

**2nd Civ. No. B262873
(LASC Case No. BC520019)**

**COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO**

ELECTRONIC ARTS INC.,

Appellant,

vs.

JAMES BROWN,

Appellee.

Appeal from Order Denying a Special Motion to Strike
Los Angeles County Superior Court,
Honorable Maureen Duffy-Lewis, Judge

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (California Rules of Court 8.208(d)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (California Rule of Court 8.208(d)(2)):

1. Defendant/appellant Electronic Arts Inc.
2. Plaintiff/appellee James Brown.

DATED: September 14, 2015

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE
JUSTICES OF THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO:

Defendant/appellant Electronic Arts Inc. (“EA”) respectfully requests that this Court reverse the trial court’s order denying EA’s Special Motion to Strike and order the trial court to enter a new order granting EA’s motion and dismissing plaintiff/appellee James (“Jim”) Brown’s complaint in its entirety, with prejudice.

The trial court correctly found that the anti-SLAPP statute applies to Brown’s right-of-publicity and related claims, but erred in allowing those claims to proceed. Contrary to the trial court’s ruling, however, Brown did not meet his burden to demonstrate his claims were likely to succeed. If Brown’s claims were based on EA’s use of his alleged likeness in a biography or documentary about the history of the NFL, the First Amendment would trump his right of publicity. EA’s work cannot be treated any differently; as the United States Supreme Court has made clear, video games are expressive works that are entitled to the same First Amendment protection as other forms of expression. *See Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011).

I. SUMMARY OF ARGUMENT

Former NFL star Jim Brown’s claims against EA are based on his allegation that one of the thousands of virtual players (or “avatars”) in EA’s *Madden NFL* video game appropriates his likeness. By “likeness,” Brown does not mean his facial features, his name, or his uniform number. 1 AA-7 at ¶ 31. Instead, he complains the avatar embodies accurate biographical data from his NFL career in the 1950s and 1960s, including his playing position, years in the league, height, weight, age, home state, skin tone, “handedness,” and relative skill level. *Id.*

Even assuming that EA’s alleged use of this publicly available information implicates Brown’s right of publicity, his claims present serious First Amendment concerns because they target an expressive work, not an advertisement. *See, e.g., Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 869-70 (1979). Without strong constitutional protection for the unauthorized use of celebrities’ names and likenesses in films, books, and other expressive works, the producers of *The Social Network* would have had to secure Mark Zuckerberg’s approval to use his name, likeness, and biographical information in their Academy Award-nominated docudrama, and the authors of *Game Change* would have had to obtain permission from Sarah Palin to use her name and biographical information in their best-selling account of the 2008 presidential campaign. Because the First Amendment ordinarily trumps the right of publicity in cases

involving expressive works, no such approvals were needed. Nor did EA need Brown's approval to use historical information about him (or his likeness) in its expressive work.

While courts generally have not hesitated to dismiss right-of-publicity claims targeting the use of celebrities' names and likenesses in books and films – and even online fantasy-sports websites and trading cards (*see* cases cited in Section IV.C) – some courts have struggled to apply these First Amendment principles to cases arising from video games. The United States Supreme Court, however, has left no doubt that video games “are as much entitled to the protection of free speech as the best of literature.” *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2737 n.4 (2011) (“*EMA*”).

Under *EMA*, EA's creation of *Madden NFL* – including the avatar that allegedly represents Brown – unquestionably involves the exercise of its free-speech rights. Consequently, EA filed a Special Motion to Strike Brown's claims under California's anti-SLAPP statute, Code of Civil Procedure § 425.16. Under the statute, any cause of action arising from conduct in furtherance of the defendant's right of free speech in connection with an issue of public interest shall be stricken, unless the plaintiff establishes a probability of prevailing on those claims.

EA raised five defenses, any one of which would defeat Brown's claims *as a matter of law*. While the trial court correctly determined that

Brown’s claims fell within the ambit of the anti-SLAPP statute because they arose from EA’s conduct in furtherance of its free-speech rights about a matter of public interest, the trial court erred in rejecting EA’s defenses.

First, the trial court misapplied the transformative-use test. The trial court held that the test did not defeat Brown’s claims because the avatar’s characteristics are “substantively identical to those of Brown” and because *Madden NFL* takes place on a football field (where Brown made his living), as opposed to some altered, surreal environment. The trial court incorrectly determined that the transformative-use test focuses solely on whether the celebrity’s image has been altered, rather than on whether the defendant’s expressive work, as a whole, is transformative. In effect, the court penalized EA for creating a realistic expressive work, denying First Amendment protection because EA depicted Brown literally, as a professional football player from the 1950s and 1960s, rather than as a 17th-century pirate or 23rd-century intergalactic explorer.

As recent cases have reaffirmed, however, the California Supreme Court mandates that courts examine the work *as a whole* to determine whether the defendant has added elements that transform the work into something more than a conventional portrait of the celebrity. *See, e.g., Vijay v. Twentieth Century Fox*, 2014 U.S. Dist. Lexis 152098 (C.D. Cal. Oct. 27, 2014); *Noriega v. Activision*, BC 551747 (Los Angeles Super. Ct., Oct. 27, 2014). Here, EA has created countless other elements – including

the vast array of video graphics, audio features, underlying programming, and historical information – that make the video game far more than an isolated or conventional depiction of Jim Brown. *See* Section IV.B.

Second, the trial court mistakenly rejected EA’s constitutional public-interest defense because it misread *Keller v. Electronic Arts*, 724 F.3d 1268 (9th Cir. 2013) as holding that the defense does not apply to video games. 2 AA-532. Neither the *Keller* majority nor any other court evaluating a right-of-publicity claim has held that the public-interest defense does not apply to video games. Rather, the *Keller* majority concluded that the public-interest defense did not apply to the specific video game at issue in *Keller* because it purportedly did not “publish” or “report” factual data. 724 F.3d at 1283. As explained below, the *Keller* Court’s “publishing”/“reporting” requirement finds no support in California law, and is not binding on this Court. *See* Section IV.C. Because controlling authority recognizes professional football as a matter of significant public interest, any use of Brown’s alleged likeness in *Madden NFL* falls squarely within the public-interest defense. *See id.*

Third, the trial court erroneously concluded that the public-affairs exemption in Civil Code § 3344(d) is not a defense, and should not be considered in the context of a special motion to strike. The trial court failed to provide any authority for this proposition, which is contradicted by the plain language of the statute. Section 3344(d) specifically exempts from

liability 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[.]” Here, EA allegedly used Brown’s likeness in connection with an expressive work about professional football, which, under controlling case law, unquestionably is a “public affairs” use exempted from Section 3344(a)’s consent requirement. *See* Section IV.D. Consequently, Section 3344(d) is available to EA as a defense and bars Brown’s claims.

Fourth, the trial court rejected the *Rogers*/Restatement test, finding that California courts apply the transformative-use test. But given the difficulty courts have had in applying the transformative-use test, *see* Section IV.B, California courts should join other courts that have adopted the *Rogers*/Restatement test as a defense to right-of-publicity claims. Under that test, the First Amendment defeats a right-of-publicity claim targeting an expressive work, unless the use of the celebrity’s likeness is “wholly unrelated” to the work or is simply a disguised commercial advertisement. *See Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989); Restatement (Third) of Unfair Competition, § 47, cmt. c. This test yields far more predictable and speech-protective results than the transformative-use test, and requires dismissal of Brown’s claims. He is not “wholly unrelated” to a video game about NFL football, and the use of his alleged

likeness is not a disguised commercial advertisement for any product or service. *See* Section IV.E.

Fifth, the trial court denied EA’s incidental-use defense, noting that the defense “is premised on the theory that [an] incidental use has no commercial value.” 2 AA-532. Since the trial court found that Brown’s persona has commercial value, it reasoned that the use of an avatar with Brown’s alleged characteristics could not be incidental. *Id.* But the trial court relied on *Pooley v. Nat. Hole-in-One Ass’n*, 89 F. Supp. 2d 1108 (D. Ariz. 2000), where the court applied the incidental-use doctrine to ***commercial speech***, which receives significantly less constitutional protection than expressive works. Had the trial court followed cases applying the doctrine to expressive works, it would have concluded that EA’s use of Brown’s alleged likeness – as just ***one*** of approximately 7,500 professional football players in *Madden NFL* – was incidental and thus not actionable.

For each of these reasons, EA respectfully requests that this Court reverse the trial court’s order.

II. STATEMENT OF THE CASE

A. Factual Background.

EA is a leader in the video-game industry, and has published *Madden NFL* annually for over twenty years. 1 AA-45 at ¶ 2. The game allows users to experience the excitement and challenge of NFL football,

through technically advanced software engineering and creative audiovisual elements. 1 AA-45 at ¶¶ 3-5; 1 AA-62 to 71. Users may choose to compete against the game itself, against another user connected to the same game system, or against someone connected over the Internet. *Id.*; 1 AA-46 at ¶ 6.

Madden NFL does not use Brown's name, photograph, or literal image. 1 AA-47 at ¶ 9. Instead, Brown complains that the game used publicly available, historical information about him – namely, his position, years in the NFL, his alleged roster height and weight, age, home state, skin color, “handedness,” and relative skill level – to create a digital in-game character (called an “avatar”) that allegedly conjures his identity. 1 AA-7 at ¶ 31. The avatar at issue is one out of more than 7,500 that appear in the relevant editions of *Madden NFL* as members of the NFL's 32 current teams, 146 “historic” NFL teams chosen by EA, and 31 all-time, all-star teams. 1 AA-46 at ¶ 8. Users can enjoy the game without ever encountering the avatar that Brown complains of; indeed, users could find the avatar only if they bypassed the current NFL teams, selected the historic-teams function, and then selected either the 1965 Cleveland Browns or the All-Browns team from over 145 teams in that mode. 1 AA-47 at ¶ 11.

As a review of the game shows,¹ the virtual world of *Madden NFL* is constructed from an array of video graphics, audio features, and data. 1 AA-45 at ¶¶ 4-5; 1 AA-62 to 71. After a user chooses two teams to compete against each other, the game assigns a stadium and populates it with virtual players, coaches, referees, mascots, cheerleaders, and fans – all designed and rendered by EA’s graphic artists. 1 AA-45 at ¶ 5. In the Xbox and PlayStation 2 versions of *Madden NFL*, players may choose to play current or historic teams. The historic teams differ significantly from the current teams: the historic teams do not include photographs or images of actual players; the historic teams do not include the names of actual players who played on those teams; and the uniform numbers of virtual players on the historic teams do not match those worn by the actual players. 1 AA-47 at ¶ 9.

Although the avatars’ characteristics (such as height, weight, ability, and experience) and other variables (including crowd noise and weather) affect the teams’ performances, individual users most directly influence game outcomes by creating and calling plays (*e.g.*, whether to run, pass, or kick and which defensive scheme to employ) and using hand-held

¹ EA lodged copies of the 2006-2010 editions of *Madden NFL* for PlayStation2, as well as a PlayStation2 game console, memory card, and controllers, so that the trial court could experience the game firsthand. 2 AA-289. As required by the California Rules of Court, EA will lodge the same materials with this Court in connection with the Appellant’s Appendix. *See* Cal. R. Court 8.124(b)(1)(B); 8.122(b)(3)(B). At the Court’s request, EA is willing to send a technician to demonstrate how the game is played.

controllers to manipulate avatars' actions on the field. 1 AA-46 at ¶ 7; 1 AA-59 at ¶ 15; 1 AA-60 at ¶¶ 16, 18-19; 1 AA-252 to 262; 1 AA-264 to 267. Because of these numerous variables and the creative input of the users, the game experience changes each time it is played. *Id.*

The user's control over the storyline of each game is enhanced by his or her ability to make changes to the avatars and to other elements of the game. Users may alter the abilities, appearances, and biographical information of the virtual players, and create custom virtual players from scratch. 1 AA-45 at ¶ 4; 1 AA-62 to 71. For example, a user may change a player's physical characteristics (such as height or weight), his accessories (such as helmets, visors, or wristbands), the player's physical abilities (such as speed and agility, arm strength, or passing accuracy), or a player's biographical details, thus creating the user's own custom players and teams. *Id.* Users experience the game audio-visually through real-time television-like animation and action-specific play-by-play commentary. *Id.*; 1 AA-45 at ¶ 5. The game also includes realistic original sounds, such as the crunch of players' pads upon contact, the audible of a quarterback changing a play at the line of scrimmage, and the roar of the crowd. *Id.*

Although *Madden NFL* conveys substantial factual information about NFL teams and players, including the historic teams featured in *Madden NFL 06-09*, the game does not recreate or recount actual historical games. 1 AA-47 at ¶ 12; 1 AA-72 to 137; 1 AA-59 at ¶ 14; 1 AA-242 to

251; 1 AA-46 at ¶ 7. The action of the game and the results are fictional, and are driven by the user’s creativity and skill. 1 AA-46 at ¶ 7. EA’s game designers have also created functions that enable users to create their own counterfactual, interactive, historical narratives. For example, “Franchise Mode” allows users to take on the role of an NFL team’s general manager over as many as thirty seasons, with the ability to draft college players, trade players to other teams, run a team’s training camp, fire coaches, navigate the league’s salary cap, and manage personnel matters. 1 AA-46 at ¶ 6. It is, as Judge Sidney Thomas described EA’s similar college-football video game, “a work of interactive historical fiction.” *Keller*, 724 F.3d at 1285.

Interactive historical works of this sort are not limited to sports video games. Other video games allow users to lead armies in historic battles, run real-life presidential campaigns, and even rebuild empires. In *Patton v. Rommel*, for instance, users wage battles between two famous World War II generals who never actually faced one another. 1 AA-47 at ¶ 14. In *The Political Machine 2012* and *President Elect*, users manage the campaigns of real-life U.S. presidential candidates, and of some politicians who never actually ran for the presidency. 1 AA-58 at ¶ 9; 1 AA-198. Expressive works like these – and *Madden NFL* – are entertaining and informative.

B. Procedural History

In July 2008, Brown filed a lawsuit against EA in New York, asserting trademark, right-of-publicity, and unfair-competition claims arising from the alleged use of his likeness in *Madden NFL*. 1 AA-58 at ¶ 7; 1 AA-178. After voluntarily dismissing that action, he re-filed the suit in federal district court in Los Angeles in 2009. 1 AA-58 at ¶¶8; 1 AA-195; 1 AA-202. EA filed a motion to dismiss the trademark claim and also filed a special motion to strike the remaining state-law claims. The court granted the motion to dismiss the trademark claims, and declined to exercise supplemental jurisdiction over the right-of-publicity claims, denying the motion to strike as moot. *See Brown v. Electronic Arts*, 2009 U.S. Dist. Lexis 131387 (C.D. Cal. Sept. 23, 2009). A Ninth Circuit panel unanimously affirmed dismissal of the trademark claim. *Brown v. Electronic Arts*, 724 F.3d 1235 (9th Cir. 2013).

On August 30, 2013, Brown filed the operative complaint against EA. 1 AA-1. He alleges that EA misappropriated his “likeness” by including an avatar that supposedly depicts him in the historic-teams function in several annual editions of *Madden NFL*. 1 AA-7 at ¶ 31. Specifically, Brown alleges that EA used certain publicly available information about him from the years that he played professional football, but *not* his name, photograph, facial features, or uniform number. *Id.*

Brown asserts claims for: (1) violation of his right of publicity under Civil

Code § 3344; (2) violation of his common-law right of publicity; (3) unfair competition; and (4) unjust enrichment. 1 AA-1.

On November 1, 2013, EA filed a special motion to strike the complaint under Code of Civil Procedure § 425.16. 2 AA-555. After the case was reassigned twice, EA filed an updated special motion to strike. 1 AA-21 to 43. Judge Duffy-Lewis denied EA's motion on March 9, 2015, holding that EA met its initial burden under Section 425.16, but that Brown met his burden of establishing a probability of prevailing on his claims. 2 AA-530; 2 AA-536. EA filed a timely notice of appeal on March 20, 2015. 2 AA-539.

C. Statement of Appealability

The order denying EA's special motion to strike is appealable under Sections 425.16(i) and 904.1(a)(13) of the Code of Civil Procedure.

D. Standard of Review

An order granting or denying a special motion to strike is subject to de novo review. *See Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.*, 122 Cal. App. 4th 1049, 1056 (2004). Thus, this Court should exercise its independent judgment in determining whether Brown has met his burden of establishing a probability of prevailing on his claims. *Id.*

III. THE TRIAL COURT CORRECTLY HELD THAT THE ANTI-SLAPP STATUTE APPLIES TO BROWN'S CLAIMS.

California's anti-SLAPP statute entitles defendants to "early dismissal of unmeritorious claims" that are filed "to interfere with the valid exercise of the constitutional rights of freedom of speech and petition."

Club Members for an Honest Election v. Sierra Club, 45 Cal. 4th 309, 315 (2008). Under the statute, any "cause of action against a person arising from any act ... in furtherance of the person's right of ... free speech ... 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).

The California Supreme Court has set forth a two-step process for determining whether a cause of action must be stricken under Section 425.16. *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Id.* To make this showing, the defendant must demonstrate that the plaintiff's claim arises from actions by the defendant that "fit[] one of the categories spelled out in ... section 425.16, subdivision (e)." *Id.* Subdivision (e)(4) protects "any ... conduct [by the defendant] in furtherance of the exercise of the constitutional right ... of free speech in connection with ... an issue

of public interest.” If the defendant meets this threshold showing, the burden shifts to the plaintiff to establish, with competent evidence, “a probability that [he] will prevail on the claim[s].” Cal. Civ. Proc. Code § 425.16(b)(1). If the plaintiff cannot meet that burden, his claims must be dismissed with prejudice. *Id.*

As the trial court correctly found, EA met its initial burden of showing that Brown’s claims target EA’s acts in furtherance of its free-speech rights. 2 AA-530. Brown’s claims arise from the use of his alleged likeness in EA’s *Madden NFL* video game. 1 AA-2 at ¶ 1. That use constitutes an act in furtherance of EA’s free-speech rights within the meaning of Section 425.16. The United States Supreme Court emphatically has held that video games are expressive works that are entitled to the same First Amendment protection as books, plays, and movies. *EMA*, 131 S. Ct. at 2733. Consequently, every court to consider the issue has found that the anti-SLAPP statute applies to claims arising from use of celebrity likenesses in video games. *Davis v. Electronic Arts*, 775 F.3d 1172, 1176 (9th Cir. 2015); *Keller*, 724 F.3d at 1273; *No Doubt v. Activision*, 192 Cal. App. 4th 1018, 1027 (2011).

Under the anti-SLAPP statute, a defendant also must show that it exercised its speech rights “in connection with a public issue” or an “issue of public interest.” Cal. Civ. Proc. Code § 425.16 (b)(1), (e)(4). In *Nygaard v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008), the court reiterated

that “the issue need not be ‘significant’ to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest.” *Id.* Similarly, in *Hilton v. Hallmark Cards*, the Ninth Circuit instructed that courts “must construe ... ‘issue of public interest’ ... broadly” to include any “topic of widespread, public interest” or “person ... in the public eye.” 599 F.3d 894, 906-07 (2010).

In a variety of contexts, courts have recognized that professional sports are matters of significant public interest – both because they broadly impact popular culture and because particular attention is paid to sporting events and athletes’ performances. In *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 411 (2001), for example, the court noted that professional baseball “is followed by millions of people across this country on a daily basis,” and concluded that information about baseball players “command[s] a substantial public interest.” In *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790, 795-96 (1995) the court held that these “public interest considerations ... apply with equal force to professional football.” *See also Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff’d en banc*, 595 F.2d 1265 (3rd Cir. 1979) (same); *Smith v. Pro Football*, 593 F.2d 1173, 1200 (D.C. Cir. 1978) (same).

As these authorities confirm, EA’s expressive work about NFL football plainly relates to a matter of public interest within the meaning of

the anti-SLAPP statute. Because EA satisfied its initial burden under the statute, the burden shifted to Brown to demonstrate a probability of prevailing on each of his claims.

To satisfy that burden, Brown must “state[] and substantiate[] a legally sufficient claim,” *Navellier*, 29 Cal. 4th at 93 (citations omitted), and “meet [EA’s] constitutional defenses.” *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 359 (1995). Brown did not and cannot meet this burden because each of his claims is barred by several separate and independent defenses.

IV. THE TRIAL COURT ERRED IN FINDING THAT BROWN DEMONSTRATED A PROBABILITY OF PREVAILING.

A. The Right Of Publicity Is Subject To Strict Constitutional Scrutiny.

As EA argued below, the right of publicity – as applied to expressive works like *Madden NFL* – is a content-based regulation on speech. 1 AA-32; see *Dryer v. NFL*, 55 F. Supp. 3d 1181, 1188, 1193 (D. Minn. 2014) (dismissing retired athletes’ right-of-publicity claims against producer of football films because films were expressive works, not commercial speech (citations omitted)) (*appeal docketed*, no. 14-3428 (8th Cir., Oct. 28, 2014)). But the trial court overlooked this threshold inquiry into the appropriate level of constitutional scrutiny, neglecting to even mention constitutional scrutiny, let alone apply the exacting level of scrutiny mandated under these circumstances. As a result, the trial court’s analysis

was not moored to the constitutional principle that content-based regulations must leave sufficient room for free expression.²

The United States Supreme Court recently examined content-based restrictions on speech in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). The ordinance at issue in *Reed* regulated the outdoor display of signs, with varying exceptions for those that were “ideological,” “political” or “temporary directional[.]” *Id.* at 2224-25. The Ninth Circuit had determined that the regulation was content-neutral, reasoning that it did not “mention any idea or viewpoint, let alone single one out for differential treatment.” *Id.* at 2229. The Supreme Court reversed, and explained that the ordinance was content-based, because its application “to any given sign depend[ed] entirely on the communicative content of the sign.” *Id.* at 2227. In other words, a regulation is content-based if “authorities must necessarily examine the content” of the speech to determine whether it is

² To be clear, strict scrutiny is not required when the right of publicity is applied to commercial speech, only when the right of publicity restricts the use of his name or likeness in an expressive work. The legislative history shows that Section 3344 was targeted at false endorsements in commercial speech, and was not meant to restrict realistic depictions of public figures in expressive works. *See* Section IV.D for further discussion of legislative history.

Indeed, the seminal cases applying California right-of-publicity law recognized those claims targeting advertisements, not expressive works. *See, e.g., Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (tobacco advertisement); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (automobile advertisement); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (snack-food advertisement); *Abdul-Jabbar v. GMC*, 75 F.3d 1391 (9th Cir. 1996) (automobile advertisement); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998) (beer advertisement).

subject to the regulation. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987) (tax-exemption statute invalid because it required state officials to evaluate whether a magazine's content was related to religion, a profession, trade or sports). Thus, the Supreme Court reaffirmed in *Reed* that a content-based regulation is subject to strict scrutiny even if it lacks a "censorial motive." 135 S. Ct. at 2228.

The same is true for a right-of-publicity claim applied to an expressive work. It requires a court to examine the content of the work because the thrust of the claim is that the plaintiff's name or likeness is included *in the content of* the defendant's work. Indeed, as the *Keller* majority (and the trial court here) understood it, California's right-of-publicity law would permit an artist to create an unauthorized oil painting of Jim Brown with the body of a fish ruling over an ocean kingdom, but not of Brown as he actually looked, running with a ball on a football field. *See Keller*, 724 F.3d at 1276. These distinctions plainly would be based on the content of the painting. As Professor Eugene Volokh has observed, "[t]he right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people's name or likenesses)." E. Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 912 n.35 (2003).³

³ Other scholars agree that the right of publicity is a content-based restriction. *See, e.g.*, D. Leenheer Zimmerman, *Who Put The Right In The Right Of Publicity?* 9 DePaul-LCA J. Art & Ent. L. 35, 53-54 (1998) ("Publicity rights ... are a kind of content-based regulation of speech"); F. Dougherty, *All The World's Not A Stooge: The 'Transformativeness' Test*

The Supreme Court has directed that content-based regulations of speech are presumptively invalid and subject to strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); accord *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

The Court has recognized limited exceptions to this rule, in the form of a few historic categories of expression that 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.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). These categories include obscenity, defamation, fraud, fighting words, and true threats; the Supreme Court repeatedly has refused to enlarge the list, reasoning that “[b]efore exempting a [new] category of speech from the normal prohibition on content-based restrictions ... the Court must be presented with ‘persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.’” *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012); see also *United States v. Stevens*, 559 U.S. 460, 482 (2010); *EMA*, 131 S. Ct. at 2741. False statements on

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, 46, 61 (2003) (“right of publicity laws are content-based speech restrictions” and “should be subject to heightened scrutiny”); M. Conrad, *A New First Amendment Goal Line Defense – Stopping the Right of Publicity Offense*, 40 Ohio N.U.L. Rev. 743, 789 (2014) (“[b]ecause the depictions are not commercial in nature ... full First Amendment rights should apply” and “full First Amendment rights mean a form of the strict scrutiny test for content-related restrictions on speech”).

military achievements did not suffice in *Alvarez*. 132 S. Ct. at 2547. In *Stevens*, the Court declined to create a new category for depictions of animal cruelty. 559 U.S. at 482. In *EMA*, the Court struck down a regulation prohibiting the sale of violent video games to minors, and declared that “new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.” 131 S. Ct. at 2734.

As a “relatively raw and brash newcomer” in American jurisprudence, 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* (2d ed. 2000), the right of publicity should not be exempt from strict constitutional scrutiny. The right of publicity is merely an “economic right” that protects a person’s “economic interests.” *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415 (2001); *see also Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973-76 (10th Cir. 1996) (observing that the most credible rationale for the right of publicity is that it “maximizes the economic and informational value of... identities;” and noting that this economic “efficiency argument is most persuasive in the context of advertising” but “is not as persuasive ... when applied to nonadvertising uses.”). Even if the right had deeper historical roots, its concern with “exploiting the value to be obtained from merchandising the celebrity’s image,” *Comedy III Prods. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 400 (2001), pales as a state interest, even in

comparison to the injuries raised in *Alvarez* (false statements in military achievements) and *Stevens* (animal cruelty), especially when the right of publicity targets an expressive work.

In two recent cases, courts have confirmed that the right of publicity is content-based and presumptively invalid when applied to expressive works. In *Dryer v. NFL*, the court dismissed three retired NFL players' right-of-publicity claims targeting the use of their names and likenesses in league-produced films, citing the United States Supreme Court's instruction that "*content-based restrictions on non-commercial speech are appropriate 'only in the most extraordinary circumstances' [.]*" 55 F. Supp. 3d at 1188 (emphasis added). Once the court determined that the football-themed films at issue were "not commercial speech and [we]re instead entitled to full protection under the First Amendment," its conclusion was straightforward: "Because the productions are fully protected speech, Plaintiffs' claims against them fail."⁴ *Id.* at 1193.

Likewise, in *Frazier v. Boomsma*, 2007 U.S. Dist. Lexis 72427 (D. Ariz. Sept. 27, 2007), the plaintiff challenged a state statute creating a right of publicity for dead soldiers that would have prevented him from using soldiers' names on t-shirts about wars in which they served. The court held

⁴ Notably, several of those claims arose under California law. *Dryer*, 55 F. Supp. 3d at 1196.

that the statute was content-based and did not survive strict scrutiny, explaining:

The right of publicity can warrant content-based restrictions on *commercial speech*. However, the right of publicity cannot justify content-based restrictions on *political or artistic expression* where the identity of the holder of the right bears a reasonable relationship to the message. The rationale for this rule is that right-of-publicity-based limitations on political and other core forms of protected speech would block important avenues of self-expression and unduly restrict the marketplace of ideas ... The State cannot give anyone a right of commercial exaction for the exercise of someone else's First Amendment rights.

Id. at *42-43, 48 (emphasis added).

Content-based restrictions are pernicious because they chill protected speech. Strict scrutiny, far better than the *ad hoc* balancing reflected in the trial court's application of EA's defenses, safeguards against that problem by ensuring that such restraints on expression "reach[] reasonably sound and predictable outcomes." G. R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 Pepp. L. Rev. 273, 280, 299 (2009).

Because the trial court failed to consider that the right of publicity – as applied to expressive works – is a content-based restriction on speech, it interpreted each of EA's defenses much too narrowly, allowing Brown to burden a far wider swath of expression than the First Amendment permits. If the court had applied the proper level of constitutional scrutiny, Brown's right-of-publicity and related claims should have been dismissed

because there is no compelling interest served by allowing professional athletes and other celebrities to censor the content of expressive works like books, films, and video games.

B. The Transformative-Use Test

In an effort to ease the tension between the First Amendment and the right of publicity, the California Supreme Court in 2001 announced the transformative-use defense to right-of-publicity claims. *Comedy III*, 25 Cal. 4th at 404. The Court explained that, under this test, the First Amendment trumps the right of publicity if the plaintiff's name or likeness is transformed by other content in the defendant's expressive work. As examples of potentially transformative works, the Court cited "factual reporting," "fictionalized portrayal[s]" such as docudramas, "heavy-handed lampooning" such as cartoons and "subtle social criticism" such as pop art. *Id.* at 406. Courts have struggled to apply the test, *see, e.g., Winter v. DC Comics*, 99 Cal. App. 4th 458, 474 (2002), *rev'd*, 30 Cal. 4th 881 (2003), and one subset of cases – *Keller*, most prominently – framed it so narrowly that the test would protect only distorted cartoon renderings of celebrities in fantastical settings. Other courts have stayed true to the California Supreme Court's much broader articulation of the test. *See, e.g., Noriega*, L.A. Super. Ct. No. BC 551747; *Ross v. Roberts*, 222 Cal. App. 4th 677, 687-88 (2013); *Vijay*, 2014 U.S. Dist. Lexis 152098.

In *Comedy III*, the owner of The Three Stooges’ publicity rights sued an artist who sold t-shirts and prints featuring literal images of the comic trio. 25 Cal. 4th at 393-94. The California Supreme Court upheld a judgment against the artist. *Id.* at 394, 409-10. In reaching its decision, the court formulated “what is essentially 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 391.

The Court explained that “when an artist is faced with a right of publicity challenge to his or her work, he or she may raise an affirmative defense that the work is protected by the First Amendment inasmuch as it” – that is, *the work* – “contains significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame.” *Id.* at 407. The Court emphasized that the correct “inquiry is whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.” *Id.* at 406. “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.” *Id.* Applying its test, the Court found that since the defendant’s t-shirts and prints contained only a literal representation of The Three Stooges – without any other creative or artistic

elements or commentary – the First Amendment did not foreclose liability. *Id.* at 410.

Just two years after *Comedy III*, the California Supreme Court revisited the test in *Winter v. DC Comics*, reversing a unanimous intermediate appellate panel. 30 Cal. 4th at 888-92. In that case, musicians Johnny and Edgar Winter sued a publisher of comic books that featured characters named “Johnny and Edgar Autumn.” The characters’ faces resembled the Winter Brothers, but they were depicted as “villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature[.]” *Id.* at 886. The Court reaffirmed that the crucial issue is “whether the work is transformative” and whether the defendant’s work “contain[s] significant creative elements that transform [it] into something more than mere celebrity likenesses.” *Id.* at 885. To underscore the breadth of this protection, the Court pointed out *again* that transformative works “can take many forms, from factual reporting to fictionalized portrayal” – both of which involve literal portrayals of individuals – and “from heavy-handed lampooning to subtle social criticism.” *Id.* at 888 (citations omitted). Turning to the defendants’ comic books, the Court stated that “[a]pplication of the test to this case is not difficult.” *Id.* at 890. While the comic books’ phantasmagoric physical transformation of the plaintiffs’ likenesses may have been sufficient to confer First Amendment protection, it was not necessary to the Court’s

holding. The transformative-use test shielded the works because the plaintiffs' likenesses were "merely part of the raw materials from which the comic books were synthesized[.]" *Id.*

Subsequent courts have struggled to frame the transformative-use analysis, unsure about what needs to be transformed, and how. Should the focus be solely on the depiction of the plaintiff so that his or her likeness or name must be distorted or used in a surreal setting in order to receive First Amendment protection? Or should the court focus on the defendant's work as a whole – not just on the plaintiff's name or likeness – so that (as the Court instructed in *Comedy III* and *Winter*), the test protects even realistic depictions of the plaintiff so long as the defendant uses the plaintiff's name or likeness simply as one of the "raw materials" to create a new work?

This confusion arose in part because two early applications of the test happened to involve cartoonish alterations of a celebrity's likeness and environment. *See Winter*, 30 Cal. 4th at 886 (half-worm, half-men); *Kirby v. Sega of America*, 144 Cal. App. 4th 47 (2006) (pop singer rendered as 25th-century intergalactic journalist). But neither case suggests that fantastical transformations were necessary for First Amendment protection. In fact, the California Supreme Court squarely addressed the issue in *Comedy III* and *Winter*: proper application of the transformative-use test requires an evaluation of the defendant's work *as a whole*, not just an examination of the celebrity's depiction within the work. *Comedy III*, 25

Cal. 4th at 406-07; *Winter*, 30 Cal. 4th at 886. Specifically, the Court made clear that “factual reporting” and biography qualify as transformative use, citing cases involving a biography of Howard Hughes and a docudrama regarding Rudolph Valentino. *Comedy III*, 25 Cal. 4th at 406-07. Since biographies and docudramas involve transformative expression, it follows that the First Amendment protects realistic depictions in realistic scenarios.

The Sixth Circuit recognized these principles in *ETW Corp. v. Jireh Publ.*, 332 F.3d 915 (6th Cir. 2003). *ETW* concerned a lithograph featuring a realistic likeness of Tiger Woods playing golf at The Masters, with several former champions in the background. *Id.* at 918. The Sixth Circuit found that the artist’s “work does not capitalize solely on a literal depiction of Woods. Rather, [the] work consists of a collage of images in addition to Woods’s image which are combined to describe, in artistic form, a historic event in sports history[.]” *Id.* at 938. “Because [the] work has substantial transformative elements” and “consists of much more than a mere literal likeness of Woods,” the court concluded that “Woods’s right of publicity must yield[.]” *Id.* at 936, 938.⁵

⁵ The California Supreme Court borrowed the concept of transformative use from copyright law, and relied heavily on the U.S. Supreme Court’s landmark decision in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). There, the Court held that the defendant’s rap song would be “transformative” of the plaintiff’s original ballad, and not infringing, if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 579. Far from cabining the transformative-use test to parodies or other works that alter or distort an original work, courts in copyright cases have expanded the definition of transformativeness to encompass a broad range of uses. These

Focusing only on the alleged depiction of Brown, and not on EA’s work as a whole, the trial court below resolved the transformativeness inquiry against EA. 2 AA-535. The court concluded that because Brown is “realistically portrayed” in the context of football games, EA’s use of his alleged likeness in *Madden NFL* is not transformative. *Id.* The court followed *No Doubt v. Activision Publishing*, 192 Cal. App. 4th 1018 (2011), and the majorities in *Keller* and *Hart v. Electronic Arts*, 717 F.3d 141 (3d Cir. 2013), each of which focused exclusively – and incorrectly – on the depictions of the plaintiffs and ignored the games’ other creative elements.

In *No Doubt*, members of a pop band entered a contract allowing a video-game publisher to scan and photograph the band members’ likenesses for use, along with two of their songs, in the video game *Band*

include the use of: unaltered thumbnail photographs in a search engine (*Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007)); an unaltered clip from a 1960s television program in a play about that era (*Sofa Entm’t v. Dodger Prods.*, 709 F.3d 1273, 1278-1279 (9th Cir. 2013)); unaltered portions of literary works in a searchable online library (*Authors Guild v. Google*, 954 F. Supp. 2d 282, 291-292 (S.D.N.Y. 2013)); unaltered photographs in works of appropriation art that did not comment on, critique, or parody the originals (*Cariou v. Prince*, 714 F.3d 694, 706-708 (2d Cir. 2013)); and unaltered concert posters in a biography of the Grateful Dead (*Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608-612 (2d Cir. 2006)). In contrast, the *Keller* majority suggested that transformative use focuses on distortion or manipulation. *Keller*, 724 F.3d at 1276-77. Given transformative use’s origins in copyright law, that simply cannot be right, and its application in right-of-publicity law cannot be limited to fantastical characters like the half-worm, half-human creatures in *Winter*, or the 25th-century intergalactic journalist in *Kirby*, 144 Cal. App. 4th 47. As the California Supreme Court emphasized in *Guglielmi*, “[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality” to avoid right-of-publicity claims. 25 Cal. 3d at 869.

Hero. 192 Cal. App. 4th at 1024. Two weeks before the publication date, the plaintiffs learned that the publisher had created an “unlocking” feature that permitted users, as they advanced in the game, to make the band members sing songs they would never perform, sing in opposite-gendered voices, and perform solo or with other bands. *Id.* The plaintiffs alleged that the video-game publisher “never communicated its intentions to permit such manipulations” and, in fact, represented that the likenesses “would be used only in conjunction with the selected No Doubt songs.” *Id.*

Rather than focus on the video-game company’s apparent breach of the parties’ contract, the court applied the transformative-use test to the band’s right-of-publicity claims. *Id.* at 1033. Although the court acknowledged the California Supreme Court’s instruction that “even literal reproductions of celebrities” may be transformative, it held that *Band Hero* failed the test because it depicted the plaintiffs in their normal professional setting, “doing exactly what they do as celebrities.” *Id.* at 1034. Of course, that is precisely what biographers do, and the California Supreme Court specifically identified a biography of Howard Hughes as an example of a transformative work in *Comedy III*. Moreover, depicting the plaintiff band members “doing...what they do” is precisely what the band *wanted* the video game to do; in this unique case, the band sued because of the fantastical alterations the video-game company had made to their personas.

Perhaps for that reason, the court refused to credit those fantastical

alterations to the defense in the transformative-use analysis, and concluded that the game fell short because “the avatars perform rock songs, the same activity by which the band achieved and maintained its fame.” *Id.*

The *Keller* majority followed *No Doubt*, and effectively replaced the California Supreme Court’s transformative-use test, which focuses on the defendant’s work as a whole, with an “altered-likeness” test that focuses only on physical alterations to the plaintiff’s likeness and the professional setting in which he or she is depicted. In *Keller*, a former college starting quarterback claimed that EA violated his right of publicity by realistically depicting him, along with other NCAA football players, in a video game about NCAA football. 724 F.3d at 1270. The *Keller* majority concluded that the use of the plaintiff’s identity was not transformative because he was depicted in EA’s *NCAA Football* video game “as what he was: the starting quarterback for Arizona State University[,]” and because “the game’s setting is identical to where the public found Plaintiff during his collegiate career: on the football field.” 724 F.3d at 1276.⁶

Keller’s holding is inconsistent with the California Supreme Court’s instructions for applying the transformative-use test. For a visual artist to prevail under *Keller*’s interpretation of the test, she would have to

⁶ The panel in *Davis v. Electronic Arts*, another Ninth Circuit case concerning *Madden NFL*, held that it was bound by the *Keller* majority. *See Davis*, 775 F.3d 1172, 1177 (9th Cir. 2015). The *Hart* majority also followed the *Keller* majority. 717 F.3d at 166.

physically alter a celebrity’s likeness to cartoonish effect, and place the likeness in a context other than the one in which the celebrity gained notoriety. 724 F.3d at 1276. This altered-likeness requirement would create absurd results when applied to biography, requiring biographers to change the name of their subjects. To avoid this result, courts might be tempted to exempt biography from *Keller*’s altered-likeness test – but this would require the sort of medium-specific rule emphatically rejected by the U.S. Supreme Court. *Winters v. New York*, 333 U.S. 507, 510 (1948) (“the line between the informing and entertaining is too elusive for the protection of that basic [free speech] right”).

In practice, if Jim Brown sued over the use of his name in a biography, a court would credit the transformative effect of all the work’s other expressive elements – the author’s research, insights, and prose – on the name. *Keller* refused to credit the equivalent expressive elements in a video game, *id.*, but the California Court of Appeal did precisely that for a songwriter’s use of a name in *Ross v. Roberts*, 222 Cal. App. 4th at 687-88 (2013) (drug kingpin’s exact name transformed by song lyrics and “fictional tales”). There is no justification for a constitutional rule that protects a written work but not a visual one.⁷

⁷ See R. Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 Colum. J.L. & Arts 157, 188 (2015) (the improperly narrow transformative-use test has created a “body of law out of step with the rest of First Amendment doctrine, which discriminates against visual realism for no articulated reason.”).

Keller's version of the transformative-use test also penalizes “realistic[] portray[al]s” of people “doing exactly what they do as celebrities,” affording them less protection than surreal depictions. 724 F.3d at 1276, 1279. Discouraging the more accurate message is a startling deviation from constitutional jurisprudence, and cannot be reconciled with the First Amendment’s core “truth-seeking” aims. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

Dissenting in *Keller*, Judge Thomas recognized how far his colleagues and the majority in *Hart* – and eventually the trial court in this case – have strayed from the California Supreme Court’s instructions in *Comedy III* and *Winter*. “The majority confines its inquiry to how a single athlete’s likeness is represented in the video game,” he noted, “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.” *Keller*, 724 F.3d at 1285. Under the California Supreme Court’s formulation of test, “the salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual person or image has been altered.” *Id.*

Turning to EA’s *NCAA Football* video game, which is similar to *Madden NFL*, and “[a]pplying the *Comedy III* considerations ... in proper holistic context,” Judge Thomas concluded that “the considerations favor

First Amendment protection.” *Id.* at 1286. In words that apply with equal force here, he observed that:

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.

Id. at 1286. He found EA’s game to be a “work of interactive historical fiction” chock-full of EA’s own creative expression, as well as opportunities for the user to make further changes. *Id.* at 1285. For instance, certain modes of the game permit players to “become[] a virtual coach[,]” recruiting and developing fictional players for his own team. *Id.* at 1286. On the field, the user “controls not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors.” *Id.*

Judge Thomas warned that the “stakes are not small.” *Id.* at 1290. He declined to “punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games. That the lifelike roar of the 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[.]” *Id.* at 1287. Looking beyond video

games to other works that incorporate celebrity likenesses, Judge Thomas cautioned that the *Keller* and *Hart* majorities’ “logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings.” *Id.* at 1290.

The *Keller* majority tried to dismiss Judge Thomas’ concerns in a footnote, suggesting that documentaries, biographies, and other works may still be protected because “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.’” *Id.* at 1279, n.10. But First Amendment protection cannot depend on something so fickle, and inscrutable, as a “likely purchaser’s primary motivation.” The majority simply had no answer to Judge Thomas’ point that their interpretation of the transformative-use test, if applied to other forms of expression, would threaten the long-established right of filmmakers, authors, and others to create works that realistically depict historical figures in the context in which they garnered public attention.

Courts have begun to recognize that the *Keller* (and *Hart* and *No Doubt*) majorities’ altered-likeness test cannot be reconciled with *Comedy III* or *Winter*. In *Noriega*, the court granted a video-game publisher’s special motion to strike a right-of-publicity claim by the former Panamanian dictator, and explained that:

Plaintiff places great reliance [on] *Keller v. Elec. Arts Inc.*, 724 F.3d 268 (9th Cir. 2013). First, that case is not binding authority on this Court. Further, to the extent that *Keller* suggests that the entirety of the disputed work should not be considered under the second prong of the anti-slapp analysis, such reasoning is in conflict with the controlling California authorities cited herein and relied upon by this Court.

Noriega, L.A. Super. Ct. No. BC 551747 at 6 n.4. In *Vijay*, too, a federal court followed *Comedy III*'s original command and held that the likeness of an extra, who appeared for several seconds in the film *Titanic* and in a related documentary, was transformed not only by his “costume and make-up[,]” but also by the defendants’ “special effects[,]” “music[,]” and “significant artistic expression” in “nearly five hours of film[.]” 2014 U.S. Dist. Lexis 152098, at *13.

Like the courts in *ETW*, *Noriega*, and *Vijay*, this Court should adhere to the transformative-use test announced by the California Supreme Court in *Comedy III* and *Winter*, and focus on EA’s entire work, not just on the alleged depiction of Brown. Had the trial court done so, it would have found that *Madden NFL* is transformative for all the reasons Judge Thomas identified in his discussion of *NCAA Football*. The game allows users to build their own teams, their own players, and their own games. 1 AA-46 at ¶ 6; 1 AA-60 at ¶ 17; 1 AA-264. EA’s creative expression abounds in the details of the game – the graphics, the sounds, and the movements. 1 AA-45 at ¶¶ 4-5; 1 AA-62 to 71. Even the narratives are creative: users can match current teams against historic teams; they can choose to interact with

characters including a barber, a tattoo artist and a sports agent; or they can run a franchise for up to thirty years as its general manager. 1 AA-46 at ¶ 6. The avatar that Brown complains about is only a miniscule part of the work, which includes roughly 7,500 virtual athletes and an array of other features. 1 AA-46 to 47 at ¶ 8. Under these circumstances, no reasonable trier of fact could find that those two avatars are the “sum and substance” of *Madden NFL*, or that EA’s work is a “conventional portrait” of Brown or a “mere celebrity likeness or imitation,” akin to the Three Stooges T-shirt in *Comedy III*.

Under the transformative-use test announced by the California Supreme Court in *Comedy III*, the First Amendment bars Brown’s claims. Just as it would preclude Brown from preventing the publication of the many books about football history that have featured him, presumably without securing his permission or paying him anything.⁸

C. The Constitutional Public-Interest Defense.

According to his complaint, EA violated Brown’s right of publicity not by using his name, photograph, or literal likeness, but instead by using publicly-available biographical and statistical data about him: his “position,” “years in the NFL,” “approximate height and weight,” “age,” “home state,” “skin color,” “handedness,” and “relative skill level.” 1 AA-

⁸ See, e.g., M. Freeman, *Jim Brown: The Fierce Life of an American Hero* (2007); T. Pluto, *Browns Town 1964: Cleveland Browns and the 1964 Championship* (1997).

7 at ¶ 31. Brown argues that no one can use this historical information in an expressive work, or incorporate it into an interactive avatar in a video game, without first obtaining his consent (and presumably paying him a fee). The trial court’s order supports this dangerous theory.

California case law, however, does not support that theory. In light of the public interest in sports, courts have held that publishers may use an athlete’s historical and biographical information in an expressive work without liability under the right of publicity. *See, e.g., Dora v. Frontline Video*, 15 Cal. App. 4th 536, 540 (1993); *Gionfriddo*, 94 Cal. App. 4th at 410; *Montana*, 34 Cal. App. 4th at 796-98. Under *EMA*, video games cannot receive any less protection. 131 S. Ct. at 2733, 2737 n.4.

Gionfriddo is instructive. There, the court held that the First Amendment permitted the defendants to use the names and images of retired professional baseball players in game programs, web features, and other works without the players’ permission. 94 Cal. App. 4th at 410. The court explained that the right of publicity “does not provide relief for every publication of a person’s name or likeness”; in most cases, the right to disseminate and to receive information about issues of public interest must prevail over the celebrity’s economic interest. *Id.* at 409.

The information conveyed by the defendants’ works in *Gionfriddo* constituted “bits of baseball’s history: names of players ... ; descriptions of memorable performances from former games ... ; photographs and video

clips taken of plaintiffs [and] ... made available to the public through Web sites, home videos, and other programs presenting historic events from long ago.” *Id.* at 410. The court emphasized the “substantial public interest” in baseball generally and in “factual data concerning the athletic performance of the plaintiffs” specifically. *Id.* at 411. This public interest was not diminished by the fact that the information was communicated through game programs and websites, rather than books or newspapers, or by the fact that the plaintiffs had retired from the sport decades earlier. As the court emphasized, “entertainment features receive the same constitutional protections as factual news reports,” and “the public interest is not limited to current events; the public is also entitled to be informed and entertained about our history.” *Id.* at 410-11.

In contrast to the “substantial” public interest in the dissemination of information about professional baseball, the players had only a “negligible” economic interest at stake because the alleged appropriation of their names and likenesses involved “historical fact[s], descriptions of these facts, and video depictions of them,” within expressive works. *Id.* at 415.

In the end, the case was easy for the court to decide. Because “the public interest favoring the free dissemination of information regarding baseball’s history far outweigh[ed] any proprietary interests at stake,” the court dismissed the right-of-publicity claims. *Id.* (emphasis added).

Earlier California authorities confirm that the public interest in disseminating information – through news accounts or works of entertainment – ordinarily trumps the right of publicity. In *Dora*, for example, a legendary surfer filed a right-of-publicity lawsuit against the producers of a surf film that included audio recordings and video footage of him. 15 Cal. App. 4th at 540. The court began by noting that that “every publication of someone’s name or likeness does not give rise to an appropriation action[,]” and reiterated the rule that “[p]ublication of matters in the public interest ... is not ordinarily actionable.” *Id.* at 542. The court observed that “matters in the public interest are not restricted to current events; magazines and books, radio and television may legitimately inform and entertain the public with reproduction of past events ... and biographies.” *Id.* at 543 (citations and internal quotations omitted). The court easily found the sport’s history was a matter of public interest. *Id.*

Subsequently, the court in *Montana* held that the public interest in professional football trumped former San Francisco 49ers quarterback Joe Montana’s right of publicity in a case arising from the sale of posters featuring his image. 34 Cal. App. 4th at 796-98. There, the court did not even consider Montana’s supposed economic interests; the fact that his image was used on a poster that related to a matter of public interest – one of the 49ers’ Super Bowl triumphs – alone entitled the work to constitutional protection. *Id.* at 794-95.

The Eighth Circuit’s decision in *C.B.C. Distribution v. Major League Baseball Advanced Media*, 505 F.3d 818, 822-23 (8th Cir. 2007), underscores that constitutional protection reaches nontraditional forms of expression – even information for which the publisher previously had paid a license fee to the plaintiff. In *C.B.C.*, the court held that Major League Baseball players’ names, biographies, and statistics were matters of public interest and were insulated from right-of-publicity claims, even when disseminated through online fantasy-baseball websites. *Id.* at 822-823. *C.B.C.*’s fantasy-baseball games incorporated information that was “all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.” *Id.* at 823. *See also CBS Interactive v. NFL Players Ass’n.*, 259 F.R.D. 398, 417 (D. Minn. 2009) (same).

The trial court below rejected this defense in two sentences on the grounds that *Keller* “determined that the public interest defense does not apply to video games.” 2 AA-532. Even if a federal court were an authoritative source on the scope of a test crafted by California courts – which it is not – that is not what the *Keller* majority held. Rather, the majority construed the California test to cover only the “publication or reporting of newsworthy items.” 724 F.3d 1268, 1282 (2013), citing *Hilton*, 599 F.3d at 912. The majority never said that the test does not apply to video games; presumably, if CNN developed a video game that

published “newsworthy” information about professional football, 724 F.3d at 1283, the *Keller* majority would find that the game was protected by the public-interest test.

But the *Keller* construction is not supported by California authority. By distilling the *Dora*, *Montana*, and *Gionfriddo* holdings into a categorical rule that the public-interest test covers only “publishing or reporting factual data,” the *Keller* majority limited constitutional protection to traditional expressive activities, like reciting facts in newspapers and evening news broadcasts, effectively stripping constitutional safeguards from the innovative forms of expression that most depend on constitutional protection to survive and grow. As the court in *Gionfriddo* explained, “[i]t is manifest that as news occurs, or as a baseball season unfolds, the First Amendment will protect mere recitations of the players’ accomplishments[,]” 94 Cal. App. 4th at 410. The purpose of the public-interest test is to draw a wider circle, protecting “verbal descriptions and video depictions” of retired baseball players, *id.*; a remembrance of the “events and public personalities at Malibu in the early days of surfing,” 15 Cal. App. 4th at 540; and other creative, unconventional uses of information that interests the public. Even the plaintiff in *Montana* conceded that the First Amendment protected the actual pages of the newspaper; the court held that the public-interest test went further to protect

the commemorative posters based on them – merchandise, in other words, and hardly a “reference source.” 34 Cal. App. 4th at 794.⁹

Brown argued below that the public-interest test boxes out *Madden NFL* in other, quite idiosyncratic ways. He held up the fact that *Madden NFL* did not use Brown’s name as proof that EA had not “publish[ed],” “report[ed],” or even “convey[ed] information” about him to the public, 2 AA-314. But even traditional news reports about sports teams often convey information about players without identifying them by name. Brown also argued that EA lost the constitutional protection it would have had if, like C.B.C., it had used publicly available information for a fantasy football league, because EA added a “digital[] replica[]” of Brown and permitted users to interact with it. 2 AA-317. Of course, C.B.C.’s fantasy football league *was* interactive, and the Supreme Court in *EMA* flatly rejected the argument that interactivity weakens First Amendment protection. 131 S. Ct. at 2738.

According to Brown, in order to qualify for the constitutional public-interest test, a speaker must use the celebrity’s name, but must not use a

⁹ Moreover, *Madden NFL* would qualify even under *Keller*’s narrower, “publication or reporting” formulation of the constitutional public-interest test: The game’s creators collected biographical and statistical information for hundreds of players, selected those who were worthy of being on all-time, all-star teams, picked other teams from NFL history that they deemed historically significant, and published all this information in a complex visual world. 1 AA-46 to 47 at ¶ 8; 1 AA-47 at ¶ 12; 1 AA-72 to 137; 1 AA-59 at ¶ 14; 1 AA-242 to 251; 1 AA-45 at ¶ 4; 1 AA-62 to 71.

digital avatar representing him, or enable interactivity. Each of these new caveats is arbitrary and baseless – why, for instance, is a photographic or video representation of a likeness permissible under *Gionfriddo*, but not one in digital form? Collectively, they undermine the broad speech-protective aims of the constitutional public-interest test. But Brown is not seeking consistency – he only seeks to exclude *Madden NFL* from the test’s protection in this case. Because the public-interest test protects the publicly available information that EA used, however, it protects the video game that EA created in order to disseminate it.

D. Civil Code Section 3344(d)’s Public-Affairs Exemption

When the California Legislature enacted the right-of-publicity statute for living individuals, it expressly exempted from liability any use of an individual’s likeness in an expressive work that relates to a matter of “public affairs.” Cal. Civ. Code § 3344(d). The trial court appears to have misread the statute, holding that “Civil Code section 3344(d) provides the basis for compensatory relief for the use of another’s name or likeness. It is not a defense nor is it constitutional. It, therefore, does not apply to the special motion to strike analysis.” 2 AA-533. The basis for relief for the “knowing[] use[of] another’s name, voice, signature, photograph, or likeness” is set forth in Section 3344(a). Subsection (d) carves out an express statutory exemption from liability – a defense that courts repeatedly have applied, including in connection with special motions to strike. *See*,

e.g., *Doe v. Gangland Prods.*, 730 F.3d 946, 961 (9th Cir. 2013) (applying subsection (d) to right-of-publicity claim on anti-SLAPP motion).

Had the trial court applied Section 3344(d), it would have held the exemption defeats Brown’s claims. The legislative history makes clear that Section 3344 was not intended to restrict realistic depictions of public figures in expressive works, but rather to address merchants’ practices of hawking goods and services by deceptively suggesting a celebrity endorsement. *See* S. Comm. on Judiciary, Analysis of “AB 826 (Vasconcellos) as amended October 20,” at 3 (Oct. 20, 1971) (on file in Cal. State Archives, 1971 reg. sess., Assem. B. 826, S. Comm. on Judiciary File) (noting that the bill was intended to remedy “sales schemes” in which “manufacturers and retailers...select a person’s name and use it to promote their product”). That narrow legislative focus underscores the need to read the “public affairs” exception broadly, and to avoid imposing liability on expressive works.

Consistent with the legislative purpose, courts have interpreted the public-affairs exemption expansively, recognizing that it applies to much more than just traditional news reports.¹⁰ In *Dora*, for instance, the court rejected the plaintiff’s argument that a surfing film did not relate to “public

¹⁰ Before *Keller*, even the Ninth Circuit had held that Section 3344(d) provided a defense to both statutory and common-law right-of-publicity claims, and that it afforded even broader protection than the First Amendment. *New Kids on the Block v. News America Pub.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992).

affairs” within the meaning of Section 3344(d). *Id.* Noting that Section 3344(d) “distinguishes between news and public affairs,” the court held that “the Legislature intended that the category of public affairs would include things that would not necessarily be considered news.” *Id.* at 545. Because “the public is interested in and constitutionally entitled to know about things, people, and events that affect it,” the court concluded, “we cannot limit the term ‘public affairs’ to topics that might be covered on public television or public radio.” *Id.* at 546. Following *Dora*, the Court of Appeal specifically found that professional football is a matter of “public affairs” within the meaning of Section 3344(d). *Montana*, 34 Cal. App. 4th at 796; *see also Gionfriddo*, 94 Cal. App. 4th at 416 (holding that, “in view of baseball’s pervasive influence on our culture,” the defendants’ game programs and web sites were “public affairs uses exempt from consent under Section 3344”).

Under a properly broad application of the exemption, *Madden NFL* clearly qualifies for protection. Just like the poster in *Montana*, EA’s video game focuses on professional football, a recognized matter of “public affairs.” *Montana*, 34 Cal. App. 4th at 796; *Gionfriddo*, 94 Cal. App. 4th at 416. Compared to the *Montana* poster, *Madden NFL* has an even stronger claim on informational value and creative expression, given the breadth of information it contains and the innovative ways in which its audience can engage with this information to simulate and learn about professional

football. Similarly, nothing of legal significance separates *Madden NFL* from *Dora*'s protected surfing documentary.

Nor should the artificial distinctions created by *Keller* prevent Section 3344(d) from applying here. In *Keller*, the majority suggested that the exemption applies only to statutory right-of-publicity claims, and treated it as co-extensive with the constitutional public-interest defense. 724 F.3d at 1282. Most problematic, the *Keller* majority held that, like the constitutional defense, the statutory public-affairs exemption protects only expressive works that involve “publishing or reporting.” *Id.* Neither the statutory language, nor the case law, nor the legislative history supports that interpretation. Section 3344(d) provides that no consent is needed to use an individual’s name or likeness “in connection with any news, public affairs, or sports broadcast or account[.]”¹¹ The statute does not contain any “publishing” or “reporting” limitation, and no California state appellate court has imposed the limitations proposed by the *Keller* majority.

But *Madden NFL* should be exempt from liability under Section 3344(d), even if the Court applies the *Keller* majority’s “publishing or reporting” restriction. As noted above, *Madden NFL* is published and

¹¹ The legislature used broad language in crafting the public affairs exemption, exempting any use “*in connection with any news, public affairs, or sports broadcast or account*” not just uses “in” such a broadcast or account. Cal. Civ. Code § 3344(d) (emphasis added). Thus, by its terms, the exemption applies beyond traditional broadcasts or accounts – *i.e.* “publishing” or “reporting” – and reaches expression made “in connection with” a broadcast or account.

communicates information about an issue of public affairs. The game has a virtual trainer that informs users about the rules of the game. 1 AA-60 at ¶¶ 20; 1 AA-271 to 275. Users are educated about current NFL teams’ rosters and playbooks, the league’s draft, its salary cap, and its history. 1 AA-59 to 60 at ¶¶ 14-19; 1 AA-242 to 270; 1 AA-47 at ¶ 12; 1 AA-72 to 137; 1 AA-45 at ¶ 4; 1 AA-62 to 71. And, as Brown emphasizes in his complaint, his alleged likeness is based on EA’s use of publicly available, historical data: how many years he played in the league, his height and weight, his skin tone, and his relative skill level. 1 AA-7 at ¶ 31. Because EA is publishing information about a matter of undisputed public importance, its expressive work should be exempt from liability under Section 3344(d). The fact that EA publishes in the context of a video game, as opposed to a book, a documentary, or a celebratory poster, is of no consequence. *EMA*, 131 S. Ct. at 2733.

E. The *Rogers*/Restatement Test

While the transformative-use test has proven difficult for many courts to apply, the *Rogers*/Restatement test is more predictable, and more protective of free expression. Under this test, which was formulated by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (1989), the First Amendment defeats a right-of-publicity claim arising from an expressive work, unless the use of the celebrity’s name or likeness is “wholly unrelated” to the work or is “simply a disguised commercial advertisement

for the sale of goods or services.” *Rogers* is consistent with the approach taken by the Restatement (Third) of Unfair Competition, § 46, which restricts the right of publicity to the unauthorized appropriation of the commercial value of a person’s identity “for purposes of trade.” The Restatement provides that “use in entertainment and other creative works is permitted,” unless “the name or likeness is used solely to attract attention to a work that is not related to the identified person.” *Id.* § 47, cmt. c.

Following *Keller*, the court below declined to apply the *Rogers*/Restatement test. The *Keller* court suggested that only one circuit court has followed the *Rogers*/Restatement approach. 724 F.3d at 1281. To the contrary, it has been adopted by numerous courts as a defense to right-of-publicity claims. *See, e.g., Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003); *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 336-338 (E.D. Pa. 1996); *Romantics v. Activision Publ.*, 574 F. Supp. 2d 758, 766 (E.D. Mich. 2008); *Ruffin-Steinback v. De Passe*, 82 F. Supp. 2d 723, 730 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457 (6th Cir. 2001); *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001).

Unlike the transformative-use test, the *Rogers*/Restatement approach would properly confine the right-of-publicity tort to situations in which speakers have depicted or referred to a celebrity in order to sell something – either by falsely claiming a celebrity commercial endorsement or by

gratuitously including a celebrity image in a publication. Confined to these circumstances, the right-of-publicity does not raise constitutional concerns because speech that falsely claims a commercial endorsement is analogous 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*, 425 U.S. 748, 771 (1976). Likewise, the gratuitous use of a celebrity's image to attract attention, unrelated to any expressive content in the work, merits little First Amendment protection. Thus confined, the right-of-publicity tort would raise far less constitutional concern.

Brown is clearly not "wholly unrelated" to the subject of EA's work about professional football, and the use of his "likenesses" is not a disguised commercial advertisement for *Madden NFL* or anything else. Thus, the *Rogers/Restatement* test would defeat Brown's claims.

F. Incidental Use

Where the use of the plaintiff's name or likeness is incidental in relation to the defendant's work as a whole, the use is not actionable under the right of publicity. *See Ladany v. William Morrow & Co.*, 465 F. Supp. 870 (S.D.N.Y. 1978); *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 895 (1974). The trial court acknowledged that "it is undisputed that the avatar allegedly depicting plaintiff is 1 of 7,500 in the game," but nonetheless rejected EA's incidental-use defense, stating that,

“incidental use is premised on the theory that incidental use has no commercial value,” and finding that, because Brown is “iconic and unique,” his likeness “is not merely incidental to the game.” 2 AA-532. The trial court reached this result because it misread *Pooley v. National Hole-In-One Ass’n*, 89 F. Supp. 2d 1108 (D. Ariz. 2000) – a case applying the incidental-use doctrine to *commercial speech*, which receives significantly less constitutional protection than expressive works. *Pooley* did note that the *rationale* for the incidental-use defense is that “an incidental use has no commercial value,” but then explained that courts *apply* the test by examining “*the role that the use plays with respect to the entire publication,*” based on several factors including: “(1) whether the use has a unique quality or value that would result in commercial profit to the defendant; (2) whether the use contributes something of significance; (3) the relationship between the reference to the plaintiff and the purpose and subject of the work; and (4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication.” *Id.* at 1112. The trial court below misunderstood *Pooley*’s “rationale” to be the sum and substance of incidental use, and whittled the test down to one question: Is Brown a professionally and financially successful celebrity, who has been paid for his affiliation and services? That is not the law.

The United States Supreme Court has explained “the mere incidental mention of the plaintiff’s name in a book or a motion picture is not an

invasion of his privacy; nor is the publication of a photograph or a newsreel in which he incidentally appears.” *Zacchini*, 433 U.S. 562, 575 n.11 (1977). This doctrine is grounded in the First Amendment, and prevents “unconstitutional interference” with the exercise of free speech. *Id.* Indeed, if the creators of an expressive work had to pay “anyone briefly depicted or referred to ... , [it] would unduly burden expressive activity.” *Aligo v. Time-Life Books*, 1994 U.S. Dist. Lexis 21559, at *6-7 (N.D. Cal. Dec. 19, 1994). Drawing a crowded courtroom scene, painting a mural of a military battle, or writing a comprehensive account of a presidential campaign, all would require bargaining with each participant for permission to use his likeness. This would impose an intolerable burden on writers, artists, and others who create expressive works that incorporate multitudes of people.

Ladany v. William Morrow illustrates this risk – and the legal solution in the context of a right-of-publicity claim targeting an expressive work. The plaintiff was an Israeli athlete who survived the 1972 Munich Olympic massacre. 465 F. Supp. at 871. He sued an author who wrote a book about the attack, alleging that his right of publicity was violated by the author’s 13-page account (in a 458-page book) of his escape from the Olympic Village. *Id.* at 872. Ladany was one of 101 people identified by name in the work. *Id.* To prevent the “uncalled-for burden” that would be imposed on the author if he had to get consent from each subject or face a

right-of-publicity claim, the court turned to the incidental-use defense. *Id.* at 880. Because “[t]he book concerns itself with the entire tragedy,” the court observed that it “refer[red] to virtually every individual who played any part in any aspect of the drama: athletes, terrorists, Olympic administrators, politicians, police, soldiers, airline personnel, diplomats[.]” *Id.* at 881. In that context, the court held that “the references to Ladany” – who was a participant in the real-life events – were “incidental” and thus nonactionable.

California courts follow the same rule, and have decided the issue as a matter of law. In 1974, for example, the Court of Appeal affirmed an order sustaining a demurrer to a right-of-publicity claim on the grounds that the brief mention of the plaintiff in a textbook was incidental. *Johnson*, 43 Cal. App. 3d at 895. The federal district court in *Aligo* – relying heavily on *Ladany* engaged in an incidental-use analysis and held that the defendant’s fleeting use of the plaintiff’s image in an infomercial was not actionable and granted a motion to dismiss. 1994 U.S. Dist. Lexis 21559, at *7-9, *12; accord *Lohan v. Perez*, 924 F. Supp. 2d 447, 455-456 (E.D.N.Y. 2013) (dismissing right-of-publicity claim because, among other things, the “isolated nature of the use” of plaintiff’s name in one line of a song was incidental); *Man v. Warner Bros.*, 317 F. Supp. 50, 53 (S.D.N.Y. 1970) (finding incidental use where film about Woodstock included 45 seconds of plaintiff’s performance).

Although the *Keller* majority did not address the incidental-use defense, Judge Thomas focused in his dissent on the insubstantial role that any single virtual athlete plays in EA's *NCAA Football* video game. He noted that "[a]s a quantitative matter, *NCAA Football* is different from other right of publicity cases in the sheer number of virtual actors involved. . . . [The game] includes not just [plaintiff] Sam Keller, but thousands of virtual actors . . . [t]he sheer number of athletes involved inevitably diminish[es] the significance of the publicity right at issue." 724 F.3d at 1287. "*Comedy III*," he pointed out, "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*." *Id.* at 1288 (emphasis added). "In contrast," he emphasized, "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." *Id.*

Judge Thomas' observation that "[t]he quantity of players involved dilutes the commercial impact of any particular player," *id.* at 1289, goes to the heart of the incidental-use defense. This doctrine is essential to protect the ability of authors, filmmakers, video-game publishers, and others to create expressive works that include large numbers of individuals who

participated in real-life or historical events. Consider, for example, the book at issue in *Ladany*, or *Game Change*, the book (and film) about the 2008 presidential campaign. If the creators of these works had to negotiate a license with each individual depicted, the burdens would have been prohibitive.

A use may be incidental in the sense that it is temporally fleeting and physically miniscule, *see, e.g., Preston v. Martin Bregman Prods.*, 765 F. Supp. 116, 119 (S.D.N.Y. 1991) (plaintiff in nine seconds of feature film), or because it is ancillary to the narrative, which, again, courts determine by examining “the relationship of the references ... to the main purpose and subject of the [work].” *Ladany*, 465 F. Supp. at 882 (quotations omitted).¹² Thus, whether Brown is “iconic and unique[,]” or “well known as one of the best football player[s] of all time” or “an actor of renown” does not end the inquiry. If it did, the incidental-use test would merely be a mechanism for sorting between plaintiffs who are financially successful celebrities and those who are not. Rather, the test asks how the likeness is used within the work – whether it “prominently stands out as a highlight,” *Pooley*, 89 F. Supp. 2d at 1113, or is ancillary to “the main purpose and subject[.]”

¹² In *Davis v. Electronic Arts*, a panel of the Ninth Circuit also misapplied the incidental-use defense. *See Davis*, 775 F.3d. at 1180-81. The panel failed to focus on analogous cases, such as *Ladany*, where the plaintiff appeared in an expressive work that features a multitude of other individuals. *See id.* Instead, the panel looked solely to cases where the plaintiff appeared fleetingly, such as *Preston* or *Lohan*. *See id.*

Ladany, 465 F. Supp. at 882.

EA's use in *Madden NFL* of an avatar that allegedly depicts Brown easily qualifies as incidental. To begin with, his likeness does not appear on the cover or in promotions for EA's work. 1 AA-47 at ¶ 10; 1 AA-45 at ¶ 4; 1 AA-62 to 71. To locate the avatar that supposedly depicts Brown, a user would have to bypass all options to play using a current NFL team and select the historic-teams mode. 1 AA-47 at ¶ 11. The user then would have to choose one of the two historic teams – out of 146 in the game, plus 31 all-star teams – that include generic avatars allegedly based on biographical and historical facts that correlate to Brown. 1 AA-46 at ¶ 8. Each of those teams has a roster of roughly 50 players. *Id.* In other words, Brown's right-of-publicity claims are based on the inclusion of *one avatar out of roughly 7,500* in *Madden NFL*. *Id.* Under these circumstances, it is implausible to argue that EA's alleged use of his likeness has any unique value, contributes significantly to the work, or has any special relationship to its purpose. The avatar about which he complains exists in *Madden NFL* because he is part of an historically significant team, just like the Israeli Olympian appeared in the book because he was part of an historically significant event. As in *Ladany*, the incidental-use doctrine defeats Brown's right-of-publicity and related claims.

V. CONCLUSION

For all of the foregoing reasons, EA respectfully requests that this Court reverse the trial court's order denying EA's anti-SLAPP motion and order the trial court to enter a new order granting EA's motion in its entirety.

DATED: September 14, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,919 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine LLP, Suite 2400, 865 South Figueroa Street, Los Angeles, California 90017-2566.

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