

The Best of Two Tests: A Hybrid Test for Balancing Right of Publicity and First Amendment Interests Tailored to the Complexities of Video Games

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I. INTRODUCTION

With ten seconds left in the game, the Arizona State Sun Devils are down by a field goal. Samuel Keller drops back to pass. He looks left. He looks right. He sees a player downfield and launches the ball in the air. That player is you. You look up and see the ball spiraling toward you as you leap in the air. You jump over the defender and bring down the ball landing in the end zone. Your teammates rush toward you and lift you up. You have won! You are a National Champion!

Most of us will never know that feeling of playing for our favorite school and catching the game winning touchdown. However, video games such as Electronic Arts' (EA) *NCAA Football* give a gamer the unique opportunity to play out these fantasies.¹ In this game, the video game player is given the opportunity to create his or her own avatar and play alongside other virtual depictions of real-life athletes as he or she progresses through a narrative that begins while the athlete is in high school, and possibly ends in a scenario similar to the one described above.² The path that the narrative takes is constantly molded by the creative decisions of the gamer, giving the gamer the unique opportunity to live out what would otherwise only be a dream.³ Unfortunately, the Ninth Circuit's recent decision in *Keller v. Electronic Arts, Inc.* may impede gamers' abilities to explore these fantasies.⁴ In *Keller*, the court found the use of athletes' images in the *NCAA Football* video game not sufficiently transformative to warrant First Amendment protection, and ordered that the athletes must be compensated under their right of publicity.⁵ As a result, a serious roadblock has been placed in the creation of these types of games.⁶

¹ See *Keller v. Electronic Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013); See also *NCAA FOOTBALL 2006* (EA Sports 2005).

² *Keller*, 724 F. 3d at 1272.

³ See *NCAA FOOTBALL 2006* (EA Sports 2005).

⁴ *Keller*, 724 F. 3d at 1284.

⁵ *Id.* at 1284

⁶ After the Ninth Circuit's decision in *NCAA Football*, if the use of a person's likeness in a video game is not sufficiently transformative to warrant First Amendment protection, the video game producer

Over the past six decades, courts have applied statutory language and common law principles to develop the right of publicity into the doctrine that is currently used today.⁷ As this doctrine has continued to evolve, a number of market factors have changed, presenting unique issues for courts to consider. Possibly the biggest factor affecting this doctrine is the rapid development of technology, which has allowed content creators to use the personas of others in their works in ways that have never before been possible.⁸ These uses have forced courts to create and adapt various tests to account for the complexities of these new media of expression when balancing the interests of a person's right of publicity with a content producer's First Amendment rights.⁹

Part II of this Comment analyzes the statutory and common law foundations of the right of publicity in order to contextualize the interests at stake when considering more modern interactive media of expression, such as video games. When discussing right of publicity issues, this Comment will make use of the word "celebrity," which should be understood to mean any person who may be of public interest and should not be limited to famous people.¹⁰

Part III of this Comment delves into a historical analysis of how right of publicity and First Amendment interests have been balanced in a number of contexts. First, this Comment examines the predominant transformative test that has been applied by the courts to artistic depictions of a celebrity within a work, and argues that the development and expansion of this test has resulted in a number of problems. First, this Comment argues that the transformative test's factors are vague and overlap. Next, the transformative test was originally created in the context of traditional still artistic depictions and thus, was ill-suited for an extension to more complex interactive media which present unique issues. Finally, this Comment contends that courts have erroneously applied the transformative test by placing a disproportionate emphasis on the celebrity depiction in isolation from the context of the work within which it is used. On this point, this Comment suggests that if a celebrity depiction

must agree to terms with the person regarding the use of their image. These terms may extend beyond compensation and may lead to the person's ability to censor the way in which their image is used. In cases where the images of many persons are used, agreeing to terms with each individual person may be a rather large hurdle. Additionally, in some cases, such as the case of current college student-athletes, compensation is impossible because any compensation would render the athletes ineligible to participate in their sport. This has led EA to discontinue the production of its NCAA video games. See Darren Rovell, *EA Sports settles with ex-players*, ESPN (Sep. 26, 2013), http://espn.go.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game.

⁷ See 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 6:3 (2d ed. 2005).

⁸ For example, technological advances now make it possible for a video game user to map his or her face onto an avatar of a professional basketball player using the video game console's camera. This technology also allows producers to recreate the faces of the athletes themselves within the game. Associated Press, *NBA 2K15' offers option of 3D faces*, ESPN (Sept. 17, 2014).

⁹ See 2 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8:73 (2d ed. 2005).

¹⁰ "The right of publicity is not merely a legal right of the 'celebrity,' but is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking." 1 MCCARTHY, *supra* note 7, § 1:3 (2d ed. 2005).

is to be analyzed outside the context within which it is used, it should only be to determine whether the physical depiction itself has been so transformed that sufficient expression has been shown to warrant protection without consideration of its surrounding context.

Part III of this Comment also includes an examination of how the right of publicity doctrine is balanced against First Amendment interests in the context of film and video games. This Comment uses the application in film to analogize to video games, which contain many of the same expressive and narrative elements as film, but are given considerably less First Amendment protection against right of publicity claims. Specifically, this Comment argues that video games are much more similar to film than the traditional artistic depictions for which the transformative test was originally created. Thus, this Comment uses the film analogy to argue that the transformative test has been overextended to the video game context.

Part IV of this Comment examines how similar interests in the use of a person's image have been balanced against First Amendment concerns under the Lanham Act.¹¹ This includes a review and analysis of the Rogers Test that has predominantly been used by the courts to balance these interests. This Comment argues that while the relative weight afforded to First Amendment and Lanham Act interests under the Rogers Test should be informative in constructing a test for the right of publicity, the Rogers Test itself is ill-suited for this extension.

Subsequently, Part V of this Comment proposes a hybrid test that attempts to reconcile the incongruences between the weight given to First Amendment concerns under the transformative test and the Rogers Test. The test presented is cognizant of a person's more expansive rights in protecting the commercial use of his or her image under the right of publicity, but seeks to ensure that people are not able to effectively censor the use of their image in creative works. This discussion also outlines unique considerations that will arise under this proposed test when analyzing interactive mediums such as video games. The hybrid test contains three factors. First, courts should ask if the work contains expressive qualities that allow a creator or consumer to convey a message or express an idea. Second, courts should ask if the inclusion of the celebrity depicted is artistically relevant to the expressive qualities of the work such that the message or idea is advanced in a meaningful way. Third, courts should determine if consumers purchased the work primarily because of its association with the celebrity depicted or if consumers were primarily attracted to the work as a whole. The first two factors are used to quantify the First Amendment interests at stake. These First Amendment interests are then balanced against the publicity

¹¹ Under the Lanham Act, a person may sue for the use of his or her image in a way that "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U.S.C. § 1125(a)(1)(A). This is unlike the right of publicity in that the right of publicity does not contain a consumer confusion requirement. 1 McCARTHY, *supra* note 7, § 5:19. Because of this confusion requirement, someone who is not widely known or recognized will have a much more difficult time bringing a false endorsement claim. *See* 1 McCARTHY, *supra* note 7, § 5:33.

interests of the person depicted, quantified by the third factor. If on balance, the First Amendment interests outweigh the publicity interests of the person depicted, the work should be protected.

Finally, Part VI of this Comment applies the proposed hybrid test to the facts of *Keller v. Electronic Arts*, which concerned the use of college athletes' depictions in the *NCAA Football* video game. The Comment concludes that the case was erroneously decided, and that if First Amendment interests are properly weighed against the right of publicity interests at stake, the defendant EA should have prevailed.

II. THE RIGHT OF PUBLICITY

In order to craft a test which properly balances a person's right of publicity with a creator's rights of expression under the First Amendment, it is important to begin by examining how the right of publicity was developed and expanded by courts and state legislatures. Simply put, the right of publicity is the appropriation of "the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."¹² The right of publicity is granted by state law, and its infringement takes the form of the commercial tort of unfair competition.¹³

Melville B. Nimmer published one of the first and most influential constructions of the right of publicity in 1954.¹⁴ Among other things, Professor Nimmer explained that often, the use of the image of a prominent figure in connection with a product advertisement will enhance its appeal; thus, there is a publicity value to be associated with such a use.¹⁵ Professor Nimmer further explained that although the publicity value of a person's image would be much higher based on the level of fame that person has achieved, the right of publicity should be available to everyone.¹⁶ The outline of the new right of publicity created by Professor Nimmer served as a guide for courts and legislators to further develop the right of publicity into what it is today.

A. *State Law Statutory Right of Publicity*

Over a period of about 60 years, state legislatures developed the right of publicity through the enactment and interpretation of statutes.¹⁷ Though some advocate for a federal right of publicity statute, the doctrine continues to remain a creature of state

¹² RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 (1995).

¹³ See 1 MCCARTHY, *supra* note 7, § 1:3.

¹⁴ "Advertisements, almost regardless of their nature, will increase their reader appeal by including the name and portrait of a prominent personality or a well-known enterprise, although there is no 'passing off' that such personality or enterprise produces or endorses the product being advertised." Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 212 (1954).

¹⁵ *Id.* at 212.

¹⁶ *Id.* at 217.

¹⁷ See 1 MCCARTHY, *supra* note 7, § 6:6.

law.¹⁸ The first state to enact such a statute was New York in 1903.¹⁹ Though many states have modeled their statutes after the New York statute, each state's statute has unique nuances.²⁰ In fact, the separate development of the doctrine in each state has led to a great deal of variation in right of publicity laws.²¹

One typical example of such a statute, enacted in 1972, is the California Right of Publicity Statute.²² The California statute affords protection against the knowing use of "another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent."²³ The statute contains a number of exempted uses, including one for uses in connection with "news, public affairs, or sports broadcast or account, or any political campaign."²⁴ This exemption has been interpreted at least to include items that would normally be protected as free speech, and thus has been extended beyond hard news to "reports of everything from social trends, the doings of celebrities, and matters of interest to consumers."²⁵

The California right of publicity statute coexists with a state common law right of publicity. In fact, as Professor Thomas McCarthy describes in his treatise *Rights of Publicity and Privacy*, the common law has played a much greater role in shaping the right of publicity in California, with the statute assuming a more "peripheral" role.²⁶

The right of publicity has been interpreted quite expansively.²⁷ It confers to a person a property right in his or her image, which can be alienated in a variety of ways.²⁸ For example, Johnny Carson had the right to control and profit from the use

¹⁸ See generally Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227 (1999); see also Sean D. Whaley, "I'm a Highway Star": An Outline for a Federal Right of Publicity, 31 HASTINGS COMM. & ENT. L.J. 257 (2009).

¹⁹ "In the national legal world of publicity and privacy rights, the state of New York is a special case. Historically, it is a special case because in the 1902 *Roberson* case, the New York Court of Appeals was the first state high court in the nation to consider and reject a common law right of privacy. In 1903, to correct that court decision, New York was the first state in the nation to enact a statute granting a civil right, albeit a limited one, to sue for the invasion of privacy. The statute was limited because it permitted recovery only for the type of invasion of privacy involving 'appropriation' of identity for commercial use." 1 MCCARTHY, *supra* note 7, § 6:74

²⁰ See 1 MCCARTHY, *supra* note 7, § 6:6.

²¹ *Id.*

²² CAL. CIV. CODE § 3344 (West 2015).

²³ *Id.*

²⁴ "(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)." *Id.*

²⁵ 1 MCCARTHY, *supra* note 7, § 6:33. See, e.g., *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536 (1993) (exempting a documentary about surfers on Malibu Beach under the exception for public affairs).

²⁶ See 1 MCCARTHY, *supra* note 7, § 6:11.

²⁷ See GRAEME B. DINWOODIE & MARK D. JANIS, TRADEMARKS AND UNFAIR COMPETITION LAW AND POLICY 946 (4th ed. 2014).

²⁸ *Id.*

of his famous tagline “Here’s Johnny,” which was associated with his persona from “The Tonight Show,” and then demand compensation when it was used in association with the name of a toilet.²⁹ Further, unlike a personal privacy right, Carson had the ability to alienate this right and profit from the use of his tagline by assigning it to a licensing agency that could actively seek monetization opportunities.³⁰ Comparatively, any trademark right that NBC may own in “Here’s Johnny” is substantially narrower. In order for NBC to seek relief under the Lanham Act, it would need to prove that the use of the tagline on the product caused some sort of consumer confusion.³¹ Thus, the right of publicity expands beyond the scope of protection awarded under the right of privacy or the Lanham Act.

III. INTERACTION OF THE RIGHT TO PUBLICITY AND THE FIRST AMENDMENT

As courts have continued to develop the right of publicity, many critics argue that some applications of the right of publicity violate First Amendment free speech principles.³² Some have even called for an evisceration of the doctrine.³³ While courts have recognized that many uses of a celebrity’s image will be protected by the First Amendment, they have avoided finding that the First Amendment calls for elimination of the right of publicity doctrine.³⁴ Instead, state and federal courts have sought to balance First Amendment concerns with a person’s right of publicity through the formation of various tests for different contexts.³⁵ One such test, developed by the California Supreme Court for situations where a celebrity’s image is artistically portrayed, is called the “transformative test.”³⁶

A. *Artistic Depictions and the Transformative Test*

When a person’s image is artistically rendered, the First Amendment’s protection for “expressive art” may shield it from right of publicity challenges.³⁷ In

²⁹ See generally, *John W. Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

³⁰ See 1 McCARTHY, *supra* note 7, § 5:19 (asserting that “[t]he nonassignability of traditional privacy rights was one important reason for the creation of the separate concept of the right of publicity”).

³¹ See discussion of the Lanham Act’s confusion requirement *supra* note 11.

³² See Arlen W. Langvardt, *The Troubling Implications of A Right of Publicity “Wheel” Spun Out of Control*, 45 U. KAN. L. REV. 329, 331 (1997) (arguing that the Ninth Circuit’s holding in *White v. Electronic Arts*, enforcing a common law right of publicity claim against a company who used a robot made to resemble Vanna White in one of its commercials, has the potential to seriously expand celebrities’ property rights in their image at the expense of freedom of expression).

³³ For example, Professor Eugene Volokh argues that the right of publicity violates First Amendment free speech principles especially as it is applied outside the context of commercial advertisements. He argues that although state law grants a person a “property” right in controlling the use of his or her image, First Amendment law should not tolerate this label as a means of preventing expression. Thus, Volokh would support an evisceration of the right of publicity doctrine. See generally, Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

³⁴ See 1 McCARTHY, *supra* note 7, § 2:4.

³⁵ See 2 McCARTHY, *supra* note 9, § 8:23.

³⁶ See generally, *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001).

³⁷ See 2 McCARTHY, *supra* note 9, § 8:72 (2d ed).

2001, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court devised a test to balance a celebrity's right of publicity with a producer's First Amendment rights. In this case, the court sought to determine whether the defendant's charcoal drawings of The Three Stooges, which were copied and sold as lithograph prints and on t-shirts, violated the comedy team's right of publicity.³⁸

The court developed a factor test for balancing a celebrity's right of publicity with a creator's First Amendment right to the use of that celebrity's image in artistic works.³⁹ It stated that an inquiry into whether a work is "transformative" is "necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment."⁴⁰ Then, the court went on to explain that when a work is a "literal depiction" of a celebrity for the purpose of commercial gain "directly trespassing on the right of publicity without adding significant expression beyond that trespass," the interests of protecting the celebrity outweigh the interest of the imitator.⁴¹ However, if instead the work "contains significant transformative elements"⁴² it is "especially worthy of First Amendment protection" and also less likely to affect the economic interest associated with the celebrity's image.⁴³ Thus, this first factor indicates that something beyond "conventional artistic choices" that are involved in the recreation of a celebrity's image will be necessary for a work to be considered "transformative."⁴⁴

The court elaborated that, "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."⁴⁵ Accordingly, the necessary question is "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."⁴⁶ Thus, the

³⁸ See generally, *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001).

³⁹ A typical recitation of the transformative test's factors is as follows: "The five considerations articulated in *Comedy III*, and cited by the majority, are whether: (1) the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) the work is primarily the defendant's own expression if the expression is something other than the likeness of the celebrity; (3) the literal and imitative or creative elements predominate in the work; (4) the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) an artist's skill and talent has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity's fame." The court noted that this test should be "holistic" and not distilled as "analytical factors." Keller, 724 F.3d at 1285 (Thomas, S., dissenting).

⁴⁰ *Comedy III*, 25 Cal. 4th at 404.

⁴¹ *Id.* at 405.

⁴² *Id.* The court did not fully explain what types of elements would be considered to be transformative. The court did note, however, that "the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms," which include, for example: "factual reporting," "fictionalized portrayal," "heavy-handed lampooning," and "subtle social criticism." *Id.* at 406.

⁴³ *Id.* at 405.

⁴⁴ See 2 McCARTHY, *supra* note 9, § 8:72.

⁴⁵ *Comedy III*, 25 Cal. 4th at 406.

⁴⁶ *Id.*

use of the likeness must be considered within the expressive context of the work as a whole to determine whether the likeness has been sufficiently transformed.

Finally, the court stated that the inquiry is “more quantitative than qualitative” and asks whether the “literal and imitative or the creative elements predominate the work.”⁴⁷ Thus, the quality of the artistic contribution of the work is of little importance and instead courts must look to determine whether the work is primarily a literal depiction of the celebrity devoid of creative expression. Further, anticipating close cases where the application of the transformative test would be strenuous, the court stated that as a “subsidiary inquiry” courts should consider whether “the marketability and economic value” of the work is primarily derived “from the fame of the celebrity depicted.”⁴⁸ Hence, when the work primarily derives its value from a feature other than the celebrity’s fame, the First Amendment should protect the work.

In applying this test to the facts in *Comedy III*, the court concluded that the charcoal drawings of The Three Stooges did not contain sufficient expression to be considered transformative.⁴⁹ The court commented that although the depictions were skillful, the overall goal of the work was to create “literal, conventional depictions of The Three Stooges so as to exploit their fame.”⁵⁰ The court further looked to the marketability of the product and determined that the economic value of the work derived “primarily from the fame of the celebrities depicted.”⁵¹ Accordingly, the California Supreme Court provided a baseline for what would not be considered sufficiently transformative under the new test, leaving future courts to further clarify the application of the test and define its limits.

Two years after providing the groundwork for the transformative test, the California Supreme Court defined the other end of the test’s spectrum in a case called *Winter v. D.C. Comics*, finding on summary judgment that the depictions of two comic book characters resembling two blues musicians of the time were transformative as a matter of law.⁵² In the comic book, two of the villains were half-human, half-worm brothers that shared the musician’s albino features as well as having the same first names as the musicians.⁵³ This case was “not difficult” for the court because the distortion of the character’s bodies into half-human, half-worm beings was certainly not a “literal depiction” of the plaintiffs and the depictions fit into the larger plot of the comic book’s story, which was “itself quite expressive.”⁵⁴ Thus, although the court did not need to consider the depictions within the context of the overall work because they were sufficiently transformed when considered in isolation,⁵⁵ the

⁴⁷ *Id.* at 407.

⁴⁸ *Id.*

⁴⁹ *Id.* at 409.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See generally, *Winter v. DC Comics*, 30 Cal. 4th 881 (2003).

⁵³ *Id.* at 886.

⁵⁴ *Id.* at 890.

⁵⁵ “As in *Comedy III*, *supra*, 25 Cal. 4th 387, courts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person

court implied that the fact that the characters were part of the comic book's creative narrative was also transformative.

Though the California Supreme Court developed the transformative test, other states and some federal courts have adopted and used the test when deciding right of publicity cases involving artistic depictions of celebrities. The Sixth Circuit applied the test to a case concerning a painting of famous golfer, Tiger Woods, which depicted him from three different views and was created to celebrate his victory at the 1997 Master's Tournament.⁵⁶ In the background of the piece were images of some of history's greatest golfers gazing down upon him.⁵⁷ Over five thousand reprints of the painting were produced and sold for hundreds of dollars each.⁵⁸ Affirming the dismissal of the plaintiff's right of publicity claims, the court found that "unlike the unadorned, nearly photographic reproduction of the faces of The Three Stooges in *Comedy III*, Rush's work does not capitalize solely on a literal depiction of Woods."⁵⁹ Rather, the court found the painting consisted of a "collage of images," which were combined with the images of Woods to "describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event."⁶⁰ This case further demonstrates Professor McCarthy's assertion, mentioned above, that when balancing a person's right of publicity against the First Amendment rights of the producer, courts should not look at the celebrity's artistic depiction in isolation, but rather as a part of the overall work to see if the overall expressive elements of the work are sufficient to transform the depiction. Further, this case demonstrates that literal depictions are protected under the First Amendment as long as they are depicted within a more expressive context.

B. *Balancing the Right of Publicity and the First Amendment in Film*

This section examines how various courts have balanced the right of publicity with the First Amendment in the context of film, as this will provide a useful analogy when the narrative elements of many video games are discussed. The Restatement Third of Unfair Competition states that the requisite "purpose of trade"⁶¹ for a right of publicity claim "does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."⁶² According to Professor McCarthy, "the vast

or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer. This is one of those cases." *Winter*, 30 Cal. 4th at 891-92.

⁵⁶ See *ETW Corp. v. Jireh Pub. Inc.*, 332 F.3d 915, 918 (6th Cir. 2003).

⁵⁷ *Id.* at 919.

⁵⁸ *Id.*

⁵⁹ *Id.* at 938.

⁶⁰ *Id.*

⁶¹ "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate. . . ." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

⁶² RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

majority of relevant cases, by whatever route of reasoning, reach the conclusion that the fictional use of human identity is not actionable as . . . infringement of the right of publicity.”⁶³ In fact, several states explicitly create exceptions for film in their right of publicity statutes.⁶⁴ Hence, to the extent that video games are analogous to different types of film, it is crucial to understand the analyses courts have undertaken in adjudicating film cases. A proper understanding of the weight that First Amendment concerns carry in the context of film is useful in designing a test for analogous uses of video games. Video games that are analogous to protected films should be afforded the same degree of First Amendment protection as those films. Further, the broad protection afforded to film indicates that the transformative test has been improperly extended to video games, as many video games today are more analogous to film than they are to the traditional artistic depictions that the Ninth Circuit analyzed when they first created the transformative test.⁶⁵

Throughout history, film producers have used real-life stories of both famous and non-famous people to create various types of films. These films vary from realistic documentaries,⁶⁶ where accuracy is the central focus, to docudramas,⁶⁷ loosely based in fact, where the lives and personas of real people are included as part of a dramatic fiction.⁶⁸ Both forms have been challenged on right of publicity grounds and they have usually received First Amendment protection.⁶⁹

The first class of films, those documentaries attempting to accurately portray the life of a given person, is protected under the First Amendment provided the films are not defamatory.⁷⁰ No one has the exclusive right to tell his or her life story.⁷¹ Thus, film producers have the right to use a celebrity likeness to depict the life story of any person however they see fit so long as they do not defame the person.⁷² Requiring a person’s consent would essentially give that person control over how his or her

⁶³ See 2 McCarthy, *supra* note 9, § 8:74.

⁶⁴ See Gerald O. Sweeney Jr. & John T. Williams, *Mortal Kombat: The Impact of Digital Technology on the Rights of Studios and Actors to Images and Derivative Works*, 3 MINN. INTELL. PROP. REV. 95, 109 (2002).

⁶⁵ See discussion of *Comedy III* *supra* pp. 11-13.

⁶⁶ One example of a documentary that was challenged on right of publicity grounds is the documentary “The Legends of Malibu” discussed *supra* note 25.

⁶⁷ “The word ‘docudrama’ is a combination of ‘documentary’ and ‘drama’ and implies a stage or film dramatization either closely or loosely based upon actual events with fictional dramatic elements embellishing the hard facts. 2 MCCARTHY, *supra* note 9, § 8:74 (quoting American Heritage Dictionary (1982 2d College Ed, Houghton Mifflin Co.)).

⁶⁸ One example of a docudrama is the movie *Panther*, which combines fiction with history to tell the story of the Black Panther Party. See *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 340 (E.D. Pa. 1996) (holding that the defendant producer’s use of the Plaintiff’s name and likeness in connection with its promotion of the film “Panther” did not infringe on his right of publicity because the use “was for the purpose of First Amendment expression”).

⁶⁹ See, e.g. *Seale*, 949 F. Supp. 331 at 340; *Dora*, 15 Cal. App. 4th at 546.

⁷⁰ See 2 McCarthy, *supra* note 9, § 8:64.

⁷¹ *Id.*

⁷² *Id.*

story is told.⁷³ This implicit censorship would stifle the creative expression of the producer and run contrary to the fundamental ideas of free speech and freedom of the press.⁷⁴ Thus, in almost all instances, courts will reject on First Amendment grounds any right of publicity claims based on the use of a likeness to tell the real-life story of a person.⁷⁵

The second class of films called docudramas often use celebrity likenesses in the process of telling a story that is based on historical events but incorporates fictional dramatizations. This class of films includes “the ‘unauthorized’ biography, which contains fictional episodes and dialogue intentionally inserted to embellish the story and create dramatic or entertainment value.”⁷⁶ The fact that the film uses fiction in its depiction of historical events does not take away any of the First Amendment protection.⁷⁷ Under this reasoning, a majority of courts recognizes a First Amendment right to produce these films as expressive speech and will reject challenges based on right of publicity claims.⁷⁸

In 1979, Chief Justice Bird provided a clear and articulate analysis of the fictional treatment of a person in her concurring opinion to the California Supreme Court decision, *Guglielmi v. Spelling-Goldberg Productions*.⁷⁹ In this case, the nephew of actor Rudolf Valentino sued on right of publicity grounds for the use of his uncle’s likeness in a fictionalized television version of Valentino’s life.⁸⁰ The film entitled *Legend of Valentino: A Romantic Fiction* featured a main character bearing Valentino’s name, but was based only loosely in fact and was comprised of various fictionalized events.⁸¹ At the time the case was decided, a person’s right of publicity in California did not extend beyond that person’s life.⁸² Thus, because Valentino was deceased when the film was produced, the majority affirmed the lower court’s

⁷³ See 2 McCarthy, *supra* note 9, § 8:64.

⁷⁴ *Id.*

⁷⁵ See 2 McCarthy, *supra* note 9, § 8:65.

⁷⁶ See 2 McCarthy, *supra* note 9, § 8:74.

⁷⁷ See *Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679 (2004) (“Neither that defendants’ documentary was of an historical nature nor that it involved ‘reenactments’ rather than first-hand coverage, of the events reported, diminishes any constitutional protection that it enjoys”).

⁷⁸ “The issue is whether the use of personal identity in a fictional work can be an infringement of the right of publicity or an invasion of appropriation privacy. The majority view is that fictional works are protected by the First Amendment as being informative or entertaining ‘speech,’ such that fictional uses of identity cannot be actionable under those two legal theories. However, factual misrepresentations in the fiction which are reasonably read as being of and concerning a living person may give rise to liability for defamation or false light invasion of privacy. In some rare cases, falsely presenting a fictional work as a factual one may trigger liability for false advertising.” 2 McCarthy, *supra* note 9, § 8:74.

⁷⁹ See *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 862-76 (1979).

⁸⁰ See *id.* at 861.

⁸¹ *Guglielmi*, 25 Cal. 3d at 861 (Bird, C.J., concurring).

⁸² *Id.* at 861. In 1985 the California legislature enacted a statute recognizing a post mortem right of publicity. That statute was amended in 1999 and 2007 to provide that this right was freely transferable by contract or by testamentary instrument. See 2 McCarthy, *supra* note 9, § 9:20, Cal. Civ. Code § 3344.1.

dismissal of the right of publicity claims without any substantial analysis of the plaintiff's right of publicity claims.⁸³

The concurring opinion by Chief Justice Bird, however, analyzed Valentino's right of publicity claims as if he were alive.⁸⁴ According to Chief Justice Bird, had Valentino still been alive, the court would have been tasked with determining whether a film, made for profit, which uses the name and persona of a celebrity and does not portray strictly factual events, is an infringement of that celebrity's right of publicity.⁸⁵ Chief Justice Bird concluded that the First Amendment protected this use.⁸⁶ Chief Justice Bird justified this conclusion stating that, "entertainment, as a mode of self-expression, is entitled to constitutional protection irrespective of its contribution to the marketplace of ideas."⁸⁷ In other words, the opinion implied that a work does not need to express any particular view about the celebrity's persona or criticize the celebrity in any way. A work that is purely for entertainment is protected expression under the First Amendment.⁸⁸

One particularly illuminating part of this opinion was Chief Justice Bird's response to the appellant's contention that "Valentino's name and likeness were used because they increased the value or marketability of the film," which is an argument also commonly asserted by plaintiffs in the context of video games.⁸⁹ The appellant argued that this would provide for "three distinct bases of liability."⁹⁰ First, the film was produced for profit.⁹¹ Second, the producers could have made the film and expressed themselves in a way that did not use Valentino's likeness.⁹² Third, the use of Valentino's likeness in fiction would present "a unique threat to the value of Valentino's right of publicity."⁹³

Chief Justice Bird quickly dismissed the first contention because "the First Amendment is not limited to those who publish without charge."⁹⁴ In response to the second contention that "Valentino's identity was incorporated in the film solely to increase the film's value,"⁹⁵ she stated that, "if this analysis were used to determine whether an expression is entitled to constitutional protection, grave harm would result."⁹⁶ This was because "[c]ourts would be required not merely to determine whether there is some minimal relationship between the expression and the celebrity,

⁸³ *Guglielmi*, 25 Cal. 3d at 861.

⁸⁴ *Guglielmi*, 25 Cal. 3d at 862-76 (Bird, C.J., concurring).

⁸⁵ *Id.* at 865.

⁸⁶ *Id.* at 875-76.

⁸⁷ *Id.* at 867.

⁸⁸ *Id.*

⁸⁹ *Id.* at 868.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 869.

⁹⁶ *Id.*

but to compel the author to justify the use of the celebrity's identity."⁹⁷ This would "inevitably chill the exercise of free speech."⁹⁸ Thus, writers should be able to choose whether the use of a celebrity likeness will enhance their expression.⁹⁹ Finally, Chief Justice Bird responded to the appellant's third argument that the fictional nature of the film would present a unique threat to Valentino's right of publicity.¹⁰⁰ She rejected this argument by stating that a fictional account has no greater or lesser effect on the value of the celebrity's publicity right than a truthful account, as either one may have the effect of augmenting or diminishing the celebrity's fame.¹⁰¹ Thus, under Chief Justice Bird's analysis, the film warranted First Amendment protection against the right of publicity claims.¹⁰²

Another example of a right of publicity challenge to a docudrama that was similarly rejected under the First Amendment involved a docudrama mini-series about Elizabeth Taylor.¹⁰³ Actress Elizabeth Taylor claimed that the mini-series was a commercial product that capitalized "on her name, life and career" and requested an injunction.¹⁰⁴ The California Superior Court for Los Angeles County began its analysis by stating that the United States Supreme Court has "expressly recognized that operation for profit does not exclude motion pictures, books, newspapers or magazines from protection by the First Amendment."¹⁰⁵ The court then stated that "constitutional protection is not limited to factual works but is extended to all expressive works, whether factual or fictional" and thus, "an action for infringement of the right of publicity can be maintained only if the proprietary interests at issue clearly outweigh the value of free expression in this context."¹⁰⁶ Finally, the court stated that the right of publicity should not be used to "stifle" discussion of the life and persona of a person of public interest and denied the injunction.¹⁰⁷

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Chief Justice Bird explained that, "contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, more accurately express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality. The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire." *Id.* at 869.

¹⁰⁰ *Id.* at 870.

¹⁰¹ *Id.*

¹⁰² *Id.* at 875-76.

¹⁰³ See generally, *Taylor v. Nat'l Broad. Co., Inc.*, 1994 WL 762226 (Cal. Super. Ct. Sept. 29, 1994).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing *Joseph Burstyn, Inc.*, 343 U.S. at 501-02; *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967)).

¹⁰⁶ *Id.* (quoting *Guglielmi*, 25 Cal. 3d at 871-72 (Bird, C.J., concurring)).

¹⁰⁷ *Taylor*, 1994 WL 762226 at *5.

C. *Applying the Transformative Test to Video Games*

Over the past two decades, new technology has allowed creators to transform video games into detailed media of artistic expression.¹⁰⁸ As the market for video games has grown, gamers have demanded and come to expect more detailed games that combine the latest in computer technology with creative storylines that capture the gamer's attention and retain it for hours and hours of entertainment. For some gamers, the appeal may be in the mastery of simple repetitive tasks and the ability to demonstrate this mastery by competing and interacting with other gamers. Others may be captivated by the ability to control a character as they play through and mold a narrative filled with action, adventure, plot twists, climaxes, and a conclusion. Thus, video games provide a unique medium not only for creators to express themselves by developing intricate stories aided by limitless visual possibilities, but also for gamers to express themselves both by interacting with other gamers and by shaping the narrative that unfolds within the game.¹⁰⁹

Like film, many video games provide an opportunity for video game producers to express their views and ideas about public figures and use celebrity likenesses as part of a creative narrative. The spectrum of storylines found in video games is virtually unlimited. There are narratives that place gamers in the boots of a World War II soldier and ask the gamer to defend his or her country as he or she is led by some of the greatest generals in history.¹¹⁰ Others allow the gamer to play alongside his or her favorite athletes as he or she leads a team through a season to ultimately compete for the championship.¹¹¹ Still other narratives inject the gamer into the role of a modern soldier fighting to overthrow a real-life oppressive dictator in a foreign land.¹¹² However, different from film, video games not only provide producers with the ability to construct creative narratives, many also give the gamers the ability to sculpt their own narratives by allowing them to make creative decisions that affect the ultimate outcome of the game while sometimes interacting with other players.

Courts have recognized the expressive nature of video games, confirming that "video games are expressive works entitled to as much First Amendment protection as the most profound literature."¹¹³ Despite this recognition, courts have mis-

¹⁰⁸ Compare, for example, one of the earliest video games *Pong* to a more recent video game such as *Battlefield 1942*. *Pong* consists of a very simple depiction of a circle bouncing back and forth across the screen as users control two lines at either end which are meant to represent paddles and simulate a game of ping pong. PONG (Atari Inc., 1972). *Battlefield 1942*, on the other hand, pits users against each other on a detailed battlefield fighting each other in recreations of some of World War II's greatest battles. BATTLEFIELD 1942 (Electronic Arts, 2002).

¹⁰⁹ See generally, 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, 40 (2013) (describing the variety of expressive uses of video games as a medium of expression and distinguishing them from more mundane commercial media).

¹¹⁰ See, e.g. BATTLEFIELD 1942 (Electronic Arts 2002).

¹¹¹ See, e.g. NCAA FOOTBALL 2006 (Electronic Arts 2005).

¹¹² See, e.g. CALL OF DUTY: BLACK OPS II (Activision 2012).

¹¹³ Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47, 58 (2006).

applied the transformative test to video games by disproportionately focusing on the resemblance of the celebrity likeness to the real-life celebrity, rather than looking at the celebrity depiction as one part of the game's cumulative expression.¹¹⁴ As noted in the Tiger Woods painting example, considered in isolation, the degree to which the celebrity likeness resembles the celebrity is not determinative.¹¹⁵ Instead, courts must consider the depiction within the context of the work as a whole and determine whether the work itself contains sufficient transformative elements to be protected under the First Amendment.¹¹⁶

A proper application of this standard in the video game context is exemplified in *Kirby v. Sega of America*.¹¹⁷ In *Kirby*, the California Court of Appeal for the Second Circuit applied the transformative test to find that the use of an avatar in a video game bearing similarities to musician Kieren Kirby was sufficiently transformative to be granted First Amendment protection.¹¹⁸ Though the video game character shared some common features with the musician, such as similar costumes and having a name "Ulala," which Kirby claimed was a spinoff of her signature line "ooh la la," the court found the depiction was sufficiently transformative for two reasons.¹¹⁹ The court first focused on the fact that although there were similarities to the musician, the depiction of Ulala in the game was not a literal depiction of Kirby, noting that Ulala is a "fanciful creative character."¹²⁰ Though this transformation of Kirby's likeness may have been sufficient to render the use transformative, the court also considered the depiction in light of the overall expression of the game and determined that the Ulala character "exists in the context of a unique and expressive video game."¹²¹ Thus, the court found that not only was the depiction transformative when considered in isolation, but also that the video game as a whole was transformative due to the expressive nature of the surrounding narrative in which the depiction was portrayed.¹²²

Although in this case there was also an expressive context, the court extended to video games the proposition in *Winter* that if a character is sufficiently transformed when considered in isolation from the context in which it is used, this fact alone is sufficient to warrant First Amendment protection.¹²³ Contrarily, when a celebrity depiction is not sufficiently transformed in isolation from its context, one must determine whether the depiction is one of the "raw materials" of the game's overall

¹¹⁴ See discussion of *Keller v. Electronic Arts* *infra* pp. 27-32.

¹¹⁵ See *ETW*, 332 F.3d at 938 ("Rush's work consists of a collage of images in addition to Woods's image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event").

¹¹⁶ *Id.*

¹¹⁷ *Kirby*, 144 Cal. App. 4th at 47.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 51.

¹²⁰ *Id.* at 61.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

expression.¹²⁴ Hence, in order for a celebrity depiction to be transformed, neither the celebrity's physical appearance nor his or her persona needs to be changed as long as the realistic depiction and persona are placed within a broader expressive or artistic context.

Most notably, the court in *Kirby* stated: “[A]ll that is necessary is that respondents’ work add ‘something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’ A work is transformative if it adds ‘new expression.’ That expression alone is sufficient; it need not convey any ‘meaning or message.’”¹²⁵ Therefore, under this test, when a video game producer includes a literal depiction of a celebrity within the context of an expressive narrative, the video game should qualify for First Amendment protection as long as “something new” is added and the inclusion of the character is artistically relevant to this narrative.

Despite the transformative test's requirement that the depiction of a celebrity likeness be considered within the overall expressive context of the work,¹²⁶ some courts have misapplied this standard to video games. As previously mentioned, some courts in video game cases have placed a disproportionate amount of focus on whether the likeness is transformed when considered in isolation from the context in which it is used. Because of this focus, courts have begun to use an improper standard for evaluating video games. This standard, discussed below, requires that, for a celebrity depiction to be transformative, either the physical depiction of the celebrity must be transformed itself,¹²⁷ or the celebrity must be depicted in an environment that is wholly detached from what the celebrity became famous for. This standard directly conflicts with the case precedent described above in the context of art and film, such as the Tiger Woods painting,¹²⁸ the docudrama about Rudolf Valentino,¹²⁹ and the miniseries about Elizabeth Taylor,¹³⁰ all of which portrayed the celebrity doing exactly what he or she is famous for.

This improper standard was created in *No Doubt v. Activision Publishing, Inc.*, which concerned the use of avatars that closely resembled members of the band No Doubt in a video game, *Band Hero*.¹³¹ In holding that the use of the avatars was not transformative, the California Court of Appeal for the Second District concluded that because the creators took steps to “painstakingly recreate” the looks of the No Doubt band members and because users could not modify these appearances, the depictions themselves lacked sufficient expression to be transformative.¹³² Though the court recognized that precedent has shown that “even literal reproductions of ce-

¹²⁴ See discussion *supra* Part III.A.

¹²⁵ *Kirby*, 144 Cal. App. 4th at 60 (quoting *Comedy III*, 25 Cal. 4th at 387).

¹²⁶ See discussion *supra* Part III.A.

¹²⁷ Such as the half-man-half-worm characters in *Winter* or the Ulala character in *Kirby*.

¹²⁸ See generally, *ETW*, 332 F.3d at 915.

¹²⁹ See generally, *Guglielmi*, 25 Cal. 3d. at 862.

¹³⁰ See generally, *Taylor*, 1994 WL 762226, at *5.

¹³¹ See *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (2011).

¹³² *Id.* at 1033.

lebrities can be ‘transformed’ into expressive works based on the context into which the celebrity image is placed,” it found that the added elements in this video game were not sufficiently transformative.¹³³

The court distinguished this case from *Kirby* by stating that unlike the depiction of Kirby as an “entirely new character,” portrayed as a space age reporter within the context of a “unique and expressive video game,” the avatars in *Band Hero* were not transformed “into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.”¹³⁴ The court came to this conclusion despite recognizing that the avatars are sometimes shown performing at “fanciful venues including outer space or [made] to sing songs the real band would object to singing . . . [and] the avatars appear in the context of a videogame that contains many other creative elements.”¹³⁵

In reaching this conclusion, the court may have been justified in determining, on balance, that *Band Hero* lacked sufficient expression to render the use of the celebrity images transformative; however, the resulting standard created by the court is not supported by case precedent. This standard requires video game producers wishing to use a celebrity depiction in their work to either depict the celebrity in such a way that the physical depiction itself is sufficiently altered, or to depict the celebrity in an environment that is wholly detached from that which made the celebrity famous. Thus, this standard seems to prohibit a video game producer from using a video game to tell a celebrity’s life story in the same way that producers of film and literature can with immunity under the First Amendment.¹³⁶ Given that courts have maintained that “video games are expressive works entitled to as much First Amendment protection as the most profound literature,”¹³⁷ the *No Doubt* standard for video games is unjustified.

D. *Ninth Circuit’s Application of the Transformative Test in Keller v. Electronic Arts, Inc. and Davis v. Electronic Arts Inc.*

1. *Keller v. Electronic Arts, Inc.*

The standard created by the California Supreme Court in *No Doubt* was followed by the Ninth Circuit in *Keller v. Electronic Arts, Inc.*¹³⁸ This case arose when EA used avatars resembling Arizona State University quarterback Samuel Keller and many other real-life college football players in their *NCAA Football* video game.¹³⁹ In the game, the user controls various different avatars that resemble NCAA players

¹³³ *Id.* at 1034 (quoting *Comedy III*, 25 Cal. 4th at 409).

¹³⁴ *Id.* at 1034. This became the standard that the court in *Keller* adopted to determine whether the use of the athlete depictions was transformative.

¹³⁵ *Id.*

¹³⁶ See discussion *supra* Part III.B.

¹³⁷ *Kirby*, 144 Cal. App. 4th at 58.

¹³⁸ *Keller*, 724 F. 3d at 1268.

¹³⁹ *Id.* at 1271.

and progresses through a number of game modes.¹⁴⁰ EA replicated each team as accurately as possible by contacting equipment managers to learn details, such as the height and weight of the players, as well as the player's unique equipment preferences.¹⁴¹ EA also made the in-game atmosphere to be an accurate representation of a real-life college football game by populating realistic stadiums with fans, coaches, cheerleaders, authentic sounds, and commentators who discuss the game, depending on the gamer's in-game actions.¹⁴² The names of the depicted players, however, were omitted from the game, and the depictions were listed as coming from a different hometown than their real-life counterparts.¹⁴³

While playing the game, the gamer can make a variety of modifications to both the rosters and the players themselves.¹⁴⁴ Gamers can take the team through "Dynasty Mode," in which the gamer assumes the role of head coach and makes various decisions, such as which players to recruit and who should play which positions.¹⁴⁵ The gamer also controls the team on the field and decides which plays to run.¹⁴⁶ In this mode, no two gamers' experiences are the same as the gamer plays an active role in shaping the narrative of the game. Further, there is a mode called "Campus Legend," where a user creates his own avatar by selecting all of the avatar's physical attributes and then controls this avatar alongside other realistic avatars created by EA.¹⁴⁷ The gamer actively controls the avatar's college career off the field by "making choices relating to practices, academics, and social life."¹⁴⁸ Thus, in these modes the gamer can modify both the positions and attributes of the existing players and take an engaged role in shaping the narrative of the game by assuming different personas, such as head coach or football star.

Given that the avatars were literal depictions of the student athletes, the Ninth Circuit "relied substantially" on *No Doubt* in arriving at the holding that EA's use of the avatars in the *NCAA Football* video game was not transformative.¹⁴⁹ The court stated that, as in *No Doubt*, where the avatars were depicted "doing exactly what they do as celebrities,"¹⁵⁰ "*NCAA Football* realistically portrays college football players in the context of college football games."¹⁵¹ Although the court did not need to follow *No Doubt* as binding precedent,¹⁵² the court found that "the facts of *No Doubt* [were]

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1272.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1278-79.

¹⁵⁰ *Id.* at 1276.

¹⁵¹ *Id.* at 1279.

¹⁵² Regarding the precedential value of the case the court stated, "we do not believe *No Doubt* to be inconsistent with the California Supreme Court's relevant decisions, and we will not disregard a well-reasoned decision from a state's intermediate appellate court in this context." *Id.* at 1278.

very similar to those here,¹⁵³ and chose to follow what it considered to be “particularly persuasive guidance.”¹⁵⁴ The court emphasized that the realism with which the athletes were depicted was evidence that they were not transformed.¹⁵⁵ Though the court acknowledged the creative aspects of designing realistic stadiums and the gamer’s ability to modify the physical attributes of the avatars, the court reasoned that because the athletes were realistically depicted doing exactly what they do in real life, the use was not transformative.¹⁵⁶ In considering arguments made by EA, the court rejected the argument that the ability for gamers to change the players’ looks and attributes should render the use transformative.¹⁵⁷ For this conclusion, the court cited a Third Circuit reversal of a New Jersey district court decision where, under identical facts,¹⁵⁸ the Third Circuit found that the ability for gamers to change these attributes did not qualify the use as transformative.¹⁵⁹

In reaching its decision, the Ninth Circuit placed particular emphasis on the realism with which the athletes were depicted. The court found that the realistic stadiums and environments made “the lack of transformative context . . . even more pronounced here than in *No Doubt*.”¹⁶⁰ Thus, the court concluded the use was not transformative, seemingly ignoring all of the other expressive elements of the game, including the previously mentioned narrative aspects of the game modes.

In his dissent, Judge Sidney Thomas also applied the transformative test but arrived at a different result. Judge Thomas argued that because the “creative and transformative elements of Electronic Arts’ *NCAA Football Game* series predominate over the commercial use of the athletes’ likenesses, the First Amendment protects EA from liability.”¹⁶¹ Judge Thomas asserted that the transformative test requires a “holistic analysis” and that distilling the factors individually in their application would result in a misapplication of the test.¹⁶² Thus, Judge Thomas argued that when the majority “confine[d] its inquiry to how a single athlete’s likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole,” they “contradict[ed] the holistic analysis required by the transformative test.”¹⁶³ Therefore, “the salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered.”¹⁶⁴

¹⁵³ *Id.* at 1276.

¹⁵⁴ *Id.* at 1278.

¹⁵⁵ *Id.* at 1276.

¹⁵⁶ *Id.* at 1277.

¹⁵⁷ *Id.* at 1278.

¹⁵⁸ *See generally*, Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

¹⁵⁹ *Id.*

¹⁶⁰ *Keller*, 724 F.3d at 1278.

¹⁶¹ *Id.* at 1284.

¹⁶² *Id.* at 1285.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

In applying the transformative test to the *NCAA Football* video game, Judge Thomas examined the various creative aspects of the game.¹⁶⁵ He first focused on the degree of user control in both modifying the game's elements and shaping the storyline.¹⁶⁶ Thomas cited the following aspects of the game as evidence that the game was transformative: the gamer's ability to create his or her own avatar, make decisions regarding that avatar that affect the narrative of the game, compete for awards, and play as a coach.¹⁶⁷ Thomas further mentioned that unlike the game in *No Doubt*, this game allowed for gamers to change the individual characteristics of the player's likenesses, allowing the gamer to morph Keller's "impressive physical likeness" into "an overweight and slow virtual athlete, with anemic passing ability."¹⁶⁸ The gamer even had the capability to play one athlete's likeness against the same likeness on the same field, a scenario that could never realistically occur.¹⁶⁹

Thus, Judge Thomas argued that when considered "in proper holistic context," the players' likenesses were "but one of the raw materials from which the broader game [was] constructed," the work as a whole was "primarily EA's own expression," and "the creative and transformative elements predominate[d] over the commercial use of the likeness."¹⁷⁰ Therefore, the economic value and marketability of the game came not from "the pure commercial exploitation of a celebrity image," but from the creative elements featured throughout the game. The game "was not a conventional portrait of a celebrity."¹⁷¹ Judge Thomas went on to say that he "would not punish EA" for the realistic aspects of the game.¹⁷² The fact that the gamer's experience was enhanced by the realistic "crunch of pads," crowd noise, and commentary demonstrates how little of the game was driven by the athletes' likenesses.¹⁷³ Thus, Thomas argued that, considering all the creative aspects of the game, it was deserving of First Amendment protection.¹⁷⁴

Judge Thomas' dissent is not the only instance of a judge applying the transformative test to the *NCAA Football* game and concluding that the game was transformative. In *Hart v. Electronic Arts*, a different plaintiff presented the District Court of New Jersey with a right of publicity claim on virtually identical facts.¹⁷⁵ The court noted that the lower court in *Keller* failed to consider the various alterations that the gamer could make to the avatars, and it also erroneously focused solely on the challenged image and not the setting of the surrounding game.¹⁷⁶ As a result, after

¹⁶⁵ *Id.* at 1286-87.

¹⁶⁶ *Id.* at 1285-86.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1286-87.

¹⁶⁹ *Id.* at 1286.

¹⁷⁰ *Id.* at 1286.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1287.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011) *rev'd*, 717 F.3d 141 (3d Cir. 2013).

¹⁷⁶ *Id.* at 787.

analyzing the claim under both the transformative test and the Rogers Test, the court found that the use warranted First Amendment protection.¹⁷⁷ Though this holding was eventually reversed by the Third Circuit,¹⁷⁸ it demonstrates the complexities of applying the transformative test to interactive media and indicates the necessity of a more definite and adaptable standard for evaluating the right of publicity in video games.¹⁷⁹

2. *Davis v. Electronic Arts Inc.*

In *Davis v. Electronic Arts, Inc.*, the Ninth Circuit recently concluded once again that the use of athlete avatars by EA in a football video game does not constitute a transformative use.¹⁸⁰ This time, the plaintiffs, retired professional football players, sued EA under the right of publicity for their inclusion as part of EA's *Madden NFL Football* video game.¹⁸¹ EA included depictions of the plaintiffs as members of a number of popular historic teams for which the plaintiffs once played.¹⁸² Unlike the current real-life players depicted in the game, "the players on the historic teams are not identified by name or photograph."¹⁸³ Instead, "each is described by his position, years in the NFL, height, weight, skin tone and relative skill level in different aspects of the sport."¹⁸⁴ Also unlike the current players depicted in the game, these retired members were not compensated for their inclusion in the game.¹⁸⁵

In reaching its conclusion, the court did not embark on the task of balancing the factors of the transformative test. Instead, the court applied the standard originally proposed in *No Doubt*, and found that, "*Madden NFL* replicates players' physical characteristics and allows users to manipulate them in the performance of the same activity for which they are known in real life—playing football for an NFL team."¹⁸⁶ The court further stated that, "[n]either the individual players' likenesses nor the graphics and other background content are transformed more in *Madden NFL* than they were in *NCAA Football*."¹⁸⁷

EA did not attempt to distinguish *Madden NFL* from *NCAA Football*, but instead argued that, "the court erred in *Keller* by focusing on whether the individual avatars

¹⁷⁷ *Id.*

¹⁷⁸ See *Hart*, 717 F.3d at 168 (3d Cir. 2013) (holding that the added elements of the *NCAA Football* game which do not directly affect the athlete depictions and the gamer's ability to make "minor" changes to the physical attributes of the avatars did not render the use transformative under the transformative test).

¹⁷⁹ This case also contains a dissenting opinion, which argues that the majority erred by considering the athlete likenesses in isolation from the other features of the work and by penalizing EA for the realism of the game. *Hart*, 717 F.3d at 171 (Ambro, T., dissenting).

¹⁸⁰ *Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015).

¹⁸¹ *Id.* at 1175.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1175-76.

¹⁸⁵ *Id.* at 1175.

¹⁸⁶ *Id.* at 1178.

¹⁸⁷ *Id.* at 1178.

were transformed, rather than whether the work as a whole was transformative.”¹⁸⁸ EA also argued that the use of the retired players was an incidental use, contending that “because there are several thousand players depicted in *Madden NFL*, any individual player’s likeness has only a de minimis commercial value.”¹⁸⁹ Ultimately, the court rejected EA’s arguments, finding the case indistinguishable from *Keller*, and concluded that the use was not transformative.¹⁹⁰ In doing so, the court further extended the *No Doubt* standard, which this Comment argues is a misapplication of the transformative test and ignores case precedent.

IV. AN ALTERNATIVE: EXTENDING THE ROGERS TEST TO RIGHT OF PUBLICITY CASES

In cases where Lanham Act claims are balanced with First Amendment concerns, a number of circuits have applied a test formulated by the Second Circuit in *Rogers v. Grimaldi*.¹⁹¹ In *Grimaldi*, Ginger Rogers, a popular actress who starred in a number of films with Fred Astaire, brought both a Lanham Act false endorsement claim and a right of publicity claim against the producers of a film called *Ginger and Fred*.¹⁹² The film’s plot concerned two Italian cabaret performers who imitated Rogers and Astaire and came to be known throughout Italy as Ginger and Fred.¹⁹³ The claim surrounded the use of the names “Ginger” and “Fred” in the title of the film.¹⁹⁴

The Second Circuit first addressed the Lanham Act claim and devised a three-part test for balancing the competing Lanham Act and First Amendment interests.¹⁹⁵ The Second Circuit held that courts should consider: (1) whether the name or trademark is part of the title of an expressive work, (2) whether the title has any artistic relevance to the underlying work, and (3) whether the title explicitly misleads as to the source or content of the work.¹⁹⁶ Though this case specifically stemmed from the use of celebrity names in the title of a work, courts have extended this test to apply to claims arising from use of a celebrity name or persona within the body of an expressive work as well.¹⁹⁷ Applying this test, the Second Circuit affirmed the lower court’s granting of summary judgment in favor of the defendant on the Lanham Act claims.¹⁹⁸

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1181. A full discussion of the incidental use defense is beyond the scope of this Comment. It is mentioned here to acknowledge that defendants may use this defense as a means for defending against some right of publicity claims.

¹⁹⁰ *Id.*

¹⁹¹ *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

¹⁹² *Id.* at 996.

¹⁹³ *Id.* at 997-98.

¹⁹⁴ *Id.* at 996.

¹⁹⁵ *Id.* at 1005.

¹⁹⁶ *Id.* at 999.

¹⁹⁷ See *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008).

¹⁹⁸ *Rogers*, 875 F.2d at 1005.

The court then considered the plaintiff's right of publicity claims.¹⁹⁹ Interpreting a discussion of the right of publicity in a case decided by the Oregon Supreme Court,²⁰⁰ the court undertook the "uncertain task of predicting what the New York courts would predict the Oregon courts would rule as to the contours of a right of publicity under Oregon law."²⁰¹ Operating under this pretense, the court first explained that the right of publicity, because it has no likelihood of confusion requirement, is "potentially more expansive than the Lanham Act."²⁰² The court then stated that because the right was more expansive, courts have been more willing to limit the right of publicity to accommodate First Amendment concerns.²⁰³ After supporting this position with three examples,²⁰⁴ the court stated that in the context of a right of publicity claim, the use of a celebrity's name in a movie title would not infringe upon his or her right of publicity unless (1) the title was "wholly unrelated" to the movie, or (2) the title was "simply a disguised commercial advertisement for the sale of goods or services."²⁰⁵ Thus, although it did so in the context of interpreting another state's law, the Second Circuit applied an adapted version of the Rogers Test to the right of publicity.

This extension of the Rogers Test to the right of publicity has been criticized on various grounds, especially in its applicability to video games. For example, Professor McCarthy criticizes the extension of the Rogers Test because it is a "falsity" based test, and falsity is not a requirement of the right of publicity.²⁰⁶ Similarly, some argue that the test does not conform to the original principles of the right of publicity because, under the Rogers Test, works that are "complete imitations" with "little or no creative value" would still be protected so long as there is no explicit deception on the part of the producer as to the source of the work.²⁰⁷

In *Keller*, the Ninth Circuit followed a similar line of reasoning when rejecting application of the Rogers Test to the right of publicity.²⁰⁸ The court noted that the history of the Rogers Test makes clear that the test was devised to protect consumers from the risk of confusion and that this is the "hallmark element" of a Lanham Act claim.²⁰⁹ The court contrasted this with the right of publicity, which in its view protects celebrities, rather than protecting consumers, from confusion.²¹⁰ In making

¹⁹⁹ *Id.* at 1002.

²⁰⁰ The plaintiff Rogers was an Oregon domiciliary and Oregon did not have a right of publicity statute at the time the case was decided. *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 1004.

²⁰³ *Id.*

²⁰⁴ See *Hicks v. Casablanca Records*, 464 F.Supp. 426 (S.D.N.Y.1978); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828 (App. Div. 1980); *Guglielmi*, 25 Cal. 3d at 860.

²⁰⁵ *Id.* at 1004.

²⁰⁶ See 2 McCarthy, *supra* note 9, § 8:71.

²⁰⁷ See Joseph Gutmann, *It's in the Game: Redefining the Transformative Test for the Video Game Arena*, 31 CARDOZO ARTS & ENT. L.J. 215, 220 (2012).

²⁰⁸ *Keller*, 724 F.3d at 1280.

²⁰⁹ *Id.*

²¹⁰ *Id.*

this argument, the court cited the California Supreme Court's *Comedy III* decision, which describes the right of publicity as protecting the "considerable money, time and energy [that] are needed to develop one's prominence in a particular field."²¹¹

The Ninth Circuit distinguished *Keller* from *Brown v. Electronic Arts*,²¹² which had a factually similar claim.²¹³ In *Brown*, Jim Brown, a Hall of Fame running back for the Cleveland Browns, brought a Lanham Act false endorsement claim as well as a state law right of publicity claim²¹⁴ because EA's *Madden NFL* video game included an avatar that resembled him.²¹⁵ In *Keller*, the Ninth Circuit reasoned that, unlike the Lanham Act false endorsement claim in *Brown*, Keller's right of publicity claim was not founded on the allegation that consumers were being deceived into thinking that he endorsed the game.²¹⁶ Instead, the court stated that Keller's claim was that EA had appropriated "his talent and years of hard work on the football field" without providing compensation.²¹⁷ Thus, according to the court, a test for consumer confusion could not be applied.²¹⁸

Though many of the same interests may be at stake when analyzing a right of publicity claim and a false endorsement claim brought by a celebrity, the Ninth Circuit was probably correct to determine that the Rogers Test is ill-suited to be the sole method of balancing publicity interests with First Amendment concerns. The Rogers Test was specifically created to balance the rights conferred under the Lanham Act with the First Amendment. Differences between the Lanham Act and the right of publicity make an extension of the Rogers Test to the right of publicity problematic.

For example, under the Rogers Test, courts give a great deal of deference to a creator's inclusion of a celebrity depiction within an artistic work, as courts require only that the depiction have "some artistic relevance" to the work.²¹⁹ This deference may be appropriate for a Lanham Act claim as courts are primarily concerned with protecting consumers from confusion. The Rogers Test's third factor, which seeks

²¹¹ *Comedy III*, 25 Cal. 4th at 398.

²¹² See *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243 (9th Cir. 2013) (holding that Electronic Arts' inclusion of an avatar in their *Madden NFL* video game which resembled famous historical football player Jim Brown did not constitute a false endorsement because his inclusion was artistically relevant to accurately depicting the historical team and because EA did nothing to explicitly mislead consumers as to Brown's endorsement of the video game).

²¹³ The facts of *Brown* are arguably more favorable to a plaintiff than those of *Keller* because in *Brown*, Jim Brown was a retired player who was included in the game as part of a historical team that did not contribute to the game's narrative elements in any way.

²¹⁴ The Ninth Circuit in *Brown* did not consider his state law right of publicity claim. However, in *Davis*, discussed in Part III.C.2, retired professional football players sued EA under the right of publicity for the use of their images within the *Madden NFL* video game, in a way that was identical to the use in *Brown*. The plaintiffs prevailed after the court applied *Keller* to find that the use was not transformative under the transformative test because the athletes were depicted doing exactly what they became famous for.

²¹⁵ *Brown*, 724 F.3d at 1235.

²¹⁶ *Keller*, 724 F.3d at 1281.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1280-81.

²¹⁹ See *Rogers*, 875 F.2d at 999.

to determine whether consumers were misled,²²⁰ allows courts to achieve this goal without requiring courts to embark on the more difficult task of determining what relevance the inclusion of the depiction bears to the overall work. Contrarily, the right of publicity is more concerned with protecting the celebrity and prohibits some uses of a person's likeness even when they are not likely to cause consumer confusion. Thus, the Rogers Test's second factor does little to control for infringing uses and instead, these uses must be justified purely on First Amendment grounds. Thus, the reason the celebrity was included within the work becomes more relevant and courts cannot show the same degree of deference to the creator in demonstrating that the use of the depiction is artistically relevant to the expression of the work. For these reasons, it is evident that the Rogers Test must be adapted to account for the differences between the right of publicity and the Lanham Act if it is to be appropriately used in resolving right of publicity claims.

The fact that the Rogers Test translates poorly to the right of publicity context should not be taken to mean, however, that less weight should be placed on First Amendment concerns in the right of publicity context than in the Lanham Act context. To the extent a person's image is used expressively within a work to convey a message or express an idea, the First Amendment interests at stake are the same whether the claim is brought under the Lanham Act or the right of publicity. In both contexts, the First Amendment mandates that this expression be protected. In order to safeguard these expressive uses, an appropriate amount of weight must be placed on First Amendment concerns in each context, such that a celebrity cannot use litigation to censor a creator's expressive use of the celebrity's image within a work.

V. A HYBRID TEST TO BALANCE THE RIGHT OF PUBLICITY WITH THE FIRST AMENDMENT

Although the circuit courts have applied different tests to balance the right of publicity against the First Amendment, a few common themes have emerged. First, the right of publicity has been interpreted to be more expansive than, and different from, comparable rights under the Lanham Act.²²¹ Any test created to balance the right of publicity against the First Amendment should account for this reality and protect celebrities from the exploitation of their image purely for commercial gain.

Next, courts have placed great weight on the First Amendment in consideration of both Lanham Act claims and right of publicity claims within the context of artistic works. Courts are generally reluctant to recognize right of publicity claims in any context that is not purely commercial.²²² A proper test should ensure that the proper-

²²⁰ *Id.*

²²¹ See discussion *supra* Part IV.

²²² “[F]or all practical purposes, the only kind of speech impacted by the right of publicity is commercial speech—advertising—not news, not stories, not entertainment and not entertainment satire and parody—only advertising and other purely commercial uses.” Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 198 (2001)

ty right in one's image granted by the right of publicity is not used by celebrities to censor artistic expression. The test should achieve this by separating cases in which celebrity depictions enhance the overall expression of the work from those in which celebrity depictions are arbitrarily included to increase commercial value.

Further, the two primary tests applied in right of publicity cases to account for the First Amendment have their respective shortcomings. The transformative test provides us with a series of vague considerations with considerable overlap, which have produced opposite rulings on virtually identical facts,²²³ and ultimately resulted in the improper *No Doubt* standard, discussed above. On the other hand, simplicity is a defining feature of the Rogers Test. Yet, the simplicity of the test is one of the reasons that it translates poorly from the Lanham Act context to the right of publicity context. Because of the great deference the Rogers Test shows to defendants in demonstrating minimal artistic relevance, this test fails to account for the greater rights of celebrities in protecting against the commercial exploitation of their image under the right of publicity. Also, the test's focus on consumer confusion regarding source or endorsement departs from the right of publicity's goal of protecting the interests of the celebrity. Thus, although both tests provide useful insight as to what courts should consider in balancing these rights, a more refined test is necessary not only to protect a celebrity's interest in benefiting from his or her image economically, but also to ensure that the right does not overreach such that celebrities are able to effectively censor expression.

This Comment is not the first instance of a scholar recognizing the unique considerations presented in the context of interactive media and trying to provide a better framework for balancing right of publicity and First Amendment interests within that context. A number of academics have sought to analyze video games and other interactive media within the constructs of the various tests already in existence.²²⁴ Others, recognizing the inadequacies of the current tests, have sought to adapt the transformative test for the video game context.²²⁵

²²³ Compare *Hart*, 808 F. Supp. 2d at 757, with *Keller*, 724 F.3d at 1284.

²²⁴ See generally, Ford & Liebler, *supra* note 109 (arguing that video games should be treated analogously to other expressive media such as film when awarding First Amendment protection against right of publicity claims); Jordan M. Blanke, *No Doubt About It—You've Got to Have Hart: Simulation Video Games May Redefine the Balance Between and Among the Right of Publicity, the First Amendment, and Copyright Law*, 19 B.U. J. SCI. & TECH. L. 26 (2013) (arguing that a test used to analyze video games should place a great weight on First Amendment protection).

²²⁵ For example, Joseph Gutmann suggests that when applied to video games, the transformative test should be adapted based on the type of video game being analyzed. See generally, Gutmann, *supra* note 207. This proposed test places the majority of the emphasis on the environment in which the celebrity is depicted in the video game. *Id.* at 228. Gutmann suggests that when an "environment is different from the one in which the celebrity built his or her reputation, it will transform the character even if it matches the celebrity exactly." *Id.* This is very similar to the *No Doubt* standard, which I argue is a misapplication of the transformative test based on case precedent. See discussion *supra* pp. 25-27. Gutmann proposes that if the opposite is true and a game recreates the real-life events of a celebrity, the game should not be protected. Gutmann, *supra* note 207, at 231-32. Thus, this test fails to account for the great deal of First Amendment protection that has been awarded in the context of film to producers who recreate factual events or those who combine fact and fiction in the docudramas discussed above. Further, the proposed

A proper test for balancing the right of publicity against the First Amendment should account for the complexities of video games and other interactive media but still be applicable to less complex media. Further, to the extent possible, this test should incorporate the courts' guidance regarding balancing the right of publicity and the First Amendment, as described in the cases above. Therefore, this Comment proposes a hybrid test that seeks to combine the transformative test and the Rogers Test by adapting the language of both tests to account for the competing interests at stake. Because this hybrid test seeks to integrate language from both the Rogers Test and the transformative test, some of the reasoning courts have applied in their previous analyses can be applied under this test. Moreover, though this hybrid test incorporates the flexibility necessary to deal with complex media of expression, such as video games, the basic constructs of the test make it easily applicable to less complex artistic depictions.

The hybrid test contains three factors: (1) does the work contain expressive qualities that allow a creator or consumer to convey a message or express an idea; (2) is the inclusion of the celebrity depicted artistically relevant to the expressive qualities of the work such that the message or idea is advanced in a meaningful way; and (3) did consumers purchase the work primarily because of its association with the celebrity depicted or were consumers primarily attracted to the work as a whole. The first two factors seek to quantify the value of the creator and consumer's First Amendment interests at stake in the work. The First Amendment interests embodied by the first two factors are balanced against the publicity interests of the person depicted, measured by the third factor. The third factor asks courts to quantify the role that the celebrity plays within the work by identifying other sources of consumer value not derived from the celebrity depiction which may play into the consumer purchase decision. Ultimately, if the First Amendment interests outweigh the publicity interests, the use of the celebrity depiction should be protected.

A. *The Expressive Qualities Factor*

The First Amendment protects expression. Thus, works that embody a creator's expression or provide a medium for consumer expression should be protected. The expressive qualities factor seeks to identify this expression within a work. Under this factor, courts should identify the expressive qualities of a work that allow a creator or consumer to express an idea or convey a message. The message or idea does not need to be new or original and can be based in fact.²²⁶ In conjunction with the hybrid test's second factor, the goal of this factor will be to assist courts in separating uses of celebrity depictions within works for the purpose of furthering expression, from uses that are essentially disguised commercial advertisements which attempt to create a connection between a celebrity and a product in the minds of consumers.

revisions would apply only to video games and thus are of limited use for broader application.

²²⁶ Nothing about this test should be interpreted to take away any of the protections that have been awarded to factual or realistic creations in other contexts.

1. Expression by the Creator

First, courts must identify the expressive qualities instilled in a work by the work's creator. In doing so, courts should seek out the ways that the creator attempts to convey a message or idea through the work. For traditional still artistic depictions of celebrities, the message or idea can be conveyed either by the depiction's inclusion as a part of the work's greater message, such as the Tiger Woods painting, or the message or idea can be conveyed through a direct transformation of the physical depiction of the celebrity, such as the *Winter* half-human, half-worm example. In other contexts, such as film, graphic novels, comic books, and video games, the celebrity may be depicted as part of a developed narrative and used to tell a story. For works containing a developed narrative, a celebrity's inclusion as part of that narrative will warrant significant First Amendment protection provided the use conforms to the artistic relevance factor below. As in the context of film, a creator's desire to tell a story, whether factual or fictional, about a celebrity will receive a great amount of First Amendment protection. Thus, similar uses in other media will demand similar protection.

Regardless of medium, there may be instances where a creator depicts a celebrity not as part of some greater expressive piece, but instead the creator transforms the physical depiction of the celebrity itself. If the transformation of the celebrity is used to convey a greater message or idea, this should weigh strongly in favor of First Amendment protection.²²⁷ Conversely, where the physical transformation of the celebrity is minimal such that the celebrity is depicted in a way that is still realistic, this will weigh against First Amendment protection absent some greater expressive context.²²⁸

2. Expression by the Consumer

Courts should also identify ways in which the work acts as a means of expression for the consumer. As in the context of other communicative media, consumers have significant First Amendment interests in the purchase and use of products that allow them to express themselves.²²⁹ Under this factor, courts should primarily consider expressive qualities of the work that allow for consumer expression and are enhanced by the inclusion of a celebrity depiction.²³⁰

²²⁷ Recall, the court used this reasoning in *Winter* to determine that the depiction of the two blues musicians as half-human, half-worm characters would be a sufficient transformation alone to warrant First Amendment protection. See discussion of *Winter supra* p. 14.

²²⁸ For example, if a picture of Tiger Woods was taken and printed on a mug only changing the color of Wood's clothing and depicting him on a golf course other than the one where the picture was taken, this likely would not be sufficient transformation to warrant protection.

²²⁹ See Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 *FORDHAM L. REV.* 453, 494-95 (1981).

²³⁰ Other opportunities for expression not related to the celebrity depicted are certainly important; however, they are more properly analyzed under the consumer value factor. If the expressive qualities are not related to the celebrity depicted, they serve as a source of consumer value, but they cannot be used to justify the celebrity's inclusion on First Amendment grounds.

Although there are instances where consumers can interact with still artistic depictions of celebrities,²³¹ these consumer-based expressive qualities will be especially prevalent in the video game context, where interaction between the gamer and the game is a fundamental characteristic of the medium.

3. Unique Considerations for Video Games and Other Interactive Media

Many modern video games include a developed narrative with which a gamer interacts. The gamer constantly molds the video game's narrative as he or she advances through the game. The narrative aspects of these games allow for expression both by the creator and by the consumer. To the extent that video game creators, like film producers, use a celebrity depiction to tell a story, courts should assign the same First Amendment weight they do in film in protecting this type of use.

Further, depictions that would receive protection in other media due to their inherent expression will not lose this protection merely because they are part of a video game, even though the game may lack a narrative. That is, depictions that are sufficiently expressive in isolation such that they warrant protection even on mundane media, such as a mug or calendar, will receive the same protection if featured in a video game.²³² This is because even the most simplistic video games are at least as expressive as a mug or calendar, and courts analyzing this factor should not weigh lack of complexity in the game against what would be an otherwise expressive work if analyzed in isolation.

Courts should also recognize the uniqueness of video games in giving consumers the ability to comment on public figures through their in-game interactions with that figure's likeness. Courts should protect this interest in consumer expression just as courts do with other products that give consumers the ability to express themselves. Some examples of the ways in which this feature of video games allows users to comment on public figures are described below.

When gamers have the ability to modify an existing celebrity likeness such that they are able to redesign that likeness as they see fit, the possibilities for the gamer's creative expression are limitless and the gamer is given the opportunity to express his or her views about the celebrity through his or her changes.²³³ First Amendment interests are also at play when a video game allows a gamer to create his or her own avatar and then use this avatar to interact with the celebrity likenesses within the game. Although some courts have been reluctant to assign First Amendment value

²³¹ Take, for example, a drawing book that contains the caricatured faces of celebrities and allows consumers to design the rest of their bodies; or a graphic novel where there are multiple endings that a consumer can choose based on how he or she feels about the celebrity protagonist.

²³² For example, if the painting of Tiger Woods winning the Masters was sufficiently expressive that it would receive protection if placed on a mug or a calendar, it would not lose this protection if it were included in a video game.

²³³ For example, suppose a gamer did not like famous basketball star Shaquille O'Neal, but did like his team, the Los Angeles Lakers. If this gamer could change his height so that he was smaller than all the other players, and trade him to a different team, this would constitute expression on the part of the consumer which would weigh in favor of protection under the First Amendment.

to the creation of one's own avatar in a video game,²³⁴ there are contexts in which a gamer can use this avatar to express his or her views toward a celebrity through in-game interactions.²³⁵ Thus, to the extent that these interactions occur, the ability to create an avatar generates First Amendment interests in protecting the inclusion of the celebrity.

Though many video games provide expressive opportunities to creators and consumers and thus warrant First Amendment protection, courts must be wary of the fact that the popularity of video games makes them prime candidates for companies to use to promote their products. To the extent that a company uses a game as an advertisement for its product and uses a celebrity depiction within the game to create an association with that product, courts should award substantially less First Amendment protection.

For instance, picture a game produced by Hershey's Chocolate to advertise a new basketball-shaped candy. Imagine the game allows a user to control a virtual catapult that shoots a chocolate basketball into the mouth of famous basketball player Michael Jordan. The only modification made to Jordan's face is that he is shown with a mouth that opens, and when a candy goes into his mouth, a voice says "Yumm." In this case, there is a strong argument that Jordan's inclusion in this game is simply to cause a consumer to associate Jordan with the new product. Thus, the game does not convey any expressive message or idea, and there would be little support under the First Amendment in protecting this use of Jordan's image.²³⁶ This disguised celebrity endorsement is exactly the type of use over which the right of publicity grants celebrities control. In these situations, the fact that a company is using a video game as the medium to create an association between its product and a celebrity should not warrant more First Amendment protection than an analogous use in any other more mundane medium.

B. *The Artistic Relevance Factor*

One common feature of the transformative test and the Rogers Test is that both analyze whether the celebrity depiction is artistically relevant to the work. The transformative test asks if the depiction is one of the "raw materials" used in creating the overall work, while the Rogers Tests mandates the use have some minimal artistic

²³⁴ See *Hart*, 717 F.3d at 168 (3d Cir. 2013) (quoting *No Doubt*, 192 Cal. App. 4th at 1034 ("Indeed, the ability to modify the avatar counts for little where the appeal of the game lies in users' ability to play 'as, or alongside' their preferred players or team")).

²³⁵ For example, in the context of the *NCAA Football* video game, a gamer who disliked the quarterback of his or her favorite team could create a player in his or her own image to take that quarterback's place and lead his favorite team and players to victory.

²³⁶ It should be noted, however, that even where the inclusion of the celebrity image seems to be nothing more than a disguised advertisement, courts should be receptive to defensible arguments that show otherwise. There may be instances where what appears at first glance to be purely an attempt to associate a celebrity with a product, may in actuality be part of a more expressive message such as a parody. Thus, it is important for courts to analyze each use of a celebrity image within in the full expressive context of the work in an effort to identify the intentions of the work's creator.

relevance to the work. Thus, the second factor of the proposed hybrid test asks courts to determine whether the use of the celebrity depiction is artistically relevant to the expressive qualities identified in the first factor above. Put differently, does the inclusion of the celebrity depiction contribute to the expressive qualities of the work in a meaningful way?

To make this determination, courts should first look to see the “fit” of the celebrity depiction within the work. For example in *Brown*, an accurate portrayal of the 1965 Cleveland Browns within the video game would not have been the same without the inclusion of their star running back Jim Brown.²³⁷ The same would apply to the inclusion of Samuel Keller as the quarterback for Arizona State University. Thus, the athletes’ depictions within the games would “fit” because they contribute to the game’s artistic goal of creating a realistic playing environment. On the other hand, the arbitrary inclusion of an unnecessary celebrity within a work would weigh against First Amendment protection.²³⁸

In the context of traditional still artistic depictions, courts should protect uses where the inclusion of a celebrity depiction contributes to the overall message or idea conveyed by the work in a meaningful way. As long as the realistic depiction and persona are placed within a broader expressive or artistic context, neither the celebrity’s physical appearance nor his or her persona needs to be altered under this factor. For example, when Tiger Woods was depicted from various angles with the faces of some of history’s best golfers offset in the background, Woods’ depiction served as part of an overall message about the greatness of his accomplishments. Thus, when a creator uses a celebrity depiction to further a message or idea, beyond simply seeking to benefit commercially from the celebrity’s fame, the work should receive protection.

Next, as mentioned above, creators commonly use celebrity depictions in a narrative to tell a story. In these scenarios, courts should determine whether the celebrity “fits” within the narrative. Where the celebrity inclusion contributes to the narrative in a meaningful way, courts should weigh heavily First Amendment interests in protecting this use.²³⁹ Conversely, if a celebrity depiction does not meaningfully enhance the narrative, then there is a lesser First Amendment interest in protecting the celebrity’s inclusion.²⁴⁰ This determination will require significant subjective

²³⁷ See *Brown*, 724 F.3d at 1243.

²³⁸ Take, for example, a ping pong video game consisted of hitting a ball shaped picture of Michael Jordan’s face instead of hitting an actual ball. Putting aside any legitimate justifications for protecting this as parody, this arbitrary inclusion would be evidence that the producer was trying to benefit off Jordan’s fame because it does nothing to develop the work in a meaningful way.

²³⁹ We have already seen the great deal of protection that courts are willing to afford to producers who wish to tell both factual and fictional stories about the lives of celebrities in the context of film. It follows that this sort of protection should be extended to any medium that seeks to tell a story by making use of a celebrity’s image in a way that further develops that story. See discussion *supra* Part III.B.

²⁴⁰ This line of reasoning is used under the Rogers Test when balancing Lanham Act claims against First Amendment concerns. However, the proposed hybrid test requires more than minimal artistic relevance. See discussion *supra* Part IV.

judgment by courts. In exhibiting this judgment, courts should defer to the creative decision making of the work's creator. However, the requirement that the contribution be "meaningful" should be interpreted to place a greater burden on defendants than the minimal artistic relevance standard of the Rogers Test. If a defendant cannot offer a reasonable explanation for how a celebrity depiction fits within a work, this factor will weigh against First Amendment protection.

1. Unique Considerations for Video Games and Other Interactive Media

In the context of video games, the artistic relevance factor asks whether the inclusion of the celebrity image further develops the video game in a meaningful way. For most major video games, this factor will weigh in favor of First Amendment protection if a celebrity depiction "fits" within a video game's overall narrative such that it is relevant and progresses the narrative, or if a celebrity depiction itself is transformed such that the depiction can be understood to convey a message or express a view about the celebrity.

For some games, courts will be able to easily identify the narrative because the game will involve progressing through a well-constructed story. In other games, the narrative may be more loosely structured or less defined. In these cases, as one method of determining whether or not the video game contains a narrative, courts can consider the game as a hypothetical film that would result if a gamer played through the game: Would the resulting film receive First Amendment protection under the current case precedent? If so, this should weigh strongly in favor of protecting the video game.

As an example of this analysis, consider again the facts of *No Doubt*, which provide for a close case in determining if a narrative exists. Recall, creator Activision produced a video game called *Band Hero*, in which gamers could either create their own avatars or play as avatars that realistically portrayed famous musicians, including defendant No Doubt.²⁴¹ While playing the game, the gamer did not control the movements of the avatars, and the avatars performed at various realistic and made up venues. The user could either play existing songs or create his or her own songs.

If a film were created using the narrative of *Band Hero*, it would consist of a series of repetitive performances in different venues. The film would not contain a defined beginning, climax, and conclusion; thus, its narrative elements would be limited. Consequently, *Band Hero* does not contain the type of well-developed narrative that would weigh in favor of First Amendment protection under the hybrid test. As a result, this factor would weigh against First Amendment protection absent other expressive qualities embodied by the game.²⁴²

²⁴¹ See *No Doubt*, 192 Cal. App. 4th at 1023.

²⁴² Arguably, even a film which depicts a band performing at a series of venues with no defining narrative features may be protected under the current standard for analyzing film. A film does not necessarily need to have a defined beginning, climax, and conclusion to be protected under the current case precedent. Films such as the documentaries mentioned above may be expressive without using a narrative. However, the creation of a well-developed narrative requires significant expression in and of itself that should go a

In *Band Hero*, these expressive qualities may come in the form of opportunities for consumer expression. One potential source of consumer expression is the user's ability to make the band members perform songs they would never perform in real life and perform at fanciful venues. To the extent that this feature allows consumers to express ideas about the band members, this should weigh in favor of First Amendment protection.

C. *The Consumer Value Factor*

The First Amendment interests identified by the two factors above must be balanced against a celebrity's publicity interest in commercial uses of his or her image. The consumer value factor gives courts a method of quantifying the value of this publicity interest. This factor asks courts to resolve the issue of whether consumers purchased a particular product, as opposed to a substitute in the same product class, primarily due to its association with a celebrity, or if the consumers' primary motivation was their attraction to the product as a whole. Resolving this issue will require courts to quantify the role that the celebrity depiction plays within a work. The role the celebrity depiction plays should be viewed in light of the added features of a work, beyond its primary function,²⁴³ that make the work unique and may appeal to consumers.

First, courts should attempt to quantify the role that the celebrity depiction plays both within the work and within the consumer's purchase decision. The more dominant a role the celebrity image plays, the greater the publicity interest at stake. One useful piece of evidence in this analysis will be survey evidence asking consumers why they bought a particular product as opposed to its substitute.

To illustrate this analysis, imagine two t-shirts containing images of famous Miami Dolphins quarterback Dan Marino. On the first shirt, a realistic Marino is portrayed front and center, throwing a football before a blurred crowd. The second t-shirt depicts the whole Miami Dolphins team, Marino included, standing on the sidelines cheering after winning a game. In the first scenario, a consumer survey that asks why consumers bought the shirt would likely return responses such as, "I bought it because I like Dan Marino." In the second scenario, it is less likely that this response will be warranted and it is much more likely that consumers bought the shirt merely because they are Miami Dolphins fans or because they just like the image depicted. Thus, in the first scenario, Dan Marino has a stronger publicity interest in protecting against the monetization of his image. Similarly, when multiple celebrities are depicted within a work such that a lesser focus is placed on each individual celebrity, each celebrity's publicity interest is reduced because of this lesser focus.

long way in justifying the inclusion of a celebrity depiction within that narrative, as long as the inclusion progresses the narrative in a meaningful way.

²⁴³ Only features which distinguish a given product from other products in the same class should be considered. For example, courts should not protect a depiction of a celebrity on a fork simply by virtue of the fact that consumers are attracted to the fork's usability for eating.

The survey-based inquiry described above will be most useful for the analysis of non-interactive artistic depictions, where consumers can more readily isolate exactly what about the work attracted them to it. With more complex interactive media of expression, it may be more difficult to ascertain the true sources of consumer value through survey evidence, and a more abstract analysis of the other potential sources of consumer value will be required. This analysis will differ by product class and will involve a fact intensive analysis of the overall work to identify any unique features of that particular work that create consumer value and are not derived from a celebrity depiction.²⁴⁴

1. Unique Considerations for Video Games and Other Interactive Media

For video games and other interactive media, determining the celebrity depiction's role within the work may be a bit more complex than a traditional still artistic depiction, but will require courts to consider many of the same features that they would otherwise consider. Courts should pay particular attention to: (a) whether the game contains developed environments within which the celebrity is depicted; (b) whether the likeness is the central focus of the game or whether it is one of many characters, each playing a minor role in the game; and (c) whether the gamer must necessarily encounter the likeness while playing the game.

Further, another potential source of consumer value derived from video games and other interactive media is the ability to interact with the medium. Added features that allow consumers to interact with the video game and make creative decisions within the game indicate a source of value that is not derived from the celebrity image. To the extent that consumers value these opportunities, they are necessarily assigning less value to the fame of the celebrity depicted within the game. In the context of a video game containing a celebrity depiction, some of these features would include: (a) the ability for the gamer to create his or her own avatar; (b) the ability for a gamer to shape the overall narrative of the game through his or her choices;²⁴⁵ and (c) the ability for gamers to play and interact with other gamers.²⁴⁶ In considering these added features to determine the publicity interests at stake, the key question will always be whether consumers are differentiating the game from comparable games because of the value they assign to the sum of its added features, or whether consumers purchase the game because of its association with a celebrity.

The following analysis describes how a court would apply this factor to the facts of *No Doubt*. First, the court would seek to measure the quantitative role that the celebrity likenesses play in this game. The game features various creative venues

²⁴⁴ See Part IV.C.1 for an application of this analysis to *NCAA Football*. That application exemplifies some of the features courts may look for when considering the consumer value of the added features of an interactive medium such as a video game.

²⁴⁵ For example, some games may change based upon a gamer's choice between good and evil, while others may change based on the lifestyle decisions that the gamer chooses for his or her avatar.

²⁴⁶ Many video games appeal to consumers by creating environments where gamers can interact with other gamers while playing the game. In some games, the ability to play with other gamers represents one of the main sources of consumer appeal.

in which the avatars perform and incorporates music being performed by the avatars.²⁴⁷ Though these creative additions weigh in favor of protection, they carry a lesser weight because they are predominantly background details, akin to the blurred crowd presented in the Dan Marino example. Instead, the central focus of the game is on the celebrity depiction, over which the gamer has very little control. This lack of interaction with the celebrity depictions supports a finding that any value beyond the basic playability of the game is derived simply from looking at the depiction of the band members presented in various venues.²⁴⁸ Consequently, the band members have a strong publicity interest in restricting this use.

Further, *Band Hero* does not offer the ability to modify the likenesses, though it does offer the gamer the ability to create his or her own avatar. Also, the game provides little opportunity for gamers to interact with each other. Thus, while this game presents a close case in that there is a variety of creative content beyond the celebrity depiction, the facts would support a finding that consumers primarily value the game for its use of the celebrity likenesses. Therefore, the band members have a strong publicity interest in restricting the use of their likenesses in the game, which outweighs the related First Amendment considerations.

VI. APPLYING THE HYBRID TEST TO *NCAA FOOTBALL*

A. *Revisiting the Facts*

EA's *NCAA Football* is a video game where gamers control virtual college football player avatars through a variety of game modes.²⁴⁹ The avatars are realistic depictions of contemporary NCAA student-athletes and include their jersey numbers, positions, and certain apparel choices, but exclude their names and modify their hometowns.²⁵⁰

The game provides the user with the option to select from a variety of game modes that allow the user to assume various roles while navigating through the game.²⁵¹ These game modes include a mode where the user can simply select two teams and play a virtual football game against another user or the computer, a mode where the gamer creates his or her own athlete and makes decisions to guide that athlete through the athlete's career beginning in high school ("Campus Legend"), and a game mode where the player can act as the coach of the team, recruiting players, managing players, and making in-game decisions ("Dynasty").²⁵²

²⁴⁷ *No Doubt*, 192 Cal. App. 4th at 1023.

²⁴⁸ There is also no greater narrative that would allow us to analogize this scenario to the way consumers derive value from simply watching a documentary or docudrama.

²⁴⁹ *Keller*, 724 F. 3d at 1271.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1271-72.

²⁵² *Id.* at 1272.

B. *The First Amendment Interests at Stake in NCAA Football*

1. Applying the Expressive Qualities Factor

EA's *NCAA Football* incorporates numerous expressive qualities that allow for expression by both the creators and the consumer. First, at least two of the game's modes contain a fairly developed narrative that EA uses to tell a story.²⁵³ The game also includes features that allow the consumer to express himself or herself through his or her in-game interactions with the depictions of the real-life players. Further, *NCAA Football* exhibits none of the qualities of a commercial advertisement that attempts to disguise an unlicensed celebrity endorsement of a product within the constructs of the game.

Next, *NCAA Football* provides numerous opportunities for expression by the consumer. *NCAA Football* gives gamers the ability to modify both the athletes' likenesses and the roles that the likenesses play within the game. Specifically, gamers can modify a wide variety of the athletes' traits, changing everything from their physical appearance to their playing ability. This provides gamers with the tools to comment on the athlete likenesses in ways that would not otherwise be possible. Artistic expression by the gamer is further encouraged in that gamers can create their own player avatar from scratch to resemble themselves. This unique feature gives gamers the otherwise improbable experience of being able to cast themselves into a football game and play alongside their favorite players and also to express their views toward those players through their in-game interactions with the depictions.

2. Applying the Artistic Relevance Factor

After the expressive qualities of *NCAA Football* have been identified, the proposed hybrid tests asks whether the inclusion of the athlete depictions contributes to these expressive qualities in a meaningful way. In *NCAA Football*, the athlete depictions all play a role in creating a realistic narrative based on college football. To help envision the narrative of the game and identify the roles that the celebrity depictions play within that narrative, the method, mentioned above, of imagining the game as a hypothetical film can be used.

First, consider the "Campus Legend" game mode where a user creates his or her own player and progresses from a high school to a college career. The following narrative could be imagined: the created avatar begins as a high school athlete who must lead his high school team through a season in order to attract the attention of scouts from around the nation. The player then receives offers from various universities, and must weigh school prestige and other factors in selecting the school he will attend. While at school, the player must make decisions regarding his academics, social life, and athletics, all of which will affect his performance on the field. After hard work in practice, the player finally earns a spot as the starting quarterback for his team where he is surrounded by the players he has been looking up to for so

²⁵³ These two game modes are analyzed in detail in the next section.

long. The quarterback then leads his team from week to week throughout the course of a season until finally he reaches the climax of the story, the championship game. Like any great story, the quarterback and his team achieve triumphant victory. The narrative concludes with the player receiving the highest award possible in college football, the Heisman Trophy, as a confirmation of his achievements.

A similar narrative could be imagined for the “Dynasty” game mode where the player assumes the role of the coach. Now, instead of playing alongside the likenesses, the gamer would manage the team, and lead them throughout the course of a season, making various decisions along the way, which will determine the ultimate outcome.

In both of these game modes, each likeness plays a minor role, yet cumulatively the likenesses are important to the portrayal of a realistic environment. This environment allows gamers to play through a story that seems to be based in reality, but becomes unique to each gamer based on the creative decisions the gamer makes within the game. It is up to the gamer to influence how the story will ultimately unfold; however, EA provides the framework of a narrative, based in reality, to entertain and engage the gamer. Therefore, the inclusion of the athlete depictions are artistically relevant to the expressive qualities of the game because their inclusion develops the narrative of the game and contributes to the consumer’s ability to express himself or herself within the game. Consequently, a court should conclude that there are strong First Amendment interests at stake in protecting this use.

C. *The Publicity Interests at Stake in NCAA Football*

1. Applying the Consumer Value Factor

At the most basic level, *NCAA Football* is primarily a football video game that involves the ability to play virtual football. Thus, courts should quantify the game’s added features that attract consumers and allow them to distinguish it from other football or sports games. The ultimate goal will be to determine whether the main source of value in the consumer purchase decision is the sum of these added features or an association with the college athletes.

The creators at EA went to great lengths to create realistic stadiums that featured cheering crowds, sideline players, referees, cameramen, mascots, and many of the teams’ fight songs. These environments, which enhance the realism of the game, are very likely a source of consumer attraction that is not derived from the athlete likenesses. Moreover, EA added features such as in-game commentators whose dialog, though limited to various previously recorded sound bites, is entirely determined by the actions of the gamer within the game. In creating this commentary, EA anticipated various in-game situations and recorded commentary to enhance the experience of the gamer while playing the game.

Further, the role that the athletes play within the game is small. Unlike in *No Doubt*, where the band members constituted the central focus of the game and there were a limited number of celebrities depicted, *NCAA Football* portrays thousands of

athletes. It is very likely that a gamer will play through the game without encountering some, if not most of those likenesses. Thus, very little focus is placed on the individual athlete, as the gamer is much more interested in the overall performance of his team than that of any particular player. This is similar to the example provided earlier of the t-shirt depicting Dan Marino as merely one member of the Miami Dolphins team cheering on the sidelines. In both scenarios, the value is tied to the greater expressive image, and each player assumes a minor role within that image. Thus, the small role each likeness plays in the overall game weighs in favor of finding that the athletes have a relatively small publicity interest in controlling this use.

Additionally, *NCAA Football* provides gamers with opportunities to interact with the game and make creative decisions. First, *NCAA Football* provides gamers the ability to create their own player avatars from scratch to resemble themselves. This unique feature gives gamers the otherwise improbable experience of being able to cast themselves in a football game. Next, as gamers progress through the *NCAA Football* game and play within the various game modes, they make creative decisions that mold the overall narrative of the game and determine the ultimate conclusion.²⁵⁴ Finally, in the *NCAA Football* game, one of the game modes is specifically created to pin gamer against gamer as they compete with each other in a football game, making decisions and reacting to the decisions of the opposing gamer. To the extent that consumers value the ability to interact with and compete against other gamers while playing *NCAA Football*, this feature represents a source of consumer value not derived from the athletes depicted.²⁵⁵ All of these features represent sources of value that are not directly related to the athletes' depictions and thus, weigh against a finding that significant publicity interests are at stake.

D. *Totality of the Factors*

Balancing all of the factors in the proposed hybrid test, it seems that, contrary to the Ninth Circuit's holding, EA's use of the athlete depictions in its *NCAA Football* game warrants First Amendment protection. The game exhibits numerous expressive qualities including a developed narrative and significant opportunities for consumer expression that are enhanced by the inclusion of the celebrity depictions. Although thousands of athletes are depicted, each one plays a small but artistically

²⁵⁴ As mentioned above, in *NCAA Football*, gamers playing as their own created players make decisions regarding, academics, social life, and athletics. Gamers playing as the team's coach make decisions regarding recruiting and team management.

²⁵⁵ Moreover, as technology has progressed and newer versions of these games have been created, gamers can now connect online to other gamers all over the world with the video game serving as the medium which facilitates this connection. Recently, gamers have used *NCAA Football's* online capabilities to communicate with other gamers after EA announced it would be discontinuing the series. This has resulted in some creative solutions on behalf of disgruntled gamers who have taken it upon themselves to update the 2014 version of the game to account for changes in actual college football. See generally, Rory Appleton, *NCAA Football 15? How a community is keeping the series alive with updated rosters, playoffs, and more*, VENTURE BEAT (Aug. 28, 2014, 5:15 PM), <http://venturebeat.com/2014/08/28/ncaa-football-15-is-dead-but-the-franchise-lives-on/>.

relevant role to EA's ultimate goal of creating an interactive narrative in the context of a college football video game. Thus, the First Amendment interests at stake are relatively large.

The significant First Amendment interests in *NCAA Football* are balanced against the relatively small publicity interest of the individual players in restricting the use of their respective likenesses. *NCAA Football* provides a multitude of added features including its recreation of the realistic playing environments, opportunities for gamers to artistically create and alter content within the game, and the ability to compete and interact with other gamers. Further, each individual athlete depiction plays a small role within the game and many may not even be encountered by the gamer. Because of these added features, it seems evident that gamers are primarily attracted to the game as a whole rather than the game's association with the depicted athletes. For these reasons, the game should enjoy First Amendment protection against the right of publicity claims of the athletes.

VII. CONCLUSION

As courts and legislatures developed the right of publicity over the past six decades, changes in technology and market attitudes have provided for interesting considerations concerning how the right should be interpreted. Courts have constantly maintained that the right of publicity must be balanced with First Amendment concerns, yet courts have varied in the scope of the protection they afford to different kinds of works.

With each new medium of expression, novel issues are raised. These issues have challenged the courts to develop a variety of tests to determine whether works that make use of celebrity images should be granted First Amendment protection. These tests, each with their respective merits, have also had various shortcomings, especially when applied to interactive media such as video games. Therefore, this Comment proposes a new hybrid test, which seeks to grant flexibility to account for the expressive complexities of interactive media, while providing simplicity for application to even the most mundane media. The hybrid test seeks to address the reality that people have a property right in their image under the right of publicity, while ensuring that this right does not allow people to censor the use of their respective images in all cases.

Given various incongruences in the resolution of right of publicity claims with First Amendment concerns across the circuits, it seems fairly inevitable that either the Supreme Court or Congress will provide further guidance as to how these issues should be resolved. Thus, this Comment has provided one framework for resolving these disputes, which embodies a middle ground among the methods used, and seeks to create a more standardized method of balancing the right of publicity against the First Amendment.