁴⁶⁶

The *McDonald’s Video Game* is an example of a video game that incorporates procedural rhetoric. This game is certainly not a product of the McDonald’s Corporation. Bogost calls it an “anti-advergame,” one meant to attack McDonald’s business practices. The game’s text describes it is a parody of McDonald’s.⁴⁶⁷ Somewhat incoherently, the game states that it is intended for entertainment and education, but also that it is “the product of the creators’ imaginations” and “in no way” factual.⁴⁶⁸ Making clear that there really is an argument in the game, the game’s text further states:

There are inevitably some glitches in our activity: rainforest destruction, livelihood losses in the third world, desertification, precarization of working conditions, food poisoning and so on . . .

462. Cf. *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) (“Because there are numerous ways in which defendants may comment on ‘sexuality in athletics’ without infringing plaintiff’s trademark, the district court did not encroach upon their [F]irst [A]mendment rights in granting a preliminary injunction.”).

463. IAN BOGOST, *PERSUASIVE GAMES: THE EXPRESSIVE POWER OF VIDEOGAMES* 3, 28 (2007).

464. *Id.* at 29.

465. *Id.* at 10, 46.

466. *Id.* at 29.

467. *McDonald’s Videogame* (Molcindustria 2006), available at <http://www.mcvideogame.com> (last visited Oct. 21, 2012).

468. *Id.*

Denying all these well founded accusations would be impossible so we decided to create an online game to explain to young people that this is the price to pay in order to preserve our lifestyle.⁴⁶⁹

The game requires players to manage four parts of McDonald's business: land for producing cattle and soy in South America, a slaughterhouse or "feed lot" for fattening and slaughtering the cows, restaurants for serving customers, and a corporate headquarters. The goal is to make money and avoid bankruptcy, but doing both forces difficult choices. For example, open land is limited, but more land can be obtained for cattle grazing or soy crops by replacing the grain crops of the local people, clearing the millennia-old rain forest, or demolishing a tribal settlement. These and other practices in the game can generate criticism from consumer groups, environmentalists, workers, obesity associations, and anti-globalization groups, but the player can respond by investing in public relations and lobbying. From the corporate headquarters, players can "corrupt" politicians, climatologists, health officers, and nutritionists.⁴⁷⁰

The game uses procedural rhetoric to convince the player about the inevitable corruption in the fast food industry, that no matter the choices made, financial success in the fast food industry must lead to corruption.⁴⁷¹ While these arguments can be made through more traditional media, this game combines the words and images with a game process to make its argument. Whether or not the argument is correct, the point is that the game expresses an argument, and a process is used to make it.⁴⁷²

While the *McDonald's Game* uses procedural rhetoric to make a point about a business, Bogost's point equally applies to games about individuals. While not commercially available, Hunter Jonakin's *Jeff Koons Must Die!!!* is a first-person shooter aimed at controversial artist Jeff Koons,⁴⁷³ the so-called "King of Kitsch."⁴⁷⁴ Koons, like

469. *Id.*

470. This summary of the game is based on both the game itself and Bogost's discussion. See BOGOST, *supra* note 463, at 29.

471. *Id.* at 29-31.

472. Whether an argument presented within a game is more likely to convince people than an argument presented in some other medium is an empirical question that we do not know the answer to. We are not aware of any studies that address this question, but it should be left to the proponent of the argument to decide on its form. The First Amendment status of films or television does not depend on their superiority (or lack thereof) to books or newspapers.

473. Hunter Jonakin, *Jeff Koons Must Die!!!* (2010), <http://hunterjonakin.com/koons.php>

Andy Warhol and Damien Hirst, is a well-known modern artist who appropriates the works of others in his art.⁴⁷⁵ The purpose of appropriation art is to purposely and deliberately use recognized political and commercial images, including celebrities, for social criticism.⁴⁷⁶ The celebratory description in the catalogue for Koons's most recent retrospective exhibit claims his "monumental works challenge not only the discriminations and segregations between art and commodity [], but also the distinctions between sublime art and banal taste."⁴⁷⁷ Koons often uses the works of others in recreations or collages and has been involved in numerous copyright cases as both plaintiff and defendant.⁴⁷⁸ In his works, Koons uses his identity and the identities of others, including Bob Hope, Buster Keaton, and

(last visited Oct 21, 2012).

474. See, e.g., *Jeff Koons Scottish National Gallery of Modern Art, Edinburgh: Opening This Week*, THE INDEPENDENT (UK), March 19, 2011, available at 2011 WLNR 5398261 ("The king of kitsch and baron of banality is back to rub up the art establishment the wrong way again.").

475. See *Rogers v. Koons*, 960 F.2d 301, 304-05, 309 (2d Cir. 1992) (linking Koons's *Puppies* sculpture based on a photograph to a tradition of work that takes meaning from everyday items, including Andy Warhol's reproduction of Campbell soup cans).

476. See Barbara Pollack, *Copy Rights*, ARTNEWS, Mar. 22, 2012, <http://www.artnews.com/2012/03/22/copy-rights> ("'Appropriation' covers a broad array of practices—reworking, sampling, quoting, borrowing, remixing, transforming, adapting—that focus on one person taking something that another has created and embracing it as his or her own. . . . Today, in almost any gallery or museum you will see artworks that incorporate or allude to press photographs, fine-art masterpieces, video games, Hollywood movies, anime, found objects, and just about anything that can be pulled off the Internet.").

477. JEFF KOONS 59 (Francesco Bonami ed., 2008) (exhibition catalogue for Museum of Contemporary Art, Chicago, May 31-Sept. 21, 2008).

478. See *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); *Campbell v. Koons*, No. 91-6055, 1993 WL 97381, 1993 US Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993). In 2010, Koons, who has used balloon animals in his work, sent a cease and desist letter to a gallery selling balloon animal bookends. In a blog post, the gallery responded, "Park Life just received a very formal Cease and Desist Letter from Jeff Koons' Lawyers calling for an 'Immediate Cessation' of selling our Balloon Dog sculptures. Wait, I'm confused, isnt [sic] his ENTIRE FUCKING CAREER based on co-opting other peoples work/objects???? So going forward, just so you know; Jeff Koons owns all likenesses of balloon dogs." *Jeff Koons Sends in His Goons*, PARK LIFE (Dec. 21, 2010), <http://www.parklifestore.com/2010/12/21/jeff-koons-sends-in-his-goons>. Subsequently, the gallery filed a declaratory judgment action, claiming that "[a]s virtually any clown can attest, no one owns the idea of making a balloon dog, and the shape created by twisting a balloon into a dog-like form is part of the public domain." *Complaint for Declaratory Relief and Demand for Jury Trial at 1*, *Alexander & Song, LLC v. Jeff Koons, LLC*, No. 11-0308 (N.D. Cal. Jan. 20, 2011). The case later settled.

Michael Jackson.⁴⁷⁹ Koons incorporates not only his image in his works, but also his personal life.⁴⁸⁰ The most infamous example is the *Made in Heaven* series, where he “publicly presented his private life as a metaphor for his ideas about the fulfillment of desires” through stills and sculpture derived from pornography he produced with his former wife, a former adult performer (and member of the Italian parliament).⁴⁸¹

Jonakin describes *Jeff Koons Must Die!!!* generally as “a comment on the fine art studio system, museum culture, art and commerce, hierarchical power structures, and the destructive tendencies of gallery goers, to name a few.”⁴⁸² Mirroring Koons, Jonakin ironically uses Koons in the way Koons uses himself and others. While Jonakin is somewhat vague about the nature of the game’s commentary, he based it around Koons because “Koons is one of the most polarizing and well known contemporary artists living today. . . . In general, viewers love or hate Koons and his work, and that is why he was chosen as the subject matter for this piece.”⁴⁸³ Koons’s artistic works and identity are essential for the game play of *Jeff Koons Must Die!!!*.

The process of the game is important. The game allows those who find Koons’s art to be distasteful, disruptive, or disgusting to respond by virtually destroying his work.⁴⁸⁴ The setting for the game is a museum during a retrospective exhibit of Koons’s works. The player can briefly look around and allow the game to end or the player can destroy emblematic works of Koons from various collections.⁴⁸⁵ After the player destroys one of Koons’s works, “a

479. JEFF KOONS, *supra* note 477, 52 (Bob Hope), 64 (Buster Keaton), 67 (Michael Jackson).

480. *Id.* at 10 (“If Warhol’s identity was simply his image (with nothing behind to hide or discover), Koons’s identity is a four-dimensional mirror where we can always see ourselves.”).

481. *Id.* at 7. Koons’s “musc” was Ilona Staller, better known by her stage name, La Cicciolina.

482. Jonakin, *Jeff Koons Must Die!!!*, *supra* note 473.

483. *Id.*

484. See Jamin Warren, *Jeff Koons Must Die!*, KILL SCREEN (Mar. 31, 2011) <http://killscreeendaily.com/articles/jeff-koons-must-die> (“Before I went back to school, I really hated conceptual art. I thought a lot was stupid, and when you feel alienated, there are some strong emotions with that. It taps into something visceral that seems to resonate with people.”) (interview with Hunter Jonakin).

485. The works of Koons that are visible in the game include: “Three Ball Total Equilibrium,” from the Equilibrium series; “Rabbit,” from the Statuary, Kiepenkerl series;

crude and terrifying, zombie-robot-like avatar of Koons emerges, scolds the player, and sends in security guards to fight. A second level pops players in to a room where ‘waves of curators, lawyers, assistants, and guards spawn until the player is dead.’⁴⁸⁶ But the player cannot win. Eventually, Koons, the lawyers, and the agents of the museum will be victorious. Jonakin initially allows Koons’ critics the visceral satisfaction of destroying his artistic works, but the ultimate lesson for players appears to be that they cannot prevail over the art establishment.

Not all games attempt to make a clear argument. Some games, such as historical wargames, use a process to create a simulation. Role-playing games use a process to provide a structure for a narrative. Whether or not a game process is used to make an argument, the use of the process does not somehow strip an otherwise expressive work of its expressive qualities, thereby transforming it into a mere identity carrier.

V. APPLYING THE FIRST AMENDMENT TO GAMES AND THE RIGHT OF PUBLICITY

The previous section explained the expressive value of games. In recognition of that expressive value, this section explains how the First Amendment should limit the right of publicity’s application to games. We first explain our preferred test for dealing with this issue, one drawn from the decision of the United States Court of Appeals for the Second Circuit in *Rogers v. Grimaldi*.⁴⁸⁷ We then explain the related ways in which courts have failed to apply our preferred test. Finally, we consider an additional limitation on the ability of game publishers to make unlicensed use of a person’s identity beyond that embodied in *Rogers*, a limitation drawn from the United States Supreme Court’s decision in *Zacchini v. Scripps-Howard Broadcasting Company*.⁴⁸⁸

various works from the self-exposing Made in Heaven series; and “Balloon Dog,” various versions of “Balloon Flower,” and “Hanging Heart,” all from the Celebration series. Compare JEFF KOONS, *supra* note 477, with Jonakin, *Jeff Koons Must Die!!!*, *supra* note 473.

486. “*Jeff Koons Must Die!!!*” and 4 Other Art Video Games You Can Actually Play, ARTINFO (Apr. 23, 2011), <http://www.artinfo.com/news/story/37501/jeff-koons-must-die-and-4-other-art-video-games-you-can-actually-play> (quoting Jonakin, *Jeff Koons Must Die!!!*, *supra* note 473).

487. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

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

A. *The Rogers Test*

An “official” relocation of games from the merchandise category to the expressive media category is a worthwhile step because it means recognizing that games are usually more than mere identity carriers. Alone, however, it would not immunize games from a right of publicity claim. In unusual situations, individuals can prevail even when their identities are used in one of the traditional media of expression.⁴⁸⁹ Our argument is that games should not be treated differently than these other media. While courts have offered multiple ways to evaluate whether an unauthorized use of someone’s identity should be protected by the First Amendment,⁴⁹⁰ we think the test articulated by the Second Circuit in *Rogers v. Grimaldi* makes the most sense for games and other works. This test is relatively straightforward to apply and is very protective of speech.⁴⁹¹ Some courts even think it is too protective of speech. We are not challenging the majority rule that merchandising uses of someone’s identity require permission, but the weak rationale for the rule in the merchandising context counsels against broadly labeling expressive works as merchandise when the works are more than mere identity carriers.

Courts routinely recognize the tension between the right of publicity and the First Amendment,⁴⁹² and there are several approaches for dealing with this tension. To determine whether an unauthorized use of someone’s identity in news, entertainment, or other expressive works violates the person’s right of publicity, the *Restatement (Third) of Unfair Competition* asks whether “the name or likeness is used solely to attract attention to a work that is not related to the identified person.”⁴⁹³ The California courts ask whether a use is

489. See, e.g., *Toffoloni v. LFP Publ’g Grp.*, 572 F.3d 1201 (11th Cir. 2009); *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

490. See *Welkowitz & Ochoa*, *supra* note 234, at 662-70.

491. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 792 (D.N.J. 2011). *But see* *Welkowitz & Ochoa*, *supra* note 234, at 664 (criticizing the *Rogers* test as “an invitation to censorship,” at least when applied to the use of a celebrity’s name within a work as opposed to the title of the work).

492. See, e.g., *Toffoloni*, 572 F.3d at 1207; *ETW Corp. v. Jirch Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003).

493. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

transformative.⁴⁹⁴ The Missouri courts disapprove of these two approaches for being too protective of speech and insufficiently protective of the right of publicity.⁴⁹⁵ According to the Supreme Court of Missouri, the *Restatement's* relatedness test and California's transformative test protect "any" use of a person's identity in speech that is deemed expressive,⁴⁹⁶ a conclusion belied by the decision in which the California Supreme Court announced the test.⁴⁹⁷ The Missouri test supposedly involves "more balanced balancing" and asks whether the predominant use of a person's identity is commercial exploitation or expressive.⁴⁹⁸

The *Rogers* test, which is primarily associated with trademark law, is another option. Like the right of publicity, trademark law raises potential First Amendment problems when trademarks are used as part of an expressive work.⁴⁹⁹ Although there is some variation on how it is applied,⁵⁰⁰ the *Rogers* test is the dominant response.⁵⁰¹ In *Rogers*, Ginger Rogers claimed the use of her name in a film titled "Ginger and Fred" violated both the Lanham Act and her right of publicity.⁵⁰² While the film was fictional, the story involved two Italian performers imitating Ginger Rogers and Fred Astaire who

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

495. See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-74 (Mo. 2003) (en banc).

496. See *id.* at 374.

497. The California Supreme Court held the defendant's portrait of the Three Stooges was both expressive and a violation of the Stooges' post-mortem right of publicity. See *Comedy III*, 21 P.3d at 802, 811.

498. *TCI Cablevision*, 110 S.W.3d at 374.

499. See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989).

500. In *Twin Peaks Productions, Inc., v. Publications International, Ltd.*, 996 F.2d 1366 (2d Cir. 1993), the Second Circuit described *Rogers* as calling for an inquiry into the likelihood of confusion under the traditional factors rather than looking for something that is explicitly misleading. See Elizabeth L. Rosenblatt, *Rethinking the Parameters of Trademark Use in Entertainment*, 61 FLA. L. REV. 1011, 1071-72 (2009).

501. See, e.g., *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1275-78 (11th Cir. 2012) (following *Rogers*); *Parks v. LaFace Records*, 329 F.3d 437, 451-52 (6th Cir. 2003) (same); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) (same); *Sugar Busters, LLC v. Brennan*, 177 F.3d 258, 269 n.7 (5th Cir. 1999) (same); *Muzikowski v. Paramount Pictures Corp.*, No. 01-6721, 2005 U.S. Dist. LEXIS 13127, at *38 n.6 (N.D. Ill. June 10, 2005) (same); *Woodard v. Jackson*, No. 03-0844, 2004 U.S. Dist. LEXIS 6292, at *25-26 (S.D. Ind. March 25, 2004) (same); *Club Mediterranee, S.A. v. Fox Searchlight Pictures, Inc.*, No. 04-20273, 2004 U.S. Dist. LEXIS 3543, at *3 (S.D. Fla. Feb 13, 2004) (same).

502. *Rogers*, 875 F.2d at 996.

were referred to as Ginger and Fred.⁵⁰³ The Second Circuit held that the Lanham Act “should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”⁵⁰⁴ In an approach quite similar to the *Restatement’s* test,⁵⁰⁵ the court held there is no violation of the Lanham Act “unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.”⁵⁰⁶ In *Rogers*, the court held the title was relevant to the underlying work, and the defendant prevailed.⁵⁰⁷

While the *Rogers* case was about the title of an expressive work, courts have also applied the rule to situations where a trademark is used *within* an expressive work.⁵⁰⁸ Regardless, there needs to be some larger expressive work for the defense to apply. Where a literal depiction of a celebrity’s identity appears on an otherwise plain piece of paper or a coffee mug, there is no underlying expressive work to which the person’s identity can be relevant.

Given the close relationship between the Lanham Act and the right of publicity,⁵⁰⁹ it makes sense to take similar approaches in both

503. *Id.*

504. *Id.* at 999.

505. *See Parks*, 329 F.3d at 461.

506. *Rogers*, 875 F.2d. at 999.

507. *Id.* at 1001.

508. *See, e.g., E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008) (“Although [the *Rogers*] test traditionally applies to uses of a trademark in the title of an artistic work, there is no principled reason why it ought not also apply to the use of a trademark in the body of the work.”); *ETW Corp. v. Jirch Publ’g, Inc.*, 332 F.3d 915, 927-28 (6th Cir. 2003). *Cf. Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1018 (3d Cir. 2008).

509. *See Dogan & Lemley, supra* note 100, at 1190-91. Professor Roberta Kwall may disagree with this statement about the close relationship between the Lanham Act and the right of publicity. She argues that the right of publicity is analogous to protecting moral rights. She also argues that preventing consumer confusion, the primary purpose of trademark law, is “totally unrelated to the authorial interests encompassed by moral rights.” ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY* 34, 88-89, 111 (2010). If trademark law has little to do with moral rights and moral rights are similar to the right of publicity, then it follows that trademark law has little to do with the right of publicity. However, at least part of the problem she identifies with moral rights violations are related to confusion, i.e., situations where people mistakenly think an artist approved a particular use of his or her work in an offensive way. *See id.* at 8. Her suggested approach for protecting moral rights from these types of violations is through the use of disclaimers to prevent confusion as to the artist’s association or approval of the offensive use. *See id.* at 149-51. It therefore seems like moral rights protection and trademark law do share important similarities. And if moral rights protection and the right

contexts. Indeed, the Second Circuit applied the first part of the *Rogers* test when it addressed a right of publicity claim under Oregon law, determining that the title of the movie was related to its content rather than a disguised advertisement. It was therefore not a violation of Ginger Rogers's right of publicity.⁵¹⁰ One benefit of applying the *Rogers* test as a defense to both Lanham Act and right of publicity claims is to avoid a multiplicity of tests for similar claims.

Properly understood, the California test is consistent with the *Rogers* test. In *Comedy III Productions v. Gary Saderup, Inc.*, the California Supreme Court considered whether a "literal, conventional" charcoal drawing of The Three Stooges reproduced on lithographic prints and silkscreened T-shirts violated the Stooges' post-mortem right of publicity.⁵¹¹ According to the California Supreme Court:

When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity *without adding significant expression beyond that trespass*, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist. . . .

On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.⁵¹²

The court's reference to *adding* expression as a way to satisfy the transformative use test is critical. Elsewhere the court explained, "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."⁵¹³ Put differently, the question is "whether a product containing a celebrity's likeness is so transformed that it has become primarily the

of publicity are analogous, then both share some important similarities with trademark law.

510. See *Rogers*, 875 F.2d at 1004-05. There is some disagreement about whether the Second Circuit reached its decision because it thought titles relevant to artistic works do not violate Oregon's right of publicity in the first place or because it thought the First Amendment provided a defense. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 790 (D.N.J. 2011).

511. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

512. *Id.* at 808 (emphasis added) (footnote omitted).

513. *Id.* at 809.

defendant's own expression rather than the celebrity's likeness."⁵¹⁴

The California Supreme Court further clarified that its reference to expression means additional "expression of something other than the likeness of the celebrity."⁵¹⁵ The expression could take "many forms, from factual reporting . . . to fictionalized portrayal . . ."⁵¹⁶ A poster with a conventional celebrity image lacks any expression beyond the image itself. The image is neither transformed itself nor part of a larger work that makes the celebrity image raw material for a larger work. Based on this test, the court ruled the First Amendment did not protect Saderup's portrayal of the Three Stooges.⁵¹⁷ The "sum and substance" of Saderup's drawing was The Three Stooges. According to the court, there was nothing more. Apparently, there would have been something more if Andy Warhol, rather than Saderup, had drawn the picture. After mentioning Warhol's silkscreened images of Marilyn Monroe, Elizabeth Taylor, and Elvis Presley, the court said, "Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself."⁵¹⁸ While the court's analysis is genuinely problematic for certain types of artistic works,⁵¹⁹ most of the games we have been discussing are well beyond "literal, conventional depictions" of someone's likeness.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.* at 810-11.

518. *Id.* at 811.

519. Several scholars have challenged the California Supreme Court's placement of Warhol's works on a pedestal with other forms of "high art," while leaving "low art" unprotected from right of publicity claims. See Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 1014 (2004) ("Even accepting the idea that Warhol's cachet added value to his lithographs beyond the celebrity image portrayed, it is manifest that Saderup's cachet, though more limited, did so as well. . . . Under *Saderup*, traditional portraitists, photographers and likely the unknown Warhols and Lichtensteins of the next generation will be barred from using images free to looser hands.") (footnote omitted); Dogan & Lemley, *supra* note 100, at 1178 n.77 ("[T]here is little difference between Warhol's depictions and Saderup's, except that Warhol is already a recognized artist."); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 918 (2003) ("[H]ow can an artist know how much transformation is necessary? Would Jeffrey Koons's sculpture of Michael Jackson and Jackson's chimpanzee Bubbles be transformative enough?").

In *Winter v. DC Comics*⁵²⁰ the California Supreme Court applied the *Comedy III* test to comic books. DC Comics published a five issue miniseries called *Jonah Hex: Riders of the Worm and Such*.⁵²¹ The story included two characters, Johnny and Edgar Autumn, who the court described as “less-than-subtle evocations of Johnny and Edgar Winter,” two musicians.⁵²² The Autumn brothers were presented as part human, part worm creatures, with tentacles protruding from their torsos.⁵²³ They appeared in three of the five issues, including the cover of one issue.⁵²⁴ The “sum and substance” of the comic book, however, went far beyond the real-world Winter brothers. Applying the *Comedy III* transformative use test, the court said, “To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature. And the Autumn brothers are but cartoon characters—half-human and half-worm—in a larger story, which is itself quite expressive.”⁵²⁵ The reference to the “larger story” is important. The authors of *Jonah Hex* did not change just the physical appearances of the Winter brothers. They also embedded the brothers in a larger story. That alone should have sufficed to make the use of the Winter brothers sufficiently transformative, even if the authors had not also depicted them as human-worm hybrids. Unfortunately, some courts have understood the *Winter* case to mean the *image* of an individual must be altered in order to pass the *Comedy III* test, effectively ignoring the potentially transformative nature of a larger work even when an individual is not physically altered.⁵²⁶

The facts in both *Comedy III* and *Winter* could be analyzed under the *Rogers* test to reach the same result. The *Rogers* test asks whether the use of the plaintiffs’ identities is artistically relevant to

520. *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003).

521. *Id.* at 476.

522. *Id.* at 479. The comic books evoked the Winter brothers in various ways, both through text and imagery, such as giving the Autumn brothers an albino appearance and long white hair. *See id.* at 476.

523. *See* Joe R. Lansdale et al., *Jonah Hex: Riders of the Worm and Such* no. 4, June 1995, at 12, 27-29 (comic book).

524. *See id.*; Joe R. Lansdale et al., *Jonah Hex: Riders of the Worm and Such* no. 3, May 1995, at 30; Joe R. Lansdale et al., *Jonah Hex: Riders of the Worm and Such* no. 5, July 1995, at 20.

525. *Winter*, 69 P.3d at 479 (emphasis added).

526. *See infra* discussion in section V.B.

the underlying work. In *Comedy III*, there was no underlying work for the image of The Three Stooges to be related to. In *Winter*, there was an underlying work—the story—and the (altered) Winter brothers were related to that story. The Sixth Circuit understood this point in the case about the painting of Tiger Woods' 1997 victory at the Masters Tournament in Augusta, Georgia.⁵²⁷ Although the artist depicted Woods in a fairly conventional way, the painting as a whole created a transformative context for the images of Woods.⁵²⁸

B. Applying Rogers

While some commentators have worried that the logic of *C.B.C.* means video game publishers can use the images of athletes or other celebrities in video games,⁵²⁹ at least three decisions have resisted that outcome, and they have done so in reliance on the California Supreme Court's transformative use test. In *No Doubt v. Activision Publishing, Inc.*, the California Court of Appeal held that Activision's use of the members of the band No Doubt in *Band Hero*⁵³⁰ did not pass the transformative use test because "the creative elements" were only "literal, fungible reproductions of [the band members'] likenesses."⁵³¹ Although the court acknowledged that the context in which a celebrity's likeness is used is relevant to the transformative use test,⁵³² the court nevertheless zeroed in specifically on the depiction of the band's members:

527. See *ETW Corp. v. Jirch Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003).

528. *Id.* at 936 ("Rush's work consists of much more than a mere literal likeness of Woods. It is a panorama of Woods's victory at the 1997 Masters Tournament, with all of the trappings of that tournament in full view, including the Augusta clubhouse, the leader board, images of Woods's caddy, and his final round partner's caddy. These elements in themselves are sufficient to bring Rush's work within the protection of the First Amendment. . . . A piece of art that portrays a historic sporting event communicates and celebrates the value our culture attaches to such events. It would be ironic indeed if the presence of the image of the victorious athlete would deny the work First Amendment protection. Furthermore, Rush's work includes not only images of Woods and the two caddies, but also carefully crafted likenesses of six past winners of the Masters Tournament: Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus, a veritable pantheon of golf's greats. Rush's work conveys the message that Woods himself will someday join that revered group.").

529. See Richard T. Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN ST. L. REV. 557, 571-72 (2007).

530. *Band Hero* (Activision 2009).

531. *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018, 1022 (2011).

532. *Id.* at 1033-34.

In *Band Hero* . . . no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a video game that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.⁵³³

Other courts are taking similar approaches by downplaying or ignoring the larger context in which game designers are using people's identities. Issues similar to those in *No Doubt* are being pursued in litigation in the federal courts involving various sports games published by Electronic Arts (EA).

Keller v. Electronic Arts, Inc. is, in part, a class action challenge to EA's use of unnamed players in the various NCAA basketball and football video games who match their real-world counterparts in terms of jersey numbers, height, weight, and state of origin.⁵³⁴ While the players are not given their real-world names within the games, much like some of the sports board games in the 1970s, consumers can add the real names to the games themselves. Rather than filling in blanks by hand as in the 1970s, players can easily download electronic rosters from third-party websites.⁵³⁵

In the original complaint filed in the United States District Court for the Northern District of California, Keller claimed EA violated his right of publicity under California common law and statutory law by using his identity in various editions of *NCAA Football*.⁵³⁶ EA responded to the complaint with a motion to dismiss and an anti-SLAPP motion under California's Code of Civil Procedure, challenging the lawsuit as a "strategic lawsuit against public

533. *Id.* at 1034.

534. See Second Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. 09-1967 (N.D. Cal. May 16, 2011); Class Action Complaint and Demand for Jury Trial, *Keller v. Elec. Arts, Inc.*, No. 09-1967 (N.D. Cal. May 5, 2009).

535. See *Keller v. Elec. Arts, Inc.*, No. 09-1967, 2010 U.S. Dist. LEXIS 10719, at *6-7 (N.D. Cal. Feb. 8, 2010); Class Action Complaint, *Keller*, *supra* note 534, at 9.

536. Class Action Complaint, *Keller*, *supra* note 534, at 18.

participation.”⁵³⁷ Under the anti-SLAPP provision, when a defendant is sued for speech related activities, the plaintiff must show the suit has “minimal merit” or the court will dismiss the suit.⁵³⁸ EA claimed its use of Keller’s identity is protected by: the First Amendment under the *Comedy III* test; a public interest defense recognized by the California courts; and a statutory exemption for uses “in connection with any news, public affairs, or sports broadcast or account, or any political campaign.”⁵³⁹

In response, Judge Claudia Wilken denied both EA’s motion to dismiss and its anti-SLAPP motion. While EA urged the court to look at the work as a whole, Judge Wilken ignored *Winter*’s reference to the “larger story.”⁵⁴⁰ She claimed the *Winter* decision (and the lower state court’s decision in *Kirby v. Sega of America*) “show that this Court’s focus must be on the depiction of Plaintiff in ‘NCAA Football,’ not the game’s other elements.”⁵⁴¹ Judge Wilken said that EA does not depict Samuel Michael Keller “in a different form; he is represented as [] what he was: the starting quarterback for Arizona State University.”⁵⁴² As EA did not transform Keller’s image and characteristics, and as the court ignored the larger context in which Keller appeared, i.e., the game as a whole, EA could not prevail. As for the public interest defense and the statutory exemption, Judge Wilken held both defenses apply to reporting, and while EA’s games involve matters of public affairs, the games do not constitute reporting, narrowly understood.⁵⁴³

In *Davis v. Electronic Arts, Inc.*,⁵⁴⁴ another judge of the United States District Court for the Northern District of California offered a similar analysis as the one in *Keller*. The plaintiff in this class action alleges that EA violated the rights of publicity under California law of approximately 6,000 former National Football League players in

537. See CAL. CIV. PROC. CODE § 425.16 (2012). This motion can be filed in federal court. See *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003).

538. See *Mindy’s Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598-99 (9th Cir. 2010).

539. *Keller*, 2010 U.S. Dist. LEXIS 10719, at *22-23 (quoting CAL. CIV. CODE § 3344(d)).

540. *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003).

541. *Keller*, 2010 U.S. Dist. LEXIS 10719, at *18.

542. *Id.* at *16.

543. See *id.* at *18-25.

544. See Order Denying Defendant’s Motions to Dismiss and to Strike Under CCP § 425.16, *Davis v. Elec. Arts, Inc.*, No. 10-3328 (N.D. Cal. March 29, 2012).

EA's *Madden NFL* video game series.⁵⁴⁵ The complaint alleges that although EA does not use the players' names in the games, at least some of the relevant *Madden* games use their jersey numbers and all of the relevant *Madden* games use accurate descriptions and statistics, "including height, weight, skin tone, position, team, years in the league, and athletic ability (speed, agility, etc.)."⁵⁴⁶ As in *Keller*, EA responded to this complaint with a motion to dismiss and an anti-SLAPP motion.⁵⁴⁷

Although Judge Richard Seeborg acknowledged that video games are "expressive works entitled to as much First Amendment [protection] as the most profound literature,"⁵⁴⁸ he clearly did not give the games the same protection that profound literature would receive. He declined to apply the *Rogers* test,⁵⁴⁹ and instead purported to apply the California Supreme Court's *Comedy III* test. Unlike Judge Wilken, Judge Seeborg mentioned that *Winter* referenced the "larger story" in the comic books as part of the discussion of whether the comic books transformed the Winter brothers' identities.⁵⁵⁰ Relying on *No Doubt* and *Keller*, however, Judge Seeborg still focused on the images of the players and refused to consider the larger work in which the plaintiffs appeared. He said, "A review of the applicable authority indicates that the 'transformative' use test focuses on the reproduction of plaintiff's [sic] likenesses, rather than on a canvassing of the larger work."⁵⁵¹ Finally, Judge Seeborg made clear how he conceived of the games: "EA's use of plaintiffs' likenesses, though highly sophisticated, is the digital equivalent of transferring the Three Stooges' images onto a t-shirt."⁵⁵² In other words, video games are like T-shirts, another way of saying that games are like coffee mugs.⁵⁵³

545. *Id.* at 3.

546. *Id.*

547. *Id.*

548. *Id.* at 16 (quoting *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 615 (Ct. App. 2006)).

549. *Id.* at 9-10.

550. *Id.* at 6-7.

551. *Id.* at 8 (emphasis added).

552. *Id.* at 9.

553. Judge Seeborg also considered whether EA's games are protected under the public interest test. While he accepted that news and entertainment can both constitute matters in the public interest, he said that EA's games do not "resemble[] any kind of traditional reporting"

The reasoning of *No Doubt*, *Keller*, and *Davis* suggests General Patton cannot be literally depicted in a historical wargame without permission, either by name or by likeness, despite the transformative context of the game as a whole. Nor could Al Capone or John Dillinger be literally depicted in a historical role-playing game. Their identities would have to be transformed according to a very narrow sense of what counts as transformative, thereby denying the gaming medium the opportunity to evoke the past and present in ways permitted for other media. Perhaps these courts would view wargames differently from sports games, but doing so would ignore the many similarities between wargames and sports games. Wargames evoke military history. Sports games evoke sports history. Sports games substitute athletes for soldiers, stadiums for battlefields, and sporting events for military battles. They raise similar questions about emphasizing playability or realism.⁵⁵⁴ Like historical wargames, sports games allow players to simulate recent and historical sporting events or “what-if” scenarios that could have but did not occur in the real world.

If these decisions are correct and the larger work is irrelevant to the analysis, the consequences could seriously undermine free speech interests. At least under the transformative use test, a newspaper, magazine, or book that included explicit references to a person or that person’s picture might not be protected by the First Amendment from a right of publicity claim (though the public interest test, if applied, could save straightforward reporting). A filmmaker, even a documentary filmmaker, who used a person’s image without a license might need to transform the image to avoid liability—perhaps into a

and fail to “fulfill the traditional informative role recognized as deserving protection by the court.” *Id.* at 11. This discussion again shows that he did not conceive of video games as equivalent to the traditional media of expression.

554. See, e.g., Wyatt Lee, *The Electronic Gridiron*, COMPUTER GAMING WORLD no. 42, Dec. 1987, at 16, 16 (“Computerized football competition seems to fall into two basic categories: action/strategy and statistics-based strategy.”); Win Rogers, *Great “A’s” Baseball*, COMPUTER GAMING WORLD no. 88, Nov. 1991, at 104 (“The designer of a computer baseball simulation has a tall order these days. The perfect game would provide rich visuals, a solid statistical foundation and the playability to combine graphics, arcade action and statistics smoothly.”) (review of SSI’s *Tony La Russa’s Ultimate Baseball*). As with wargames, sports games that emphasize realism can involve difficult questions about how to translate the real world action into a game. For example, the process of assigning fielding ratings to baseball players in *Strat-O-Matic Baseball* often requires difficult judgment calls based on information from a variety of sources. See, e.g., GUZZO, *supra* note 157, at 203-28.

human-worm hybrid. But of course, courts would not apply the rule consistently. Games are treated differently than newspapers, magazines, books, and films because these courts perceive games as an inferior medium of expression, i.e., as merchandise like coffee mugs and T-shirts.

Even *Hart v. Electronic Arts, Inc.*⁵⁵⁵ falls short of adequately protecting speech in games. In *Hart*, much like *Keller*, the plaintiff filed a class action against EA for its use of the identities of college athletes in several editions of *NCAA Football*.⁵⁵⁶ The plaintiff claimed a violation of his right of publicity under New Jersey law.⁵⁵⁷ As already noted, the *NCAA Football* games do not use the real-world names of the players, but the virtual players do have real world counterparts in terms of jersey numbers and other facts and statistics.⁵⁵⁸ EA moved for dismissal or summary judgment on the grounds that its use of the plaintiff's identity is protected by the First Amendment. Judge Freda Wolfson granted summary judgment to EA.⁵⁵⁹

In a comprehensive opinion, Judge Wolfson explained that the dominant tests for balancing the First Amendment with the right of publicity are the tests found in *Comedy III* and *Rogers*.⁵⁶⁰ She viewed *Comedy III's* transformative use test as the appropriate one to apply, and concluded EA's use of *Hart's* identity was transformative (though, for the sake of argument, she said the game would also be protected under the *Rogers* test).⁵⁶¹ Interestingly, Judge Wolfson agreed with the Eighth Circuit in *C.B.C.* about the First Amendment protecting the use of names, statistics, and biographical data.⁵⁶² This means the critical question for the court came down to EA's use of *Hart's* image, even though it is not clear why names and images should be treated differently.

In *Hart*, Judge Wolfson explicitly disagreed with *Keller* by saying the game as a whole should be evaluated, not just *Hart's* image

555. *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011).

556. *Id.* at 761.

557. *Id.* at 762-63.

558. *Id.* at 763.

559. *Id.* at 760.

560. *Id.* at 776, 779.

561. *Id.* at 787, 793.

562. *Id.* at 785 n.28.

on its own.⁵⁶³ Although she seemed to agree with the outcome in the *No Doubt* case,⁵⁶⁴ Judge Wolfson thought the *NCAA Football* games differ from the game at issue in *No Doubt*. For Judge Wolfson, it was critical that the *NCAA Football* games allow the players to customize the appearances of the virtual athletes in the game. While Hart's virtual counterpart in the game looks like Hart by default,⁵⁶⁵ the players can change its appearance:

What matters for my analysis of EA's First Amendment right is that EA created the mechanism by which the virtual player may be altered, as well as the multiple permutations available for each virtual player image. Since the game permits the user to alter the virtual player's physical characteristics, including the player's height, weight, hairstyle, face shape, body size, muscle size, and complexion In my view, the creation of these varied potential formulations of each virtual player alone makes the game a transformative use of Hart's image.⁵⁶⁶

While Judge Wolfson's approach in *Hart* may provide substantial protection for using someone's identity in a video game, it is not clear why these customization options should really matter for purposes of the First Amendment defense. It seems highly improbable that Judge Wolfson would expect other media to follow suit.

More likely, *Hart* is another example of a court applying special rules to games that restrict game designers from doing what creators in other media are free to do. Would the maker of a film, whether a documentary or otherwise, need to provide similar customization options of celebrities' or other persons' images in the film? The film *Patton*,⁵⁶⁷ which was opposed by the heirs of General Patton,⁵⁶⁸ failed to provide options to change Patton's appearance in the film. The film

563. *Id.* at 787.

564. *Id.* at 783 ("*NCAA Football's* use of Hart's image presents a closer call than that in *Kirby* and *No Doubt*.").

565. *Id.* at 785.

566. *Id.* See also *id.* at 783 (distinguishing the *NCAA Football* games from the game at issue in *No Doubt* based that game lacked similar customization options).

567. *PATTON* (20th Century Fox 1970).

568. Family members, through their attorney, complained to the president of Twentieth Century Fox that a film would not accurately portray Patton and might result in invasions of privacy. See Letter from Arvin H. Brown, Jr. to Spyros Skouras (Sept. 11, 1961), Lawrence Suid Papers: Box #20/Patton File, Georgetown University Library Special Collections Research Center. See also ROBERT H. PATTON, *THE PATTONS: A PERSONAL HISTORY OF AN AMERICAN FAMILY* 295-96 (1994).

depicts Patton's real world activities, much like sports games depict what athletes do in the real world. Nevertheless, *Patton* is clearly transformative. And how would *Hart's* requirement of customization options apply to non-electronic games? Is it enough that a player could use a pencil to alter a person's image on a physical playing piece, on a game board, or in a game-related book? It would be more sensible to instead recognize that games are like other expressive works and treat them as such. This means recognizing that games like *NCAA Football* and many other sports games legitimately use athletes' identities because these athletes are related to the underlying game that, as a whole, is itself an expressive work.

A recent decision of the United States District Court for the Central District of California potentially goes further than we have suggested.⁵⁶⁹ The case involved the *Topps American Heritage: American Heroes Edition* trading card set, a collection of cards featuring famous individuals, objects, and events.⁵⁷⁰ Three cards use Buzz Aldrin's identity, including his name, signature, and a famous photograph of Aldrin in a spacesuit. This same photograph is also used on the box for the cards. Aldrin and Starbuzz LLC, the company that manages Aldrin's licensing activities, filed suit against Topps.⁵⁷¹ Topps responded with an anti-SLAPP motion to strike the complaint.⁵⁷²

During the hearing on Topps's anti-SLAPP motion, Judge Dean Pregerson asked about the difference between these trading cards and a mug: "[W]hy is a trading card the same as a mug if the trading card contains a description of the historical significance of whatever the event is? A mug doesn't."⁵⁷³ In his decision Judge Pregerson might have simply relied on the several ways that these cards are more than a mere identity carrier of Aldrin's identity. Instead, he went much further and said that these cards do not constitute commercial speech

569. *Aldrin v. Topps Co., Inc.*, No. 10-9939, 2011 U.S. Dist. LEXIS 110800 (C.D. Cal. Sept. 27, 2011).

570. *Id.* at *1.

571. See Complaint for Common Law Right of Publicity, Statutory Right of Publicity, Unfair Business Practices and Unjust Enrichment, *Aldrin v. Topps Co.*, No. 10-9939 (C.D. Cal. Dec. 27, 2010).

572. *Aldrin*, 2011 U.S. Dist. LEXIS 110800, at *4.

573. Transcript of Proceedings on Motion to Strike Complaint and Motion for Preliminary Injunction at 11, *Aldrin v. Topps Co.*, No. 10-9939, 2011 U.S. Dist. LEXIS 110800 (C.D. Cal. Apr. 25, 2011).

because “the core notion of commercial speech is that it does no more than propose a commercial transaction”⁵⁷⁴ In other words, commercial speech is advertising speech. As these cards are not advertisements and do not constitute commercial speech,⁵⁷⁵ Judge Pregerson held that Topps’s uses of Aldrin’s identity was entitled to First Amendment protection, and granted Topps’s motion to strike the complaint.⁵⁷⁶

Judge Pregerson’s approach likely moves nearly the entire merchandise category into the realm of expressive speech for purposes of the right of publicity. A celebrity name or image on a coffee mug, poster, or T-shirt is not an advertisement nor is it comparable to a professional baseball player’s signature on a bat or glove (which is a clear sign of endorsement). His approach therefore goes beyond what we are advocating, but a narrow reading of this case is consistent with our argument. A card that is part of a collection of historical trading cards and that contains a discussion of the significance of each card’s subject on the card, even if brief, is not a mere identity carrier. Even the traditional baseball card is more informative than the typical celebrity-embossed coffee mug because baseball cards typically contain each player’s statistics and other basic information.

While *No Doubt*, *Keller, Davis*, and even *Hart* are insufficiently protective of the speech interests of the gaming medium, it is conceivable that the use of someone’s identity is irrelevant to a game and therefore fails the *Rogers* test. An example is *No Respect* (1985),⁵⁷⁷ described on the box as “Rodney Dangerfield’s game.”⁵⁷⁸ Presumably, the prominent use of Dangerfield’s name and likeness on the game’s box, rules, and board was licensed, but if it had not been licensed, the use would not be protected under the *Rogers* approach. *No Respect* is an abstract strategy game in the same vein as *Othello* or *Quarto*. The game is for two to four players. It includes eighty numbered tiles and a board with three columns for each player. The game involves playing these numbered tiles in the various columns,

574. *Aldrin*, 2011 U.S. Dist. LEXIS 110800, at *5 (quoting *Hilton v. Hallmark Cards*, 599 F.3d 894, 905 n.7 (9th Cir. 2010)).

575. *Id.* at *7.

576. *Id.* at *8.

577. *No Respect* (Milton Bradley 1985).

578. *Id.*

and the goal is to be the first player with three columns filled with tiles or to be the last player to play a tile.⁵⁷⁹ Further details of play are not particularly important, for they have nothing to do with Rodney Dangerfield or anyone else. The game's theme, to the extent there is one, is *pasted* onto the game in the truest sense of the word, with Rodney Dangerfield being completely irrelevant to the game. The game's uncredited designer attempted to make Dangerfield somewhat relevant to the game by incorporating his "no respect" catchphrase into the rules. The rules say, "The player who commands the least respect should probably get a break in this game by going first," but to avoid arguments, it then suggests the players should just draw tiles to see who goes first.⁵⁸⁰ Somewhat pathetically, the rules also note that one of the two ways of winning will receive little respect from the players.⁵⁸¹ Perhaps with some additional effort, Rodney Dangerfield could be made relevant to the game. As it stands, however, the designer failed to do so. *No Respect* is not much different than selling a set of checkers with the face of a celebrity on the playing pieces.

Eurogames in general may seem more analogous to *No Respect* than the other types of games discussed in this article. As compared to the American approach to game design, the European approach might suggest a weaker case for treating Eurogames like books and films, but this conclusion should be resisted. According to Alan Emrich, who is a game designer, game design instructor, and longtime industry insider,⁵⁸² European designers typically begin the design process with the gameplay mechanics, that is, the rules for how the player may move or otherwise act in the game.⁵⁸³ Once the basic mechanics are created, a designer then considers what type of theme fits the mechanics.⁵⁸⁴ The theme is then built around the mechanics.

579. *Id.* (page 2 of the rules booklet).

580. *Id.*

581. *Id.* (page 5 of the rules booklet).

582. See, e.g., Alan Emrich, Thomas Prowell & Salvatore Vasta, *Totaler Krieg!* (Decision Games 2011); Alan Emrich, *Run for Your Life*, COMPUTER GAMING WORLD no. 65, Nov. 1989, at 34 (describing Emrich as the former publisher of *Fire & Movement*, an experienced game playtester, and an experienced game convention manager).

583. Jason White & Scott Moll, *Alan Emrich and the Future of Wargaming Design*, POINT 2 POINT no. 36, at 2:07:09-2:08:10 (Aug. 8, 2008), <http://point2point.libsyn.com/webpage/2008/08> (interview with Alan Emrich).

584. *Id.*

In other words, “Europeans build a game first and then say, ‘quick, find me a story.’”⁵⁸⁵ By contrast, American designers generally begin with a theme, such as a historical battle or even something fantastic like giant monsters attacking America.⁵⁸⁶ They then design the gameplay mechanics to match the theme.⁵⁸⁷ For this reason, the themes of Eurogames sometimes appear pasted or tacked onto the underlying gameplay process, such that the theme may seem irrelevant to the gameplay.⁵⁸⁸

These generalizations about game design will not always hold, of course. The European design process is not always as clear-cut as first designing mechanics and then selecting a theme. German game designer Michael Schacht explains that newer designers may start the design process with a theme, but more experienced ones, including Schacht himself, tend to start with the mechanics.⁵⁸⁹ He then looks for the “best fitting theme to the mechanism,” and his choice of theme can cause him to revisit and further develop the game’s mechanics to better match the theme. Mechanics and theme therefore work together.⁵⁹⁰ French game designer Bruno Faidutti agrees. Ideally, according to Faidutti, “systems and theme regularly generate each other in a dialectic process.”⁵⁹¹

Additionally, the lines between the Euro and American design tradition can easily blur. English game designer Martin Wallace says, “I always start with a theme. I have never been able to just invent a mechanic.”⁵⁹² Wallace’s games combine a European emphasis on mechanics with an American emphasis on theme. An example is Wallace’s *Automobile*, a game about the “exciting early years of the

585. *Id.*

586. *See, e.g.,* J.C. Connors & Ben Knight, *Monsters Ravage America* (Avalon Hill 1998). J.C. Connors confirmed by e-mail to one of the present authors that the design for *Monsters Ravage America* began with the theme, not the mechanics. *See* E-mail from J.C. Connors to author (Apr. 29, 2012) (on file with author).

587. *See* White & Moll, *supra* note 583.

588. *See* Pulsipher, *supra* note 354.

589. E.R. Burgess, *Q&A with Michael Schacht at Orcon 2009*, BOARDGAME BABYLON, at 12:00 (Feb. 20, 2009) (downloaded using iTunes).

590. *Id.* at 12:50.

591. Bruno Faidutti, *On Mystery of the Abbey*, in *SECOND PERSON: ROLE-PLAYING AND STORY IN GAMES AND PLAYABLE MEDIA* 95, 96 (Pat Harrigan & Noah Wardrip-Fruin eds., 2007).

592. *See* Jaime “Jason” Ridcr, *Interview to Martin Wallace*, BOARDGAMEGEEK (Jan. 25, 2012, 10:39 AM), <http://boardgamegck.com/blogpost/7512/interview-to-martin-wallace>.

American car industry.”⁵⁹³ The game includes six historical “characters” from the automobile industry: Henry Ford, Charles Kettering, Alfred P. Sloan, Charles Howard, Billy Durant, and Walter Chrysler.⁵⁹⁴ On each turn, players choose one of these characters, and each one has an effect related to his historical role in the industry.⁵⁹⁵ Selecting Kettering, for example, provides a player with more research and development tokens, owing to Kettering’s success as the named inventor on numerous patents.⁵⁹⁶

Unlike American-style wargames, *Automobile* is in no sense a simulation of the early automobile industry. It is instead a stylized game about the industry. As such, the game is light on facts. It includes much less information about the six historical characters than *The Howard Hughes Game* includes about Hughes. Nevertheless, *Automobile* is still a legitimate game about the automobile industry, not an exploitive piece of merchandise, but it is a game that emphasizes thematic entertainment over information. *Automobile* is not a mere identity carrier.

Whether designers begin with the mechanics or a theme, Eurogames deserve the same treatment as other games, provided the designers do what the designer of *No Respect* failed to do: insure that where someone’s identity is used in a game, it is actually relevant to the game.

C. Zacchini’s *Limiting Principle*

Although our favored approach would protect a wide range of uses of someone’s identity in a game, there is an additional limiting principle beyond that addressed by the first prong of the *Rogers* test, one found in *Zacchini v. Scripps-Howard Broadcasting Company*,⁵⁹⁷ the United States Supreme Court’s only decision on the right of publicity. In *Zacchini*, a news station broadcast what the Court considered the economically valuable part of Hugo Zacchini’s human cannonball performance, i.e., the approximately fifteen seconds during which Mr. Zacchini was shot from a cannon and landed in a

593. Martin Wallace, *Automobile* (Mayfair 2011) (page 1 of the rules booklet).

594. *Id.*

595. *See id.* (page 5 of the rules booklet).

596. *Id.*

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

net.⁵⁹⁸ The Court thought people would be less likely to pay to see Zacchini's act if the news station could broadcast it for free.⁵⁹⁹ *Zacchini* provides little guidance for dealing with the right of publicity and the First Amendment, but it established that First Amendment interests can give way when the use of someone's name or likeness risks appropriating its full value and would destroy a person's incentive to create value in his or her name or likeness in the first place.⁶⁰⁰

Zacchini was an unusual victory for a right of publicity plaintiff because it involved a news broadcast, not an advertisement or merchandise.⁶⁰¹ In explaining why *Zacchini* should prevail, the Court noted:

The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.⁶⁰²

This statement is inconsistent with the Court's endorsement of copying in other situations where a defendant might be quite willing to pay for the right to copy: "In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying."⁶⁰³ Even if confined just to the right of publicity context, the statement in *Zacchini* is too broad. The Court did not explain why someone should pay just because he or she would be willing to pay. If required to do so, newspaper reporters and biographers might very well pay for permission to write about at least some people. This does not necessarily make it a good idea to require writers to pay. Most significantly, it would provide people with too much control over what is reported about them. Presumably, most

598. *Id.* at 563-64.

599. *Id.* at 575.

600. *Id.* at 576 ("[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer.").

601. *Id.* at 563.

602. *Id.* at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)) (alteration in original).

603. *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001).

individuals would authorize praise, but not criticism.⁶⁰⁴

The better understanding of the decision, one fairly supported by the majority opinion (though questioned by the dissent),⁶⁰⁵ is that *Zacchini* prevailed because the defendant captured the entire value of his act. If the defendant could have used *Zacchini*'s identity in such a way as to replicate and replace *Zacchini*'s act, then it would have undermined his incentive to perform it in the first place.⁶⁰⁶ And if *Zacchini* had never performed his act, then the defendant could never have broadcasted it, leaving everyone worse off. It is therefore sensible to protect the incentive to perform.

Professor Jon Garon argues that applying this understanding of *Zacchini* in the gaming context means, for example, that a game publisher could use General Patton's identity in a game when Patton's identity is relevant to the game, but a publisher should not be able to use the identity of George C. Scott, the actor who played Patton in the 1970 film,⁶⁰⁷ to "play" the role of Patton in a game.⁶⁰⁸ For living persons, this seems a sensible approach. Suppose, for example, that filmmakers could convincingly replicate living actors and therefore "hire" actors with computer-generated imagery. After one successful role, an actor's career might be finished because from that point on, filmmakers could replicate him or her with a computer. However, after a person is deceased, this concern is significantly diminished, if not eliminated. We therefore agree with Garon with regard to living personalities.

While *Zacchini*'s limiting principle is of less concern for non-electronic games that do not require actors, it is a genuine concern in the video game context. Video games do use actors for voice and motion capture.⁶⁰⁹ The issue becomes tricky when a video game uses

604. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) ("Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").

605. See *Zacchini*, 433 U.S. at 579 n.1 (Powell, J., dissenting).

606. See D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 706 (1986).

607. See *PATTON*, *supra* note 567.

608. We thank Professor Garon for these comments at the 2011 Intellectual Property Scholars Roundtable at Drake University Law School (Apr. 1, 2011).

609. See Matthew Kato, *Manufacturing Emotion*, GAME INFORMER no. 229, May 2012, at 12 (discussing the use of actors in video games); Adam Rosenberg, *The Voice*, OFFICIAL XBOX MAGAZINE no. 137, July 2012, at 53 (same); *The PS3 Game That Changes Everything*,

a fictional character closely tied to a particular actor, a problem presented by *Wendt v. Host International, Inc.*⁶¹⁰ The question in *Wendt* was whether a party who had a license from the copyright owner of the television program *Cheers* could place animatronic robot figures reminiscent of the Cliff and Norm characters in a *Cheers*-themed bar.⁶¹¹ The problem was that the characters and the actors go together.⁶¹² Assuming a character is associated with the likeness of a particular actor, when, if ever, can the owner of the copyright use that character's likeness in a subsequent book, television show, film, or game without also obtaining the actor's permission? We will not answer this question here. Our argument is limited to saying that whatever the resolution, games should not receive disfavored treatment relative to other media.

VI. CONCLUSION

The unlicensed use of a celebrity's identity in a newspaper, magazine, book, television program, or movie is a normal and routine occurrence. Add a rule-governed process to the material contained in these other media to create a game, however, and the result is often viewed as improper commercial exploitation. According to Professor Richard Karcher, "nobody would suggest that players should not have the right to be compensated for the use of their identities in the video game . . . markets . . ." ⁶¹³ We are among the nobodies. Comparing games to "mugs and other 'mundane products'" makes little sense.⁶¹⁴ Games are routinely expressive and should be treated as such, rather than as a second-class medium of expression. The First Amendment should usually stand in the way of treating games like merchandise or mere identity carriers. Because games are not coffee mugs.

PLAYSTATION: THE OFFICIAL MAGAZINE no. 59, June 2012, at 14 (same).

610. *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284, 1288 (9th Cir. 1999) (Kozinski, J., dissenting).

611. *Id.* at 1285.

612. *Id.* at 1286.

613. Karcher, *supra* note 529, at 571.

614. *See Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1269 (11th Cir. 2012). This decision does not say anything about games, but it defines the merchandise category as the "mundane products" category. *Id.* at 1270-71.