

No. ____

IN THE
Supreme Court of the United States

ELECTRONIC ARTS INC.,
Petitioner,

v.

SAMUEL MICHAEL KELLER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Kelli L. Sager
Alonzo Wickers IV
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street
Suite 2400
Los Angeles, CA 90017
(213) 633-6800

September 23, 2013

Paul M. Smith
Counsel of Record
Kenneth L. Doroshov
Katherine A. Fallow
Matthew E. Price
Mark P. Gaber
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

QUESTION PRESENTED

Whether the First Amendment protects a speaker against a state-law right-of-publicity claim that challenges the realistic use of a person's name or likeness in an expressive work.

PARTIES TO THE PROCEEDING

The Defendant-Appellant below, who is the Petitioner before this Court, is Electronic Arts Inc.

The Plaintiffs-Appellees below, who are the Respondents before this Court, are Samuel Michael Keller; Edward C. O'Bannon, Jr.; Byron Bishop; Michael Anderson; Danny Wimprine; Ishmael Thrower; Craig Newsome; Damien Rhodes; and Samuel Jacobson.

Respondents sued two additional Defendants, the National Collegiate Athletic Association and Collegiate Licensing Company, but they were not parties in the Ninth Circuit proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that it has no parent corporation and no publicly held corporation owns ten percent or more of Petitioner's stock.

TABLE OF CONTENTS

QUESTION PRESENTEDi

PARTIES TO THE PROCEEDINGii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES.....vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE 2

 A. Factual Background 6

 B. Procedural Background 7

REASONS FOR GRANTING THE PETITION 13

I. The Lower Courts Are In Disarray
Concerning the First Amendment Limits
on Right-of-Publicity Claims..... 15

 A. The Ninth and Third Circuits’
 Transformative-Use Test Protects an
 Expressive Work Only if the Plaintiff’s
 Likeness Is “Transformed.” 15

B.	The Constitutional Test Adopted Below Is Inconsistent With Tests Applied By Other Courts.	17
1.	Four Circuits and Two State Supreme Courts Have Held that the First Amendment Protects Non-Commercial Speech Depicting Well-Known People, Even if the Depiction Is Not “Transformed.”	17
2.	Other Courts Engage in Case-Specific Balancing.	20
II.	This Case Presents an Ideal Vehicle For Addressing the Constitutional Question.	23
III.	The Ninth Circuit’s Holding Is Wrong and Conflicts with This Court’s First Amendment Jurisprudence.	24
A.	The Adopted Transformative-Use Test Does Not Adequately Respect First Amendment Rights.	24
B.	The Transformative-Use Test Will Chill Protected Speech Because It Is Overbroad and Unpredictable.	29
C.	Case-Specific Balancing Is Equally Problematic.	34

D. The <i>Rogers</i> Test Confines the Right of Publicity to Circumstances Where Its Application Does Not Violate the First Amendment.....	35
CONCLUSION	36
Appendix A <i>In re NCAA Student-Athlete Name & Likeness Licensing Litigation</i> , No. 10-15387, 724 F.3d 1268, 2013 U.S. App. LEXIS 15649 (9th Cir. July 31, 2013)	1a
Appendix B <i>Keller v. Electronic Arts, Inc.</i> , No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010)	45a
Appendix C Order Denying Rehearing, <i>In re NCAA Student-Athlete Name & Likeness Licensing Litigation</i> , No. 10-15387 (9th Cir. Aug. 21, 2013).....	71a

TABLE OF AUTHORITIES

CASES

<i>Ashcroft v. ACLU</i> , 535 U.S. 564 (2002)	25
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	30
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001).....	24, 25
<i>Bleistein v. Donaldson Lithographing Co.</i> , 188 U.S. 239 (1903)	31
<i>Brown v. Electronic Arts, Inc.</i> , No. 09-56675, 724 F.3d 1235, 2013 U.S. App. LEXIS 15647 (9th Cir. July 31, 2013).....	10, 23, 24
<i>Brown v. Entertainment Merchants Ass’n</i> , 131 S. Ct. 2729 (2011).....	4, 8, 26, 33, 34
<i>Bullard v. MRA Holding, LLC</i> , 740 S.E.2d 622 (Ga. 2013).....	19
<i>Cardtoons, L.C. v. Major League Baseball Players Ass’n</i> , 95 F.3d 959 (10th Cir. 1996)	2, 22, 34
<i>C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.</i> , 505 F.3d 818 (8th Cir. 2007)	20, 21, 28, 34
<i>Comedy III Productions, Inc. v. Gary Saderup, Inc.</i> , 21 P.3d 797 (Cal. 2001)	9, 16, 17, 31
<i>Doe v. TCI Cablevision</i> , 110 S.W.3d 363 (Mo. 2003)	22

<i>Estate of Presley v. Russen</i> , 513 F. Supp. 1339 (D.N.J. 1981)	30
<i>ETW Corp. v. Jireh Publishing, Inc.</i> , 332 F.3d 915 (6th Cir. 2003)	3, 5, 18, 19
<i>Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.</i> , 202 F.2d 866 (2d Cir. 1953).....	2
<i>Hart v. Electronic Arts Inc.</i> , 717 F.3d 141 (3d Cir. 2013)	4, 9, 16, 31, 32
<i>Hilton v. Hallmark Cards</i> , 599 F.3d 894 (9th Cir. 2010)	3, 15, 32
<i>Hoffman v. Capital Cities/ABC, Inc.</i> , 255 F.3d 1180 (9th Cir. 2001).....	3, 32
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988).....	29
<i>Illinois ex. rel. Madigan v. Telemarketing Assocs., Inc.</i> , 538 U.S. 600 (2003).....	33
<i>Kirby v. Sega of America, Inc.</i> , 144 Cal. App. 4th 47 (2006).....	3
<i>Lugosi v. Universal Pictures</i> , 603 P.2d 425 (Cal. 1979).....	26
<i>Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.</i> , 296 S.E.2d 697 (Ga. 1982).....	3
<i>Matthews v. Wozencraft</i> , 15 F.3d 432 (5th Cir. 1994)	3, 18
<i>Montana v. San Jose Mercury News, Inc.</i> , 34 Cal. App. 4th 790 (1995)	22

<i>Montgomery v. Montgomery</i> , 60 S.W.3d 524 (Ky. 2001)	19
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	28
<i>No Doubt v. Activision Publishing, Inc.</i> , 192 Cal. App. 4th 1018 (2011)	3
<i>Parks v. LaFace Records</i> , 329 F.3d 437 (6th Cir. 2003)	2, 18
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	25
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984)	25
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	30
<i>Rogers v. Grimaldi</i> , 875 F.2d 994 (2d Cir. 1989).....	9, 18
<i>Ruffin-Steinback v. dePasse</i> , 82 F. Supp. 2d 723 (E.D. Mich. 2000), <i>aff'd</i> , 267 F.3d 457 (6th Cir. 2001)	2
<i>Seale v. Gramercy Pictures</i> , 949 F. Supp. 331 (E.D. Pa. 1996).....	2
<i>The Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989)	29
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)	2
<i>Toffoloni v. LFP Publishing Group, LLC</i> , 572 F.3d 1201 (11th Cir. 2009)	22
<i>Tyne v. Time Warner Entertainment Co. L.P.</i> , 901 So. 2d 802 (Fla. 2005)	3, 19
<i>United States v. Alvarez</i> , 132 S. Ct. 2537 (2012).....	25, 26
<i>United States v. Stevens</i> , 559 U.S. 460	

(2010).....	25, 26, 29, 34
<i>Valentine v. C.B.S., Inc.</i> , 698 F.2d 430 (11th Cir. 1983)	2, 18, 19
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	35
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> , 433 U.S. 562 (1977)	3, 4
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend I	2
STATUTES	
28 U.S.C. § 1254(1).....	1
Cal. Civil Code § 3344(d).....	11
OTHER AUTHORITIES	
John Broder, <i>Schwarzenegger Files Suit Against Bobblehead Maker</i> , N.Y. Times, May 18, 2004), at http://www.nytimes.com/2004/05/18/national/18arnold.html	3
Stacey L. Dogan & Mark A. Lemley, <i>What the Right of Publicity Can Learn from Trademark Law</i> , 58 Stan. L. Rev. 1161 (2006).....	6, 27
F. Jay Dougherty, <i>All the World's Not a Stoooge: The 'Transformativeness' Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art</i> , 27 Colum. J.L. & Arts 1 (2003)	6

Adam Liptak, <i>When it May Not Pay To be Famous</i> , N.Y. Times, June 1, 2013, available at http://www.nytimes.com/2013/06/02/sunday-review/between-the-first-amendment-and-right-of-publicity.html	6
Michael Madow, <i>Private Ownership of Public Image: Popular Culture & Publicity Rights</i> , 81 Cal. L. Rev. 127 (1993).....	27
1 J. Thomas McCarthy, <i>The Rights of Publicity and Privacy</i> (2013 ed.).....	13, 26
Aaron Moss, <i>When It Comes to the Right of Publicity, Yes, Doubt</i> (February 18, 2011).....	17
Andrea Peterson, U.S. Court Limits How Art Can Imitate Life, Wash. Post, Aug. 2, 2013, available at http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/02/us-court-limits-how-art-can-imitate-life/	6
<i>Restatement (Second) of Torts</i> (1977)	13
<i>Restatement (Third) of Unfair Competition</i> (1995).....	14, 20
Eugene Volokh, <i>Freedom of Speech and the Right of Publicity</i> , 40 Hous. L. Rev. 903 (2003).....	6, 25, 27
Diane Leenheer Zimmerman, <i>Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights</i> , 50 B.C. L. Rev. 1503 (2009).....	6

OPINIONS BELOW

The opinion of the Ninth Circuit affirming the denial by the United States District Court for the Northern District of California of Petitioner’s special motion to strike pursuant to California’s anti-SLAPP statute is reported at 724 F.3d 1268 (9th Cir. 2013) and reproduced at Appendix to the Petition (“Pet. App.”) 1a. The order of the Ninth Circuit granting Petitioner’s subsequent motion to stay the mandate pending proceedings in this Court is unreported and reproduced at Pet. App. 71a.

An opinion of the District Court denying Petitioner’s motion to dismiss and anti-SLAPP special motion to strike is unreported and reproduced at Pet. App. 45a.

JURISDICTION

The Ninth Circuit issued its opinion on July 31, 2013.¹ The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

¹ The Ninth Circuit applied its rule that a denial of an anti-SLAPP special motion to strike is reviewable under the collateral order doctrine. Pet. App. 5a n. 3 (citing *Mindy’s Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010)).

of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I.

STATEMENT OF THE CASE

This case involves the collision of the First Amendment and the state-law “right-of-publicity” tort, an issue that has engendered conflict and disarray among the lower courts. The right of publicity is a modern tort, first recognized in 1953.² Generally used by celebrities, it accords persons an economic right in their names and likenesses, so they may “profit from the full commercial value of their identities.” *Cardtoons L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

In recent years, right-of-publicity suits have proliferated, targeting a variety of speech and speakers, including musicians who named famous people in their lyrics; filmmakers who produced movies documenting the lives of celebrities and historical figures; authors who wrote “unauthorized biographies”; magazines and greeting-card manufacturers who used celebrity images; video-game makers who used celebrity images in constructing virtual worlds; and artists who depicted celebrities in their artworks.³

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

³ *See, e.g., Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (OutKast song lyrics); *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983) (Bob Dylan song lyrics); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (feature movie and book about the Black Panther Party); *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d

Courts have struggled to reconcile this new tort with the protections afforded by the First Amendment. This Court’s only contribution came nearly forty years ago in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the Court held that the First Amendment did not bar a right-of-publicity claim against a television station that broadcast an entertainer’s entire human-cannonball act. According to the Court, broadcasting Zacchini’s entire act posed a “substantial threat to the economic value of that performance,” and the Court contrasted the use of a performer’s “entire act” with the broadcast of a person’s name or picture in media. *Id.* at 574-76. Thus, *Zacchini* offers little or no guidance in cases involving mere *depictions* of individuals, as opposed to appropriation of their actual performances in full. Indeed, the Court was careful to cabin its decision: “[w]herever the line in particular situations is to be drawn between media reports that are protected and

723 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457 (6th Cir. 2001) (television miniseries about the Temptations); *Tyne v. Time Warner Entm’t Co., L.P.*, 901 So. 2d 802 (Fla. 2005) (movie about a shipwreck); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (book about a police officer); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (magazine using image of Dustin Hoffman); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (greeting card using image of Paris Hilton); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (2006) (video game); *No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App. 4th 1018 (2011) (video game); *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (bust of Martin Luther King, Jr.); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (lithograph of Tiger Woods); John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. Times, May 18, 2004, at <http://www.nytimes.com/2004/05/18/national/18arnold.html>.

those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent.” *Id.* at 574-75.

The expressive work at issue in this case is Petitioner’s college football video game, which was alleged to include a realistic depiction of former college football player Respondent Samuel Keller.⁴ The Ninth Circuit (and the Third Circuit, in an essentially identical case also before this Court on petition for writ of certiorari)⁵ held that the First Amendment offered no defense to Keller’s right-of-publicity claim, because the game’s depiction of Keller was *too realistic* and showed him engaged in the same activity—college football—in which he had gained his fame.

The Ninth and Third Circuits recognized that Petitioner’s video game was an expressive work, under this Court’s holding in *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011). Nonetheless, they held that the game’s depiction of the plaintiffs did not enjoy First Amendment protection. According to the Ninth and Third Circuits, the depiction of a person’s image or likeness in an expressive work enjoys First Amendment protection against a right-of-

⁴ The consolidated action actually was brought by Keller and eight other named plaintiffs, some of whom are former college football players and some of whom are former college basketball players who allege they were portrayed in Petitioner’s *NCAA Basketball* video game. Because they were all identically situated, the Ninth Circuit treated the case as one brought by Keller and we do so here as well.

⁵ *Hart v. Elec. Arts Inc.*, 717 F.3d 141 (3d Cir. 2013).

publicity claim only if the depiction sufficiently alters or “transforms” the plaintiff’s image or likeness. That rule is constitutionally perverse: it affords First Amendment protection only to fanciful or distorted portrayals, not accurate or realistic ones. The rule also chills expression, both because it is hard to predict what a court will decide is sufficiently “transformative,” and because such an inquiry inevitably requires a court to make a subjective judgment about whether a depiction is “artistic,” thus warranting protection, or “literal,” and thus subject to liability.

The test adopted by these two circuits, moreover, conflicts with various other tests adopted by other circuits and state supreme courts, which do not focus on transformation at all. Some of these courts engage in case-by-case balancing of First Amendment interests and right-of-publicity interests—an approach that raises its own constitutional problems. Others give appropriate respect to the First Amendment by confining the right-of-publicity tort to circumstances in which the challenged depiction falsely claims a celebrity commercial endorsement or is unrelated to any other expression and thus gratuitous.

The lower courts’ various and conflicting constitutional tests have resulted in numerous irreconcilable outcomes. For example, the Sixth Circuit has held that the First Amendment protects the inclusion of a professional golfer’s realistic image, prominently displayed in a painted montage including other golfers, *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003), but the Ninth and Third Circuits now have held that the First Amendment does

not protect an accurate digital depiction of a former college football player in a video game. As the judicial confusion has mounted, scholars, writers, and artists have begun to recognize a major threat to free expression.⁶ This Court's guidance is urgently needed.

A. Factual Background

Petitioner Electronic Arts' enormously popular *NCAA Football* video game series, first unveiled in 1993, artistically creates a fictional interactive college football gaming experience. In each annual edition of *NCAA Football*, users can play individual games or entire seasons, selecting from unnamed virtual players from each college's teams. Pet. App. 3a. The virtual football games occur in virtual stadiums filled with virtual fans, coaches, cheerleaders, mascots, and referees, all meticulously crafted by Electronic Arts' video game designers. *Id.* at 4a.

⁶ See, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161 (2006); F. Jay Dougherty, *All the World's Not a Stooge: The 'Transformativeness' Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 Colum. J.L. & Arts 1 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903 (2003); Diane Leenheer Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503 (2009); Adam Liptak, *When it May Not Pay To be Famous*, N.Y. Times, June 1, 2013, available at <http://www.nytimes.com/2013/06/02/sunday-review/between-the-first-amendment-and-right-of-publicity.html>; Andrea Peterson, *U.S. Court Limits How Art Can Imitate Life*, Wash. Post, Aug. 2, 2013, available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/02/us-court-limits-how-art-can-imitate-life/>.

The virtual players (“avatars”) are clothed in their teams’ uniforms and logos. The unnamed avatars are identified only by position and jersey number (*e.g.*, QB #7) but are meant to evoke real players. Thus, for example, an avatar may have an appearance (*e.g.*, height, weight, skin-tone, and throwing arm) and biographical information (*e.g.*, class year) that match those of a real player. *Id.* at 3a-4a.

Within this realistic setting, the game fosters the user’s creativity and interactivity. Users control the avatars in invented games and seasons. The game also includes a mode in which the user “coaches” a college team for up to thirty seasons to develop a school’s football program over time. *Id.* at 4a. Another mode allows users to control a single virtual player from high school through college, directing the virtual player’s choices regarding practices, academics, and social life—all of which affect the virtual player’s performance in a game. *Id.* As Judge Thomas put it in his dissent, “At its essence, EA’s *NCAA Football* is a work of interactive historical fiction.” *Id.* at 34a.

B. Procedural Background

1. Respondent Samuel Keller played as quarterback for Arizona State University in 2005, after which he transferred to the University of Nebraska, where he played football during the 2007 season. *Id.* at 3a. In May 2009, Keller filed this putative class action lawsuit in the United States District Court for the Northern District of California against Electronic Arts, the National Collegiate Athletic Association (“NCAA”), and the Collegiate Licensing Company; the district court had jurisdiction pursuant to 28 U.S.C. § 1332.

Keller alleged that Petitioner violated his California statutory and common law right of publicity, among other claims, and sought hundreds of millions of dollars in damages on behalf of the putative class and an injunction prohibiting the use of players' identities in the future and mandating the seizure and destruction of all copies of *NCAA Football* in Electronic Arts' possession. C.A. App. 147-48. The district court granted motions to consolidate Keller's case with those of eight other college athletes.

Keller's right-of-publicity claim was based on the alleged use of his biographical information and likeness in the 2005 and 2008 editions of *NCAA Football*. Pet. App. 4a-5a. He claimed the game included an animated avatar of a quarterback wearing Arizona State University and University of Nebraska uniforms with his physical and biographical attributes and career statistics, though not his name or photographic image.

Petitioner moved to dismiss and also filed a special motion to strike the lawsuit as a strategic lawsuit against public participation, pursuant to California's anti-SLAPP statute. The District Court denied both motions. *Id.* at 69a.

2. In July 2013, the Ninth Circuit affirmed the District Court's denial of Electronic Arts' anti-SLAPP motion to strike. Pet. App. 30a. The court acknowledged that, under this Court's holding in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), video games are expression that enjoy "the full protections of the First Amendment." Pet. App. 2a. Nevertheless, the court decided that Electronic Arts

had no First Amendment defense to Keller’s right-of-publicity claim. *Id.* at 30a.

In reaching that conclusion, the Ninth Circuit adopted a version of the transformative-use test, which it derived from *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). The test it adopted is essentially identical to the one adopted by the Third Circuit in *Hart v. Electronic Arts Inc.*, 717 F.3d 141 (3d Cir. 2013), the other case currently pending on a petition for certiorari. That test protects expression depicting celebrities *only* if “the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” Pet. App. 8a (quoting *Comedy III*, 21 P.3d at 799).

Here, the Ninth Circuit held Electronic Arts’ alleged use of Keller’s likeness “does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown.” *Id.* at 3a; *see id.* at 14a (holding that the video game did not sufficiently transform Keller’s likeness because it portrayed Keller “as what he was: the starting quarterback for Arizona State and Nebraska, and the game’s setting is identical to where the public found Keller during his collegiate career: on the football field” (internal quotation marks and alteration omitted)).

Petitioner argued that the court should adopt the test announced in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), contending that this test appropriately protected First Amendment rights. Under that test, an expressive work is accorded First Amendment

protection against right-of-publicity claims unless the celebrity's likeness is unrelated to the work or is used in a manner that falsely indicates that the celebrity has endorsed the product. *See* Pet. App. 21a.

The Ninth Circuit rejected that argument. *Id.* at 26a. The court reasoned that the *Rogers* test was developed to accommodate First Amendment interests in the context of trademark law, which focuses on the risk of consumer confusion. *Id.* at 23a. However, the court continued, “[t]he right of publicity protects the *celebrity*, not the *consumer*.” *Id.* (emphasis in original). Thus, the court concluded, “[t]he reasoning of . . . *Rogers* . . . that artistic and literary works should be protected unless they explicitly mislead consumers[] is simply not responsive to Keller’s asserted interests here.” *Id.* at 24a.

Notably, the same Ninth Circuit panel, in an opinion released the same day as *Keller*, held that the First Amendment provided Electronic Arts with a defense to a Lanham Act claim brought by a former NFL player in connection with another of its video games, *Madden NFL Football*. *See Brown v. Elec. Arts Inc.*, 724 F.3d 1235, No. 09-56675, 2013 U.S. App. LEXIS 15647 (9th Cir. July 31, 2013). Applying the *Rogers* test, the court concluded the video game was “entitled to the same First Amendment protection as great literature, plays, or books. . . . The *Rogers* test tells us that, in this case, the public interest in free expression outweighs the public interest in avoiding consumer confusion.” *Id.* at *32. *Keller* cited the decision in *Brown*, and acknowledged that Keller would have been “hard-pressed” to succeed on his right-of-publicity claim if the

court had applied the *Rogers* test to that claim. Pet. App. 23a-24a.

Finally, the court rejected two additional defenses, the public interest exception and the statutory public affairs exception. *Id.* at 29a.⁷

Judge Thomas forcefully dissented, warning that the Court had engaged in a “potentially dangerous and out-of-context interpretation of the transformative use test.” *Id.* at 44a (Thomas, J., dissenting). Judge Thomas noted that he “agree[s] fully with Judge Ambro’s excellent dissent in *Hart*,” *id.* at 34a n.2, and criticized the majority for “confin[ing] 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[,] . . . contradict[ing] the holistic analysis required by the transformative use test,” *id.* at 33a. In particular, Judge Thomas highlighted that

The gamers can . . . change [the virtual players’] abilities, appearances, and physical characteristics at will. Keller’s impressive physical likeness can be morphed by the gamer into an overweight and slow virtual athlete, with anemic passing ability. And the gamer can create new virtual players out of whole cloth. Players can change teams. The gamer could pit Sam Keller against himself, or a stronger or weaker version of himself, on a different team.

⁷ California’s right-of-publicity statute exempts from liability uses “in connection with any news, public affairs, sports broadcast or account, or any political campaign.” Cal. Civ. Code § 3344(d).

Or the gamer could play the game endlessly without ever encountering Keller's avatar. In the simulated games, the gamer controls not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors. Of course, one may play the game leaving the players unaltered, pitting team against team. But, in this context as well, the work is one of historic fiction. The gamer controls the teams, players, and games.

Id. at 35a. Judge Thomas concluded that, "unlike the majority, [he] would not punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games." *Id.* at 37a.

Judge Thomas also emphasized that "the essence of *NCAA Football* is founded on publicly available data, which is not protected by any individual publicity rights," *id.* at 39a, that the players names are not used in the game, *id.* at 40a, and that, under the NCAA's amateurism rules, "an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality, non-existent," *id.* at 41a-42a. In conclusion, Judge Thomas addressed the potential scope of the majority's opinion:

The logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. Absent the use of actual footage, the motion picture *Forrest Gump* might

as well be just a box of chocolates. Without its historical characters, *Midnight in Paris* would be reduced to a pedestrian domestic squabble.

Id. at 43a.

The majority rejected Judge Thomas' warning that its opinion jeopardized a broad swath of valuable expression on the theory that later courts could examine the "primary motivation" of those who are likely to *purchase* (rather than create) the expressive work. It posited that First Amendment protection would turn on whether the primary motivation of the buyer is to acquire the "expressive work of [an] artist" or to acquire a "reproduction of the celebrity." *Id.* at 19a n.10.

On August 21, 2013, the Court of Appeals granted Electronic Arts' motion to stay the mandate pending the outcome of proceedings before this Court. *Id.* at 72a.

REASONS FOR GRANTING THE PETITION

This Court's review is urgently needed to resolve conflicting authority concerning First Amendment protection against right-of-publicity claims. Since its invention in the second half of the twentieth century,⁸

⁸ The precise formulation of the tort varies from state to state. See J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6.6-6.133 (2d ed. 2000) (describing varying state-law formulations). California has both a statutory and a common law cause of action. See Pet. App. 5a. Some other states follow the *Restatement (Second) of Torts* (1977), which provides that "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy." *Id.* § 652C. Still other states follow the more narrow formulation

the right of publicity increasingly has been used in litigation against creators of expressive works—including filmmakers, authors, musicians, and others—whose expression includes the depiction of a real person. In this case, the Ninth Circuit applied a transformative-use test that makes First Amendment protection depend upon whether the depiction distorts reality enough to be deemed “transformative.” The more accurate and realistic the depiction, the greater the likelihood of liability. Other courts use a different legal test, extending First Amendment protection to expressive depictions of people regardless of whether they are realistic or “transformed,” unless those uses amount to commercial endorsements. Still other courts engage in case-by-case balancing of First Amendment interests against the economic interests protected by the right of publicity.

This disarray and conflict has real-world consequences: without this Court’s guidance, artists, musicians, and other content creators will be unsure what standards apply to their expression and, in particular, whether the realistic depiction of real individuals is tortious. If the realistic portrayal of a

of the *Restatement (Third) of Unfair Competition* (1995), under which “[o]ne 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.” *See id.* § 46 (emphasis added). The phrase “for purposes of trade” means “used in advertising the user’s goods or services, or . . . placed on merchandise marketed by the user,” and “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.” *Id.* § 47.

person in an expressive work can strip the work of First Amendment protection, then countless creative works are at risk of suit, including films like *The Social Network*, *42*, *A Beautiful Mind*, and *All the President's Men*; documentaries like Ken Burns' *Baseball* and *Jazz*; works of historical fiction like E.L. Doctorow's *Ragtime* and Thomas Pynchon's *Gravity's Rainbow*; and "unauthorized biographies" like those by Kitty Kelley. All of these works realistically portray actual individuals in the contexts that made them famous and use their biographical details. The effect of this uncertainty is to chill protected expression, all in the name of a tort with questionable underlying purposes. This Court should grant review to resolve the conflicts and provide clear direction.

I. The Lower Courts Are In Disarray Concerning the First Amendment Limits on Right-of-Publicity Claims.

A. The Ninth and Third Circuits' Transformative-Use Test Protects an Expressive Work Only if the Plaintiff's Likeness Is "Transformed."

This case is the first time the Ninth Circuit has held that the First Amendment protects the use of a person's image or likeness in expressive speech only if the image or likeness is sufficiently "transformed,"⁹ and does not protect "realistic[] portray[als]." Pet. App.

⁹ The Ninth Circuit previously applied the transformative-use test as a state-law defense in *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010), but it did not decide in that case whether the transformative-use test defines the scope of First Amendment protection. *See id.* at 909 n.11.

19a. In so holding, the Ninth Circuit followed the Third Circuit's formulation of the transformative-use test in *Hart*, 717 F.3d at 165.

The transformative-use test was first articulated in 2001, when the California Supreme Court addressed a right-of-publicity claim based on a charcoal drawing of The Three Stooges. *Comedy III*, 21 P.3d at 799. That court borrowed from copyright fair-use doctrine and adopted what it described as “essentially a balancing test . . . based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Id.* Applying that test to the facts at hand, the court found the Three Stooges drawing, sold as a lithograph and on t-shirts, to be insufficiently transformative. *Id.* at 811. It explained that the artist’s “undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.” *Id.*

In so holding, the California Supreme Court distinguished the drawing at issue from Andy Warhol’s portraits of celebrities such as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. It explained: “Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.” *Id.* Underscoring the unpredictability of its test, the court acknowledged that the difference between works that enjoy constitutional protections (like Warhol’s depictions of Marilyn Monroe) and those that do not

(like the Three Stooges sketch) will “sometimes be subtle.” *Id.*¹⁰

B. The Constitutional Test Adopted Below Is Inconsistent With Tests Applied By Other Courts.

Other circuits and state supreme courts have adopted a different constitutional approach, applying different First Amendment tests that do not depend on a depiction’s transformative character—albeit tests that themselves conflict with one another.

1. Four Circuits and Two State Supreme Courts Have Held that the First Amendment Protects Non-Commercial Speech Depicting Well-Known People, Even if the Depiction Is Not “Transformed.”

The Second, Fifth, Sixth, and Eleventh Circuits, along with the Florida and Kentucky Supreme Courts, all have held that the First Amendment protects the depiction of an individual within an expressive work, unless the depiction amounts to an unauthorized commercial endorsement or is unrelated to any other expression and thus gratuitous.

In *Rogers*, the Second Circuit considered a federal Lanham Act claim and a state right-of-publicity claim brought by Ginger Rogers against the makers of a Federico Fellini film entitled “Ginger and Fred”—a

¹⁰ See Aaron Moss, *When It Comes to the Right of Publicity, Yes, Doubt* (February 18, 2011) http://www.lawlawlandblog.com/2011/02/when_it_comes_to_the_right_of.html (displaying the Marilyn Monroe painting and the Three Stooges sketch side by side).

film not about Ginger Rogers and Fred Astaire, but instead about a fictional Italian duo who imitated them, becoming known in Italy as “Ginger and Fred.” 875 F.2d at 996-97. The Second Circuit ruled in favor of the filmmaker, holding first that the First Amendment protects the use of a person’s name in a film title from a Lanham Act claim unless the use was “‘wholly unrelated’ to the movie or was ‘simply a disguised commercial advertisement for the sale of goods or services.’” *Id.* at 1004; *see id.* at 998-1000. The court then applied essentially the same standard in rejecting Rogers’ right-of-publicity claim under Oregon law. *Id.* at 1004-05.

Other courts have applied the *Rogers* standard or a similar test in describing the First Amendment limits to right-of-publicity claims. For example, in *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994), the Fifth Circuit cited *Rogers* in concluding that the First Amendment barred a right-of-publicity claim based on a fictionalized, but accurate, account of an undercover police officer’s experiences. Similarly, in *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003), the Sixth Circuit adopted *Rogers* and remanded for a factual determination concerning whether the use of the plaintiff’s name in a song title was a “disguised commercial advertisement” that would remove it from First Amendment protection.¹¹ And in *Valentine v.*

¹¹ Shortly after *Parks*, the Sixth Circuit decided *ETW*, which involved a right-of-publicity claim challenging an artist’s use of Tiger Woods’ image in a painting celebrating Woods’ golfing achievements. 322 F.3d at 918-19. The Ninth Circuit below stated that, in view of *ETW*, the Sixth Circuit had been “inconsistent[.]” in its use of the *Rogers* test for right-of-publicity claims. Pet. App.

C.B.S., Inc., 698 F.2d 430 (11th Cir. 1983), the Eleventh Circuit construed the Florida right-of-publicity statute to allow the use of a person’s name except “to directly promote a product or service,” in order to avoid “grave questions” about the constitutionality of any broader interpretation. *Id.* at 433.

The Kentucky Supreme Court also has adopted this constitutional line, holding that a right-of-publicity claim may proceed only if the “use of a person’s name or likeness or other interest[s]” “is not sufficiently related to the underlying work, or, if the otherwise constitutionally-protected work is simply disguised commercial advertisement for the sale of goods or services.” *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001) (footnote omitted; internal quotation marks omitted). And the Florida Supreme Court recently adopted a similar rule, stating that, in light of First Amendment constraints, the state’s right of publicity does not bar the use of a name or likeness except to “directly promote a product or service.” *Tyne v. Time Warner Entm’t Co. L.P.*, 901 So. 2d 802, 810 (Fla. 2005); *see also Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 627 (Ga. 2013) (holding that the use of the plaintiff’s image on the cover of a *College Girls Gone Wild* video was actionable under Georgia’s right of publicity, and did not violate the defendant’s

25a. In fact, *ETW* confirmed that, in *Parks*, the Sixth Circuit had “applied the *Rogers* test to . . . right-of-publicity claims,” *ETW*, 332 F.3d at 936 n.17. After applying that test to the facts before it, *ETW* went on to analyze the case under a case-specific balancing of interests, *id.* at 937-38 (citing *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996)), and the transformative-use test, *id.* at 938, as well.

“freedoms of speech and press” because the image was used “as a part of an advertisement”) (quotation marks omitted).

The *Restatement (Third) of Unfair Competition* encourages the adoption of this test as well, explaining that the right of publicity is “fundamentally constrained by the public and constitutional interest in freedom of expression,” and the First Amendment ought to provide a defense against a right-of-publicity claim unless “the name or likeness is used solely to attract attention to a work that is not related to the identified person.” *Restatement (Third) of Unfair Competition*, § 47 cmt. c (1995).

2. Other Courts Engage in Case-Specific Balancing.

Still other courts engage in various forms of balancing, weighing the expressive interests protected by the First Amendment against the economic interests protected by the right of publicity based on the particular facts of the case before them. In so doing, none of these courts has focused on whether a likeness has been sufficiently “transformed.”

Thus, in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit held that the First Amendment protected fantasy baseball products that used the names of real players, their biographical data, and their performance statistics. In reaching that conclusion, the court emphasized “the public value of information about the game of baseball and its players,” noted that “the information used in CBC’s fantasy baseball games is all readily available in the public

domain,” and reasoned that “it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.” *Id.* at 823. By contrast, it continued, “the facts in this case barely, if at all implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals.” *Id.* at 824. Specifically, the court reasoned that publicity rights to one’s name and performance statistics were not needed to encourage baseball players to play the sport, and that there was little risk of consumer confusion, because the defendant’s game included all players. *Id.*

The Ninth Circuit below attempted to harmonize its outcome with *C.B.C.* on the ground that *C.B.C.* did not involve the “use[] [of] virtual likenesses of actual college football players,” Pet. App. 29a-30a n.12, but instead “merely incorporated the names along with performance and biographical data of actual major league baseball players.” *Id.* (internal quotation marks omitted). That distinction is not persuasive: if the First Amendment protects the use of someone’s name and publicly available performance and biographical data, then it also protects the creation of an avatar reflecting publicly available information about a player’s appearance and playing style. Indeed, the Eighth Circuit itself made clear that *C.B.C.*’s expressive interests would have been no different had it used actual photos of the players, *see* 505 F.3d at 823; nor would the use of photos have changed the court’s balancing of interests.

The Tenth Circuit in *Cardtoons* likewise applied a case-specific balancing test to reject a right-of-publicity claim against the creator of parody baseball cards

featuring recognizable caricatures of real baseball players. 955 F.3d at 962-63. The court held that the trading cards were expressive speech “subject to full First Amendment protection,” *id.* at 970, and emphasized that “[c]elebrities . . . are an important element of the shared communicative resources of our cultural domain,” and that “[r]estricting the use of celebrity identities restricts the communication of ideas,” *id.* at 972. It further held that these interests outweighed any purported justification for the right of publicity. *See id.* at 973-76.

In *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), the Missouri Supreme Court took a markedly different approach, holding that speech receives First Amendment protection against a right-of-publicity claim only if its “*predominant* purpose . . . is to make an expressive comment on or about a celebrity.” *Id.* at 374 (quotation marks omitted) (emphasis added). If, on the other hand, the speech “predominantly exploits the commercial value of an individual’s identity,” it is subject to liability under the right of publicity, “even if there is some ‘expressive’ content in it.” *Id.* (quotation marks omitted). In devising that test, the court specifically rejected the transformative-use test. *Id.*¹²

¹² Other courts, applying state common law or statutory exceptions designed to accommodate constitutional concerns, have drawn the line between protected and unprotected celebrity depictions by focusing on whether the publication is “newsworthy” or in the “public interest.” *See, e.g., Toffoloni v. LFP Publ’g Group, LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009) (applying Georgia law); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793-94 (1995) (applying California law).

II. This Case Presents an Ideal Vehicle For Addressing the Constitutional Question.

Plainly, the lower courts need guidance from this Court delineating the scope of First Amendment protection against a right-of-publicity claim. This case presents an excellent vehicle for providing such guidance. The Ninth Circuit acknowledged the wide-ranging circuit conflict on the issue—*see* Pet. App. 24a-26a (noting that the Second and Sixth Circuits have applied the *Rogers* test to right-of-publicity claims and that the Tenth and Eighth Circuits had applied “a flexible case-by-case approach”). And it also recognized that its decision to apply the transformative-use test, as opposed to the more speech-protective *Rogers* test, was outcome-determinative. The court acknowledged that Keller “would be hard-pressed to support” a claim under the *Rogers* test “absent evidence that EA explicitly misled consumers” into “believing that he is endorsing EA or its products.” Pet. App. 23a.

The Ninth Circuit’s decision in *Brown*—issued by the same panel on the same day—confirmed that the court’s decision to apply the transformative-use test to right-of-publicity claims, rather than the *Rogers* test, determined the outcome in this case. *Brown* concerned a Lanham Act claim brought by a former NFL player complaining about the use of his likeness in Petitioner’s *Madden NFL* game. *See Brown* 724 F.3d at ___, 2013 U.S. App. LEXIS 15647, at *3. The court applied the *Rogers* test and concluded that the First Amendment barred the Lanham Act claim, because “Brown’s likeness is artistically relevant to the games and there are no alleged facts to support the claim that

[Electronic Arts] explicitly misled consumers as to Brown’s involvement with the games.” *Id.* at *32. In such circumstances, the court held, “the public interest in free expression outweighs the public interest in avoiding consumer confusion.” *Id.* Had the court applied that same test to the right-of-publicity claim in *Keller*, Electronic Arts would have prevailed, just as it did in *Brown*.

III. The Ninth Circuit’s Holding Is Wrong and Conflicts with This Court’s First Amendment Jurisprudence.

This Court’s review also is warranted because the Ninth Circuit’s decision—which allows a state to impose tort liability for non-commercial expression that portrays a person realistically—is both wrong and dangerous. The decision cannot be squared with this Court’s precedents, and it threatens to chill the exercise of First Amendment rights.

A. The Adopted Transformative-Use Test Does Not Adequately Respect First Amendment Rights.

The Ninth and Third Circuits’ transformative-use test does not properly limit the right of publicity so that it becomes consistent with the First Amendment.

The right of publicity penalizes fully protected and valuable speech based on its content: the tort proscribes expression because it includes another’s name or likeness within its content. *Bartnicki v.*

Vopper, 532 U.S. 514, 521 (2001).¹³ This Court repeatedly has held, however, that “[c]ontent-based regulations” of speech “are presumptively invalid” and must be subjected to strict constitutional scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); accord, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (“[A]s a general matter . . . government has no power to restrict expression because of . . . its content.”) (quotation marks omitted; bracket in original); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (holding unconstitutional a statute prohibiting accurate depictions of U.S. currency unless for educational, historic, or newsworthy purposes because those determinations “cannot help but be based on the content of the photograph and the message it delivers”).

The limited exceptions to this rule consist of a few “historic and traditional categories” of expression, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (quotation marks omitted), which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). These include obscenity, defamation, fraud, fighting words, true threats, and speech integral to criminal conduct, see *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (collecting cases), and “represent ‘well-defined and narrowly limited

¹³ See also *Volokh*, *supra* note 6 at 912 n.35 (2003) (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s name or likenesses).”).

classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” *Brown*, 131 S. Ct. at 2733 (quoting *Chaplinsky*, 315 U.S. at 571-72). This Court repeatedly has refused to expand these well-defined and historical categories or to add new categories of speech that the government may proscribe. *See, e.g., Alvarez*, 132 S. Ct. at 2544; *Stevens*, 559 U.S. at 482; *Brown*, 131 S. Ct. at 2741.

An expressive work does not fall into any of these traditional exceptions merely because it includes a portrayal of an actual person. To the contrary, the right-of-publicity tort penalizing such speech is a modern innovation, not recognized in California itself until 1979. *See Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979). As a leading commentator has put it, the right of publicity is “still a relatively raw and brash newcomer,” 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* (2d ed. 2000).

Because the right of publicity penalizes speech based on its content and does not fall into one of the recognized exceptions to full First Amendment protection, it is invalid, unless its application can be limited so as to avoid unconstitutional applications of the tort. *Brown*, 131 S. Ct. at 2738 (“It is rare that a regulation restricting speech because of its content will ever be permissible.” (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000)); *id.* (explaining that content-based regulations of speech are impermissible unless they can survive strict scrutiny). The transformative-use test applied here does not do that.

To the contrary, a test that protects fanciful depictions of a person but imposes liability for realistic depictions cannot be a suitable First Amendment standard. Realistic depictions within expressive works do not constitute a category of speech, like defamation or obscenity, that warrants anything less than full First Amendment protection against content-based restrictions. Indeed, many valuable works, including biographies, documentaries, and historical fiction, include realistic portrayals or references to real people.

A transformative-use test also does not sufficiently limit the right of publicity to circumstances where its application can survive strict scrutiny. There is no compelling state interest in stamping out realistic portrayals of people. According to the Ninth Circuit, the right of publicity serves to “protect[] a form of intellectual property [in one’s person] that society deems to have some social utility.” Pet. App. 23a (quoting *Comedy III*, 21 P.3d at 804) (second alteration in original); *id.* at 24a (“Keller’s claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field.”). That economic interest, however, is not sufficiently compelling to justify penalizing non-commercial expression.¹⁴

Furthermore, a person’s appearance and biography—here, for example, Keller’s height, weight,

¹⁴ Many question the validity of the justifications for the right of publicity altogether. See, e.g., Dogan & Lemley, *supra* note 6, at 1188; Michael Madow, *Private Ownership of Public Image: Popular Culture & Publicity Rights*, 81 Cal. L. Rev. 127, 238 (1993); Volokh, *supra* note 6, at 911.

throwing arm, and visor—are facts in the public domain. Indeed, the Ninth Circuit acknowledged as much. *See* Pet. App. 30a n.12 (“It is seemingly true that each likeness is generated largely from publicly available data . . .”). It concluded, however, that the First Amendment should not protect the use of publicly available data to create a realistic likeness because the right of publicity would otherwise be “neuter[ed] . . . in our digital world.” Pet. App. 30a n.12. The court stated: “If EA creates a virtual likeness of Tom Brady using only publicly available data . . . does EA have free reign to use that likeness in commercials without violating Brady’s right of publicity? We think not, and thus must reject [the] point about the public availability of much of the data used . . .” *Id.*

But no one claims that one may use publicly available data to insert a celebrity image in a commercial. That is precisely what the *Rogers* test addresses by withholding First Amendment protection from false claims of celebrity endorsement. The question here is whether a speaker may use publicly available data to create a likeness for use in non-commercial expression. The Ninth Circuit offers no reason why the First Amendment should not protect such use. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *C.B.C.*, 505 F.3d at 823 (“[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.”).

Indeed, the transformative-use test as applied here is particularly perverse, because it assumes that the state has a *stronger* interest in penalizing *accurate*

speech than in penalizing speech that is “transformative.” That has things backwards: this Court has repeatedly held that truthful and accurate expression warrants maximum First Amendment protection. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”); *The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (criticizing a Florida law making it unlawful to publicize the name of the victim of a sexual offense because it “punish[ed] truthful publication”); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (prohibiting false light liability even for false speech on “matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth”).

B. The Transformative-Use Test Will Chill Protected Speech Because It Is Overbroad and Unpredictable.

The Ninth Circuit’s decision is not only wrong but also dangerous. Its transformative-use test is too vague and unpredictable, and too susceptible to a court’s subjective artistic judgments, to be a workable First Amendment standard.

This Court repeatedly has emphasized the importance of ensuring that restrictions on the content of speech are “well-defined.” *Stevens*, 559 U.S. at 468. Predictability is important because speakers otherwise will “steer far wider of the unlawful zone’ . . . than if

the boundaries of the forbidden areas were clearly marked,” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), thereby causing an “obvious chilling effect on free speech,” *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

The Ninth Circuit’s transformative-use test fails these requirements. If taken literally, the transformative-use test would allow states to subject biographers, filmmakers, singers, photographers, and other artists to tort liability whenever they include realistic images of, or references to, famous people. Yet many expressive works routinely use a real person’s actual name or likeness, including, for example, films like *The Social Network*, *Moneyball*, *42*, and *The King’s Speech*; documentaries like Ken Burns’ critically acclaimed series on the history of baseball; and best-selling biographies, like those by Kitty Kelley.

Indeed, a key element of the artistry in these works is the realism or accuracy of the portrayal. For example, the genius of Daniel Day-Lewis’ portrayal of Abraham Lincoln was his ability to imitate, with great realism, the likeness, mannerisms, and attributes of the president doing what Lincoln actually did. It would be disturbing if the artistic success of such a portrayal were precisely what would make it actionable. *Cf. Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981) (rejecting Elvis impersonator’s First Amendment defense to a right-of-publicity claim brought by Presley’s estate; “entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant

value as pure entertainment” (cited with approval by the Third Circuit in *Hart*, 717 F.3d at 164)).

To avoid absurd and dangerous outcomes, courts applying the transformative-use test will have little choice but to draw distinctions among expressive works reflecting their own subjective judgments about whether a particular work is sufficiently “artistic” or “creative” that it warrants protection. Thus, the California Supreme Court in *Comedy III* determined that a sketch of The Three Stooges was not creative enough to receive First Amendment protection, but an Andy Warhol portrait of Marilyn Monroe did deserve such protection because it presented “a form of ironic social comment on the dehumanization of celebrity itself.” 21 P.3d at 811. Courts should not place themselves in the role of art critic and make First Amendment freedoms turn on subjective judgments of this kind. *Cf. Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

A legal regime turning on such “subtle” distinctions among expressive works, *Comedy III*, 21 P.3d at 812, is inherently unpredictable and will chill expression. *Hart* presents a good example of such unpredictability. The Third Circuit concluded that an avatar portraying a college football player in an animated and interactive fictional college football game was actionable because the player’s image was not sufficiently transformed; yet, in the same decision, the court held that placement, in a later edition of the same video game, of an actual

photograph of the player in a montage of other photographs of Rutgers football players was not actionable, because the context made the depiction transformative. *Hart*, 717 F.3d at 169-70 (citing *ETW*, 332 F.3d at 938).

It is hard rationally to reconcile these two rulings.¹⁵ According to the dissent in *Hart*, the majority simply treated video games as less worthy of constitutional protection than other types of expressive works, such as photomontages—despite this Court’s clear preclusion of such a First Amendment double standard in *Brown*. *Id.* at 174 (Ambro, J., dissenting) (expressing concern about “a medium-specific metric that provides less protection to video games than other expressive works”). The majority did not respond to Judge Ambro’s concerns at all, except to claim that it faithfully followed *Brown*’s admonition that video games “enjoy the full force of First Amendment protections.” *Id.* at 148 (majority opinion).

Similarly, Judge Thomas warned that the Ninth Circuit’s holding “jeopardizes the creative use of

¹⁵ The Ninth Circuit’s applications of the transformative-use test prior to the case also demonstrate the test’s unpredictability. In *Hilton*, the court held that the use of Paris Hilton’s face superimposed over a cartoon body in a greeting card parody of the television show *The Simple Life* was not transformative because “the basic setting is the same [as in the show]: we see Paris Hilton, born to privilege, working as a waitress.” 599 F.3d at 911. Yet in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), the Ninth Circuit stated in dicta that a magazine’s use of an image of Dustin Hoffman from “*Tootsie*” was transformative because “Hoffman’s body was eliminated and a new, differently clothed body was substituted in its place.” *Id.* at 1184 n.2.

historic figures in motion pictures, books, and sound recordings.” Pet. App. 43a (Thomas, J., dissenting). The majority responded that its holding was not so broad, because its transformative-use test allows a court to consider “whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. Certainly this leaves room for distinguishing this case . . . and cases involving *other kinds of expressive works*.” *Id.* at 19a-20a n.10 (majority opinion) (internal quotation marks omitted; citations omitted) (emphasis added). This reasoning bears no relation to this Court’s First Amendment jurisprudence. First, it implies the type of medium-specific metric this Court rejected in *Brown*, 131 S. Ct. at 2733. Second, it requires speakers to *guess* what a court might *guess* to be “a likely *purchaser’s* primary motivation,” Pet. App. 19a n.10, in buying an expressive work. Such a standard might “leave[] room for [courts to] distinguish[]” cases, *id.* at 20a n.10, but it leaves *no* “breathing room for protected speech,” *Illinois ex. rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). Speakers’ potential liability cannot possibly depend upon whether they guess correctly about the motivations of people they do not know and cannot control.

Speakers need certainty about whether their speech will subject them to liability, or they will self-censor. The transformative-use test cannot provide that predictability.

C. Case-Specific Balancing Is Equally Problematic.

Decisions calling for ad hoc balancing of First Amendment interests and the interests protected by the right of publicity present just as many constitutional problems. *See, e.g., Cardtoons*, 95 F.3d at 973-76; *C.B.C.*, 505 F.3d at 824. This Court has rejected any notion of a “free-floating test for First Amendment coverage.” *Stevens*, 559 U.S. at 470; *see also Brown*, 131 S. Ct. at 2734. As this Court has explained, “[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” *Stevens*, 559 U.S. at 470.

Moreover, here, ad hoc balancing requires a court to weigh apples against oranges. There is no principled way to determine, case by case, whether the *economic* interest of a person in preventing a given portrayal outweighs the *social* value of a given expressive work. The two interests being compared are too different to enable judges to reach consistent and predictable results.

**D. The *Rogers* Test Confines the Right of
Publicity to Circumstances Where Its
Application Does Not Violate the First
Amendment.**

Unlike the transformative-use test and case-by-case balancing, the *Rogers* test confines the right-of-publicity tort to situations in which speakers have used a depiction of, or reference to, a celebrity to sell something—either by falsely claiming a celebrity commercial endorsement or by including a celebrity image in a publication gratuitously, just to attract attention.

Confined to these circumstances, the right of publicity does not raise constitutional concerns. Speech that falsely claims a commercial endorsement is akin to the category of fraudulent speech that the government has long regulated without any First Amendment concerns. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (noting that fraudulent speech generally falls outside the protections of the First Amendment). And the gratuitous use of a celebrity’s image to attract attention, unrelated to any expressive content in the work, likewise falls outside First Amendment protection altogether. Thus confined, the right-of-publicity tort raises little constitutional concern.

* * *

This Court’s review is sorely needed. Because so many expressive works are distributed nationwide, the rule created by the Ninth and Third Circuits effectively has set the constitutional rule for the rest of the country. But that rule makes no sense constitutionally.

Moreover, the rule is so vague and unpredictable in its application that speakers will not know whether their speech is constitutionally protected or tortious. Given the potentially ruinous financial consequences of guessing wrong (here, Respondent seeks hundreds of millions of dollars on behalf of a class that could have thousands of members), speakers will go too far in their self-censorship. Unless and until this Court intervenes, a great deal of valuable and protected expression will be chilled.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Kelli L. Sager
Alonzo Wickers IV
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street
Suite 2400
Los Angeles, CA 90017
(213) 633-6800

Paul M. Smith
Counsel of Record
Kenneth L. Doroshov
Katherine A. Fallow
Matthew E. Price
Mark P. Gaber
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

APPENDIX

1a

Appendix A

United States Court of Appeals,
Ninth Circuit.

In re NCAA STUDENT-ATHLETE NAME &
LIKENESS LICENSING LITIGATION,
Samuel Michael Keller; Edward C. O'bannon, Jr.;
Byron Bishop; Michael Anderson; Danny Wimprine;
Ishmael Thrower; Craig Newsome; Damien Rhodes;
Samuel Jacobson, Plaintiffs-Appellees,

v.

Electronic Arts Inc., Defendant-Appellant,
and
National Collegiate Athletic Association; Collegiate
Licensing Company, Defendants.

No. 10-15387.

Argued and Submitted Feb. 15, 2011.

Submission Vacated Feb. 18, 2011.

Argued and Resubmitted July 13, 2012.

Filed July 31, 2013.

Gregory L. Cutner and Robert J. Wierenga, Schiff
Harden, LLP, Ann Arbor, MI; Rocky N. Unruh, Schiff
Hardin, LLP, San Francisco, CA, for Amicus Curiae
National Collegiate Athletic Association.*

Appeal from the United States District Court for the
Northern District of California, Claudia A. Wilken,
District Judge, Presiding. D.C. No. 4:09-cv-01967-CW.

* The NCAA's motion to file its amicus brief is GRANTED.

Before: SIDNEY R. THOMAS and JAY S. BYBEE, Circuit Judges, and GORDON J. QUIST, Senior District Judge.**

OPINION

BYBEE, Circuit Judge:

Video games are entitled to the full protections of the First Amendment, because “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).” *Brown v. Entm’t Merchs. Ass’n*, — U.S. —, —, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011).¹ Such rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First

** The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

¹ In *Brown v. Electronic Arts, Inc.*, No. 09–56675, slip op. at 9–10 (9th Cir. July 31, 2013), we noted that “there may be some work referred to as a ‘video game’ (or referred to as a ‘book,’ ‘play,’ or ‘movie’ for that matter) that does not contain enough of the elements contemplated by the Supreme Court [in *Brown v. Entertainment Merchants Association*] to warrant First Amendment protection as an expressive work,” but asserted that “[e]ven if there is a line to be drawn between expressive video games and non-expressive video games, and even if courts should at some point be drawing that line, we have no need to draw that line here.” The same holds true in this case.

Amendment. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977). In this case, we must balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer to use his likeness in its expressive works.

The district court concluded that the game developer, Electronic Arts (“EA”), had no First Amendment defense against the right-of-publicity claims of the football player, Samuel Keller. We affirm. Under the “transformative use” test developed by the California Supreme Court, EA’s use does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown. The other First Amendment defenses asserted by EA do not defeat Keller’s claims either.

I

Samuel Keller was the starting quarterback for Arizona State University in 2005 before he transferred to the University of Nebraska, where he played during the 2007 season. EA is the producer of the *NCAA Football* series of video games, which allow users to control avatars representing college football players as those avatars participate in simulated games. In *NCAA Football*, EA seeks to replicate each school’s entire team as accurately as possible. Every real football player on each team included in the game has a corresponding avatar in the game with the player’s actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state. EA attempts to match any unique, highly identifiable

playing behaviors by sending detailed questionnaires to team equipment managers. Additionally, EA creates realistic virtual versions of actual stadiums; populates them with the virtual athletes, coaches, cheerleaders, and fans realistically rendered by EA's graphic artists; and incorporates realistic sounds such as the crunch of the players' pads and the roar of the crowd.

EA's game differs from reality in that EA omits the players' names on their jerseys and assigns each player a home town that is different from the actual player's home town. However, users of the video game may upload rosters of names obtained from third parties so that the names do appear on the jerseys. In such cases, EA allows images from the game containing athletes' real names to be posted on its website by users. Users can further alter reality by entering "Dynasty" mode, where the user assumes a head coach's responsibilities for a college program for up to thirty seasons, including recruiting players from a randomly generated pool of high school athletes, or "Campus Legend" mode, where the user controls a virtual player from high school through college, making choices relating to practices, academics, and social life.

In the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller. In the 2008 edition, the virtual quarterback for Nebraska has these same characteristics, though the jersey number does not

match, presumably because Keller changed his number right before the season started.

Objecting to this use of his likeness, Keller filed a putative class-action complaint in the Northern District of California asserting, as relevant on appeal, that EA violated his right of publicity under California Civil Code § 3344 and California common law.² EA moved to strike the complaint as a strategic lawsuit against public participation (“SLAPP”) under California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, and the district court denied the motion. We have jurisdiction over EA’s appeal pursuant to 28 U.S.C. § 1291. *See Batzel v. Smith*, 333 F.3d 1018, 1024–26 (9th Cir. 2003).³

II

California’s anti-SLAPP statute is designed to discourage suits that “masquerade as ordinary lawsuits but are brought to deter common citizens from

² There are actually nine named plaintiffs, all former National Collegiate Athletic Association (“NCAA”) football or basketball players: Keller, Edward O’Bannon, Jr. (UCLA), Byron Bishop (University of North Carolina), Michael Anderson (University of Memphis), Danny Wimprine (University of Memphis), Ishmael Thrower (Arizona State University), Craig Newsome (Arizona State University), Damien Rhodes (Syracuse University), and Samuel Jacobson (University of Minnesota). EA’s NCAA basketball games are also implicated in this appeal. Because the issues are the same for each plaintiff, all of the claims are addressed through our discussion of Keller and *NCAA Football*.

³ We review *de novo* the district court’s denial of a motion to strike under California’s anti-SLAPP statute. *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010).

exercising their political or legal rights or to punish them for doing so.” *Batzel*, 333 F.3d at 1024 (internal quotation marks omitted). The statute provides:

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1). We have determined that the anti-SLAPP statute is available in federal court. *Thomas v. Fry’s Elecs., Inc.*, 400 F.3d 1206 (9th Cir. 2005) (per curiam).

We evaluate an anti-SLAPP motion in two steps. First, the defendant must “make a prima facie showing that the plaintiff’s suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant’s right to free speech under the United States or California Constitution.” *Batzel*, 333 F.3d at 1024. Keller does not contest that EA has made this threshold showing. Indeed, there is no question that “video games qualify for First Amendment protection,” *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2733, or that Keller’s suit arises from EA’s production and distribution of *NCAA Football* in furtherance of EA’s protected right to express itself through video games.

Second, we must evaluate whether the plaintiff has “establish[ed] a reasonable probability that the plaintiff will prevail on his or her . . . claim.” *Batzel*, 333 F.3d at 1024. “The plaintiff must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited.” *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) (internal quotation marks omitted). The statute “subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim.” *Navellier v. Sletten*, 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703, 711 (Cal. 2002) (internal quotation marks omitted). EA did not contest before the district court and does not contest here that Keller has stated a right-of-publicity claim under California common and statutory law.⁴ Instead, EA raises four affirmative defenses derived from the First Amendment: the “transformative use” test, the *Rogers* test, the “public interest” test, and the “public affairs” exemption. EA argues that, in light of these defenses, it is not reasonably probable that Keller

⁴ The elements of a right-of-publicity claim under California common law are: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Stewart v. Rolling Stone LLC*, 181 Cal.App.4th 664, 105 Cal.Rptr.3d 98, 111 (internal quotation marks omitted). The same claim under California Civil Code § 3344 requires a plaintiff to prove “all the elements of the common law cause of action” plus “a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.” *Id.*

will prevail on his right-of-publicity claim. This appeal therefore centers on the applicability of these defenses. We take each one in turn.⁵

A

The California Supreme Court formulated the transformative use defense in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 21 P.3d 797 (Cal. 2001). The defense is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Id.* at 799. The California Supreme Court explained that “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.” *Id.* at 808. The court rejected the wholesale importation of the copyright “fair use” defense into right-of-publicity claims, but recognized that some aspects of that defense are “particularly pertinent.” *Id.*; see 17 U.S.C. § 107; see also *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1277–78 (9th Cir. 2013) (discussing the “fair use” defense codified in 17 U.S.C. § 107).

Comedy III gives us at least five factors to consider in determining whether a work is sufficiently

⁵Just as we did in *Hilton v. Hallmark Cards*, we reserve the question of whether the First Amendment furnishes a defense other than those the parties raise. 599 F.3d 894, 909 n.11 (9th Cir. 2009).

transformative to obtain First Amendment protection. See J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 8:72 (2d ed. 2012). First, if “the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized,” it is more likely to be transformative than if “the depiction or imitation of the celebrity is the very sum and substance of the work in question.” *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 809. Second, the work is protected if it is “primarily the defendant’s own expression”—as long as that expression is “something other than the likeness of the celebrity.” *Id.* This factor requires an examination of whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. McCarthy, *supra*, § 8:72. Third, to avoid making judgments concerning “the quality of the artistic contribution,” a court should conduct an inquiry “more quantitative than qualitative” and ask “whether the literal and imitative or the creative elements predominate in the work.” *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 809. Fourth, the California Supreme Court indicated that “a subsidiary inquiry” would be useful in close cases: whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.” *Id.* at 810. Lastly, the court indicated that “when an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame,” the work is not transformative. *Id.*

We have explained that “[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,” because the California Supreme Court “envisioned the application of the defense as a question of fact.” *Hilton*, 599 F.3d at 910. As a result, EA “is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.” *Id.*

California courts have applied the transformative use test in relevant situations in four cases. First, in *Comedy III* itself, the California Supreme Court applied the test to T-shirts and lithographs bearing a likeness of The Three Stooges and concluded that it could “discern no significant transformative or creative contribution.” *Id.* at 811. The court reasoned that the artist’s “undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.” *Id.* “[W]ere we to decide that [the artist’s] depictions were protected by the First Amendment,” the court continued, “we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements.” *Id.*

Second, in *Winter v. DC Comics*, the California Supreme Court applied the test to comic books containing characters Johnny and Edgar Autumn, “depicted as villainous half-worm, half-human offspring” but evoking two famous brothers, rockers Johnny and Edgar Winter. 30 Cal.4th 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 476 (Cal. 2003). The court held that “the comic books are transformative and entitled to First Amendment protection.” *Id.* at 480. It

reasoned that the comic books “are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs’ mere likenesses.” *Id.* at 479. “To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature.” *Id.* Importantly, the court relied on the fact that the brothers “are but cartoon characters . . . in a larger story, which is itself quite expressive.” *Id.*

Third, in *Kirby v. Sega of America, Inc.*, the California Court of Appeal applied the transformative use test to a video game in which the user controls the dancing of “Ulala,” a reporter from outer space allegedly based on singer Kierin Kirby, whose “signature’ lyrical expression . . . is ‘ooh la la.’” 144 Cal.App.4th 47, 50 Cal.Rptr.3d 607, 609–10 (Ct. App. 2006). The court held that “Ulala is more than a mere likeness or literal depiction of Kirby,” pointing to Ulala’s “extremely tall, slender computer-generated physique,” her “hairstyle and primary costume,” her dance moves, and her role as “a space-age reporter in the 25th century,” all of which were “unlike any public depiction of Kirby.” *Id.* at 616. “As in *Winter*, Ulala is a ‘fanciful, creative character’ who exists in the context of a unique and expressive video game.” *Id.* at 618.

Finally, in *No Doubt v. Activision Publishing, Inc.*, the California Court of Appeal addressed Activision’s *Band Hero* video game. 192 Cal.App.4th 1018, 122 Cal.Rptr.3d 397, 400 (Ct. App. 2011), *petition for review denied*, 2011 Cal. LEXIS 6100 (Cal. June 8, 2011) (No. B223996). In *Band Hero*, users simulate performing in a rock band in time with popular songs. *Id.* at 401.

Users choose from a number of avatars, some of which represent actual rock stars, including the members of the rock band No Doubt. *Id.* at 401. Activision licensed No Doubt’s likeness, but allegedly exceeded the scope of the license by permitting users to manipulate the No Doubt avatars to play any song in the game, solo or with members of other bands, and even to alter the avatars’ voices. *Id.* at 402. The court held that No Doubt’s right of publicity prevailed despite Activision’s First Amendment defense because the game was not “transformative” under the *Comedy III* test. It reasoned that the video game characters were “literal recreations of the band members,” doing “the same activity by which the band achieved and maintains its fame.” *Id.* at 411. According to the court, the fact “that the avatars appear in the context of a videogame that contains many other creative elements[] does not transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.” *Id.* The court concluded that “the expressive elements of the game remain manifestly subordinated to the overall goal of creating a conventional portrait of No Doubt so as to commercially exploit its fame.” *Id.* (internal quotation marks omitted).

We have also had occasion to apply the transformative use test. In *Hilton v. Hallmark Cards*, we applied the test to a birthday card depicting Paris Hilton in a manner reminiscent of an episode of Hilton’s reality show *The Simple Life*. 599 F.3d at 899. We observed some differences between the episode and the card, but noted that “the basic setting is the same: we

see Paris Hilton, born to privilege, working as a waitress.” *Id.* at 911. We reasoned that “[w]hen we compare Hallmark’s card to the video game in *Kirby*, which transported a 1990s singer (catchphrases and all) into the 25th century and transmogrified her into a space-age reporter, . . . the card falls far short of the level of new expression added in the video game.” *Id.* As a result, we concluded that “there is enough doubt as to whether Hallmark’s card is transformative under our case law that we cannot say Hallmark is entitled to the defense as a matter of law.” *Id.*⁶

With these cases in mind as guidance, we conclude that EA’s use of Keller’s likeness does not contain significant transformative elements such that EA is entitled to the defense as a matter of law. The facts of *No Doubt* are very similar to those here. EA is alleged to have replicated Keller’s physical characteristics in *NCAA Football*, just as the members of No Doubt are realistically portrayed in *Band Hero*. Here, as in *Band Hero*, users manipulate the characters in the performance of the same activity for which they are known in real life—playing football in this case, and

⁶ We also briefly addressed the transformative use test in a footnote in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). We indicated that if we had considered the test, we would have concluded that an image of Dustin Hoffman from “Tootsie” that had been altered to make it appear like he was wearing fashions from a decade later “contained ‘significant transformative elements.’” *Id.* at 1184 n.2; 1182–83. “Hoffman’s body was eliminated and a new, differently clothed body was substituted in its place. In fact, the entire theory of Hoffman’s case rests on his allegation that the photograph is not a ‘true’ or ‘literal’ depiction of him, but a false portrayal.” *Id.* at 1184 n.2.

performing in a rock band in *Band Hero*. The context in which the activity occurs is also similarly realistic—real venues in *Band Hero* and realistic depictions of actual football stadiums in *NCAA Football*. As the district court found, Keller is represented as “what he was: the starting quarterback for Arizona State” and Nebraska, and “the game’s setting is identical to where the public found [Keller] during his collegiate career: on the football field.” *Keller v. Elec. Arts, Inc.*, No. C 09–1967 CW, 2010 WL 530108, at *5 (N.D. Cal. Feb. 8, 2010).

EA argues that the district court erred in focusing primarily on Keller’s likeness and ignoring the transformative elements of the game as a whole. Judge Thomas, our dissenting colleague, suggests the same. *See* Dissent at 34. We are unable to say that there was any error, particularly in light of *No Doubt*, which reasoned much the same as the district court in this case: “that the avatars appear in the context of a videogame that contains many other creative elements[] does not transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.” *No Doubt*, 122 Cal.Rptr.3d at 411.⁷ EA

⁷ Judge Thomas argues that the “sheer number of virtual actors,” the absence of “any evidence as to the personal marketing power of Sam Keller,” and the relative anonymity of each individual player in *NCAA Football* as compared to the public figures in other California right-of publicity cases all mitigate in favor of finding that the EA’s First Amendment rights outweigh Keller’s right of publicity. *See* Dissent at 37–40. These facts are not irrelevant to the analysis—they all can be considered in the framework of the five considerations from *Comedy III* laid out above—but the fact is that EA elected to use avatars that mimic

suggests that the fact that *NCAA Football* users can alter the characteristics of the avatars in the game is significant. Again, our dissenting colleague agrees. *See* Dissent at 36–37. In *No Doubt*, the California Court of Appeal noted that *Band Hero* “d[id] not permit players to alter the No Doubt avatars in any respect.” *Id.* at 410. The court went on to say that the No Doubt avatars “remain at all times immutable images of the real celebrity musicians, in stark contrast to the ‘fanciful, creative characters’ in *Winter* and *Kirby*.” *Id.* The court explained further:

[I]t is the differences between *Kirby* and the instant case . . . which are determinative. In *Kirby*, the pop singer was portrayed as an entirely new character—the space-age news reporter Ulala. In *Band Hero*, by contrast, no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a

real college football players for a reason. If EA did not think there was value in having an avatar designed to mimic each individual player, it would not go to the lengths it does to achieve realism in this regard. Having chosen to use the players’ likenesses, EA cannot now hide behind the numerosity of its potential offenses or the alleged unimportance of any one individual player.

videogame that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.

Id. at 410–11. Judge Thomas says that “[t]he Court of Appeal cited character immutability as a chief factor distinguishing [*No Doubt*] from *Winter* and *Kirby*.” Dissent at 37. Though No Doubt certainly mentioned the immutability of the avatars, we do not read the California Court of Appeal’s decision as turning on the inability of users to alter the avatars. The key contrast with *Winter* and *Kirby* was that in those games the public figures were transformed into “fanciful, creative characters” or “portrayed as . . . entirely new character[s].” *No Doubt*, 122 Cal.Rptr.3d at 410. On this front, our case is clearly aligned with *No Doubt*, not with *Winter* and *Kirby*. We believe No Doubt offers a persuasive precedent that cannot be materially distinguished from Keller’s case.^{8,9}

⁸ EA further argues that *No Doubt* is distinguishable because the video game company in that case entered into a license agreement which it allegedly breached. However, the California Court of Appeal did not rely on breach of contract in its analysis of whether the game was transformative. 122 Cal.Rptr.3d at 412 n.7. Keller asserts here that EA contracted away its First Amendment rights in a licensing agreement with the NCAA that purportedly prohibited the use of athlete likenesses. However, in light of our conclusion that EA is not entitled to a First Amendment defense as a matter of law, we need not reach this issue and leave it for the district court to address in the first instance on remand should the finder of fact determine in post-SLAPP proceedings that EA’s use is transformative.

The Third Circuit came to the same conclusion in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). In *Hart*, EA faced a materially identical challenge under New Jersey right-of-publicity law, brought by former Rutgers quarterback Ryan Hart. *See id.* at 163 n.28 (“*Keller* is simply [*Hart*] incarnated in California.”). Though the Third Circuit was tasked with interpreting New Jersey law, the court looked to the transformative use test developed in California. *See id.* at 158 n.23 (noting that the right-of-publicity laws are “strikingly similar . . . and protect similar interests” in New Jersey and California, and that “consequently [there is] no issue in applying balancing tests developed in California to New Jersey”); *see also id.* at 165 (holding that “the Transformative Use Test is the proper analytical framework to apply to cases such as the one at bar”). Applying the test, the court held that “the *NCAA Football* . . . games at issue . . . do not sufficiently transform [*Hart*]’s identity to escape the

⁹ In dissent, Judge Thomas suggests that this case is distinguishable from other right-to-publicity cases because “an individual college athlete’s right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent” because “NCAA rules prohibit athletes from benefitting economically from any success on the field.” Dissent at 41. Judge Thomas commendably addresses the fairness of this structure, *see* Dissent at 41–42 n.5, but setting fairness aside, the fact is that college athletes are not indefinitely bound by NCAA rules. Once an athlete graduates from college, for instance, the athlete can capitalize on his success on the field during college in any number of ways. EA’s use of a college athlete’s likeness interferes with the athlete’s right to capitalize on his athletic success once he is beyond the dominion of NCAA rule.

right of publicity claim,” reversing the district court’s grant of summary judgment to EA. *Id.* at 170.

As we have, the Third Circuit considered the potentially transformative nature of the game as a whole, *id.* at 166, 169, and the user’s ability to alter avatar characteristics, *id.* at 166–68. Asserting that “the lack of transformative context is even more pronounced here than in *No Doubt*,” *id.* at 166, and that “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,” *id.* at 168 (internal quotation marks omitted), the Third Circuit agreed with us that these changes do not render the *NCAA Football* games sufficiently transformative to defeat a right-of-publicity claim.

Judge Ambro dissented in *Hart*, concluding that “the creative components of *NCAA Football* contain sufficient expressive transformation to merit First Amendment protection.” *Id.* at 175 (Ambro, J., dissenting). But in critiquing the majority opinion, Judge Ambro disregarded *No Doubt* and *Kirby* because “they were not decided by the architect of the Transformative Use Test, the Supreme Court of California.” *Id.* at 172 n.4. He thus “d[id] not attempt to explain or distinguish the[se cases’] holdings except to note that [he] believe[s] *No Doubt*, which focused on individual depictions rather than the work in its entirety, was wrongly decided in light of the prior precedent in *Comedy III* and *Winter*.” *Id.* We recognize that we are bound only by the decisions of a state’s highest court and not by decisions of the state’s intermediate appellate court when considering statelaw

issues sitting in diversity jurisdiction. See *In re Kirkland*, 915 F.2d 1236, 1238–39 (9th Cir. 1990). Nonetheless, where there is no binding precedent from the state’s highest court, we “must predict how the highest state court would decide the issue using *intermediate appellate court decisions*, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” *Id.* at 1239 (emphasis added). As stated above, we believe *No Doubt* in particular provides persuasive guidance. 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. Like the majority in *Hart*, we rely substantially on *No Doubt*, and believe we are correct to do so.

Given that *NCAA Football* realistically portrays college football players in the context of college football games, the district court was correct in concluding that EA cannot prevail as a matter of law based on the transformative use defense at the anti-SLAPP stage. Cf. *Hilton*, 599 F.3d at 910–11.¹⁰

¹⁰ Judge Thomas asserts that “[t]he logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context,” “jeopardiz[ing] the creative use of historic figures in motion pictures, books, and sound recordings.” Dissent at 43. We reject the notion that our holding has such broad consequences. As discussed above, one of the factors identified in *Comedy III* “requires an examination of whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist.” *McCarthy*, *supra*, § 8:72; see *Comedy III*, 106 Cal.Rptr.2d

B

EA urges us to adopt for right-of-publicity claims the broader First Amendment defense that we have previously adopted in the context of false endorsement claims under the Lanham Act: the *Rogers* test.¹¹ See *Brown v. Elec. Arts*, No. 09–56675, slip op. at 5–6 (applying the *Rogers* test to a Lanham Act claim brought by former NFL player Jim Brown relating to the use of his likeness in EA’s *Madden NFL* video games).

Rogers v. Grimaldi is a landmark Second Circuit case balancing First Amendment rights against claims under the Lanham Act. 875 F.2d 994 (2d Cir.1989). The case involved a suit brought by the famous performer Ginger Rogers against the producers and distributors of *Ginger and Fred*, a movie about two fictional Italian cabaret performers who imitated Rogers and her frequent performing partner Fred Astaire. *Id.* at 996–97. Rogers alleged both a violation of the Lanham Act for creating the false impression that she endorsed the film and infringement of her common law right of publicity. *Id.* at 997.

126, 21 P.3d at 809. Certainly this leaves room for distinguishing between this case—where we have emphasized EA’s primary emphasis on reproducing reality—and cases involving other kinds of expressive works.

¹¹ Keller argues that EA never asked the district court to apply *Rogers* and has therefore waived the issue on appeal. Although it could have been more explicit, EA’s anti-SLAPP motion did cite *Rogers* and argue that Keller had not alleged that his likeness was “wholly unrelated” to the content of the video game or a “disguised commercial advertisement,” the two prongs of the *Rogers* test.

The *Rogers* court recognized that “[m]ovies, plays, books, and songs are all indisputably works of artistic expression and deserve protection,” but that “[t]he purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product.” *Id.* “Consumers of artistic works thus have a dual interest: They have an interest in not being misled and they also have an interest in enjoying the results of the author’s freedom of expression.” *Id.* at 998. The *Rogers* court determined that titles of artistic or literary works were less likely to be misleading than “the names of ordinary commercial products,” and thus that Lanham Act protections applied with less rigor when considering titles of artistic or literary works than when considering ordinary products. *Id.* at 999–1000. The court concluded that “in general the Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.” *Id.* at 999. The court therefore held:

In the context of allegedly misleading titles using a celebrity’s name, that balance will normally not support application of the [Lanham] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.

Id.

We first endorsed the *Rogers* test for Lanham Act claims involving artistic or expressive works in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir.

2002). We agreed that, in the context of artistic and literary titles, “[c]onsumers expect a title to communicate a message about the book or movie, but they do not expect it to identify the publisher or producer,” and “adopt[ed] the *Rogers* standard as our own.” *Id.* Then, in *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, we considered a claim by a strip club owner that video game maker Rock Star incorporated its club logo into the game’s virtual depiction of East Los Angeles, violating the club’s trademark right to that logo. 547 F.3d 1095, 1096–98 (9th Cir. 2008). We held that Rock Star’s use of the logo and trade dress was protected by the First Amendment and that it therefore could not be held liable under the Lanham Act. *Id.* at 1099–1101. In so doing, we extended the *Rogers* test slightly, noting that “[a]lthough this test traditionally applies to uses of a trademark in the title of an artistic work, there is no principled reason why it ought not also apply to the use of a trademark in the body of the work.” *Id.* at 1099.

In this case, EA argues that we should extend this test, created to evaluate Lanham Act claims, to apply to right-of-publicity claims because it is “less prone to misinterpretation” and “more protective of free expression” than the transformative use defense. Although we acknowledge that there is some overlap between the transformative use test formulated by the California Supreme Court and the *Rogers* test, we disagree that the *Rogers* test should be imported wholesale for right-of-publicity claims. Our conclusion on this point is consistent with the Third Circuit’s rejection of EA’s identical argument in *Hart*. *See Hart*,

717 F.3d at 154–58. As the history and development of the *Rogers* test makes clear, it was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim. *See Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1149 (9th Cir. 2002). The right of publicity, on the other hand, does not primarily seek to prevent consumer confusion. *See Hart*, 717 F.3d at 158 (“[T]he right of publicity does not implicate the potential for consumer confusion. . . .”). Rather, it primarily “protects a form of intellectual property [in one’s person] that society deems to have some social utility.” *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 804. As the California Supreme Court has explained:

Often considerable money, time and energy are needed to develop one’s prominence in a particular field. Years of labor may be required before one’s skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one’s identity.

Id. at 804–05 (internal quotation marks and citations omitted).

The right of publicity protects the *celebrity*, not the *consumer*. Keller’s publicity claim is not founded on an allegation that consumers are being illegally misled into believing that he is endorsing EA or its products. Indeed, he would be hard-pressed to support such an allegation absent evidence that EA explicitly misled consumers into holding such a belief. *See Brown v. Elec. Arts*, No. 09–56675, slip op. at 23 (holding under the

Rogers test that, since “Brown’s likeness is artistically relevant to the [*Madden NFL*] games and there are no alleged facts to support the claim that EA explicitly misled consumers as to Brown’s involvement with the games,” “the public interest in free expression outweighs the public interest in avoiding consumer confusion”). Instead, Keller’s claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field. The reasoning of the *Rogers* and *Mattel* courts—that artistic and literary works should be protected unless they explicitly mislead consumers—is simply not responsive to Keller’s asserted interests here. *Cf. Hart*, 717 F.3d at 157 (“Effectively, [EA] argues that [Hart] should be unable to assert a claim for appropriating his likeness as a football player precisely because his likeness was used for a game about football. Adopting this line of reasoning threatens to turn the right of publicity on its head.”).

We recognize that *Rogers* also dealt with a right-of-publicity claim—one under Oregon law—and applied a modified version of its Lanham Act test in order to adapt to that particular context:

In light of the Oregon Court’s concern for the protection of free expression, . . . the right of publicity [would not] bar the use of a celebrity’s name in a movie title unless the title was “wholly unrelated” to the movie or was “simply a disguised commercial advertisement for the sale of goods or services.”

875 F.2d at 1004. However, the *Rogers* court was faced with a situation in which the “Oregon Courts . . . [had] not determined the scope of the common law right of publicity in that state.” *Id.* at 1002. In the absence of clear state-law precedent, the *Rogers* court was “obliged to engage in 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.” *Id.* In light of *Comedy III* and its progeny, we are faced with no such uncertain task.

Lastly, we note that the only circuit court to import the *Rogers* test into the publicity arena, the Sixth Circuit, has done so inconsistently. In *Parks v. LaFace Records*, the Sixth Circuit indicated that the *Rogers* test was appropriate for right-of-publicity claims, noting that the Restatement (Third) of Unfair Competition had endorsed use of the test in that context. 329 F.3d 437, 461 (6th Cir. 2003) (citing *Restatement (Third) of Unfair Competition* § 47 cmt. c). Subsequently, in *ETW Corp. v. Jireh Publishing, Inc.*, the court acknowledged the *Parks* decision but did not apply the *Rogers* test to the Ohio right-of-publicity claim in question. 332 F.3d at 915, 936 & n.17 (6th Cir. 2003). Instead, the court applied a balancing test from comment d in the *Restatement* (analyzing “the substantiality and market effect of the use of the celebrity’s image . . . in light of the informational and creative content”), as well as the transformative use test from *Comedy III*. *Id.* at 937–38; see *Hart*, 717 F.3d at 157 (“We find *Parks* to be less than persuasive [as to the applicability of the *Rogers*

test to right-of-publicity cases] given that just over a month later another panel of the Sixth Circuit decided [*ETW*], a right of publicity case where the Circuit applied the Transformative Use Test.”). Similarly, the Tenth Circuit in *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996), and the Eighth Circuit in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), rejected the *Rogers* test in favor of a flexible case-by-case approach that takes into account the celebrity’s interest in retaining his or her publicity and the public’s interest in free expression. Therefore, we decline EA’s invitation to extend the *Rogers* test to right-of-publicity claims.

C

California has developed two additional defenses aimed at protecting the reporting of factual information under state law. One of these defenses only applies to common law right-of-publicity claims while the other only applies to statutory right-of-publicity claims. *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639, 640 (Ct. App. 1995). Liability will not lie for common law right-of-publicity claims for the “publication of matters in the public interest.” *Id.* at 640–41. Similarly, liability will not lie for statutory right-of-publicity claims for the “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.” Cal. Civ. Code § 3344(d). Although these defenses are based on First Amendment concerns, *Gill v. Hearst Publ’g Co.*, 40 Cal.2d 224, 253 P.2d 441, 443–44 (Cal.

1953), they are not coextensive with the Federal Constitution, *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992), and their application is thus a matter of state law.

EA argues that these defenses give it the right to “incorporate athletes’ names, statistics, and other biographical information” into its expressive works, as the defenses were “designed to create ‘extra breathing space’ for the use of a person’s name in connection with matters of public interest.” Keller responds that the right of publicity yields to free use of a public figure’s likeness only to the extent reasonably required to report information to the public or publish factual data, and that the defenses apply only to broadcasts or accounts of public affairs, not to EA’s *NCAA Football* games, which do not contain or constitute such reporting about Keller.

California courts have generally analyzed the common law defense and the statutory defense separately, but it is clear that both defenses protect only the act of publishing or reporting. By its terms, § 3344(d) is limited to a “broadcast or account,” and we have confirmed that the common law defense is about a publication or reporting of newsworthy items. *Hilton*, 599 F.3d at 912. However, most of the discussion by California courts pertains to whether the subject matter of the communication is of “public interest” or related to “news” or “public affairs,” leaving little guidance as to when the communication constitutes a publication or reporting.

For instance, in *Dora v. Frontline Video, Inc.*, a well known surfer sued the producer of a documentary on

surfing entitled “The Legends of Malibu,” claiming misappropriation of his name and likeness. 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790, 791 (Ct. App. 1993). The court held that the documentary was protected because it was “a fair comment on real life events which have caught the popular imagination.” *Id.* at 792 (internal quotation marks omitted). The court explained that surfing “has created a lifestyle that influences speech, behavior, dress, and entertainment,” has had “an economic impact,” and “has also had a significant influence on the popular culture,” such that “[i]t would be difficult to conclude that a surfing documentary does not fall within the category of public affairs.” *Id.* at 794–95. Similarly, in *Gionfriddo v. Major League Baseball*, retired professional baseball players alleged that Major League Baseball violated their right of publicity by displaying “factual data concerning the players, their performance statistics, and verbal descriptions and video depictions of their play” in game programs and on its website. 94 Cal.App.4th 400, 114 Cal.Rptr.2d 307, 314 (Ct. App. 2001). The court reasoned that “[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.” *Id.* at 315. And in *Montana v. San Jose Mercury News, Inc.*, former NFL quarterback Joe Montana brought a right-of-publicity action against a newspaper for selling posters containing previously published pages from the newspaper depicting the many Super Bowl victories by Montana and the San Francisco 49ers. *Montana*, 40 Cal.Rptr.2d at 639–40. The court found that “[p]osters

portraying the 49'ers' [sic] victories are . . . a form of public interest presentation to which protection must be extended." *Id.* at 641 (internal quotation marks omitted).

We think that, unlike in *Gionfriddo*, *Montana*, and *Dora*, EA is not publishing or reporting factual data. EA's video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games. Although EA has incorporated certain actual player information into the game (height, weight, etc.), its case is considerably weakened by its decision not to include the athletes' names along with their likenesses and statistical data. EA can hardly be considered to be "reporting" on Keller's career at Arizona State and Nebraska when it is not even using Keller's name in connection with his avatar in the game. Put simply, EA's interactive game is not a publication of facts about college football; it is a game, not a reference source. These state law defenses, therefore, do not apply.¹²

¹² We similarly reject Judge Thomas's argument that Keller's right-of publicity claim should give way to the First Amendment in light of the fact that "the essence of *NCAA Football* is founded on publicly available data." Dissent at 40. Judge Thomas compares *NCAA Football* to the fantasy baseball products that the Eighth Circuit deemed protected by the First Amendment in the face of a right-of-publicity claim in *C.B.C. Distribution and Marketing*, 505 F.3d at 823–24. Dissent at 40. But there is a big difference between a video game like *NCAA Football* and fantasy baseball products like those at issue in *C.B.C.* Those products merely "incorporate[d] the names along with performance and biographical data of actual major league baseball players." *Id.* at 820. *NCAA Football*, on the other hand, uses virtual likenesses of actual college football

III

Under California’s transformative use defense, EA’s use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment. We reject EA’s suggestion to import the *Rogers* test into the right-of-publicity arena, and conclude that statelaw defenses for the reporting of information do not protect EA’s use.

AFFIRMED.

players. It is seemingly true that each likeness is generated largely from publicly available data—though, as Judge Thomas acknowledges, EA solicits certain information directly from schools—but finding this fact dispositive would neuter the right of publicity in our digital world. Computer programmers with the appropriate expertise can create a realistic likeness of any celebrity using only publicly available data. If EA creates a virtual likeness of Tom Brady using only publicly available data—public images and videos of Brady—does EA have free reign to use that likeness in commercials without violating Brady’s right of publicity? We think not, and thus must reject Judge Thomas’s point about the public availability of much of the data used given that EA produced and used actual likenesses of the athletes involved.

THOMAS, Circuit Judge, dissenting:

Because the creative and transformative elements of Electronic Arts' NCAA Football video game series predominate over the commercial use of the athletes' likenesses, the First Amendment protects EA from liability. Therefore, I respectfully dissent.

I

As expressive works, video games are entitled to First Amendment protection. *Brown v. Entm't Merchs. Ass'n*, — U.S. —, —, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011). The First Amendment affords additional protection to *NCAA Football* because it involves a subject of substantial public interest: collegiate football. *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997). Because football is a matter of public interest, the use of the images of athletes is entitled to constitutional protection, even if profits are involved. *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 40 Cal.Rptr.2d 639, 643 n.2 (Cal. Ct. App. 1995); *see also* Cal. Civ. Code §3344(d) (exempting from liability the “use of a name . . . or likeness in connection with any . . . public affairs, or sports broadcast or account”).

Where it is recognized, the tort of appropriation is a creature of common law or statute, depending on the jurisdiction. However, the right to compensation for the misappropriation for commercial use of one's image or celebrity is far from absolute. In every jurisdiction, any right of publicity must be balanced against the constitutional protection afforded by the First Amendment. Courts have employed a variety of

methods in balancing the rights. *See, e.g., Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc). The California Supreme Court applies a “transformative use” test it formulated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 21 P.3d 797 (Cal. 2001).¹

As the majority properly notes, the transformative use defense is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 799. The rationale for the test, as the majority notes, is that “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.” *Id.* at 808.

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

¹ I agree with the majority that the test articulated in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), should not be employed in this context. The *Rogers* test is appropriately applied in Lanham Act cases, where the primary concern is with the danger of consumer confusion when a work is depicted as something it is not. 15 U.S.C. § 1125(a)(1). However, the right of publicity is an economic right to use the value of one own’s celebrity. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576–77, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977). Therefore, a more nuanced balancing is required. In our context, I believe the transformative use test—if correctly applied to the work as a whole—provides the proper analytical framework.

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. *Id.* at 809–10.

Although these considerations are often distilled as analytical factors, Justice Mosk was careful in *Comedy III* not to label them as such. Indeed, the focus of *Comedy III* is a more holistic examination of whether the transformative and creative elements of a particular work predominate over commercially based literal or imitative depictions. The distinction is critical, because excessive deconstruction of *Comedy III* can lead to misapplication of the test. And it is at this juncture that I must respectfully part ways with my colleagues in the majority.

The majority confines 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. In my view, this approach contradicts the holistic analysis required by the transformative use test. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170–76 (3d Cir. 2013) (Ambro, J.,

dissenting).² 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.

When EA's *NCAA Football* video game series is examined carefully, and put in proper context, I conclude that the creative and transformative elements of the games predominate over the commercial use of the likenesses of the athletes within the games.

A

The first step in conducting a balancing is to examine the creative work at issue. At its essence, EA's *NCAA Football* is a work of interactive historical fiction. Although the game changes from year to year, its most popular features predominately involve role-playing by the gamer. For example, a player can create a virtual image of himself as a potential college football player. The virtual player decides which position he would like to play, then participates in a series of "tryouts" or competes in an entire high school season to gauge his skill. Based on his performance, the virtual player is ranked and available to play at select colleges. The player chooses among the colleges, then assumes the role of a college football player. He also selects a major, the amount of time he wishes to spend on social activities, and practice—all of which may affect the virtual player's performance. He then plays

² I agree fully with Judge Ambro's excellent dissent in *Hart*, which describes the analytic flaws of applying a transformative use test outside the context of the work as a whole.

his position on the college team. In some versions of the game, in another mode, the virtual player can engage in a competition for the Heisman Trophy. In another popular mode, the gamer becomes a virtual coach. The coach scouts, recruits, and develops entirely fictional players for his team. The coach can then promote the team's evolution over decades of seasons.

The college teams that are supplied in the game do replicate the actual college teams for that season, including virtual athletes who bear the statistical and physical dimensions of the actual college athletes. But, unlike their professional football counterparts in the *Madden NFL* series, the NCAA football players in these games are not identified.

The gamers can also change their abilities, appearances, and physical characteristics at will. Keller's impressive physical likeness can be morphed by the gamer into an overweight and slow virtual athlete, with anemic passing ability. And the gamer can create new virtual players out of whole cloth. Players can change teams. The gamer could pit Sam Keller against himself, or a stronger or weaker version of himself, on a different team. Or the gamer could play the game endlessly without ever encountering Keller's avatar. In the simulated games, the gamer controls not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors. Of course, one may play the game leaving the players unaltered, pitting team against team. But, in this context as well, the work is one of historic fiction. The gamer controls the teams, players, and games.

Applying the *Comedy III* considerations to *NCAA Football* in proper holistic context, the considerations favor First Amendment protection. The athletic likenesses are but one of the raw materials from which the broader game is constructed. The work, considered as a whole, is primarily one of EA's own expression. The creative and transformative elements predominate over the commercial use of likenesses. The marketability and economic value of the game comes from the creative elements within, not from the pure commercial exploitation of a celebrity image. The game is not a conventional portrait of a celebrity, but a work consisting of many creative and transformative elements.

The video game at issue is much akin to the creations the California Supreme Court found protected in *Winter v. DC Comics*, 30 Cal.4th 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 476 (Cal. 2003), where the two fabled guitarists Johnny and Edgar Winter were easily identifiable, but depicted as chimeras. It is also consistent with the California Court of Appeal's decision in *Kirby v. Sega of America, Inc.*, 144 Cal.App.4th 47, 50 Cal.Rptr.3d 607, 609–10 (Cal. Ct. App. 2006), where a character easily identified as singer Kierin Kirby, more popularly known as Lady Miss Kier, was transformed into a “fanciful, creative character’ who exists in the context of a unique and expressive video game.” *Id.* at 618. So, too, are the virtual players who populate the world of the *NCAA Football* series.

No Doubt v. Activision Publishing, Inc., 192 Cal.App.4th 1018, 122 Cal.Rptr.3d 397 (Cal. Ct. App.

2011), is not to the contrary. The literal representations in *No Doubt* were not, and could not be, transformed in any way. Indeed, in *No Doubt*, the bandmembers posed for motion-capture photography to allow reproduction of their likenesses, *id.* at 402, and the Court of Appeal underscored the fact that the video game did not “permit players to alter the No Doubt avatars in any respect” and the avatars remained “at all times immutable images of the real celebrity musicians,” *id.* at 410. The Court of Appeal cited character immutability as a chief factor distinguishing that case from *Winter* and *Kirby*. *Id.* Unlike the avatars in *No Doubt*, the virtual players in NCAA Football are completely mutable and changeable at the whim of the gamer. The majority places great reliance on *No Doubt* as support for its proposition that the initial placement of realistic avatars in the game overcomes the First Amendment’s protection, but the Court of Appeal in *No Doubt* rejected such a cramped construction, noting that “even literal reproductions of celebrities may be ‘transformed’ into expressive works based on the context into which the celebrity image is placed.” *Id.* at 410 (citing *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 797).³

Unlike the majority, I would not punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games. Majority op. at 21 n.10. That the lifelike roar of the

³ Of course, to the extent that the Court of Appeal’s opinion in *No Doubt* may be read to be in tension with the transformative use test as articulated by the California Supreme Court in *Comedy III* and *Winter*, it must yield.

crowd and the crunch of pads contribute to the gamer's experience demonstrates how little of *NCAA Football* is driven by the particular likeness of Sam Keller, or any of the other plaintiffs, rather than by the game's artistic elements.

In short, considering the creative elements alone in this case satisfies the transformative use test in favor of First Amendment protection.

B

Although one could leave the analysis with an examination of the transformative and creative aspects of the game, a true balancing requires an inquiry as to the other side of the scales: the publicity right at stake. Here, as well, the *NCAA Football* video game series can be distinguished from the traditional right of publicity cases, both from a quantitative and a qualitative perspective.

As a quantitative matter, *NCAA Football* is different from other right of publicity cases in the sheer number of virtual actors involved. Most right of publicity cases involve either one celebrity, or a finite and defined group of celebrities. *Comedy III* involved literal likenesses of the Three Stooges. *Hilton v. Hallmark Cards*, 599 F.3d 894, 909–12 (9th Cir. 2009), involved the literal likeness of Paris Hilton. *Winter* involved the images of the rock star brother duo. *Kirby* involved the likeness of one singer. *No Doubt* focused on the likenesses of the members of a specific legendary band.

In contrast, *NCAA Football* includes not just Sam Keller, but thousands of virtual actors. This

consideration is of particular significance when we examine, as instructed by *Comedy III*, whether the source of the product marketability comes from creative elements or from pure exploitation of a celebrity image. 106 Cal.Rptr.2d 126, 21 P.3d at 810. There is not, at this stage of the litigation, any evidence as to the personal marketing power of Sam Keller, as distinguished from the appeal of the creative aspects of the product. Regardless, the sheer number of athletes involved inevitably diminish the significance of the publicity right at issue. *Comedy III* involved literal depictions of the Three Stooges on lithographs and T-shirts. *Winter* involved characters depicted in a comic strip. *Kirby* and *No Doubt* involved pivotal characters in a video game. The commercial image of the celebrities in each case was central to the production, and its contact with the consumer was immediate and unavoidable. In contrast, one could play *NCAA Football* thousands of times without ever encountering a particular avatar. In context of the collective, an individual's publicity right is relatively insignificant. Put another way, if an anonymous virtual player is tackled in an imaginary video game and no one notices, is there any right of publicity infringed at all?

The sheer quantity of the virtual players in the game underscores the inappropriateness of analyzing the right of publicity through the lens of one likeness only. Only when the creative work is considered in complete context can a proper analysis be conducted.

As a qualitative matter, the essence of *NCAA Football* is founded on publicly available data, which is not protected by any individual publicity rights. It is

true that EA solicits and receives information directly from colleges and universities. But the information is hardly proprietary. Personal vital statistics for players are found in college programs and media guides. Likewise, playing statistics are easily available. In this respect, the information used by EA is indistinguishable from the information used in fantasy athletic leagues, for which the First Amendment provides protection, *C.B. C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823–24 (8th Cir. 2007), or much beloved statistical board games, such as Strat-OMatic. An athlete’s right of publicity simply does not encompass publicly available statistical data. *See, e.g., IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271–72 (2d Cir. 2010) (“The First Amendment protects ‘[e]ven dry information, devoid of advocacy, political relevance, or artistic expression.’” (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001)) (alteration in original)).⁴

Further, the structure of the game is not founded on exploitation of an individual’s publicity rights. The players are unidentified and anonymous. It is true that third-party software is available to quickly identify the players, but that is not part of the EA package. And the

⁴ Contrary to the majority’s suggestion, I do not claim that any use of a likeness founded on publicly available information is transformative. Majority op. 30–31 n.12. The majority’s analogy to a commercial featuring Tom Brady is inapposite for at least two reasons: (1) a commercial is not interactive in the same way that *NCAA Football* is, and (2) Brady’s marketing power is well established, while that of the plaintiffs is not.

fact that the players can be identified by the knowledgeable user by their position, team, and statistics is somewhat beside the point. The issue is whether the marketability of the product is driven by an individual celebrity, or by the game itself. *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 810. Player anonymity, while certainly not a complete defense, bears on the question of how we balance the right of publicity against the First Amendment. This feature of the game places it in stark contrast with *No Doubt*, where the whole point of the enterprise was the successful commercial exploitation of the specifically identified, worldfamous musicians.

Finally, as a qualitative matter, the publicity rights of college athletes are remarkably restricted. This consideration is critical because the “right to exploit commercially one’s celebrity is primarily an economic right.” *Gionfriddo v. Major League Baseball*, 94 Cal.App.4th 400, 114 Cal.Rptr.2d 307, 318 (Cal. Ct. App. 2001). NCAA rules prohibit athletes from benefitting economically from any success on the field. NCAA Bylaw 12.5 specifically prohibits commercial licensing of an NCAA athlete’s name or picture. NCAA, *2012–13 NCAA Division I Manual* § 12.5.2.1 (2012). Before being allowed to compete each year, all Division I NCAA athletes must sign a contract stating that they understand the prohibition on licensing and affirming that they have not violated any amateurism rules. In short, even if an athlete wished to license his image to EA, the athlete could not do so without destroying amateur status. Thus, an individual college athlete’s

right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent.⁵

In sum, even apart from consideration of transformative elements, examination of the right of publicity in question also resolves the balance in favor of the First Amendment. The quantity of players involved dilutes the commercial impact of any particular player and the scope of the publicity right is significantly reduced by the fact that: (1) a player cannot own the individual, publicly available statistics on which the game is based; (2) the players are not identified in the game; and (3) NCAA college athletes

⁵ The issue of whether this structure is fair to the student athlete is beyond the scope of this appeal, but forms a significant backdrop to the discussion. The NCAA received revenues of \$871.6 million in fiscal year 2011–12, with 81% of the money coming from television and marketing fees. However, few college athletes will ever receive any professional compensation. The NCAA reports that in 2011, there were 67,887 college football players. Of those, 15,086 were senior players, and only 255 athletes were drafted for a professional team. Thus, only 1.7% of seniors received any subsequent professional economic compensation for their athletic endeavors. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level* (2011), available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2011/2011+probability+of+going+pro>.

And participation in college football can come at a terrible cost. The NCAA reports that, during a recent five-year period, college football players suffered 41,000 injuries, including 23 non-fatal catastrophic injuries and 11 fatalities from indirect catastrophic injuries. NCAA, *Football Injuries: Data From the 2004/05 to 2008/09 Seasons*, available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/health+and+safety/sports+injuries/resources/football+injuries>.

do not have the right to license their names and likenesses, even if they chose to do so.⁶

II

Given the proper application of the transformative use test, Keller is unlikely to prevail. The balance of interests falls squarely on the side of the First Amendment. The stakes are not small. The logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. Absent the use of actual footage, the motion picture *Forrest Gump* might as well be just a box of chocolates. Without its historical characters, *Midnight in Paris* would be reduced to a pedestrian domestic squabble. The majority's holding that creative use of realistic images and personas does not satisfy the transformative use test cannot be reconciled with the many cases affording such works First Amendment

⁶ While acknowledging that these considerations are relevant to the *Comedy III* analysis, the majority says EA's use of realistic likenesses demonstrates that it sees "value in having an avatar designed to mimic each individual player." Majority op. at 17 n.7. But the same is true of any right of publicity case. The defendants in *Winter* saw value in using comic book characters that resembled the Winter brothers. Andy Warhol—whose portraits were discussed in *Comedy III*—saw value in using images of celebrities such as Marilyn Monroe. In those cases, the products' marketability derives primarily from the creative elements, not from a pure commercial exploitation of a celebrity image. The same is true of *NCAA Football*.

protection.⁷ I respectfully disagree with this potentially dangerous and out-of-context interpretation of the transformative use test.

For these reasons, I respectfully dissent.

⁷ See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (affording First Amendment protection to an artist's use of photographs of Tiger Woods); J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 8.65 (2013 ed.) (collecting cases); *Hart*, 717 F.3d at 173 (Ambro, J., dissenting) (describing cases). Football.

45a

Appendix B

United States District Court
N.D. California

Samuel Michael KELLER, on behalf of himself and all
others similarly situated, Plaintiff,

v.

ELECTRONIC ARTS, INC.; National Collegiate Ath-
letics Association; and Collegiate Licensing Company,
Defendants.

No. C 09–1967 CW.

Feb. 8, 2010.

ORDER ON DEFENDANTS' MOTIONS
TO DISMISS (Docket Nos. 34, 47, 48)
AND ELECTRONIC ARTS' ANTI-SLAPP
MOTION TO STRIKE

(Docket No. 35)

CLAUDIA WILKEN, District Judge.

Defendants Electronic Arts, Inc. (EA), the National Collegiate Athletics Association (NCAA) and the Collegiate Licensing Company (CLC) move separately to dismiss Plaintiff Samuel Michael Keller's claims against them. EA also moves to strike Plaintiff's claims against it pursuant to California Civil Code section 425.16 (Docket No. 35). Plaintiff opposes the motions. As *amici curiae*, James "Jim" Brown and Herbert Anthony Adderley filed a brief in opposition to EA's motion to dismiss. The motions were heard on December 17, 2009. Having considered all of the papers

submitted by the parties, the Court DENIES EA's Motion to Dismiss (Docket No. 34), GRANTS NCAA's Motion in part and DENIES it in part (Docket No. 48), DENIES CLC's Motion (Docket No. 47) and DENIES EA's Motion to Strike (Docket No. 35).

BACKGROUND

Plaintiff is a former starting quarterback for the Arizona State University and University of Nebraska football teams.

EA, a Delaware corporation with a principal place of business in California, develops interactive entertainment software. It produces, among other things, the "NCAA Football" series of video games. In the games, consumers can simulate football matches between college and university teams. Plaintiff alleges that, to make the games realistic, EA designs the virtual football players to resemble real-life college football athletes, including himself. He claims that these virtual players are nearly identical to their real-life counterparts: they share the same jersey numbers, have similar physical characteristics and come from the same home state. To enhance the accuracy of the player depictions, Plaintiff alleges, EA sends questionnaires to team equipment managers of college football teams. Although EA omits the real-life athletes' names from "NCAA Football," Plaintiff asserts that consumers may access online services to download team rosters and the athletes' names, and upload them into the games. Plaintiff claims that, in recent iterations, EA has included features that facilitate the upload of this information.

Plaintiff alleges that EA uses his likeness without his consent. He asserts that NCAA, an unincorporated association based in Indiana, and CLC, a Georgia corporation headquartered in Atlanta, facilitated this use. Plaintiff claims that EA, NCAA and CLC met at NCAA's Indiana headquarters and EA's California headquarters to negotiate the agreements that underlie the alleged misconduct.

Plaintiff alleges other misconduct by NCAA and CLC, related to NCAA's amateurism rules. Plaintiff maintains that NCAA's approval of EA's games violates NCAA's "duty to NCAA athletes to honor its own rules prohibiting the use of student likenesses...." Compl. ¶ 15. He cites NCAA Bylaw 12.5, which prohibits the commercial licensing of the "name, picture or likeness" of athletes at NCAA-member institutions. Compl. ¶ 13. Plaintiff asserts that CLC must honor NCAA's prohibitions on the use of student likenesses.

Plaintiff charges NCAA with violations of Indiana's right of publicity statute, civil conspiracy and breach of contract. He charges CLC with civil conspiracy and unjust enrichment. Against EA, he pleads claims for violations of California's statutory and common law rights of publicity, civil conspiracy, violation of California's Unfair Competition Law and unjust enrichment. He intends to move to certify his case as a class action and seeks, among other things, damages and an injunction prohibiting the future use of his and putative class members' likenesses.

LEGAL STANDARD

A complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” are not taken as true. *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949–50, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555).

DISCUSSION

I. Indiana Right of Publicity Claim

Plaintiff alleges that NCAA violated his Indiana right of publicity. He argues that Indiana law applies to NCAA because its headquarters are located in Indiana and the alleged violation occurred in Indiana. NCAA argues that Plaintiff’s claim fails as a matter of law because he does not allege that it used his image or likeness. Plaintiff responds that NCAA used his likeness because it “expressly reviewed and knowingly approved each version of each NCAA-brand videogame” Opp’n to NCAA’s Mot. to Dismiss at 4.

Under Indiana law, personalities have a property interest in, among other things, their images and likenesses. Ind. Code § 32-36-1-7. A personality is a living or deceased person whose image and likeness have commercial value. *Id.* § 32-36-1-6. Indiana Code section 32-36-1-8 provides,

A person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person

(emphasis added).

Although the parties do not offer controlling authority on this point, the plain language of the statute favors NCAA's position. Plaintiff argues that NCAA's liability under Indiana law arises from its knowing approval of EA's use of his likeness. This interpretation expands liability under the Indiana statute to include persons who enable right of publicity violations. However, Plaintiff does not offer any authority to show that section 32-36-1-8 encompasses this type of misconduct. The Court declines to adopt Plaintiff's interpretation.

Plaintiff makes a related argument that NCAA should be held liable under Indiana's right of publicity statute as a co-conspirator of EA, which used his likeness. He cites cases that provide that co-conspirators can be held liable as joint tortfeasors for damages caused by another co-conspirator. *See, e.g., Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7

Cal.4th 503, 511, 28 Cal.Rptr.2d 475, 869 P.2d 454 (1994); *Boyle v. Anderson Fire Fighters Ass'n Local 1262*, 497 N.E.2d 1073, 1079 (Ind. Ct. App. 1986). However, these cases are inapposite because Plaintiff has not alleged that either EA or CLC, NCAA's alleged co-conspirators, violated Indiana's right of publicity statute.

Plaintiff's Indiana right of publicity claim against NCAA is dismissed with leave to amend to allege that NCAA used his likeness or conspired with others to violate his right of publicity under Indiana law.

II. California Right of Publicity Claims

California's right of publicity statute provides,

Any person who knowingly uses 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 . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

Cal. Civ. Code § 3344(a). The statutory right of publicity complements the common law right of publicity, which arises from the misappropriation tort derived from the law of privacy. *See Comedy III Prods., Inc. v. Saderup*, 25 Cal.4th 387, 391, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001). To state a claim under California common law, a plaintiff must allege "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to

defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Hilton v. Hallmark Cards*, 580 F.3d 874, 889 (9th Cir. 2009) (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001)). Although the statutory and common law rights are similar, there are differences. For example, to state a claim under section 3344, a plaintiff must prove knowing use in addition to satisfying the elements of a common law claim. *Kirby v. Sega of Am., Inc.*, 144 Cal.App.4th 47, 55, 50 Cal.Rptr.3d 607 (2006).

EA does not contest the sufficiency of Plaintiff's claims. It asserts, however, that his right of publicity claims are barred by the First Amendment and California law. The Court considers and rejects each of these defenses in turn.

A. Transformative Use Defense¹

A defendant may raise an affirmative defense that the challenged work is “protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame.” *Hilton*, 580 F.3d at 889 (quoting *Comedy III*, 25 Cal.4th at 407, 106 Cal.Rptr.2d 126, 21 P.3d 797) (internal quotation marks omitted). The defense “poses what is essentially a balancing test between the First Amendment and the right of publicity.” *Hilton*, 580

¹ *Amici* invite the Court to adopt another standard to assess right of publicity claims. Because the Court finds that the transformative test is sufficient for the purposes of this motion, it does not address *amici*'s arguments.

F.3d at 889 (quoting *Winter v. DC Comics*, 30 Cal.4th 881, 885, 134 Cal.Rptr.2d 634, 69 P.3d 473 (2003)) (internal quotation marks omitted).

To determine whether a work is transformative, a court must inquire into

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

Comedy III, 25 Cal.4th at 406, 106 Cal.Rptr.2d 126, 21 P.3d 797. “An artist depicting a celebrity must contribute something more than a merely trivial variation, but create something recognizably his own, in order to qualify for legal protection.” *Winter*, 30 Cal.4th at 888, 134 Cal.Rptr.2d 634, 69 P.3d 473 (quoting *Comedy III*, 25 Cal.4th at 408, 106 Cal.Rptr.2d 126, 21 P.3d 797) (internal quotation and editing marks omitted). The analysis “simply requires the court to examine and compare the allegedly expressive work with the images of the plaintiff to discern if the defendant’s work contributes significantly distinctive and expressive content.” *Kirby*, 144 Cal.App.4th at 61, 50 Cal.Rptr.3d 607. “If distinctions exist, the First Amendment bars claims based on appropriation of the

plaintiff's identity or likeness; if not, the claims are not barred." *Id.*

Two California Supreme Court cases "bookend the spectrum" used to measure a work's transformative nature. *Hilton*, 580 F.3d at 890–91. On one end, *Comedy III* provides an example of a nontransformative work. There, the defendant's "literal, conventional depictions of The Three Stooges," drawn in charcoal and printed on tee-shirts, did not contain transformative elements that warranted protection by the First Amendment. *Comedy III*, 25 Cal.4th at 409, 106 Cal.Rptr.2d 126, 21 P.3d 797. Interpreting *Comedy III*, the Ninth Circuit stated that "it is clear that merely merchandising a celebrity's image without that person's consent . . . does not amount to a transformative use." *Hilton*, 580 F.3d at 890.

Winter offers the opposite bookend. There, a comic book publisher depicted two musicians, Johnny and Edgar Winter, as half-human, half-worm cartoon characters. *Winter*, 30 Cal.4th at 890, 134 Cal.Rptr.2d 634, 69 P.3d 473. The court affirmed summary judgment in favor of the defendant, holding that the images were sufficiently transformative. The court stated,

Although the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the raw materials from which the comic books were synthesized.

Id.

Using *Comedy III* and *Winter* as guideposts, *Kirby* applied the transformative use analysis to a video game. There, the court held that the main character in the defendant's video game was transformed. The plaintiff was a musician and dancer, known for saying the phrase "ooh la la." *Kirby*, 144 Cal.App.4th at 50–51, 50 Cal.Rptr.3d 607. Ulala, the main character in the defendant's game, worked as a news reporter in the twenty-fifth century, "dispatched to investigate an invasion of Earth." *Id.* at 52, 50 Cal.Rptr.3d 607. Although there were similarities between the two, the court held Ulala to be "more than a mere likeness or literal depiction of Kirby." *Id.* at 59, 50 Cal.Rptr.3d 607. "Ulala contains sufficient expressive content to constitute a 'transformative work' under the test articulated by the [California] Supreme Court." *Id.* In particular, Ulala was extremely tall and wore clothing that differed from the plaintiff's and the setting for the game was unlike any in which she had appeared. *Id.*

Here, EA's depiction of Plaintiff in "NCAA Football" is not sufficiently transformative to bar his California right of publicity claims as a matter of law.²

² EA asks the Court to take judicial notice of the content of the video games "NCAA Football 2006" through "NCAA Football 2009," "NCAA March Madness 2006" through "NCAA March Madness 2008," and "NCAA Basketball 2009;" paragraphs four of the Strauser and O'Brien Declarations summarizing the content of these video games; various press releases announcing the release date of the video games; a United States Copyright Office document indicating the date of first publication for "NCAA March Madness 2007;" an August 15, 2008 order from *Kent v. Universal Studios, Inc.*, Case No. 08-2704 (C.D. Cal.); and the content of the CBSSports.com Fantasy College Football game. (Docket No. 36.)

In the game, the quarterback for Arizona State University shares many of Plaintiff's characteristics. For example, the virtual player wears the same jersey number, is the same height and weight and hails from the same state. EA's depiction of Plaintiff is far from the transmogrification of the Winter brothers. EA does not depict Plaintiff in a different form; he is represented as he what he was: the starting quarterback for Arizona State University. Further, unlike in *Kirby*, the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field.

EA asserts that the video game, taken as a whole, contains transformative elements. However, the broad view EA asks the Court to take is not supported by precedent. In *Winter*, the court focused on the depictions of the plaintiffs, not the content of the other portions of the comic book. The court in *Kirby* did the same: it compared Ulala with the plaintiff; its analysis

Generally, in ruling on a motion to dismiss, a court cannot consider material outside of the complaint. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds in Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). However, a court may consider exhibits submitted with the complaint and those documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Id.* at 453-54.

Because Plaintiff refers to the video games in his complaint, the Court GRANTS EA's request for judicial notice of them. Plaintiff does not mention the press releases or other materials proffered by EA. Therefore, the Court DENIES EA's request as to the other materials.

did not extend beyond the game's elements unrelated to Ulala. These cases show that this Court's focus must be on the depiction of Plaintiff in "NCAA Football," not the game's other elements.

Accordingly, at this stage, EA's transformative use defense fails.

B. Public Interest Defense

"Under California law, 'no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.'" *Hilton*, 580 F.3d at 892 (quoting *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 793, 40 Cal.Rptr.2d 639 (1995)). "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities.'" *Hilton*, 580 F.3d at 892 (quoting *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 542, 18 Cal.Rptr.2d 790 (1993)).

In *Gionfriddo v. Major League Baseball*, the court held that the defendants were entitled to the public interest defense. 94 Cal.App.4th 400, 415, 114 Cal.Rptr.2d 307 (2001). There, the plaintiffs, four former baseball players, claimed that the defendants' use of their names and statistics violated their rights of publicity. *Id.* at 405–07, 114 Cal.Rptr.2d 307. Their information appeared on a website, which reported historical team rosters and listed names of players who won awards during each season. *Id.* at 406, 114 Cal.Rptr.2d 307. The defendants also included still photographs of the plaintiffs from their playing days in video documentaries. *Id.* The court characterized these

uses as “simply making historical facts available to the public through game programs, Web sites and video clips.” *Id.* at 411, 114 Cal.Rptr.2d 307. Because the public had an interest in the plaintiffs’ athletic performance, the First Amendment protected the “recitation and discussion of [their] factual data.” *Id.*

The public interest defense also applied in *Montana*. There, the defendant newspaper sold posters containing reproductions of newspaper pages reporting on the San Francisco 49ers’ win in the 1990 Super Bowl; these pages contained images of the plaintiff. 34 Cal.App.4th at 792, 40 Cal.Rptr.2d 639. The plaintiff conceded that the original newspaper accounts were protected by the First Amendment, but challenged their reproduction as posters. *Id.* at 794, 40 Cal.Rptr.2d 639. The court held that the posters were entitled to the same First Amendment protection as the original news stories. The court stated,

Montana’s name and likeness appeared in the posters for *precisely* the same reason they appeared on the original newspaper front pages: because Montana was a major player in contemporaneous newsworthy sports events. Under these circumstances, Montana’s claim that SJMN used his face and name solely to extract the commercial value from them fails.

Id. (emphasis in original). Citing *Montana*, the Ninth Circuit stated that the public interest defense “is about . . . publication or reporting.” *Hilton*, 580 F.3d at 892.

“NCAA Football” is unlike the works in *Gionfriddo* and *Montana*. The game does not merely report or

publish Plaintiff's statistics and abilities. On the contrary, EA enables the consumer to assume the identity of various student athletes and compete in simulated college football matches. EA is correct that products created for entertainment deserve constitutional protection. *See, e.g., Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307 ("Entertainment features receive the same constitutional protection as factual news reports."). But it does not follow that these protections are absolute and always trump the right of publicity.

EA cites cases in which courts held that the public interest exception protected online fantasy baseball and football games. Although these games are more analogous to "NCAA Football," the cases are nonetheless distinguishable. In *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media*, a declaratory judgment action, the plaintiff sold "fantasy baseball products" that included the names and statistics of major league baseball players. 505 F.3d 818, 820–21 (8th Cir. 2007). Through these products, consumers could form fantasy baseball teams and compete with other users. *Id.* at 820. "A participant's success ... depend[ed] on the actual performance of the fantasy team's players on their respective actual teams during the course of the major league baseball season." *Id.* at 820–21. The defendant counterclaimed, arguing that these products violated players' rights of publicity. The court disagreed. It analogized the case to *Gionfriddo*, and held that the use of the players' information in the fantasy game was a "recitation and discussion" of the players' information. *Id.* at 823–24

(quoting *Gionfriddo*, 94 Cal.App.4th at 411, 114 Cal.Rptr.2d 307).

C.B.C. Distribution is inapplicable here. Success in “NCAA Football” does not depend on updated reports of the real-life players’ progress during the college football season. Further, EA’s game provides more than just the players’ names and statistics; it offers a depiction of the student athletes’ physical characteristics and, as noted, enables consumers to control the virtual players on a simulated football field. EA’s use of Plaintiff’s likeness goes far beyond what the court considered in *C.B.C. Distribution*.

EA is not entitled to the public interest defense on this motion.

C. Section 3344(d) Exemption

California Civil Code section 3344(d) provides a public affairs exemption to the statutory right of publicity. It exempts from liability under section 3344 “a use of a name ... or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.” Cal. Civ. Code § 3344(d). This exemption is not coextensive with the public interest defense; it “is designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person’s name in connection with matters of public interest.” *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992) (citing *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 421, 198 Cal.Rptr. 342 (1983)).

In *Dora v. Frontline Video, Inc.*, a California court held that section 3344(d) barred a plaintiff’s statutory

right of publicity claim. 15 Cal.App.4th at 546, 18 Cal.Rptr.2d 790. The defendant's documentary on surfing contained, among other things, the plaintiff's name and likeness. *Id.* at 540, 18 Cal.Rptr.2d 790. The court held that this use was exempted by section 3344(d) because the plaintiff's name and likeness were used in connection with public affairs. In doing so, the court addressed the meaning of "public affairs." The court distinguished "public affairs" from "news," stating that "'public affairs' was intended to mean something less important than news." *Dora*, 15 Cal.App.4th at 545, 18 Cal.Rptr.2d 790. Thus, the subject matter encompassed by public affairs is not limited "to topics that might be covered on public television or public radio." *Id.* at 546, 18 Cal.Rptr.2d 790.

Here, Plaintiff does not dispute EA's contention that college athletics are "public affairs." He asserts, however, that section 3344(d) only applies to factual reporting.³ In essence, he asserts that section 3344(d) applies to the same type of "reporting" as does the public interest defense.

Neither party offered direct authority on the type of use for which the section 3344(d) exemption applies.

³ EA understands Plaintiff to argue that reporting implicates newsworthy information. So interpreted, EA claims, Plaintiff's argument must fail because *Dora* draws a distinction between "news" and "public affairs." The Court does not construe Plaintiff's argument in the same way. Instead, the Court reads Plaintiff to argue that "NCAA Football" does not constitute "reporting" and, as a result, EA does not use his name and likeness in a manner that is exempted by section 3344(d).

However, *Montana* is instructive. There, the court stated that “the statutory cause of action specifically exempts from liability the use of a name or likeness in connection with the *reporting* of a matter in the public interest.” 34 Cal.App.4th at 793, 40 Cal.Rptr.2d 639 (emphasis added). Thus, without authority requiring otherwise, the Court construes section 3344(d) to require the same type of activity as the public interest defense discussed above, namely reporting.⁴ Although “NCAA Football” is based on subject matter considered “public affairs,” EA is not entitled to the statutory defense because its use of Plaintiff’s image and likeness extends beyond reporting information about him.

Accordingly, Plaintiff’s California statutory and common law right of publicity claims are not barred as a matter of law. III. Civil Conspiracy Claims

Defendants move separately to dismiss Plaintiff’s civil conspiracy claims. All challenge the sufficiency of Plaintiff’s claims, arguing that he does not plead an underlying tort, which is a necessary element. CLC separately asserts the agent immunity defense.

Plaintiff did not specify the state law under which his civil conspiracy claims arise. For the purposes of this motion, the Court assumes that his claims arise under California law.

⁴ Although section 3344(d) and the public interest defense implicate the same type of activity, they are nonetheless not coextensive because section 3344(d) defines safe harbors for reporting in particular contexts. *See New Kids on the Block*, 971 F.2d at 310 n.10.

D. Sufficiency of the Claims

Civil conspiracy “is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.” *Applied Equipment Corp.*, 7 Cal.4th at 510, 28 Cal.Rptr.2d 475, 869 P.2d 454 (citing *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 784, 157 Cal.Rptr. 392, 598 P.2d 45 (1979)). “Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort.” *Applied Equipment Corp.*, 7 Cal.4th at 511, 28 Cal.Rptr.2d 475, 869 P.2d 454.

A claim for civil conspiracy consists of three elements: “(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct.” *Kidron v. Movie Acquisition Corp.*, 40 Cal.App.4th 1571, 1581, 47 Cal.Rptr.2d 752 (1995). “The conspiring defendants must ... have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose.” *Id.* at 1582, 47 Cal.Rptr.2d 752 (citing *Wyatt*, 24 Cal.3d at 784–86, 157 Cal.Rptr. 392, 598 P.2d 45). This knowledge must be combined with an intent to aid in achieving the objective of the conspiracy. *Kidron*, 40 Cal.App.4th at 1582, 47 Cal.Rptr.2d 752; *Schick v. Bach*, 193 Cal.App.3d 1321, 1328, 238 Cal.Rptr. 902 (1987). A claim of unlawful conspiracy must contain “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Twombly*, 550

U.S. at 556. A bare allegation that a conspiracy existed does not suffice. *Id.*

Plaintiff alleges that there were meetings among Defendants in California and Indiana. Compl. ¶¶ 54–56. He asserts that Defendants knew of NCAA principles barring the licensing of student-athlete identities, but nonetheless approved EA’s games containing the athletes’ likenesses without their consent. Compl. ¶¶ 12–15. Finally, he claims that EA’s actions violated his California statutory and common law rights of publicity.⁵ These factual allegations sufficiently support liability under Plaintiff’s civil conspiracy claim.⁶

⁵ Plaintiff alleges that Defendants conspired to deprive “class members of their right to protect their names, likenesses and rights to publicity and their contractual, property rights.” Compl. ¶ 80. For the purposes of this motion, the Court construes this allegation to refer to EA’s alleged violation of Plaintiff’s California right of publicity because he does not state a claim based on the tortious conduct of any other Defendant.

⁶ Citing *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI*, 100 Cal.App.4th 1102, 123 Cal.Rptr.2d 297 (2002), CLC also argues that it cannot accrue tort liability under a civil conspiracy theory because Plaintiff has not alleged that it can make video games. This argument is unavailing. *Everest Investors 8* states that “tort liability from a conspiracy presupposes that the conspirator is legally capable of committing the tort—that he owes a duty to the plaintiff recognized by law and is potentially subject to liability for the breach of that duty.” *Id.* at 1106, 123 Cal.Rptr.2d 297. Nothing in the record indicates that CLC is legally incapable of violating Plaintiff’s rights of publicity.

E. CLC's Agent Immunity Defense

CLC maintains that the agent immunity defense bars Plaintiff's conspiracy claim against it. This defense provides that no liability shall lie "if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty." *Doctors' Co. v. Superior Court*, 49 Cal.3d 39, 44, 260 Cal.Rptr. 183, 775 P.2d 508 (1989).

CLC maintains that Plaintiff's allegations that its role as a licensing company entering into agreements on behalf of NCAA establishes, as a matter of law, that it is NCAA's agent. These allegations are not sufficient at this early stage to establish CLC's entitlement to this defense.

III. Section 17200 Claim

EA maintains that Plaintiff fails to state a claim under California Business and Professions Code section 17200 because he does not allege an underlying wrong or seek available relief. However, as discussed above, Plaintiff sufficiently asserts right of publicity and civil conspiracy claims. With regard to relief, he seeks an injunction, which EA concedes is available under section 17200. Thus, Plaintiff has stated a section 17200 claim against EA.

IV. Breach of Contract Claim

NCAA argues that Plaintiff does not state a breach of contract claim because he has not identified an enforceable contract. Because Plaintiff does not specify

the state law under which his claim arises, the Court assumes that California law applies.

To assert a cause of action for breach of contract in California, a plaintiff must plead: (1) existence of a contract; (2) the plaintiff's performance or excuse for non-performance; the defendant's breach; and (4) damages to the plaintiff as a result of the breach. *Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal.App.4th 1375, 1391 n. 6, 11 Cal.Rptr.3d 412 (2004).

Plaintiff has not identified a contract that he is seeking to enforce. Although he refers to an NCAA document as a contract, he does not attach the document to his complaint. Instead, he states that by signing the document, the athletes agree that "they have 'read and understand' the NCAA's rules" and that "to the best of [their] knowledge [they] have not violated any amateurism rules." Compl. ¶ 14. These phrases, on their own, do not indicate that the document is a contract. Plaintiff's breach of contract claim against NCAA is dismissed with leave to amend to allege or attach an enforceable contract.

V. Unjust Enrichment Claims

Plaintiff claims that EA and CLC were unjustly enriched through the sale of video games that use his likeness. EA and CLC argue that his claim is barred because California law does not provide a cause of action for unjust enrichment. Even if it did, EA and CLC argue, Plaintiff's allegations regarding the existence of a contract with NCAA would independently bar an unjust enrichment claim.

California courts appear to be split on whether there is an independent cause of action for unjust enrichment. *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1270–71 (C.D. Cal. 2007) (applying California law). One view is that unjust enrichment is not a cause of action, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. *McBride v. Boughton*, 123 Cal.App.4th 379, 387, 20 Cal.Rptr.3d 115 (2004). In *McBride*, the court construed a “purported” unjust enrichment claim as a cause of action seeking restitution. *Id.* There are at least two potential bases for a cause of action seeking restitution: (1) an alternative to breach of contract damages when the parties had a contract which was procured by fraud or is unenforceable for some reason; and (2) where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct and the plaintiff chooses not to sue in tort but to seek restitution on a quasi-contract theory. *Id.* at 388, 20 Cal.Rptr.3d 115. In the latter case, the law implies a contract, or quasi-contract, without regard to the parties’ intent, to avoid unjust enrichment. *Id.*

Another view is that a cause of action for unjust enrichment exists and its elements are receipt of a benefit and unjust retention of the benefit at the expense of another. *Lectrodryer v. SeoulBank*, 77 Cal.App.4th 723, 726, 91 Cal.Rptr.2d 881 (2000); *First Nationwide Savings v. Perry*, 11 Cal.App.4th 1657, 1662–63, 15 Cal.Rptr.2d 173 (1992).

Even under the more restrictive analysis of *McBride*, Plaintiff sufficiently pleads claims for restitution against EA and CLC on the theory that

they obtained a benefit from him through their alleged wrongful conduct. His breach of contract claim against NCAA does not bar these claims. Although EA and CLC correctly note that the existence of such a contract could bar a restitutionary claim against a contracting party, it is not clear that his alleged contract with NCAA defined any rights between him and EA and CLC. *Cf. Cal. Med. Ass'n v. Aetna U.S. Healthcare of Cal.*, 94 Cal.App.4th 151, 172, 114 Cal.Rptr.2d 109 (2001) (holding that “as a matter of law, a quasi-contract action for unjust enrichment does not lie where, as here, express binding agreements exist and define the parties’ rights”). Thus, Plaintiff has adequately stated his unjust enrichment claim for restitution against EA and CLC.

VI. EA’s Anti–SLAPP Motion to Strike

Finally, EA moves under California Code of Civil Procedure section 425.16 to strike all of Plaintiff’s claims against it. Section 425.16(b)(1), which addresses Strategic Lawsuits Against Public Participation (SLAPP), provides,

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

California anti-SLAPP motions are available to litigants proceeding in federal court. *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206, 1206 (9th Cir. 2005). California courts analyze anti-SLAPP motions in two steps. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.” *Equilon Enter. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67, 124 Cal.Rptr.2d 507, 52 P.3d 685 (2002). Second, the court “determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” *Id.*

Assuming that the challenged causes of action arise from protected activity, Plaintiff makes a sufficient showing of his probability of success on the merits. EA incorrectly argues that Plaintiff has a substantial burden to show probability of success. It maintains that the Court must apply “the same standard governing motions for summary judgment, nonsuit, or directed verdict.” EA’s Mot. to Strike at 12. However, this standard does not apply in federal court.

“At the second step of the anti-SLAPP inquiry, the required probability that [a party] will prevail need not be high.” *Hilton*, 580 F.3d at 888–89. The “statute does not bar a plaintiff from litigating an action that arises out of the defendant’s free speech or petitioning; it subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim.” *Id.* at 888 (quoting *Navellier v. Sletten*, 29 Cal.4th 82, 93, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002)) (quotation marks omitted). In *Thomas v. Fry’s Electronics*, the case that provides that

anti-SLAPP motions are available to litigants proceeding in federal court, the court stated that “federal courts may not impose a heightened pleading requirement in derogation of federal notice pleading rules.” 400 F.3d at 1207; *see also Empress LLC v. City & County of S.F.*, 419 F.3d 1052, 1056 (9th Cir.2005) (holding that “a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require”); *Verizon, Inc. v. Covad Commc’ns. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (holding that procedural “state laws are not used in federal court if to do so would result in a direct collision with a Federal Rule of Civil Procedure” and noting that federal courts have “accordingly refused to apply certain discovery-limiting provisions of the anti-SLAPP statute because they would conflict with Fed. R. Civ. P. 56”).

Under Federal Rule of Civil Procedure 8, Plaintiff has sufficiently stated his claims against EA. Accordingly, the Court denies EA’s special motion to strike Plaintiff’s claims as a SLAPP.

CONCLUSION

For the foregoing reasons, the Court DENIES EA’s Motion to Dismiss (Docket No. 34), GRANTS NCAA’s Motion in part and DENIES it in part (Docket No. 48), DENIES CLC’s Motion (Docket No. 47) and DENIES EA’s Motion to Strike (Docket No. 35). Plaintiff’s claims for violation of his Indiana right of publicity and breach of contract against NCAA are dismissed with leave to amend. In accordance with this Court’s Order of January 15, 2010 on consolidation, Plaintiff has thirty days from the date of this Order to

70a

file a consolidated amended complaint. A case management conference is scheduled for April 27, 2010 at 2:00 p.m.

IT IS SO ORDERED.

71a

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NCAA STUDENT-ATHLETE
NAME & LIKENESS LICENSING
LITIGATION,

SAMUEL MICHAEL KELLER;
EDWARD C. O'BANNON, Jr.; BYRON
BISHOP; MICHAEL ANDERSON;
DANNY WIMPRINE; ISHMAEL
THROWER; CRAIG NEWSOME;
DAMIEN RHODES; SAMUEL
JACOBSON,

Plaintiffs – Appellees,

v.

ELECTRONIC ARTS INC.,

Defendant – Appellant,

And

NATIONAL COLLEGIATE ATHL-
ETIC ASSOCIATION; COLLEGIATE
LICENSING COMPANY,

Defendants.

No. 10-15387

D.C. No. 4:09-cv-
01967-CW

Northern District
of California,
Oakland

ORDER

72a

Before: THOMAS and BYBEE, Circuit Judges, and
QUIST, Senior District Judge.

Filed Aug. 21, 2013

Appellant's motion for stay of the issuance of the
mandate pending application for writ of certiorari is
GRANTED. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed
pending the filing of the petition for writ of certiorari in
the Supreme Court. The stay shall continue until final
disposition by the Supreme Court.