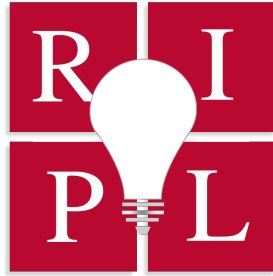


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SO ARE GAMES COFFEE MUGS OR WHAT? GAMES AND THE RIGHTS OF PUBLICITY REVISITED

WILLIAM K. FORD

ABSTRACT

In *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), the U.S. Supreme Court held that video games are equivalent to other forms of media for First Amendment purposes. This decision should have put video games in the same category as other forms of non-commercial, expressive speech for purposes of the right of publicity. This article reviews the post-*Brown* decisions to determine the current place of video games within the caselaw. The result of that review is that games are still in a transitional stage, no longer merchandise as a matter of doctrine, but not yet receiving the same treatment as books, films, and other forms of traditional media. The tension between doctrine and case outcomes cannot last, but the right cases have not yet come along to force courts to confront the discrepancy.

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I. INTRODUCTION	178
II. DISCUSSION	180
III. CONCLUSION	199
IV. APPENDIX	200

SO ARE GAMES COFFEE MUGS OR WHAT? GAMES AND THE RIGHT OF PUBLICITY REVISITED

WILLIAM K. FORD*

I. INTRODUCTION

The Supreme Court’s 2011 decision in *Brown v. Entertainment Merchants Association*¹ was about the ability of the government to restrict minors’ access to violent video games,² but the implications of the Court’s holding were broader. The Court held not only that video games are protected by the First Amendment, a determination that hardly broke new ground,³ but the Court also equated video games to books and films for First Amendment purposes.⁴ Treating video games in the same way as more traditional forms of media could have changed the way video games—and maybe games generally—are treated for purposes of the right of publicity. Generally speaking, books and films can use the names and likenesses of real people, both living and dead, without getting permission from the person or the person’s estate. When no other defense applies, such as a statutory exemption,⁵ courts usually recognize First Amendment protection for books and films from right of publicity claims.

Traditionally, games have not fared as well. Beginning with a “seminal” 1967 state court decision involving board games,⁶ games have instead been treated like celebrity memorabilia, like coffee mugs and t-shirts adorned with celebrity names or likenesses.⁷ Using names and likenesses on merchandise, unlike in books and films, generally *does* require permission.⁸ But *Brown* had the potential to change this

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¹ 564 U.S. 786 (2011).

² *Id.* at 805.

³ *See, e.g.*, *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003); William K. Ford, *The Law and Science of Video Game Violence: What was Lost in Translation*, 31 CARDOZO ARTS & ENT. L.J. 297, 312 (2013) (collecting cases).

⁴ 564 U.S. at 790 (“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.”).

⁵ *See, e.g.*, CAL. CIV. CODE § 3344.1(a)(2) (Deering 2020) (exempting books, audiovisual works, radio programs, television programs, and other types of works from liability under the statutory right of publicity provisions covering deceased personalities).

⁶ *Palmer v. Schonhorn Enterprises, Inc.*, 232 A.2d 458 (N.J. Super. Ct. 1967). The Third Circuit referred to *Palmer* as a “seminal” case in *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013).

⁷ *See* William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 21-36 (2013).

⁸ *See, e.g.*, CAL. CIV. CODE § 3344(a) (Deering 2020) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods . . . without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.”); CAL. CIV. CODE § 3344.1(a)(1) (Deering 2020) (“Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products,

situation, to provide the same freedom to video game producers that is enjoyed by biographers, historians, documentarians, and even the makers of fictional works. So what happened? Eight years after *Brown*, are video games *now* like books and films, or are they still like coffee mugs and T-shirts?

The answer is that games are still more like coffee mugs and T-shirts, but the prediction of this article is that we should expect change and we should expect it to happen sooner rather than later. The small assortment of post-*Brown* lower court decisions has indeed failed to drag games out of the merchandise category for purposes of the right of publicity. But the leading decisions have been close. The Third Circuit and the Ninth Circuit panels were both divided.⁹ These divisions occurred even though both cases were hardly the best ones for the video game defendants, insofar as they dealt with sports simulation games long subject to licensing.¹⁰ Judge Thomas Ambro, dissenting from the Third Circuit's decision, called out his colleagues for applying a "medium-specific metric" to video games,¹¹ and neither the Third Circuit nor the Ninth Circuit majorities could explain why, post-*Brown*, book and film publishers can create realistic works with real people but video game publishers cannot. At some point, the courts will be forced to face, rather than evade, the inconsistency.

There has yet to be a reported appellate opinion involving a video game's unauthorized use of a real person in a traditional narrative, whether informative or entertaining, non-fictional or fictional. The one case actually involving a fictionalized story with a real individual did result in a ruling for the video game defendants, but this decision was made by a state trial court in an unreported order and involved a very unsympathetic plaintiff.¹² While courts may preserve a narrow carve-out for the already decided cases involving sports simulations,¹³ an appellate court will eventually confront a case involving a narrative similar to what's found in typical films and television shows and find it untenable to distinguish away the cases involving these other forms of media. When this happens, games will no longer be coffee mugs.

merchandise, or goods . . . without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof.”)

⁹ See *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1284 (9th Cir. 2013); *Hart*, 717 F.3d at 170. In *Hart*, the Third Circuit reversed a district court decision favorable to video game producers, but even the district court did not treat the video games at issue as we would expect traditional forms of media to be treated. In ruling for the defendant on summary judgment, the district court focused heavily on the ability of players of the games to alter the visual appearance of the plaintiff's avatar. *Id.* at 166 (“Indeed, the ability for users to change the avatar accounted, in large part, for the District Court's deciding that *NCAA Football* satisfied the Transformative Use Test.”). Makers of films do not provide viewers with an opportunity to alter the appearance of real people, yet filmmakers generally prevail in these cases. On the other hand, the district court did at least consider “several creative elements apart from Hart's image” and rejected a narrow focus on only the avatar, instead saying the game should be considered as a whole. *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 784, 787 (D.N.J. 2011), *rev'd*, *Hart*, 717 F.3d. at 170.

¹⁰ See Ford & Liebler, *supra* note 7, at 33-36.

¹¹ *Hart*, 717 F.3d at 174 (Ambro, J., dissenting).

¹² *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747, 2014 WL 5930149 (Cal. Super. Ct. Oct. 27, 2014).

¹³ The same point might apply to music simulations, given the *No Doubt* case discussed below. See *infra* notes 119–126 and accompanying text (discussing *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (2011)).

II. DISCUSSION¹⁴

The right of publicity is governed by state law. Therefore, any discussion of the right of publicity depends upon generalizations about the varying laws of many different jurisdictions. Nevertheless, sound generalizations are possible. According to McCarthy and Schechter's leading treatise on the subject, "The right of publicity is simply the inherent right of every human being to control the commercial use of his or her identity."¹⁵ A person's identity includes his or her name and likeness, but it can also include other aspects of a person's identity, such as a person's voice or signature.¹⁶ Some decisions have gone even further, perhaps too far. Protectable identities can include catchphrases that remind people of someone (e.g., the phrase "Here's Johnny," which evokes Johnny Carson)¹⁷ or scenes that remind people of a particular person (e.g., a robot with a blond wig on a set reminiscent of Wheel of Fortune, which evokes Vanna White).¹⁸

The right of publicity is commonly described as confusing and even a mess.¹⁹ The confusion begins with its historical development.²⁰ Older cases and nearly all cases decided under New York law rely on the right of *privacy* rather than the right of publicity.²¹ New York's "right of publicity" is actually limited to the statutory protections for privacy in sections 50 and 51 of the New York Civil Rights Law, which prohibits non-consensual uses of a person's "name, portrait, picture or voice . . . for advertising purposes or for the purposes of trade"²² Some courts draw a sharp distinction between the rights of privacy and publicity, with the former protecting emotional interests and the latter protecting economic interests,²³ but as Professor

¹⁴ The background included in this discussion is brief and even avoids the standard invocations of Warren & Brandeis, Prosser, and Nimmer. A thorough history, complete with all the usual suspects, plus new historical details and analysis, can be found in Jennifer Rothman's recent book on the topic. See JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY* 11-86 (2018).

¹⁵ J. THOMAS MCCARTHY & ROGER E. SCHECHTER, 1 *THE RIGHTS OF PUBLICITY AND PRIVACY* § 3:1 (2d ed. 2019). See also *id.* at § 1:3 ("Today it is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity.")

¹⁶ See, e.g., CAL. CIV. CODE § 3344(a) (Deering 2020).

¹⁷ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834-37 (6th Cir. 1983).

¹⁸ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397-99 (9th Cir. 1992).

¹⁹ Ashley Messenger, *Rethinking the Right of Publicity in the Context of Social Media*, 24 WIDENER L. REV. 259, 259 (2018) ("Right of publicity law is famously a mess."); *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956) ("The state of the law is still that of a haystack in a hurricane[.]").

²⁰ See ROTHMAN, *supra* note 14, at 30-44 ("From the Ashes of Privacy").

²¹ See *Stephano v. News Group Publ'ns*, 474 N.E.2d 580, 584 (N.Y. 1984) (explaining how under New York law "the 'right of publicity' is encompassed under the Civil Rights Law as an aspect of the right of privacy"); *Palmer*, 232 A.2d at 459 ("Plaintiffs contend that the use of their respective names reduces their ability to obtain satisfactory commercial affiliation by licensing agreements and that such use is an invasion of their privacy and an unfair exploitation and commercialization of their names and reputations. In essence, the issue here is whether defendant, on the statement of facts detailed herein, has violated and continues to violate plaintiffs' rights of privacy.")

²² See N.Y. CIV. RIGHTS LAW §§ 50, 51 (2020); *Stephano*, 474 N.E.2d at 583-84.

²³ See *Crump v. Beckley Newspapers*, 173 W. Va. 699, 714 n.6 (W.Va. 1983) ("This 'right of privacy' is not to be confused with the 'right of publicity' first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) . . . The right of privacy protects individual personality and feelings, the right of publicity protects the commercial value of a name or likeness.")

Jennifer Rothman argues, the divide between the two doctrines is often overstated.²⁴ Outside of New York, the relevant contemporary cases usually refer to the right of publicity when dealing with the unauthorized commercial use of someone's identity. Except when referring to New York law, the relevant doctrine will therefore be referred to as the right of publicity. Unfortunately, the doctrinal confusion does not end with this distinction between the rights of privacy and publicity. Adding to the confusion are variations in state common law and statutory rules, a lack of clarity about which state's law governs when the interests of multiple states are implicated,²⁵ conflicts with federal copyright law,²⁶ and—especially important for present purposes—variations in how courts reconcile the First Amendment with the right of publicity.²⁷

McCarthy and Schechter describe the right of publicity in terms of regulating *commercial* uses of people's identities, and fairly so, but commercial uses for purposes of the right of publicity are not limited to what is defined as commercial speech for purposes of First Amendment doctrine. Commercial speech in the First Amendment context is often defined as "speech that does no more than propose a commercial transaction."²⁸ While this particular definition may be overly narrow and incomplete even for First Amendment purposes,²⁹ whatever qualifies as commercial speech receives less First Amendment protection than non-commercial speech,³⁰ and the right of publicity, inevitably sweeps up works that constitute non-commercial speech for First Amendment purposes. Statutory exemptions, state constitutions, and even the judicial narrowing of statutes prevent some conflicts with the First Amendment,³¹ but

²⁴ See ROTHMAN, *supra* note 14, at 11 ("The right of privacy was and remains the original right of publicity.").

²⁵ See 1 MCCARTHY & SCHECHTER, *supra* note 15, at § 11:7 ("there is little consistency in the case law").

²⁶ See ROTHMAN, *supra* note 14, at 160-79 ("A Collision Course with Copyright").

²⁷ See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 954 (6th Cir. 2003) (Clay, J., dissenting) ("Aside from the confusing development of the right of publicity, and aside from the many differences associated with the various state statutes in effect, the point of confusion most associated with the right of publicity law is its interplay with the First Amendment."); Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALBANY L. REV. 1357, 1363 (2007) ("[T]he courts, in trying to engraft exceptions to this expanding right [of publicity], have created a disordered and incoherent body of First Amendment case law."); ROTHMAN, *supra* note 14, at 145-53.

²⁸ *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014).

²⁹ See *Bd. of Trs. v. Fox*, 492 U.S. 469, 475 (1989) ("[C]ommunications can 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues[.]'"); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515-17 (7th Cir. 2014) (discussing commercial speech); *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 906 (9th Cir. 2004) (same).

³⁰ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983); *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980); *Bevan & Assocs., LPA v. Yost*, No. 18-3262, 2019 U.S. App. LEXIS 20201, at *22 (6th Cir. July 8, 2019); *Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Prof'l Eng'rs & Surveyors*, 916 F.3d 483, 487 (5th Cir. 2019).

³¹ See, e.g., *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 830 n.13 (11th Cir. 2016) ("The protection derived from this provision of the Michigan Constitution provides the necessary shield for the works at issue and we need not address whether the First Amendment would also serve to protect the works."); *Stephano v. News Group Publ'ns*, 64 N.Y.2d 174, 184 (N.Y. 1984) ("The [New York privacy] statute does not define trade or advertising purposes. However, the courts have consistently held, from the time of its enactment, that these terms should not be construed to apply to publications concerning newsworthy events or matters of public interest[.]"; 2 MCCARTHY & SCHECHTER, *supra* note 15, at § 8:36 ("One way courts avoid directly facing a constitutional First Amendment conflict with any tort or property right, including the rights of publicity and privacy, is to interpret the common law or statute so as to sufficiently narrow it to avoid a head-on collision.").

as evidenced by the many cases considering First Amendment defenses to right of publicity claims, conflicts between the right of publicity and the First Amendment often occur.³² When conflicts do occur, courts must consider whether the First Amendment provides a defense to liability.

Depending on how one counts them, there are four or five different judicial approaches or tests for reconciling the First Amendment with the right of publicity.³³ One approach is not a “test” in the usual sense, meaning an inquiry focused on a specific question or a list of factors for courts to analyze. This first approach is instead an *ad hoc* balancing of the interests involved with a free-ranging discussion of the various policy considerations.³⁴ Few cases take this approach, however, making any predictions about outcomes under this approach difficult.

The remaining three to four approaches sound more like typical judicial tests. First, the “relatedness” test asks whether the use of the plaintiff’s identity is “wholly unrelated” to the work.³⁵ Put another way, in a version that more closely tracks the language in Lanham Act false-association cases, this test asks whether the use of the plaintiff’s identity has artistic relevance to the work or is instead a disguised advertisement.³⁶ Where the use is artistically relevant, the use is protected by the First Amendment. This test is generally considered more defendant-friendly.

Second, the predominant purpose test, endorsed by the Missouri Supreme Court, asks whether the use of a person’s identity is more about making an expressive comment about the individual or more about “exploit[ing] the commercial value of an individual’s identity.”³⁷ The Missouri court complained about tests that supposedly provide First Amendment protection when a work is “in *any* way expressive” and preferred “more balanced balancing.”³⁸ Where the use is *predominantly* about expressive comment, the use is (or “could be”) protected by the First Amendment.³⁹ Where the use is more about commercial exploitation, the use is not protected.⁴⁰ Compared to the relatedness test, the predominant purpose test is much more plaintiff-friendly.

The remaining approach is the transformative use test popularized by the California Supreme Court in the well-known *Comedy III* case.⁴¹ Professor Rothman counts the *Comedy III* test as two different tests because courts apply the *Comedy III*

³² See, e.g., *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818 (8th Cir. 2007) (fantasy baseball games); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (song); *Winter v. DC Comics*, 30 Cal. 4th 881 (Cal. 2003) (comic books); *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (charcoal drawing); *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47 (2006) (video game).

³³ See ROTHMAN, *supra* note 14, at 145-47.

³⁴ See *C.B.C. Distrib. & Mktg.*, 505 F.3d at 823-24; *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972-76 (10th Cir. 1996).

³⁵ See *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 865 n.6 (Cal. 1979) (Bird, C.J., concurring); RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 47 cmt. c. (1995).

³⁶ This test is often referred to as the *Rogers* test, named for the *Rogers v. Grimaldi* case from the Second Circuit. See *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989). See generally William K. Ford, *Restoring Rogers: Video Games, False Association Claims, and the ‘Explicitly Misleading’ Use of Trademarks*, 16 J. MARSHALL REV. INTELL. PROP. L. 306 (2017).

³⁷ See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

³⁸ *Id.* (emphasis added).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *Comedy III*, 21 P.3d at 808-10.

test in two very different ways, one much more protective of speech than the other.⁴² The more protective version considers the use of the plaintiff's identity in the context of the work as a whole and the extent to which the plaintiff's identity is part of a larger work. The less protective version zeroes in on whether the use of the plaintiff's identity is realistic.⁴³ The transformative use test may be plaintiff- or defendant-friendly, depending on how the court applies it. Considering the work as a whole is clearly better for defendants because it allows for the realistic use of a plaintiff's identity within a transformative context. Focusing on an image of the plaintiff and ignoring the larger context is clearly better for plaintiffs because it means any realistic image of a plaintiff potentially triggers liability, regardless of the context of the use.

Comedy III was a case about a charcoal drawing of The Three Stooges by artist Gary Saderup.⁴⁴ The defendants sold reproductions of this drawing on T-shirts and lithographs.⁴⁵ Comedy III, the entity which controlled the rights to The Three Stooges, claimed a violation of the deceased Stooges' rights of publicity. Ultimately, the court agreed.⁴⁶ Yet the court did not view the charcoal drawing on merchandise as commercial speech.⁴⁷ Instead, the court said the defendants' products were expressive works.⁴⁸ The defendants argued the products were not within the scope of California's right of publicity statute for deceased personalities,⁴⁹ but the court disagreed. The defendants *did* violate the statute, said the court.⁵⁰ This conclusion required the court to determine whether the statute, as applied to the defendants, violated their First Amendment rights.⁵¹

In addressing the constitutional question, the court took inspiration from copyright's fair use doctrine and held that First Amendment protection depends on whether the work at issue is transformative. The question is whether the work contains "significant transformative elements" beyond the literal depiction of the celebrities.⁵² The court added:

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

⁴² See ROTHMAN, *supra* note 14, at 146.

⁴³ *Id.*

⁴⁴ See *Comedy III*, 21 P.3d at 800.

⁴⁵ *Id.* at 800-01.

⁴⁶ *Id.* at 811.

⁴⁷ *Id.* at 802 ("[T]he present case does not concern commercial speech.").

⁴⁸ *Id.*

⁴⁹ See CAL. CIV. CODE § 3344.1 (Deering 2020) (formerly Civil Code § 990). On the renumbering of the statute in the Civil Code, see *Comedy III*, 21 P.3d at 799 n.1.

⁵⁰ *Id.* at 802 ("Saderup thus used the likeness of The Three Stooges 'on . . . products, merchandise, or goods' within the meaning of the statute.").

⁵¹ *Id.*

⁵² *Id.* at 808.

we use the word “expression,” we mean expression of something other than the likeness of the celebrity.⁵³

In close cases, *Comedy III* said courts should also consider whether the marketability of a work is tied primarily to the celebrity’s fame or to efforts of the defendant artist.⁵⁴

While some authorities disapprove of applying the *Comedy III* test outside the use of a person’s likeness and doubt whether the court intended to apply the test to things other than an image of a person,⁵⁵ the California Supreme Court provided a range of examples of works that are transformative, including “factual reporting,” “fictionalized portrayal[s],” and even a specific example of Rosa Parks’ name used as a song title.⁵⁶ The court appeared to conceive of the test as an all-purpose one, one that would balance the First Amendment with the right of publicity in cases generally. Whatever the test is applied to, the court was clear that a work can be transformative even if the work is realistic. Again, factual reporting can be transformative, provided the use is something more than a literal use of a person’s identity with no significant expression added by the defendant.

In her recent book, Professor Rothman offers some general solutions to the conflict between the right of publicity and the First Amendment. Part of her argument is about how courts should think about the interests at stake and that if they better identify the interests at stake, they are more likely to get the cases right.⁵⁷ She also recommends supplementing the existing First Amendment tests with further considerations drawn from copyright law’s fair use analysis and from trademark law’s nominative fair use analysis.⁵⁸ Assuming a court starts with a transformative use test, it is already using one fair use factor drawn from copyright law. There are three others.⁵⁹ Trademark law’s nominative fair use analysis adds three more factors using the Ninth Circuit’s approach, but eleven or more factors using the Second Circuit’s approach.⁶⁰ The transformative use analysis, plus three additional copyright fair use factors, and three, eleven, or more than eleven fair use factors is not likely to make these cases more predictable or change many outcomes. Many of the First Amendment

⁵³ *Id.* at 809.

⁵⁴ *Id.* at 810.

⁵⁵ See 2 MCCARTHY & SCHECHTER, *supra* note 15, at § 8:72 (“In the authors’ view, the ‘transformative’ test is restricted to the kind of case the court was faced with: an artistic visual depiction of a celebrity image. While the court mentioned other forms of expression in passing, it did so only by way of analogy, not by expansion of its rule to other situations. Therefore, in our view, the ‘transformative’ test is strictly limited to visual artistic images which appear in a nonadvertising context.”); Estate of Fuller v. Maxfield & Oberton Holdings, LLC, 906 F. Supp. 2d 997, 1006 (N.D. Cal. 2012) (“Defendant has not explained, and the Court cannot see, how this test could be applied to an individual’s name when his image is not also involved.”).

⁵⁶ *Comedy III*, 21 P.3d at 809.

⁵⁷ See ROTHMAN, *supra* note 14, at 154-59.

⁵⁸ *Id.* at 157-59.

⁵⁹ *Id.* at 157.

⁶⁰ See Int’l Info. Sys. Sec. Certification Consortium v. Sec. Univ., LLC, 823 F.3d 153, 168 (2d Cir. 2016) (“Because we believe that the nominative fair use factors will be helpful to a district court’s analysis, we hold that, in nominative use cases, district courts are to consider the Ninth Circuit and Third Circuit’s nominative fair use factors, in addition to the [eight] *Polaroid* factors.”). While the Ninth and Third Circuits both have three factors, they overlap, which is why the count is eleven or more.

problems described in this article and elsewhere would be solved not by complicating the rules, but by courts applying the same settled rules in the *same way* to both traditional and non-traditional forms of media.

Despite the various points of confusion or disagreement across states and courts, including the different approaches to reconciling the First Amendment with the right of publicity (a “disordered and incoherent body of First Amendment case law”⁶¹), there is a sizeable core of predictability in modern right of publicity law, particularly when dealing with traditional categories of works, such as advertisements, newspapers, books, magazines, television shows, and films. The chart in the Appendix summarizes many common situations. While any listed use of a person’s identity could raise a hard question, such as whether a plaintiff is defining his or her identity too broadly (e.g., a “Here’s Johnny” scenario), many situations present relatively easy cases with predictable answers.

The first column mainly consists of commercial speech. Traditional advertisements constitute commercial speech and are the core situations covered by the right of publicity. The general rule is that permission is needed to use someone’s identity in an advertisement to avoid infringement, and the First Amendment won’t provide a defense to such uses when permission is lacking. The other two categories in the first column, uses on product packaging and uses for business names, may or may not represent situations involving commercial speech. After the Supreme Court’s decision in *Matal v. Tam*, it’s not clear.⁶² Cases involving business names are unusual, but cases involving product packaging should usually be easy to predict. Under current law permission would be needed, for example, to produce a Mr. T breakfast cereal with his name and likeness on the box or to place an athlete’s likeness on a box of Wheaties.⁶³ There can be no real doubt about most of these types of cases.

The third column includes non-commercial, expressive works. For a newspaper or magazine article, permission is not needed to use someone’s name or likeness.⁶⁴ The same applies to biographies.⁶⁵ As for entertainment, the courts typically reject a rigid distinction between news and entertainment works for First Amendment purposes.⁶⁶ Therefore, like newspapers, novels and movies typically do not require permission.⁶⁷ This generalization does require some caveats, however. What follows are three of these caveats.

⁶¹ Leaffer, *supra* note 27, at 1363.

⁶² Product packaging and business names can serve as trademarks, but in *Tam*, the Supreme Court left open whether trademarks constitute commercial speech. *See Matal v. Tam*, 137 S. Ct. 1744, 1763-64 (2017) (opinion of Alito, J.); *id.*, at 1767 (opinion of Kennedy, J., concurring in part and concurring in the judgment).

⁶³ *See, e.g.*, CAL. CIV. CODE § 3344(a) (Deering 2020). According to *The New York Times*, Quaker Oats’ Mr. T cereal was the first breakfast cereal named for a real individual. *See* Pamela G. Holli, *New Cereal Pitch to Children*, N.Y. TIMES, at D1 (March 27, 1985).

⁶⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

⁶⁵ *Id.* at § 47 cmt. a. Biographers understand the rule. *See, e.g.*, HOWARD SOUNES, NOTES FROM THE VELVET UNDERGROUND: THE LIFE OF LOU REED 350 (2015) (“One doesn’t require anyone’s permission to write biography[.]”).

⁶⁶ *See Winters v. New York*, 333 U.S. 507, 510 (1948) (“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.”).

⁶⁷ *See, e.g.*, *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978); *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970).

First, the examples in the right-hand column cover many typical situations, but when situations arise for which the caselaw is mixed or non-existent, publishers may justifiably need to proceed with caution. Comic books, for example, have been around a long time, but historically, comic books have been a less respected medium than traditional books or films.⁶⁸ As the cases are mixed, comic book publishers cannot have the same confidence as traditional book and film publishers that they will be protected from right of publicity claims.

Three cases illustrate the problem with comic books, one older and two more recent. In 1950, a New York court held that the publication of a comic book version of a real-world event was insulated from liability under sections 50 and 51 of the New York Civil Rights Laws by a public interest exception.⁶⁹ The story focused on the heroic exploits of the plaintiff in rescuing people from the Empire State Building after a United States Army airplane crashed into it, but even with an event of this significance, the court was divided 3 to 2 on whether the defendant violated the statute.⁷⁰ In 2003, the California Supreme Court held that villains in a *Jonah Hex* comic book who were inspired by real-world musicians Johnny and Edgar Winter were sufficiently transformed into the non-human “Autumn” brothers to be protected by the First Amendment.⁷¹ However, the court’s opinion can be read—or misread—to require significant visual changes to a real person in order to qualify as transformative, which makes it risky to provide realistic portrayals of real people in comic books.⁷²

Also in 2003, the Missouri Supreme Court held that the First Amendment did not protect the naming of a villain in a comic book after the real-world hockey player Tony Twist.⁷³ The case involved what is likely the largest judgment in a right of publicity case.⁷⁴ The jury verdict against the defendants was a shocking \$24,500,000,⁷⁵ later reduced to a still shocking \$15,000,000 at a retrial.⁷⁶ The significance of this case is complicated by the defendants’ claim that the naming of the character “was not a parody or other expressive comment or a fictionalized account of the real Twist,” which led the Missouri Supreme Court to conclude that the only purpose of using Twist’s name was to appeal to hockey fans.⁷⁷ If one is a cautious comic book publisher, or a publisher of some other less traditional form of media, how does one react to cases like the ones from New York and Missouri? Asking for permission to refer to real people is a plausible answer.

⁶⁸ See Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 166-68 (2015) (discussing comic books); STAN LEE & GEORGE MAIR, *EXCELSIOR: THE AMAZING LIFE OF STAN LEE* 56-57 (2002) (describing comic books as being at “the very bottom of the cultural totem pole” in mid-century America).

⁶⁹ *Molony v. Boy Comics Publishers*, 277 A.D. 166 (N.Y. App. Div. 1950).

⁷⁰ *Id.* at 168.

⁷¹ *Winter v. DC Comics*, 30 Cal. 4th 881, 892 (Cal. 2003)

⁷² Although the court mentioned the “larger story” in which the characters appear, much of the court’s language focused on the visual transformation of the characters: “To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature.” *Id.* at 890. Misreading *Jonah Hex* involves downplaying the context in which the characters appear—“the larger story”—and focusing on the fanciful visual changes to the characters.

⁷³ See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-74 (Mo. 2003).

⁷⁴ *Id.* at 374 (Mo. 2003).

⁷⁵ *Id.* at 365.

⁷⁶ See *Doe v. McFarlane*, 207 S.W.3d 52, 56 (Mo. Ct. App. 2006).

⁷⁷ *Doe*, 110 S.W.3d at 374. See also *Doe*, 207 S.W.3d at 60.

The second caveat is based on New York law. Partially fictional works incorporating real people can create a problem under New York Civil Rights Law sections 50 and 51. As the result of a recent state court decision, this problem is no longer hypothetical or a mere academic digression.⁷⁸ Dating back to a 1913 case, *Binns v. Vitagraph Company of America*,⁷⁹ and a time when privacy rights were allowed to interfere with more expression than today,⁸⁰ the New York Court of Appeals held that at least some films are within the scope of New York’s privacy statute and can infringe upon an individual’s privacy rights.⁸¹ *Binns* involved a series of films depicting Jack Binns, the wireless operator who in 1909 sent the first radio distress signal from a ship at sea.⁸² It’s clear from the court’s description that one film recreated the incident at sea with actors.⁸³ It’s unclear what exactly the other films included. The court described one as “essentially a picture of the plaintiff.”⁸⁴ Like the explanation of the films, the rule endorsed by the court is not particularly clear, but whatever the rule to be applied to future cases, the court took a dim view of films produced for amusement as it found the films in violation of the privacy statute.

While the *Binns* decision probably reflects hostility to what was then a relatively new medium of communication—and at a time when notions of free speech were more constrained—the New York Court of Appeals has never overruled the case. In a 1967 case, the Court of Appeals confronted another expressive work that was not strictly factual reporting, a biography of Warren Spahn aimed at younger readers. The book contains imagined dialogue—and lots of it.⁸⁵ The book also contains some factual errors.⁸⁶ Although the defendants explained the need for some dramatization to appeal to children, the court found both the author and publisher in violation of New York’s privacy statute due to the fictional elements and the errors.⁸⁷ The court suggested that fictionalized dialogue alone *might* be sufficient to support liability even without the errors,⁸⁸ a holding that would threaten every dramatic recreation of real-world events.

The speech-chilling implications of *Binns* and *Spahn* were substantially lessened by lower state and federal courts interpreting the cases very narrowly or even ignoring them.⁸⁹ The New York Court of Appeals itself narrowed *Binns* and *Spahn* in 2000, at

⁷⁸ See *Porco v Lifetime Entertainment Servs., LLC*, 147 A.D.3d 1253, 1256 (N.Y. App. Div. 2017).

⁷⁹ 103 N.E. 1108, 1109 (N.Y. 1913).

⁸⁰ See Mark A. Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153 (2019) (reviewing JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018)), (“The pre-1954 history of the right of publicity . . . was an outrageous infringement on speech on matters of public concern.”).

⁸¹ *Binns*, 103 N.E. at 1111 (“We hold that the name and picture of the plaintiff were used by the defendant as a matter of business and profit and contrary to the prohibition of the statute.”).

⁸² *Id.* at 1109.

⁸³ *Id.* at 1109-10. Some of this footage is included in a PBS documentary on the subject. See *RESCUE AT SEA* (WGBH Educational Foundation 1999) (PBS Home Video VHS tape).

⁸⁴ *Binns*, 103 N.E. at 1110-11.

⁸⁵ *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 842-43 (N.Y. 1967). The work is clearly a dramatized account of Spahn’s life. Chapter one opens with a battle at the Remagen Bridge in Germany in 1945 and is filled with exciting dialogue and details that no one would be likely to remember with such detail. See MILTON J. SHAPIRO, *THE WARREN SPAHN STORY* 9-14 (1958).

⁸⁶ *Spahn*, 233 N.E.2d at 842.

⁸⁷ *Id.* at 843.

⁸⁸ *Id.* at 843.

⁸⁹ See *Hicks*, 464 F.Supp. at 432 (“However, upon closer scrutiny of *Spahn*, this Court is of the opinion that the *Spahn* holding should be and was intended to be limited to its facts[.]”); *Molony v.*

least in cases where a photograph is used to illustrate a newsworthy story, but the court still did not overrule the cases.⁹⁰ The court instead reaffirmed them, saying, “[U]nder *Binns* and *Spahn*, an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception [to the statutory right of privacy].”⁹¹ As *Binns* and *Spahn* have not been overruled, it was only a matter of time before a lower court actually followed these decisions. In 2017, it happened. The New York Supreme Court’s Appellate Division reversed the dismissal of a case involving a television movie about a convicted murderer, which allegedly contained fictionalized elements.⁹² Perhaps this case, *Porco v. Lifetime Entertainment Services*, will finally force the New York Court of Appeals to confront the problems created by *Binns* and *Spahn*—or perhaps the legislature will revise the statute first.⁹³

The third caveat is tied to the U.S. Supreme Court’s only decision involving the right of publicity, the well-known case of *Zacchini v. Scripps-Howard Broadcasting Company*.⁹⁴ In *Zacchini*, the Court considered whether the First Amendment shielded a news broadcast of Hugo Zacchini’s human cannonball act from a right of publicity claim where the station, at least according to the majority, broadcast Zacchini’s “entire act.” The case was unusual because it involved a news report and because the Court said the First Amendment did not provide a defense.⁹⁵

Despite some overbroad language in *Zacchini*, a general principle of the case is that the First Amendment will not protect a use of person’s identity that, if allowed, would undermine or destroy the incentive for the person to perform his or her job in the first place. The Court said, “Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.”⁹⁶ Whether this actually occurred in *Zacchini* is questionable,⁹⁷ but a modern application of the principle would be digitally inserting living actors into new roles without their consent. A real-world actor with popular appeal could be inserted into roles to avoid paying the actor, thus

Boy Comics Publishers, 277 A.D. 166, 173 (N.Y. App. Div. 1950) (“In the *Binns* case it was stated that the statute is penal and should be strictly construed. Since its decision in 1913, it has been distinguished frequently, and confined to its particular facts[.]”). See also 2 MCCARTHY & SCHECHTER, *supra* note 15, at § 8:77 (“[A]fter the *Spahn* decision in 1967, most of the lower courts upheld the immunity of docudramas and unauthorized biographies from liability under the New York statute. They did this by either ignoring or distinguishing the *Binns-Spahn* cases.”). Last year, in a case to be discussed below, the New York Court of Appeals helpfully lists many of the cases that have declined to follow its earlier rulings and did so without any hint of disapproval. See *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 393 (N.Y. 2018).

⁹⁰ *Messenger v. Gruner + Jahr Printing & Publ’g*, 727 N.E.2d 549, 555 (N.Y. 2000).

⁹¹ *Id.*

⁹² *Porco v Lifetime Entertainment Servs., LLC*, 147 A.D.3d 1253, 1256 (N.Y. App. Div. 2017).

⁹³ For recent efforts to reform sections 50 and 51 of New York’s Civil Rights Law, see Assembly Bill No. A05605, 2019-2020 Reg. Sess. (N.Y. 2019) (“AN ACT to amend the civil rights law and the arts and cultural affairs law, in relation to the right of privacy and the right of publicity”); Senate Bill No. S05959, 2019-2020 Reg. Sess. (N.Y. 2019) (same).

⁹⁴ 433 U.S. 562 (1977).

⁹⁵ *Id.* at 563-65.

⁹⁶ *Id.* at 574-75.

⁹⁷ See *id.* at 579 n.1 (Powell, J., dissenting).

undermining the pursuit of an acting career in the first place.⁹⁸ A documentary about the history of Hollywood might have a fair reason to digitally recreate some individuals as themselves,⁹⁹ but the situation looks closer to the concern in *Zacchini* when individuals are being used to play other characters.¹⁰⁰

Despite these caveats, many common situations involving the use of real people's identities in expressive works involve relatively easy cases. Uses in newspapers, magazine articles, books, documentaries, docudramas, and television shows generally present straightforward questions with predictable answers. Assuming no other common law or statutory exemption protects an expressive work from a right of publicity claim, uses in these contexts are generally protected by the First Amendment. In 2013, for example, the Rosa and Raymond Parks Institute for Self Development sued Target for selling seven unauthorized biographies and a made-for-television movie about Rosa Parks.¹⁰¹ The issues were not difficult. The Institute lost in the district court on summary judgment and then lost again on appeal.¹⁰² All four federal judges therefore agreed and reached the expected result. The only interesting question is why the Institute pursued these claims in the first place.¹⁰³

But what about games? Games are missing from the chart in the Appendix. The answer for games once was clear and predictable: games are merchandise; they belong in the middle column; and therefore, permission is generally required to use a real person in a game.¹⁰⁴ Expectations and industry practice might well have varied for the use of a person's name on a trivia game card, a use of a politician or military figure in a game, or a use in a game for purposes of parody. Courts might very well have found these uses protected on some basis had the issue arisen,¹⁰⁵ but the general rule was that permission was needed to use someone's identity in a game.

⁹⁸ See ROTHMAN, *supra* note 14, at 175-77; Ford & Liebler, *supra* note 7, at 97.

⁹⁹ As indicated in the chart in the Appendix, pornography already raises difficult questions in right of publicity cases. The problems posed by "deepfakes" and pornography are beyond the scope of the present discussion, but deepfakes do raise serious questions about where the lines should be drawn for the freedom to digitally recreate people. See Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1921-24 (2019). As with less intrusive digital recreations of people, a resolution of the deepfake problem should not depend on whether a film or a game is involved.

¹⁰⁰ See Ford & Liebler, *supra* note 7, at 97.

¹⁰¹ See *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 826-27, 832 (11th Cir. 2016). The case also involved a plaque, which involved a harder question, but the court found that the plaque was also protected by a "qualified privileged" under the Michigan state constitution "to communicate on matters of public interest." *Id.* at 830-32.

¹⁰² *Id.* at 832.

¹⁰³ Perhaps the Institute was emboldened by a questionable 2003 decision involving an unauthorized song named after Rosa Parks. In response to a motion for summary judgment, the district court ruled that the First Amendment provided a defense to Parks' Lanham Act and right of publicity claims. The Sixth Circuit disagreed, holding that the First Amendment defense could not be resolved as a matter of law. See *Parks v. LaFace Records*, 329 F.3d 437, 461, 463 (6th Cir. 2003).

¹⁰⁴ See, e.g., 2 MCCARTHY & SCHECHTER, *supra* note 15, at § 7:26; Ford & Liebler, *supra* note 7, at 21-36.

¹⁰⁵ During the closing argument of Michael's Jordan case against Dominick's grocery store for its unauthorized use of Michael Jordan's identity in an advertisement, Jordan's attorney compared the advertising use to Jordan's name being used in a trivia game. He said to the jury, "It's an answer to a trivia game. You don't have to pay anything actually to use it." Interestingly, the game's publisher still paid Jordan \$5,000. Trial Transcript, *Jordan v. Dominick's Finer Food, LLC.*, No. 10-C-00407, at 803-05 (N.D. Ill. Aug. 21, 2015). See also Trial Transcript, *Jordan v. Dominick's Finer Food, LLC.*, No.

This general rule was established in three cases from 1967, 1970, and 1973. The first two cases both involved sports simulation board games. In 1967, *Palmer v. Schonhorn Enterprises, Inc.* involved a board game called *Pro-Am Golf*.¹⁰⁶ In 1970, *Uhlaender v. Henricksen* involved a pair of baseball board games called *Negamco's Major League Baseball* and *Big League Manager Baseball*.¹⁰⁷ The games simulated golf and baseball by providing various custom statistics for the athletes, dice or spinners, and rules for resolving either a game of golf or a game of baseball.¹⁰⁸ In 1973, a third case involved a game using Howard Hughes' name and various biographical facts about him.¹⁰⁹ All three of these cases reached the same conclusion. The courts said games were a form of merchandise and unlike, say, a biography, the manufacturers of the games needed to obtain permission to use the names of real people.¹¹⁰

The gaming medium has come a long way since 1973, and video games are a major part of the medium's evolution. Despite the earlier decisions involving games, in 2007 the Eighth Circuit's *C.B.C.* decision recognized First Amendment protection for fantasy baseball.¹¹¹ In 2011, the U.S. Supreme Court in *Brown* described video games as comparable to books and films. Are games still stuck in the middle of the chart after

10-C-00407, at 509-512 (N.D. Ill. Aug. 19, 2015) (cross examination involving the use of Jordan's identity in the trivia game).

¹⁰⁶ 232 A.2d 458, 459 (N.J. Super. Ct. 1967).

¹⁰⁷ 316 F. Supp. 1277 (D. Minn. 1970). *Strat-O-Matic Baseball* is probably the better-known example of the games in this genre, though its heyday passed long ago. See GLENN GUZZO, *STRAT-O-MATIC FANATICS: THE UNLIKELY SUCCESS STORY OF A GAME THAT BECAME AN AMERICAN PASSION* (2005).

¹⁰⁸ *Pro-Am Golf* (1966) is the more obscure game of the three. In a previous article a co-author and I discussed the game based on the court's opinion, but a copy of the game was not available to us at the time. See Ford & Liebler, *supra* note 7, at 22-26. Indeed, there was nothing online about the game other than what could be found in the court's opinion. After publishing that article, one copy of the game appeared on eBay in 2014, which I purchased. Nothing in the box changes any conclusions in the previous article, but some courts have reported the game used the pictures or likenesses of the various real golfers included in the game. See *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1086 (D. Mo. 2006), *aff'd* 505 F.3d 818 (8th Cir. Mo., Oct. 16, 2007); *Parks v. Laface Records*, 76 F. Supp. 2d 775, 779 n.3 (D. Minn. 1999), *rev'd* 329 F.3d 437 (6th Cir. 2003). This is not accurate. The game used only the names and biographical data of the professional and celebrity golfers. (Among the 23 player profiles included were ones for celebrity golfers Bob Hope, Bing Crosby, and Jackie Gleason.) For a demonstration of how the game works, see *Games Are Not Coffee Mugs*, Ep. 4, UIC JOHN MARSHALL (July 17, 2014), <https://www.youtube.com/watch?v=6lcDqR4Wqeg>.

¹⁰⁹ *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 72 Misc. 2d 788 (N.Y. Sup. Ct. 1973).

¹¹⁰ See *Palmer*, 232 A.2d at 79 ("It would therefore seem, from a review of the authorities, that although the publication of biographical data of a well-known figure does not per se constitute an invasion of privacy, the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies does."); *Uhlaender*, 316 F. Supp. at 1283 ("Defendants have violated plaintiffs' rights by the unauthorized appropriation of their names and statistics for commercial use."); *Rosemont*, 72 Misc. at 791 ("In reality, defendants are not disseminating news. They are not educating the public as to the achievements of Howard Hughes. They are selling a commodity, a commercial product, an entertaining game of chance, the outcome of which is determined by maneuvering tokens on a game board by the throw of the dice. The use of plaintiff's name, biographical data etc. in this context is not legitimate to the public interest. It is merely the medium used to market a commodity familiar to us all in its varied types and forms.")

¹¹¹ *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818 (8th Cir. 2007).

these decisions? Since *Brown* there have been seven notable decisions involving video games and the right of publicity. The table below lists them in chronological order.

Post-*Brown* Right of Publicity/Privacy Video Game Decisions

Case	Court	Year	Game(s)	Defendant Prevalled?
<i>Hart v. Elec. Arts, Inc.</i> ¹¹²	Third Circuit	2013	<i>NCAA Football</i> (series)	No
<i>Keller v. Elec. Arts Inc.</i> ¹¹³	Ninth Circuit	2013	<i>NCAA Football</i> and <i>NCAA Basketball</i> (series)	No
<i>Noriega v. Activision/Blizzard, Inc.</i> ¹¹⁴	Cal. Superior Court	2014	<i>Call of Duty: Black Ops II</i>	Yes
<i>Davis v. Elec. Arts, Inc.</i> ¹¹⁵	Ninth Circuit	2015	<i>Madden NFL</i> (series)	No
<i>Lohan v. Take-Two Interactive Software, Inc.</i> ¹¹⁶	N.Y. Court of Appeals	2018	<i>Grand Theft Auto V</i>	Yes
<i>Gravano v. Take-Two Interactive Software, Inc.</i> ¹¹⁷	N.Y. Court of Appeals	2018	<i>Grand Theft Auto V</i>	Yes
<i>Hamilton v. Speight</i> ¹¹⁸	E.D. Pa.	2019	<i>Gears of War</i> (series)	Yes

There is, however, one earlier decision involving video games that is particularly important for understanding these cases. That case is *No Doubt v. Activision Publishing, Inc.*,¹¹⁹ which was decided by the Court of Appeal of California a little over four months before *Brown*. In *No Doubt* the court held that the First Amendment does not protect the use of the band No Doubt in Activision's *Band Hero* video game.¹²⁰ *Band Hero* is a musical simulation game. As can be seen in the Appendix, the rules applicable to musical recreations in other forms of media can vary, especially when the recreation

¹¹² 717 F.3d 141.

¹¹³ 724 F.3d 1268.

¹¹⁴ No. BC 551747, 2014 WL 5930149.

¹¹⁵ 775 F.3d 1172. The court focused its discussion on the *NCAA Football* games but the court's holding and discussion applies to the *NCAA Basketball* games as well. *Id.* at 1272 n.2.

¹¹⁶ 97 N.E.3d 389.

¹¹⁷ 31 N.Y.3d 988.

¹¹⁸ No. 2:17-cv-169, 2019 U.S. Dist. LEXIS 165113, 2019 WL 4697485 (E.D. Pa. Sept. 26, 2019), *appeal docketed*, No. 19-3495 (3d Cir. Oct. 31, 2019).

¹¹⁹ 192 Cal. App. 4th 1018 (2011).

¹²⁰ *Id.* at 1022.

is not contained within a broader narrative.¹²¹ In *No Doubt*, the Court of Appeal of California was bound by the California Supreme Court's decision in *Comedy III*. The court of appeal therefore applied the transformative use test.

In applying the transformative use test, the court acknowledged that realistic portrayals of an individual could be transformative.¹²² Context matters, said the court.¹²³ In *Band Hero* the context included placing No Doubt in fanciful venues and the ability to have No Doubt perform songs from other artists.¹²⁴ Yet the court still held that Activision's use was not transformative because the various contextual features of the game did "not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities."¹²⁵ Context matters, except when it doesn't. The court treated the transformative test as one that requires some visual change to the portrayal of the plaintiffs, focusing on the avatars in the game rather than the game as a whole. The court also said Activision wanted to appeal to No Doubt's fan base,¹²⁶ which was surely true. How would this analysis square with the treatment of a documentary or a biography about No Doubt? Such works would strive to be realistic and both would be published to appeal mostly to fans of No Doubt, perhaps even more so than a game featuring a variety of music. Why are games different than documentaries or biographies? Or why is *Band Hero* in particular different? Realism can't be the explanation. The fact that the case was about a game could be.

The Third and Ninth Circuits' decisions in *Hart* and *Keller* relied upon *No Doubt* in deciding similar cases involving video games, but rather than musical simulations, *Hart* and *Keller* involved college sports simulations. The plaintiffs in both putative class actions were college athletes who objected to the use of their identities in the games as members of the teams represented in the games.¹²⁷ Although the plaintiffs' names were not included in the off-the-shelf versions of the games, the games included assorted biographical and career information about the players, which would identify each avatar's real-world counterpart.¹²⁸ Consumers could also download rosters to name the player avatars.¹²⁹ Both courts of appeals accepted the transformative use test as the correct way to balance the right of publicity with the First Amendment, but in a baffling statement the Ninth Circuit described itself as *bound* by *Comedy III*'s transformative use test and considered *No Doubt* a persuasive application of the test.¹³⁰ Like the Third Circuit, the Ninth Circuit was free to follow the California state courts if it found the *Comedy III* and *No Doubt* decisions persuasive interpretations of the First Amendment, but no federal court is bound by a state supreme court's interpretation of the First Amendment.¹³¹

¹²¹ Compare *infra* notes 13 and 18 in the Appendix.

¹²² 192 Cal. App. 4th at 1033-34.

¹²³ *Id.* at 1034.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1035.

¹²⁷ *Keller*, 724 F.3d at 1272; *Hart*, 717 F.3d at 145-46.

¹²⁸ See *Keller*, 724 F.3d at 1272; *Hart*, 717 F.3d at 145-47.

¹²⁹ See *Keller*, 724 F.3d at 1272; *Hart*, 808 F. Supp. at 761, 764.

¹³⁰ See *Keller*, 724 F.3d at 1273-79; *Hart*, 717 F.3d at 158-70.

¹³¹ It's true that "[w]hen interpreting state law, a federal court is bound by the decision of the highest state court." *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). But the transformative use test was not a matter of state law in *Comedy III*. It was not something the California Supreme Court

In following *Comedy III*, as applied in *No Doubt*, both courts focused on the realistic portrayal of the college athletes in the games. In *Comedy III*, there was no larger context in which The Three Stooges appeared, but in *Hart* and *Keller* there was an elaborate game and environment surrounding each avatar. Any recognition of the larger context in which the avatars appeared, however, was overcome by the same analysis as the court's analysis in *No Doubt*: the players were realistically portrayed doing what they did in the real world when playing for their college teams.¹³²

Both decisions generated a dissent. Judge Ambro's dissent in *Hart* was the clearest in trying to apply uniform rules to different forms of media, including "biographies, documentaries, docudramas, and other expressive works depicting real-life figures, whether the accounts are factual or fictional."¹³³ Ambro's dissent recognizes that the inquiry into the transformative use of a person's identity can't focus solely on the realism of the likeness, but must depend on the larger context in which a likeness or other indicator of identity appears.¹³⁴ Ambro therefore focused on the many creative elements of the games to assess whether they were transformative.¹³⁵ Similarly, Judge Sidney Thomas' dissent in *Keller* mentioned the need to evaluate the "proper holistic context" in which the plaintiff's identity appears,¹³⁶ but his dissent is somewhat mixed. On the one hand, he emphasized the relative anonymity of any given avatar in the *NCAA Football* games and contrasted this fact with the much greater prominence of *No Doubt* in the *Band Hero* game.¹³⁷ It's unclear how this sort of approach would apply to a biography or typical documentary. Few biographies or documentaries focus on no one in particular. On the other hand, Thomas said he fully agreed with Ambro's dissent in *Hart*.¹³⁸ Both dissenters endorsed treating the various forms of expressive works consistently, even though at least some of Thomas' discussion raises questions about how to do this.

grafted onto a state statute as a construction of the statute. The California Supreme Court made clear that *Saderup* was liable under the statute unless the First Amendment independently prevented the application of the statute and offered the transformative use test as the way to determine if the First Amendment does so. The transformative use test was therefore an interpretation of the U.S. Constitution, not state law. Federal courts are not bound by state interpretations of federal law or the U.S. Constitution. *See Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984) ("Of course, the state court's interpretation of federal law does not bind our decision, though it may persuade us to reach a similar result."); *Toussaint v. McCarthy*, 801 F.2d 1080, 1097 (9th Cir. 1980) ("Although a state court's determination of state law binds the federal courts, interpretation of the federal constitution cannot be circumscribed by state definitions."). *See also Industrial Consultants v. H. S. Equities*, 646 F.2d 746, 749 (2d Cir. 1980) ("The district court was not bound to adopt the Oklahoma [Supreme] [C]ourt's interpretation of federal constitutional principles, even as applied to Oklahoma statutes."); *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1171 (5th Cir. 1979) ("[W]e are not bound by state court determinations on federal constitutional issues[.]"). The Supreme Court's decision in *Zacchini* is also on point. It shows that federal courts are not bound when a state's highest court interprets federal law in the application of a state statute. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977).

¹³² *See Keller*, 724 F.3d at 1276; *Hart*, 717 F.3d at 168.

¹³³ *Hart*, 717 F.3d at 173 (Ambro, J., dissenting).

¹³⁴ *Id.* at 173.

¹³⁵ *Id.* at 174-75.

¹³⁶ *Keller*, 724 F.3d at 1286 (Thomas, J. dissenting).

¹³⁷ *Id.* at 1288.

¹³⁸ *Id.* at 1285 n.2.

As a consequence of *Hart* and *Keller*, permission is needed from every one of thousands of players portrayed in these games, despite the incidental role of most players. Applying the same rule to a biography would mean not just the subject matter of the biography (the person's whose name is in the title) would have to grant permission, but so would everyone else who is named in the book. Group licensing agreements can facilitate obtaining permission from a league's worth of professional athletes, but there is no group licensing agreement for "people who have interacted with X," where X is some celebrity, politician, scientist, business person, or anyone else that might be the subject of a biography. Even if permission could be obtained from the subject matter of a biography and everyone else who is to be named, the ability to grant permission creates the ability to control or influence what an author says, thus limiting the candor of the biographer. Such a rule would be the end of unauthorized biographies and documentaries, assuming courts actually applied this rule to these works, which they don't.

When the Ninth Circuit decided the *Davis v. Electronic Arts, Inc.* case in 2015, it was largely a replay of *Keller*, but with retired professional football players portrayed in the *Madden NFL* series of video games rather than college athletes.¹³⁹ Unlike active professional players, these retired players were not part of a group licensing deal, and they did not give their permission to be portrayed in the games.¹⁴⁰ As in *Keller*, these non-consenting retired players were not named in the games, but the players were identifiable due to the biographical and career data included in the game.¹⁴¹ *Davis* included a revealing exchange during the oral argument where one judge on the panel dismissed the expressive value of video games, comparing them unfavorably to the typical greeting card.¹⁴² *Davis* followed the prior panel's lead in *Keller*, as it was supposed to,¹⁴³ and also briefly considered and rejected Electronic Arts' alternative defenses not previously resolved in *Keller*. In *Davis*, none of the judges suggested any skepticism about *Keller*, but the case was routine in a sense, given *Keller's* status as circuit precedent.

The majorities in *Hart* and *Keller* did not admit they were applying different rules to video games than they would apply to other forms of media, but the majorities could offer little more than simple denials.¹⁴⁴ *Davis*, as a straightforward application of *Keller*, did not even try to address this question. In a recent article, Professor Michael Park suggests the following reason for the disparate treatment of video games in these cases:

¹³⁹ *Davis v. Electronic Arts Inc.*, 775 F.3d 1172, 1175-76 (9th Cir. 2015).

¹⁴⁰ *Id.* at 1175.

¹⁴¹ *Id.* at 1175-76.

¹⁴² Oral Argument at 00:09:33, *Davis v. Electronic Arts, Inc.*, No. 12-15737 (9th Cir. Sept. 11, 2014), https://www.youtube.com/watch?v=_hlz3cx6IWQ. See also Ford (2017), *supra* note 36, at 310-11 (discussing this part of the oral argument).

¹⁴³ See *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (discussing when a three-judge panel in the Ninth Circuit is bound by prior three-judge panel decisions).

¹⁴⁴ See *Keller*, 724 F.3d at 1279 n. 10; *Hart*, 717 F.3d at 165. Footnote 10 in *Keller* was the majority's response to the dissenting judge's claim about the effect *Keller* would have on other forms of media that feature realistic depictions of individuals. It's difficult to figure out what footnote 10 is supposed to mean. The majority said other realistic works are not necessarily in jeopardy. Electronic Arts, however, had a "primary emphasis on reproducing reality." *Keller*, 724 F.3d at 1279 n. 10. Documentaries would not be protected by the First Amendment from right of publicity claims?

Nothing evinces more complete relinquishment or appropriation of one's identity by another than for a user to control an avatar. As a right historically rooted in the right to privacy—'the right to be let alone'—an argument can be made that the embodiment of an avatar simulacrum, and the control afforded to users in interactive games, overly infringes on an individual's right to control how their identity is used and represented.¹⁴⁵

Courts do not offer this rationale as the reason for the disparate treatment (instead, they deny that there is any disparate treatment), but more fundamentally, it's not clear why this would be true. Consider Ryan Hart, the Rutgers quarterback and named plaintiff in the *Hart* case. Why would it represent more of a relinquishment of Hart's identity to be portrayed as an avatar in a football game than to be portrayed in a biopic or docudrama? Any given user of *NCAA Football* can make a limited range of choices for any particular avatar, all confined to playing football. In a hypothetical docudrama about Rutgers football or about Hart in particular, the viewers may be passive "users" of the work who don't make any choices about how the work proceeds, but the writer or writers would put words into Hart's mouth and an actor would bring these words to life and choose how to deliver the lines, the tone to use, and the facial expressions to make. Wouldn't this type of work be the greater appropriation, especially if the docudrama focused on Hart in particular? Yet the docudrama would be protected by the First Amendment (except, *perhaps*, in a New York state court, as noted earlier). Writers and actors could of course do similar things in a video game as a docudrama, provided someone produced a more narrative style video game about Rutgers football instead of a football simulation. Thus, it's not really clear why the game element makes any difference in terms of the appropriation of one's identity.

The more plausible explanation for the differential treatment of games, as illustrated by the oral argument comment in *Davis*, is that games simply don't receive the same level of respect as other forms of media. Traditionally, games are merchandise or commodities subject to the same treatment as celebrity coffee mugs. Many judges likely have limited experience with video games. Moreover, sports simulations lack close analogues to cases involving other forms of media. Unlike docudramas which often use real people without permission, what would it even mean for real-world baseball or football games to include real people in the games without permission? There are films about sports figures that recreate bits and pieces of sporting events, but these scenes are likely to be contained within a larger narrative.¹⁴⁶ Nevertheless, *Hart* and *Keller* were still close cases. But what if the case involves a game that seems more like a film or television show?

The two New York cases listed above were both victories for the video game defendants, but only marginally so. Unlike *Hart*, *Keller*, and *Davis*, both cases involved *Grand Theft Auto V*, which is not a music or sports simulation game. Instead, it has stories with plots and dialogue. The plaintiffs were actress Lindsay Lohan in one

¹⁴⁵ Michael K. Park, *The Medium is the Message: Digital Aesthetics and Publicity Interests in Interactive Entertainment Media*, 89 U. COLO. L. REV. 1166, 1195 (2018).

¹⁴⁶ See, e.g., 42 (Warner Bros. 2013) (Jackie Robinson); *THE BABE* (Universal Pictures 1992) (Babe Ruth).

case¹⁴⁷ and reality show star Karen Gravano in the other.¹⁴⁸ In the *Lohan* case, Lohan referred to three alleged uses of her identity in the game, and it was at least plausible to view one of them (a character named Lacey Jonas) as a parody of the real-world Lohan.¹⁴⁹ In the *Gravano* case, Gravano's alleged appearance in the game was clearly a parody of the plaintiff as the similarities between Gravano and a video game character named Andrea Bottino could not have been coincidental.¹⁵⁰ The real-world Gravano's father is named Sammy and is a Gambino family mobster.¹⁵¹ The fictional Bottino's father is named Sammy and is a Gambetti family mobster.¹⁵² Gravano was on a reality show called "Mob Wives."¹⁵³ Bottino was on a fictional show called "Wise Bitches."¹⁵⁴ Gravano and Bottino both moved out West for safety.¹⁵⁵ This case presented an opportunity to revisit *Binns* and *Spahn* and to address the status of video games under New York's right of privacy. It would have been of some note if the New York Court of Appeals had ruled that video game producers are as free to construct parodies of real people as, say, the producers of *South Park*. The court did neither of these things. Instead, the court in both cases said the video game characters were not recognizable as the plaintiffs.¹⁵⁶ In *Lohan*, the court said, "[T]he ambiguous representations in question are nothing more than cultural comment that is not recognizable as [Lohan]."¹⁵⁷ In *Gravano*, the court said, "[Gravano] is not recognizable from the images at issue here."¹⁵⁸ By holding that neither game actually used the plaintiffs' likenesses, the court avoided the interesting questions.¹⁵⁹

This leaves the two cases, *Noriega v. Activision/Blizzard, Inc.*,¹⁶⁰ and *Hamilton v. Speight*.¹⁶¹ Of these two, *Hamilton* is less interesting for present purposes. In *Hamilton*, the plaintiff, Lenwood Hamilton, claimed the publishers of the *Gears of War* video game series used his professional wrestling identity as Hard Rock Hamilton in the creation of a character named Augustus "Cole Train" Cole.¹⁶² The District Court for the Eastern District of Pennsylvania said there were some similarities between Hamilton and Cole in terms of appearance and voice,¹⁶³ but the *Gears of War* games had nothing to do with wrestling or even Earth. The Cole character was a former player of a fictional sport called "thrashball" who became a soldier, not a former or current

¹⁴⁷ *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389, 395-96 (N.Y. 2018).

¹⁴⁸ *Gravano v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 396, 397 (N.Y. 2018).

¹⁴⁹ *Lohan*, 97 N.E.3d at 392.

¹⁵⁰ See Verified Amended Complaint, *Gravano v. Take-Two Interactive Software, Inc.*, No. 151633/2014, at 3 (N.Y. Sup. Ct. March 28, 2014).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *Lohan*, 97 N.E.3d at 395-96; *Gravano*, 97 N.E.3d at 397.

¹⁵⁷ *Lohan*, 97 N.E.3d at 395.

¹⁵⁸ *Gravano*, 97 N.E.3d at 397.

¹⁵⁹ See *Lohan*, 97 N.E.3d at 396 (declining to address any other arguments because the character in the game is not recognizable as Lohan).

¹⁶⁰ No. BC 551747, 2014 WL 5930149 (Cal. Sup. Ct. Oct. 27, 2014).

¹⁶¹ No. 2:17-cv-169, 2019 U.S. Dist. LEXIS 165113 (E.D. Pa. Sept. 26, 2019), *appeal docketed*, No. 19-3495 (3d Cir. Oct. 31, 2019).

¹⁶² *Id.* at *2, 19.

¹⁶³ *Id.* at *6 ("Cole and Hamilton share broadly similar faces, hair styles, races, skin tones, and large, muscular body builds. Cole's and Hamilton's voices also sound similar.").

wrestler.¹⁶⁴ Applying the transformative use test as required by Third Circuit precedent in *Hart*,¹⁶⁵ the court found any use of Hamilton's identity in the games to be quite transformative in terms of appearance, biography, and personality.¹⁶⁶ The court described the larger context of the use in *Hamilton* as "profoundly transformative," involving an "extraordinarily fanciful situation" on a fictional planet in a fictional war.¹⁶⁷ The use was therefore protected by the First Amendment.¹⁶⁸ As any use of Hamilton's identity was no more than "one of the 'raw materials' from which the Cole character was synthesized" before being placed in a highly fanciful game,¹⁶⁹ the case was similar to a pre-*Brown* California state court decision from 2006 and reached the same result as the state court.¹⁷⁰ *Hamilton* did not involve the portrayal of a real person doing something like what the person does or did in the real world. *Hamilton* was not like the *Noriega* case.

In one important way, the most interesting of the seven post-*Brown* cases involves Manuel Noriega's unlicensed appearance in *Call of Duty: Black Ops II*. The case is *Noriega v. Activision/Blizzard, Inc.*,¹⁷¹ which was decided by the Superior Court of California. Like *Grand Theft Auto V*, *Call of Duty: Black Ops II* is not a music or sports simulation game. It is instead a military-style first-person shooter game. It also features a campaign mode with a narrative storyline and various characters. Real-world people appear in the game, such as Oliver North who participated in the making of the game by recording dialogue.¹⁷² Former Panamanian dictator Manuel Noriega also appeared in the game, but he did not participate in the making of the game nor did he authorize his appearance in it.¹⁷³ One of the missions ("Time and Fate") takes place in Panama in 1986 with Noriega as the President of Panama assisting the CIA.¹⁷⁴ Another mission ("Suffer With Me") takes place in 1989 with a goal of capturing Noriega.¹⁷⁵

Although the storylines are fiction, Noriega is portrayed realistically. His likeness is realistic. Under *No Doubt*, his case against Activision/Blizzard seemed compelling. Yet the court held:

[D]efendants' use of Noriega's likeness was transformative. The publicly available photographs of Noriega used to create his avatar were part of the extensive "raw materials" from which the game was synthesized. Noriega's depiction was not the "very sum and substance" of the work. The complex and

¹⁶⁴ *Id.* at *5-6

¹⁶⁵ *Id.* at *10.

¹⁶⁶ *Id.* at *19.

¹⁶⁷ *Id.* at *24-26.

¹⁶⁸ *Id.* at *26.

¹⁶⁹ *Id.* at *18.

¹⁷⁰ The California case is the well-known case of *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47 (2006), and the district court in *Hamilton* discussed and relied upon it as an application of the transformative use test. See *Hamilton*, 2019 U.S. Dist. LEXIS 165113, at *14-15, 21.

¹⁷¹ No. BC 551747, 2014 WL 5930149 (Cal. Sup. Ct. Oct. 27, 2014).

¹⁷² See Larry Frum, *Review: 'Call of Duty: Black Ops II' is Disjointed But Compelling*, CNN (Nov. 16, 2012), <https://www.cnn.com/2012/11/16/tech/gaming-gadgets/call-of-duty-review/index.html>.

¹⁷³ See Complaint, *Noriega v. Activision Blizzard, Inc.*, No BC 551747, at 2 (Cal. Sup. Ct. July 15, 2014).

¹⁷⁴ See *Call of Duty: Black Ops II* 52-59 (2012) (BradyGames Signature Series Guide).

¹⁷⁵ *Id.* at 82-89.

multi-faceted game is a product of defendants' own expression, with *de minimis* use of Noriega's likeness. Because the video game is transformative [sic], economic considerations are not relevant. Regardless, the Court concludes that the marketability and economic value of the challenged work in this case comes not from Noriega, but from the creativity, skill and reputation of defendants.¹⁷⁶

Although a use should not have to be *de minimis* to qualify for First Amendment protection, the focus on the game as a whole sounds quite compelling and consistent with *Comedy III*. However, it's not consistent with *No Doubt*. Interestingly, the court explicitly rejected any reliance on *Keller*, because *Keller* would require ignoring the video game as a whole and require instead focusing on just the Noriega character—but this was also true of *No Doubt*.¹⁷⁷ Noriega appears to be the case that finally gives video games their due and treats them like a court would treat a book or film. Admittedly, it's unclear if the trial court judge was truly sympathetic to the First Amendment interests of the video game medium or simply unsympathetic to the infamous plaintiff. Had the court gone the other way in *Noriega*, it could have easily explained the outcome as consistent with *No Doubt*, *Hart*, and *Keller*, but how would the court have explained the outcome as consistent with cases involving other forms of media? In any event, *Noriega* is an unreported trial court order, which is not binding on other courts,¹⁷⁸ and it is not likely to have the same persuasive influence as *No Doubt*.

Dissenting in *Keller*, Judge Thomas worried that “[t]he logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings.”¹⁷⁹ He was right about the *logical* consequences, but of course, the logical consequences need not control in other cases. The assortment of cases involving video games has not and probably will not affect cases involving traditional forms of media. Despite the narrow focus on realism as the touchstone of liability in *No Doubt*, *Keller*, and *Davis*, recent decisions from these same courts involving films yield the expected results, not the result that follows from the video game cases.¹⁸⁰ The results in these recent cases are the same ones that would have been expected if none of the video game cases had ever been decided.

¹⁷⁶ *Noriega*, No. BC 551747, 2014 WL 5930149, at 4.

¹⁷⁷ *Id.* at *4 n. 4.

¹⁷⁸ *See, e.g.*, *Bolanos v. Superior Court*, 169 Cal. App. 4th 744, 761 (2008) (“[A] written trial court ruling has no precedential value.”); *In re Molz*, 127 Cal. App. 4th 836, 845 (2005) (“These trial court decisions, of course, have no precedential authority.”).

¹⁷⁹ *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013) (Thomas, J., concurring).

¹⁸⁰ *See Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) (film entitled *The Hurt Locker*); *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018) (television miniseries entitled *Feud: Bette and Joan*). *See also Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 437-40 (S.D.N.Y. 2019) (following California state court and Ninth Circuit decisions in a case about a documentary entitled *Whitney: Can I Be Me*).

III. CONCLUSION

A more nuanced or more complex First Amendment test is not needed to reconcile the cases involving games with the cases involving other forms of media. To reduce uncertainty and to avoid chilling speech, a simpler test is preferable over a more complex one. Either the relatedness test or the transformative use test could be this simple test. Where the transformative use test has run into problems is when courts have applied it to less traditional forms of media—mainly games—but when courts confront games that appear more analogous to the films they routinely protect, courts are likely to reach outcomes like the one in the *Noriega* case. The opinions in *Hart* and *Keller* contain no serious response to the claim that they were applying a “medium-specific metric” to video games, but at least these courts were doing what was traditionally done with sports simulation games, and in *Davis*, the court was “simply” following circuit precedent. The New York cases avoided the problem of reconciling the right of privacy with the First Amendment by finding no recognizable uses of the plaintiffs’ likenesses in the games. The problem cannot be avoided in cases like *Noriega* where a plaintiff is clearly identified by name. When cases like *Noriega* finally arise in the appellate courts, with the use of identifiable (and non-notorious) individuals in games with the look and feel of narrative films (as opposed to sports simulations), it will become untenable to disfavor games relative to traditional forms of media. To remain consistent with the Supreme Court’s position on games in *Brown*, the lower courts will finally have to stop treating games like coffee mugs.

IV. APPENDIX

The Right of Publicity/Privacy

Advertising and Other Uses for Purposes of Trade	Merchandise and Other Uses for Purposes of Trade	Expressive Works
Commercial Speech(?) ¹	Non-Commercial Speech(?) ²	Non-Commercial Speech
Permission ordinarily needed	*Permission ordinarily needed*	*Permission ordinarily NOT needed*
Traditional Ads ³ Product Packaging ⁴ Business Names ⁵	<u>Merchandise</u> ⁶ Coffee Mugs ⁷ Plastic Busts ⁸ Posters ⁹ Trading Cards ¹⁰ T-shirts ¹¹ <u>Other (Debatable) Uses</u> Pornography ¹² Musical Tributes (?) ¹³ Fictionalized History (N.Y. law) (?) ¹⁴	<u>Traditional Media</u> News Reporting ¹⁵ Biographies ¹⁶ Novels ¹⁷ Plays/Musicals ¹⁸ Television Programs/Films (including fictionalized works and docudramas) ¹⁹ <u>Less Traditional Media</u> Comic Books(?) ²⁰ <u>Merchandise</u> Political Merchandise ²¹ Transformative Merchandise ²² <hr/> Limitation: <i>Zacchini</i> ²³

¹ See *Harris v. Quinn*, 573 U.S. 616, 648 (2014) (discussing the difference between commercial and non-commercial speech); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515-17 (7th Cir. 2014) (same); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1016-18 (3d Cir. 2008) (same). Insofar as product packaging and business names are used as trademarks (including the related category of trade dress), it is not clear whether these uses would constitute commercial speech. See *Iancu v. Brunetti*, 204 L. Ed. 2d 714, 726 (2019) (Breyer, J., concurring in part and dissenting in part) (“The Court has not decided whether the trademark statute is simply a method of regulating pure ‘commercial speech.’”).

² See *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (Cal. 2001) (“But the present case does not concern commercial speech. As the trial court found, Saderup’s portraits of The Three Stooges are expressive works and not an advertisement for or endorsement of a product.”).

³ See, e.g., CAL. CIV. CODE § 3344(a) (Deering 2020); CAL. CIV. CODE § 3344.1(a)(1) (Deering 2020); 765 Ill. Comp. Stat. 1075/5 (2019) (“Commercial purpose”); N.Y. CIV. RIGHTS LAW §§ 50, 51 (2020); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (1995).

⁴ See, e.g., CAL. CIV. CODE § 3344(a) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products . . . or goods . . . without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

⁵ See *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994) (restaurant called “Spanky McFarland’s”).

⁶ See, e.g., CAL. CIV. CODE § 3344(a) (Deering 2020) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in . . . merchandise . . . without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

⁷ See *Fuentes v. Mega Media Holdings, Inc.*, 721 F. Supp. 2d 1255, 1258 (S.D. Fla. 2010) (“To maintain a cause of action for a violation of [Florida statute] section 540.08, a plaintiff must allege that his or her name or likeness is used to directly promote a commercial product or service, such as T-shirts, hats, *coffee mugs*, etc.”) (emphasis added).

⁸ See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc., v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (plastic bust of Martin Luther King, Jr.).

⁹ See, e.g., *Brinkley v. Casablanco*, 80 A.D.2d 428 (N.Y. App. Div. 1981) (poster of Christie Brinkley).

¹⁰ See *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (baseball cards). *But see Aldrin v. Topps Co.*, No. 10-9939, 2011 U.S. Dist. LEXIS 110800 (C.D. Cal. Sept. 27, 2011) (granting the defendant’s anti-SLAPP motion where the defendant used the plaintiff’s name (and likeness?) in a trading card set entitled ‘Topps American Heritage: American Heroes Edition’). *Cf. Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996) (holding that *parody* trading cards are protected by the First Amendment).

¹¹ See, e.g., *Ohio State Univ. v. Skreened Ltd.*, 16 F. Supp. 3d 905, 915-17 (S.D. Ohio 2014) (T-shirts with the name and likeness of football coach Urban Meyer); *Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.*, No. 10-2333, 2013 U.S. Dist. LEXIS 31155, at *53-56 (S.D.N.Y. March 6, 2013) (T-shirts with the likeness of Bruce Lee).

¹² See *Toffoloni v. LFB Publ’g Group*, 572 F.3d 1201, 1213 (11th Cir. 2009) (“We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity.”); *Geary v. Goldstein*, 831 F. Supp. 269, 276 (S.D.N.Y. 1993) (holding that there was “a factual dispute over whether the adaptation [of a real television commercial into a pornographic version] falls within the public interest exception” to New York’s right of privacy); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726-27 (S.D.N.Y. 1978) (granting a preliminary injunction over an illustration in *Playgirl* magazine of “a nude black man seated in the corner of a boxing ring” captioned “Mystery Man” and referred to as “the Greatest”). A decision involving the unauthorized use of the plaintiffs on the cover of an erotic book entitled *A Gronking to Remember* is plausibly explained as a case in this category. See *Roe v. Amazon.com*, No. 15-0111, 2016 U.S. Dist. LEXIS 33297, at *1-16 (S.D. Ohio March 15, 2016) (denying a motion for judgment on the pleadings filed by the author of the book). *But see Balsley v. LFP, Inc.*, No. 1:08-CV-491, 2010 U.S. Dist. LEXIS 152034, at *2-3, 28 (N.D. Ohio Jan. 26, 2010) (photograph published in *Hustler* magazine did not violate the plaintiff’s right of publicity).

¹³ Compare *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981) (“[W]e confront the question of whether the use of the likeness of a famous deceased entertainer in a performance mainly designed to imitate that famous entertainer’s own past stage performances is to be considered primarily as a commercial appropriation by the imitator or show’s producer of the famous entertainer’s likeness or as a valuable contribution of information or culture. [W]e have decided that although THE BIG EL SHOW contains an informational and entertainment element, the show serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society.”), with NEV. REV. STAT. § 597.790(2), (2)(b) (2019) (“Any commercial use by another of the name, voice, signature, photograph or likeness of a person requires the written consent of that person or his or her successor in interest unless: . . . (b) The use is an attempt to portray, imitate, simulate or impersonate a person in a live performance[.]”).

¹⁴ Compare *Messenger v. Gruner + Jahr Printing & Publ’g*, 727 N.E.2d 549, 555 (N.Y. 2000) (“*Binns* and *Spahn* concerned a strikingly different scenario from the one before us. In those cases, defendants invented biographies of plaintiffs’ lives. The courts concluded that the substantially

fictional works at issue were nothing more than attempts to trade on the persona of Warren Spahn or John Binns. Thus, under *Binns* and *Spahn*, an article may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception.”), *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (N.Y. 1967), *Binns v. Vitagraph Co. of America*, 103 N.E. 1108 (N.Y. 1913), and *Porco v. Lifetime Entertainment Servs., LLC*, 147 A.D.3d 1253 (N.Y. App. Div. 2017), with *Costanza v. Seinfeld*, 279 A.D.2d 255, 255 (N.Y. App. Div. 2001) (“[W]orks of fiction do not fall within the narrow scope of the statutory definitions [in sections 50 and 51] of ‘advertising’ or ‘trade.’”). In a case decided under Michigan law, the Eleventh Circuit held that a fictionalized biography of Rosa Parks was protected from a common law right of publicity/privacy claim by a “qualified privilege to report on matters in the public interest.” *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 827, 831 (11th Cir. 2016) (“As for the sixth book, *Rosa Parks: Childhood of Famous Americans*, by Kathleen Kudlinski, it is a fictionalized biography meant to introduce children to the importance of Parks, so it, too, concerns a matter of public interest.”).

¹⁵ See, e.g., CAL. CIV. CODE § 3344(d) (Deering 2020); IND. CODE § 32-36-1-1(c)(1)(B) (2019); *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 310 (9th Cir. 1992) (“In this case, *USA Today’s* and *The Star’s* use of the New Kids’ name was ‘in connection with’ news accounts: *The Star* ran concurrent articles on the New Kids along with its 900-number poll, while *USA Today* promised a subsequent story on the popularity of various members of the singing group. Both papers also have an established track record of polling their readers and then reporting the poll results as part of a later news story. The New Kids’ misappropriation claims are barred by California Civil Code section 3344(d).”); *Messenger*, 727 N.E.2d at 552 (“[W]e have made clear that [New York Civil Rights Law section 50 and 51] do not apply to reports of newsworthy events or matters of public interest . . . This is because a newsworthy article is not deemed produced for the purposes of advertising or trade.”); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995) (“Like the common law cause of action, the statutory cause of action specifically exempts from liability the use of a name or likeness in connection with the reporting of a matter in the public interest.”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

¹⁶ See, e.g., *Rosa & Raymond Parks Inst.*, 812 F.3d at 827, 831 (multiple books about Rosa Parks).

¹⁷ See, e.g., *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (fictionalized biography called *RUSH*); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (*Agatha* novel (and film)); *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970) (*Compulsion* novel (and film)).

¹⁸ See *Joplin Enterprises v. Allen*, 795 F. Supp. 349, 350-51 (W.D. Wash. 1992) (“Janis is a two-act play about Janis Joplin . . . Act I fictionally portrays Ms. Joplin’s experiences over the course of a day previous to an evening’s concert performance. Its forty-six page script focuses on visions of artistic inspiration and their colloquies with Ms. Joplin. Act I contains only one song. Defendants concede, for the purposes of their motions, that Act II simulates an evening’s concert performance by Mr. Joplin . . . Under California law, plaintiffs cannot state a legally cognizable right of publicity claim in this case.”).

¹⁹ See, e.g., *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) (*The Hurt Locker*); *Rosa & Raymond Parks Inst.*, 812 F.3d at 827 (*The Rosa Parks Story*); *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 437-41 (S.D.N.Y. 2019) (*Whitney: Can I Be Me* (documentary)); *Cummings v. Soul Train Holdings LLC*, 67 F. Supp. 3d 599 (S.D.N.Y. 2014) (television performance from *The Soul Train* released on DVD); *Vijay v. Twentieth Century Fox Film Corp.*, 14-5404, 2014 U.S. Dist. LEXIS 152098 (C.D. Cal. Oct. 27, 2014) (*Titanic* and *Ghosts of the Abyss*); *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 455 (Cal. 1979) (opinion of Bird, C.J., concurring) (“This court must decide whether the use of a deceased celebrity’s name and likeness in a fictional film [*Legend of Valentino: A Romantic Fiction*] exhibited on television constitutes an actionable infringement of that person’s right of publicity. It is clear that appellant’s action cannot be maintained.”); *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970) (*Compulsion* film (and novel)); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177 (Utah 1954) (*Look for the Silver Lining*); *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018) (*Feud: Bette and Joan* (television docudrama)); *Polydoros v. Twentieth Century Fox Film Corp.*, 79 Cal. Rptr. 2d 207 (Ct. App. 1997) (*The Sandlot*). The Supreme Court of California subsequently treated Chief Justice Bird’s earlier cited concurrence in *Guglielmi* as a majority opinion of the court. See *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 n.7 (Cal. 2001).

²⁰ See *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003). It’s unclear if the California Supreme Court would have decided this case in the same way if the comic book depictions of the plaintiffs had been more realistic. For comic book cases reaching different outcomes, compare *Doe v. TCI Cablevision*, 110

S.W.3d 363, 374 (Mo. 2003) (comic book defendant liable), *with* *Molony v. Boy Comics Publishers*, 277 A.D. 166 (N.Y. App. Div. 1950) (comic book defendant not liable).

²¹ See *Rosa & Raymond Parks Inst.*, 812 F.3d at 827-28 (“collage-styled plaque that included, among other items, a picture of Parks, alongside Dr. Martin Luther King, Jr.”); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 451 (N.Y. Sup. Ct. 1968) (“Thus, in the present case, where the poster in question appears privileged by virtue of its public interest character, plaintiff has failed to establish any clear legal or factual right, whether viewed within the context of either ‘right of privacy’ or ‘right of publicity’, which would warrant the granting of the preliminary injunction sought.”).

²² In *Comedy III*, the California Supreme Court said, “[W]hen a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.” *Comedy III Productions*, 21 P.3d at 808. However, the court found that the Three Stooges’ image on the lithographs and T-shirts in that particular case was *not* transformative. For examples where the courts found images transformative, see *Tiger Woods. ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (prints of a collage painting); *World Wrestling Fedn. Entm't, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 420, 443-45 (W.D. Pa. 2003) (parody merchandise, including t-shirts and mugs).

²³ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); *Wis. Interscholastic Ath. Ass'n v. Gannett Co.*, 658 F.3d 614, 624-25 (7th Cir. 2011) (discussing *Zacchini*'s limitations on the First Amendment in a case not about the right of publicity but instead about a state actor granting exclusive licenses to broadcast sporting events).