

Court of Appeals
of the
State of New York

APL-2017-00027

KAREN GRAVANO,

Plaintiff-Appellant,

– against –

TAKE-TWO INTERACTIVE SOFTWARE, INC., and ROCKSTAR GAMES,
Defendants-Respondents.

APL-2017-00028

LINDSAY LOHAN,

Plaintiff-Respondent,

– against –

TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES,
ROCKSTAR GAMES, INC. and ROCKSTAR NORTH,
Defendants-Appellants.

BRIEF FOR *AMICUS CURIAE* JARRYD HUNTLEY

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Interest of *Amicus Curiae*

These cases determine whether independent (“indie”) videogame developers who create works of interactive fiction will enjoy the same creative freedoms as mass-market publishers like Defendants-Appellees (“Rockstar”)—the same First Amendment rights long exercised by novelists, playwrights, and screenwriters—to bring their stories to player-audiences in virtual worlds.

Jarryd Huntley is an award-winning indie videogame developer. His works are published in New York and across the country, and are featured in the Smithsonian Museum in Washington, D.C. He teaches game design at Lorain County Community College in Elyria, Ohio, and wrote *GAME PROGRAMING FOR ARTISTS* (2017), a textbook that “provides a foundation for artists and other creatives to jumpstart learning to program their own games.” A resident of Cleveland, Ohio, Mr. Huntley is a prominent member of Cleveland’s robust indie development community, an authority on game development in “flyover states,” and a sought-after speaker and panelist on indie game development at community forums and national conferences alike.

Authors like Mr. Huntley are uniquely vulnerable to fractures in legal protections for their works. Their interactive fictions are innovative, genre-defying, and less easily analogized to classics like *Citizen Kane* than those published by studios with the resources to realize cinematic experiences, and rely more heavily on their players' imaginations than their mass-market counterparts.

But they cannot afford to defend frivolous claims, and would be directly affected by the limitations Plaintiffs-Appellants (the "Celebrities") ask this Court to impose on New York's influential "work of fiction" doctrine, which the First Department correctly applied, or a decision based on particular features of *Grand Theft Auto V* ("GTAV"), instead of the categorical protections the doctrine provides.

Indie authors rely on courts to fully enforce the "work of fiction" doctrine as they publish their works in New York and beyond. Its protections are not only required under a raft of First Amendment decisions from the Supreme Court, and necessary to clarify dissonance in this Court's jurisprudence, they are the lynchpin of continued innovation in an increasingly important medium of artistic expression.

Summary of Argument

This case presents two dispositive questions on which this Court's decisions diverge: what are "works of fiction," and when are they immune to publicity claims under Section 51 of the Civil Rights Law? The decision below correctly applied New York's "work of fiction" doctrine to protect a videogame, but the parties proffer incompatible answers under old cases that still chill First Amendment freedoms.

The parties agree that "works of fiction" are categorically immune to publicity claims, but dispute the doctrine's application to GTAV. The Celebrities deny that it is "work of fiction" at all: to Lohan, it is an "advertisement in disguise" or an "invented biography" trading on her fame; to Gravano, a commercial product that implies her endorsement. Rockstar simply denies that GTAV used their likenesses, either because its avatars did not depict them as a matter of *fact*, or because "works of fiction" like GTAV do not depict real people as a matter of law.

None of the parties brief the doctrine this Court has affirmed to resolve these issues, categorically protecting works *known by audiences to be imagined*, even if a use is *unmistakable*, because authors have a *right* to depict real people to suspend their audiences' disbelief.

This doctrine constitutionalized Section 51 after the Supreme Court abrogated an ancient line of cases holding “fictionalization” actionable (without defining it) under Section 51 (without saying why). *Binns v. Vitograph*, 210 N.Y. 51 (1913); *Spahn v. Messner*, 18 N.Y.2d 324 (1966). These relics failed to distinguish false-light from publicity interests, requiring the Supreme Court to vacate five of this Court’s decisions that did not adequately protect works of fiction. After declaring them entitled to full First Amendment protection, *Winters v. New York*, 333 U.S. 507 (1948); *Burstyn v. Wilson*, 343 U.S. 495 (1952), the Supreme Court forbid this Court from applying Section 51 to works that do not conceal their fictional nature, *Spahn*, 387 U.S. 239 (1967); *Time v. Hill*, 385 U.S. 374 (1967), clarifying that “fictionalization” is not actionable in publicity claims. *Zacchini v. Scripps*, 433 U.S. 562 (1977).

To ignore five apposite Supreme Court decisions is a feat indeed. But the Celebrities manage it, even though *Binns* and its progeny are widely disfavored. And though this Court has twice affirmed the “work of fiction” doctrine, it has not resolved lingering tensions in *Binns* and *Spahn*, emboldening hungry litigants like the Celebrities to take new bites at rotten apples.

Instead, the lower courts resolved them by articulating categorical protections for “works of fiction” under *Time*. The doctrine now suffuses leading decisions from coast to coast, and is a testament to New York’s Constitution, which created a “hospitable environment” for “the burgeoning publishing industry to establish a home in our state during the early years of our nation’s history.” *Holmes v. Winter*, 22 N.Y.3d 300, 307 (2013). When called to protect works of fiction, New York courts did it proud, defining them by the features that give them value, not the mediums in which they appear.

They protected the freedom to imagine, holding that commercial interests in persona *cannot* trump an author’s First Amendment right to suspend her audience’s disbelief. They recognized that depicting real people is *essential* to fiction, not just inoffensive at law. And they protected them *categorically* to secure their expressive power.

These are not just poetical insights, though poets say them best.¹

¹ Samuel Taylor Coleridge, *Biographia Literaria* (1817), Ch. XIV (fiction’s power lies in “exciting the sympathy of the reader by a faithful adherence to the truth,” while “giving the interest of novelty by the modifying colours of imagination.”).

They define a protected category of speech under Section 51, and New York courts have consistently applied them to works in traditional mediums, insulating plays, novels, and films against publicity claims.

Now, the Celebrities seek a “change in law,” asking this Court to withdraw these protections from videogames. *C.f. Brown v. EMA*, 564 U.S. 786 (2011) (it cannot). But they do not only ask this Court to dislodge settled protections for works of fiction, or ignore six Supreme Court decisions it cannot “change.” They ask it to cripple a medium that is inherently fictive, for videogames meet legal criteria for “works of fiction” more fundamentally than any medium yet devised, telling stories in virtual worlds that, as the decision below correctly held, every gamer knows are not “real” the moment a game boots up.

The Celebrities’ disdain for the medium is unlawful and ignorant. Their claims reached this Court just as Mr. Huntley’s works entered the Smithsonian, and “[t]he process by which this new art form will emerge is already under way,” with indie authors at the vanguard as “the digital art medium matures.”²

² Janet H. Murray, *HAMLET ON THE HOLODECK: THE FUTURE OF NARRATIVE IN CYBERSPACE* (MIT University Press 2016), at 111, 139.

As Mr. Huntley warns his students, readers, and audiences,³ any change in New York law would uniquely chill these “pioneering and aspiring storytellers who identify with the figure of the Shakespeare of the future as hacker-bard.”⁴ Unlike studios that publish highly profitable works like GTAV, they cannot readily afford counsel, and rely particularly heavily on New York’s clear, categorical, and influential analysis as they publish their works in the state, and as cases in other jurisdictions come to term.

Silencing pioneers who explore new forms is a tragedy of artistic innovation, but courts in New York confront it with courage. Judge Woolsey protected James Joyce’s *Ulysses* from the New York City Bar Association, finding it “a serious experiment in a new, if not wholly novel, literary genre,” and commending Joyce for being “loyal to his technique,” because doing otherwise “would be artistically inexcusable.” *U.S. v. One Book Called “Ulysses”*, 5 F. Supp. 182, 183 (S.D.N.Y. 1933).

³ *The Future of Imagination*, The City Club of Cleveland (Oct. 13, 2017), <http://www.ideastream.org/programs/city-club-forum/the-future-of-imagination-virtual-augmented-reality>.

⁴ Murray, *supra* n.2 at x.

Videogame authors deserve no less protection for their craft. The Celebrities sell themselves as Davids to Rockstar’s Goliath, but the doctrine they assail protects the *real* Davids, indie authors who receive no vast sums for short works,⁵ and labor tirelessly for their art.⁶ They may be liable in defamation or privacy if they harm those interests, like artists in other mediums. But their right to use real people to tell stories cannot constitutionally be subordinated to celebrity pocketbooks.

Mr. Huntley therefore requests that this Court affirm the decision below, clarify categorical protection for “works of fiction,” and ensure that the videogame authors of today, no less than the playwrights of yesterday, are not bullied by frivolous threats from litigious celebrities against telling their stories to the player-audiences of tomorrow.

⁵ TMZ.COM, *Lindsay Lohan: rolling in \$\$\$\$* (Aug. 13, 2012) (Lohan earned \$2 million the year after her shoplifting conviction).

⁶ Jason Schreier, *Video Games Are Destroying The People Who Make Them* (NEW YORK TIMES, Oct. 25, 2017).

Argument

I. Section 51 Does Not Apply To “Works Of Fiction.”

Section 51 categorically excludes “works of fiction,” a protected category of expression beyond “the narrow scope of the statutory phrases ‘advertising’ and ‘trade.’” *Hampton v. Guare*, 195 A.D.2d 366 (1st Dep’t 1993); *Costanza v. Seinfeld*, 279 A.D.2d 255 (1st Dep’t 2001) (same). After the Supreme Court “reversed course” in *Winters* to recognize First Amendment protections for fiction, *Brown*, 564 U.S. at 797, this Court affirmed that a “consistent line of cases” require courts to protect “works of fiction” as a matter of law. *Notre Dame v. Twentieth Century-Fox*, 22 A.D.2d 452, 455 (1st Dep’t 1965), *aff’d*, 15 N.Y.2d 940.

When the Supreme Court limited Section 51 claims for “fictionalization” to factual works that place persons in a false light, *Time*, 385 U.S. at 396, and isolated the commercial interest protected by the right of publicity, *Zacchini*, 433 U.S. at 573, courts recognized that “the right of publicity does not attach” where “it is evident to the public that the events so depicted are fictitious.” *Hicks v. Casablanca*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (dismissing publicity claim because novel’s readers “would know that the work was fictitious.”).

The California Supreme Court famously recognized that “[f]iction writers may be able to more persuasively, more accurately express themselves by weaving into the tale persons or events familiar to their readers,” and correctly held that “[t]he choice is theirs.” *Guglielmi v. Spelling-Goldberg*, 603 P.2d 454, 460-63 (1979) (Bird, C.J., concurring). But it did so by following *Hicks*, which followed *Notre Dame*.

This categorical protection is now axiomatic. *See, e.g., Donahue v. Warner Bros.*, 272 P.2d 177, 182 (Utah 1954) (“fictional publications”), *Leopold v. Levin*, 259 N.E.2d 250, 256 (Ill. 1970) (“works of fiction”); *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (“refus[ing] to extend the right of publicity” to uses in “a fictional or semi-fictional book or movie” from “concern for free expression”); Restatement (Third) of Unfair Competition § 47 (1995) (“works of fiction”).

II. The First Amendment Protects “Works Of Fiction.”

A century ago, fiction was actionable *per se*. A new medium (“moving pictures”) threw courts into a tizzy, and the Supreme Court deemed them mere “spectacle,” “entertaining” but “capable of great evil,” and disentitled to First Amendment protection. *Mutual Film v. Indus. Comm’n of Ohio*, 236 U.S. 230, 244 (1915).

Binns, decided just two years earlier, was a product of its time. Addressing a “picture film” that dramatized a heroic rescue at sea, this Court enforced privacy interests in “peculiarities as of dress and walk,” or “personal fads, eccentricities, [and] amusements” under Section 51, and held that only hard news was protected by the First Amendment, lest “[b]y such pictures an audience would be amused and the maker of the films and the exhibitors would be enriched.” 210 N.Y. at 58.

Judges assumed that “those who engage in the show business” would not “confine their productions to the things which are just, pure, and of good report,” and exploit “the business advantage of depicting the evil and voluptuous thing with the poisonous charm.” *Pathe v. Cobb*, 202 A.D. 450, 457 (3d Dep’t 1922). Works of “pure fiction, and not fact” could therefore be enjoined under Section 51 under “clear distinctions between a news reel and a motion picture photoplay,” because “[a] photoplay is inherently a work of fiction,” but “[a] news reel contains no fiction, but shows only actual photographs of current events.” *Humiston v. Universal*, 189 A.D. 467, 470-71 (1st Dep’t 1919).

Courts applied *Binns* against works meant “to amuse and astonish the reading public, not for the legitimate purpose of disseminating news,” *Sutton v. Hearst*, 277 A.D.2d 155, 157 (1st Dep’t 1950), finding them actionable under Section 51 if they were “fictional or novelized in character.” *Koussevitzky v. Allen*, 188 Misc. 479, 484 (Sup. Ct. 1947). Only works deemed not “of fiction,” like “tales of historic personages and events” that were “educational and informative” or had “legitimate news interest” were “not, as a general rule, within the purview of the statute.” *Lahiri v. Daily Mirror*, 162 Misc. 776, 782 (Sup. Ct. 1937).

A. The Supreme Court Protects Fiction.

By mid-century, the Supreme Court rejected this view, reversing two decisions from this Court that failed to protect works of fiction. In 1948 (seven years after *Citizen Kane* premiered) the Supreme Court rejected New York’s argument “that the constitutional protection for a free press applies only to the exposition of ideas” because “[t]he line between the informing and the entertaining is too elusive” to protect authors, and held that works of fiction are fully protected by the First Amendment. *Winters*, 333 U.S. at 510.

The Supreme Court reversed this Court again in 1952, *Burstyn*, 343 U.S. at 501, rejecting *Binns*' premise that works of fiction were actionable if they "enriched" their authors. 210 N.Y. at 58. *Binns* was already in disrepute, "distinguished frequently" and "confined to its particular facts" since inception, *Molony v. Boy Comics*, 277 A.D. 166, 173 (1st Dep't 1950). Courts immediately applied *Winters* and *Burstyn* to clear detritus from the right of publicity, noting *Binns*' widely criticized "infringement upon freedom of speech." *Donahue*, 272 P.2d at 181-83 (protecting fictional film against publicity claims).

B. This Court Makes Fiction Actionable Again.

But *Winters* and *Burstyn* came late to New York. A decade later, New York courts still drew "no distinction between fictionalizing a character and using the name for other purposes of trade or for advertising." *Flores v. Mosler*, 7 N.Y. 2d 276, 285 (1959) (Van Voorhis, J., dissenting). Judge Van Voorhis worried only that Section 51 might chill the fictions he enjoyed ("war novels"), and would only permit works to "introduce actual historical events into a story" or use names "in connection with what they actually did," barring works from "introducing real people into fictional episodes." *Id.*

This Court adopted the Judge’s distinction within a decade, unanimously banning a “fictitious biography” under Section 51, and without addressing *Winters*, drew its forbidden line. *Spahn v. Messner*, 18 N.Y.2d 324, 328 (1966) (“The factual reporting of newsworthy persons and events is in the public interest and is protected. The fictitious is not.”). Flouting *Burstyn* as well, *Spahn* forbade “fictionalized” uses if “exploited for the defendants’ commercial benefit through the medium of an unauthorized biography.” *Id.*

Spahn misread the most speech-protective decision of its century, *New York Times v. Sullivan*, 376 U.S 254 (1964), which insulated *false* statements of *fact* from the tort of *defamation*, to magnify *Binns*’ restrictions on works of *fiction* under *different* claims. Decided while *Spahn* was pending before Supreme Court, *Sullivan* was the centerpiece of the defense, but by focusing on defamation, this Court erroneously suggested that “fiction” meant nothing more than factual falsehood (even if audiences knew a work was imagined), found it unprotected by the First Amendment (even against different claims asserting weaker interests), and made fiction actionable again *per se* under Section 51.

The problem, as Judge Van Voorhis foresaw in *Mosler*, was the indiscriminate use of terms like “fictionalized” and “false,” which pack different interests (reputation, privacy, commercial) into different torts (defamation, privacy, false-light, publicity) requiring different constitutional constraints (fault for falsity, newsworthiness for privacy; protections for fiction against commercial interests in persona). Section 51 was no help: collapsing these claims before common-law jurisdictions refined them. *Howell v. N.Y. Post*, 81 N.Y. 2d 115, 123 (1993).

Spahn did not plead defamation (the book was laudatory), and claimed only that the book took “pecuniary advantage” of his identity “to create for profit a fictionalized and dramatic story” “designed primarily and exclusively for entertainment value.” 43 Misc. 2d 219, 227 (Sup. Ct. 1964). So none of the New York courts that banned *The Warren Spahn Story* parsed false-light from publicity claims, or analyzed the different constraints they require.

Supreme Court criticized *factual* errors in the children’s novella: evidently (Sgt.) Spahn did not repair a bridge, was not carried on a stretcher (he walked), and received no Bronze Star. *Id.* at 225-28.

The First Department called it “an unauthorized fictionalized biography” and forbade “fictionalization or dramatization.” 23 A.D.2d at 220. And this Court, in turn, saw “no constitutional infirmities” banning the book because “[n]o public interest is served by protecting” a “fictitious biography,” whatever that was. 18 N.Y.2d at 329.

C. The Supreme Court Protects Fiction Again.

Spahn was vacated in six months, and remanded for reconsideration under *Time*. 387 U.S. 239 (1967). The Supreme Court had no need to parse it, because *Time* vacated a two-line Section 51 decision from this Court, *Hill v. Hayes*, 15 N.Y.2d 986 (1965), after delving into the record to provide guidance on how the First Amendment protects works of fiction. 384 U.S. at 374.

The problems with *Spahn* were obvious. It drew an “elusive” line for liability, and left “fictitious biography” undefined. This Court stated only that the book “[p]urport[ed] to be [Spahn’s] biography” without explaining how, or distinguishing works stating false facts from those *known to be imaginary*—as a children’s novella with “imagined dialogue” might reasonably be known.

Instead, *Spahn* suggested that any variance from historical fact was actionable in any work under any claim, appearing to bless the Celebrities’ frontal assault on fiction. But the Supreme Court rejected this view in *Time*, holding that Section 51 cannot apply to works that readers *know* to be fictional, and limiting actionable “fictionalization” to false-light claims against works that *conceal* their fictive nature. 385 U.S. at 396. So the Supreme Court instructed this Court to follow *Time*, fix *Spahn*, and protect fiction.

When it vacated those decisions, the Supreme Court “was steeped in the literature of privacy law” and the “distinct branches” of publicity and false-light invasion of privacy. *Zacchini*, 433 U.S. at 571-72. “The differences between these two torts are important,” because “the State’s interests in providing a cause of action in each instance are different”: false-light protects reputation from falsehoods, while the publicity interest is purely commercial, and truth and falsehood are irrelevant.⁷ *Id.* at 572. But this Court’s decision in *Time* and *Spahn* made no distinction between (protected) fiction and (knowing) falsehood.

⁷ See J. Thomas McCarthy, 2 THE RIGHTS OF PUBLICITY AND PRIVACY § 8:87 (2d ed.) (“An unthinking and robotic application of the New York ‘fictionalization’ exception could tear away all free speech protections for creative and dramatic uses of real persons”).

The news article in *Time* described a promotional event for a fictional play that was inspired by real events, and the real people (a family held hostage by escaped convicts) sued Life Magazine under Section 51. And the Supreme Court identified a single dispositive question: *did the work conceal its fictional nature from its audience?*

The jury was instructed to return a plaintiffs' verdict if "the statements concerning the plaintiffs in the article constituted fiction, as compared with news, or matters which were newsworthy." 385 U.S. at 419 (Fortas, J., dissenting). This unconstitutionally banned known fictions, implying "that 'fictionalization' was synonymous with 'falsity' without regard to knowledge or even negligence," so the Supreme Court limited Section 51 to cases where publishers knowingly or recklessly failed to convey a work's fictional nature. *Id.* at 396.

The Supreme Court criticized the trial court for "variously restat[ing] this 'fictionalization' requirement" as (1) "whether [Life] altered or changed the true facts," or (2) "whether the article constituted 'fiction,' or was 'fictionalized.'" *Id.* at 394-95. And New York courts conflated them under Section 51, chilling works that collapsed these criteria by altering reality *through* fiction *without* stating facts.

As the Supreme Court observed, “nothing in the New York cases decided at the time of trial limited liability” for “fictionalization” under Section 51 “to cases of knowing or reckless falsity and *Spahn*, decided since, has left the question in doubt.” *Id.* So the Supreme Court refined “fictionalization” to mean *factual falsehood*, treated *Time* and *Spahn* as false-light cases, *Zacchini*, 433 U.S. at 571-72, and because the words “somewhat fictionalized” were deleted in the editing process, remanded *Time* to determine whether the article conveyed a knowing falsehood or a known fiction. 385 U.S. at 393-94 & n. 11.

In most jurisdictions, *Time* simply constrains false-light claims. But the Supreme Court addressed fiction in *Time* because Section 51 does not distinguish the torts, *Howell*, 81 N.Y.2d at 123, and this Court failed to distinguish fiction from falsehood. So in New York, *Time* is fiction’s *Sullivan*, constitutionalizing Section 51 by grafting a “knowing or reckless” element to “fictionalization,” and distinguishing actionably concealing “fiction” as fact (as the article might have done) from non-actionably depicting events in fiction (as did the unchallenged play).⁸

⁸ The play was known to be a work of fiction and not at issue, but the Supreme Court reiterated *Winters* for good measure. 385 U.S. at 388.

D. This Court Makes Fiction Actionable Again, Again.

Time settled, but this Court adhered to *Spahn*, even though the Supreme Court would “have affirmed in due course” had it agreed. 21 N.Y.2d 124, 29 (1967) (“*Spahn II*”) (Bergan, J., dissenting). *Spahn II* paid “only lip service” to *Time*,⁹ holding that the book’s “literary techniques,” “distortions and inaccuracies” violated Section 51 without parsing known fictions from actionable falsehoods.

Spahn II found the Supreme Court’s distinction superfluous. Eschewing analysis for rhetorical questions, its majority asked “how it may be argued” that “imaginary incidents,” “invented dialogue,” and “thoughts and feelings which were likewise the figment of the author’s imagination” “can be said not to constitute knowing falsehood.” *Id.* at 127-29 (refusing to grant “a literary license which is not only unnecessary to the protection of free speech but destructive of” *Spahn*’s state-law right “to be free of the commercial exploitation of his name.”).

⁹ Appellants’ Jur. St., *Julian Messner, Inc. v. Spahn*, 1968 WL 129237, at 25 (Mar. 26, 1968) (*Spahn II*’s “purported application . . . of the constitutional criteria announced in *Time, Inc. v. Hill* has made [the Supreme] Court’s remand pointless.”).

These “categorical assignments” misperceived “works of fiction,” their authors’ “constitutional privilege to write,” and that

All fiction is false in the literal sense that it is imagined rather than actual. It is, of course, ‘calculated’ because the author knows he is writing fiction and not fact; and it is more than a ‘reckless’ disregard for truth.

Id. at 131 (Bergan, J., dissenting). But *Spahn II* evaded merits review, and the Supreme Court never reached them, dismissing the publisher’s appeal after a challenge to the existence of a substantial federal question on the empirical extent of the book’s falsehoods. 89 S.Ct. 676 (1969).

E. Courts Restore Protections For “Works of Fiction.”

Spahn II failed to clarify protections for “works of fiction,” so the lower courts leapt into the breach. Defining them under *Winters*, *Burstyn*, and *Time*, they weighed authors’ expressive interests in using real people against commercial interests in persona under *Zacchini*, and categorically excluded “works of fiction” from Section 51.

1. This Court Affirms the “Work of Fiction” Doctrine.

This Court ratified the “work of fiction” doctrine two years before *Spahn II*, when it affirmed *Notre Dame*. 15 N.Y.2d 940 (1965).

After reading the challenged novel—a farce depicting recognizable people—and enjoying a “special viewing” of the film, the First Department held that works of fiction are categorically protected against publicity claims under the “only critique” permitted under a “consistent line of cases”:

Is there any basis for any inference on the part of rational readers or viewers that the antics engaging their attention are anything more than fiction?

22 A.D.2d at 455. There was none, as a matter of law, because reasonable audiences knew they were “not seeing or reading about real Notre Dame happenings or actual Notre Dame characters.” *Id.* (“Nobody is deceived. Nobody is confused. . . . nobody was intended to be.”).

This Court affirmed, and neither retracted, qualified, nor mentioned its affirmance in *Spahn II*. Even Judge Van Voorhis voted to affirm *Notre Dame*, and both dissenting Judges in *Notre Dame* joined *Spahn II* without comment.

2. *Hicks* Weighs Interests And Protects Fiction.

Spahn II's omission of *Notre Dame* was “curious,” but the “work of fiction” doctrine rationalized them. *Hicks*, 464 F. Supp. at 432.

The right of publicity was better understood when *Hicks* was decided. The Supreme Court addressed it for the first time the year before (in *Zacchini*), and *Hicks* joined the emerging consensus isolating commercial interests in persona from dignitary interests protected by false-light and other privacy torts.¹⁰ 464 F. Supp. at 431. As *Hicks* explained, *Time* privileged known fictions over dignitary interests asserted in false-light claims, which required “deliberate falsifications or an attempt by a defendant to present the disputed events as true,” so weaker state-law commercial interests in exploiting persona could not censor *bona fide* “works of fiction” under Section 51. *Id.* at 433.

Therefore, if audiences “would know that the work was fictitious,” it was immune to publicity claims under Section 51 because an author’s First Amendment rights “outweigh[] whatever publicity rights plaintiffs may possess.” *Id.* *Spahn II* applied only to “fiction *qua falsification*,” but for works known “as fictions,” *Notre Dame* controlled, protecting works of fiction where “the defendant had not represented the events . . . to be true” and the audience knew “that the circumstances involved therein were fictitious.” *Id.* at 432.

¹⁰ See Patrick Kabat, *The Right Of Publicity* (YALE LAW SCHOOL, May 31, 2016), <https://law.yale.edu/right-publicity-through-thicket>.

Spahn II fell rapidly into disfavor. Illinois pronounced it “basically irrelevant” post-*Winters*, dismissing publicity claims against works of fiction. *Leopold v. Levin*, 259 N.E.2d 250 (Ill. 1970). California sided with *Notre Dame* and *Hicks*, categorically protecting works of fiction because an author’s “interest in free expression [is] paramount and overrides a plaintiff’s ability to control the publicity values in his name.” *Guglielmi*, 603 P.2d at 463 n.20. And the Second Circuit followed *Guglielmi* and *Hicks*, protecting works of fiction unless a use had no artistic relevance. *Rogers*, 875 F.2d at 1004.

New York courts followed suit, and *Spahn II* no longer merited mention in claims against works of fiction. *Hampton*, 195 A.D.2d at 366 (citing *Notre Dame*); *Costanza*, 279 A.D.2d at 255 (citing *Guare*). Fiction was finally understood to state no facts, and was protected accordingly.

[I]t should go without saying that a person need not get the consent of a celebrity to write a fictional piece about that person, even if the fictional work is in the form of an autobiography, so long as it is made clear that the creative work is fictional.

Rosemont v. McGraw-Hill, 85 Misc. 2d 583, 587 (Sup. Ct. 1975); *see also Carter-Clark v. Random House*, 17 A.D.3d 241, 242 (1st Dep’t 2005) (dismissing libel claim against *roman à clef* because “the record demonstrates this book was a work of fiction”).

In 2001, after the Second Circuit certified questions about “fictionalization” in its “older cases,” this Court finally confronted *Binns* and *Spahn II*, implied their irrelevance to “works of fiction,” and limited them to works that “invented biographies of plaintiff’s lives” by creating a “false implication” that they were true accounts. *Messenger v. Gruner*, 94 N.Y.2d 436, 446-47 (2000).

But *Messenger* only addressed nonfiction, requiring a “real relationship” between stock photographs with real people used to illustrate factual news articles in this “fictionalized way.” *Id.* at 444. It rationalized *Binns* and *Spahn II* with First Amendment protections for *factual* works, but was not called explain protections for works of fiction, because the article at bar was a news report.

This Court has still not closed the gap. There is no *Messenger* for “works of fiction,” even though the overwhelming weight of First Amendment authority (and New York’s lower courts) affirms that no commercial interest in persona, under any constitutional analysis, can trump a fiction author’s expressive rights.

III. The Celebrities’ Request To Withdraw Protections For “Works of Fiction” From Videogames Should Be Denied.

The Celebrities ask this Court to widen this gap, revive anachronistic “exceptions” they cannot define, overrule First Amendment protections for “works of fiction” this Court cannot change, and retract those protections from videogames. It shouldn’t.

A. Authors (And Judges) Need Categorical Rules.

The “work of fiction” doctrine is a masterwork, a constitutional shorthand that saves courts from applying strict scrutiny to every challenged work, and determining anew whether applying Section 51 is necessary to protect a compelling interest and limited to that end.

As the Ninth Circuit held when bad decisions about videogames required a resort to strict scrutiny to protect a work of fiction, the right of publicity is a content-based restriction on speech. *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016). Liability is “presumptively unconstitutional,” and publicity claims against works of fiction “cannot stand” because the First Amendment “safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.” *Id.* at 905–06.

The “work of fiction” doctrine saves New York courts from repeating this analysis for works with common features, categorically weighing their authors’ rights against state interests in permitting the exploitation of persona, against which “the right of free expression would prevail.” *Brinkley v. Casablancas*, 80 A.D.2d 428, 438 (1st Dep’t 1981) (dismissing publicity claim against “fictional biography”).

The doctrine also deters unconstitutional impulses, like the medium bias against videogames *Brown* forbade, and the high-art bias that required the Supreme Court to overrule *Mutual Film*. Even when films were poison, judges knew that “persons trained only in the law” cannot be arbiters of artistic merit—a “dangerous undertaking,” because “some works of genius would be sure to miss appreciation,” and “[t]heir very novelty would make them repulsive until the public had learned the new language in which their author spoke.” *Bleistein v. Donaldson*, 188 U.S. 239, 252 (1903).

Asking courts to adjudicate literary genres, or determine what constitutes a “literary work,” *Frosch v. Grosset*, 75 A.D.2d 768, 769 (1st Dep’t 1980), is doubly dangerous for new mediums, threatening to obscure protected features common to novel works and classics.

By focusing on protected features *across* mediums, without reference to literary merit or narrative devices (like satire and parody, the Celebrities’ bugaboos), the “work of fiction” doctrine protects authors whose works may not yet be classics, but exercise the same First Amendment freedom to imagine.

B. The First Department Correctly Protected GTAV As A “Work Of Fiction.”

The decision below correctly applied these categorical protections. Quoting *Guare* (and noting this Court’s denial of leave to appeal) the First Department protected GTAV *even if* it depicted the Celebrities. Recognizing interactivity (“the player’s ability to choose how to proceed in the game”) as the hallmark by which players understand the game is not “real,” the First Department protected it *as a work of fiction*. *Gravano v. Take-Two*, 142 A.D.3d 776, 777 (1st Dep’t 2016).

The First Department understood that satires, parodies, and narratives may all be protected *as* works of fiction, and located those devices in GTAV. But constitutional protection does not inhere in them. Judges do not “import the role of literary or dramatic critic,” but categorically protect authors who make clear that their “works of fiction” are imagined. *Notre Dame*, 22 A.D.2d at 458.

This definition dates to antiquity:

[Fiction] is an invention which knows it is invention; or which knows *and says* it is invention; or which whatever it knows and says, *is known* to be invention. . . . It is not lying at all, but exempt from all notions of truth and falsehood.¹¹

These are not academic musings. Courts apply them.

[T]he author who denotes his work as fiction proclaims his literary license and indifference to ‘the facts.’ There is no pretense. All fiction, by definition, eschews an obligation to be faithful to historical truth. Every fiction writer knows his creation is in some sense ‘false.’ That is the nature of the art.

Guglielmi, 603 P.2d at 461; *Hicks*, 464 F. Supp. at 426.

And videogame authors follow them, under a developer’s creed called “the magic circle,” a play space within which a gamer accepts the fictive conceits of a virtual world in consideration for its imaginative value.¹² If a game works this magic, it is fully protected as a “work of fiction,” whatever other narrative, literary, or expressive devices it may employ, for through their interactivity, videogames are inherently “artificial, fictitious, imaginary, intangible, and invented.”¹³

¹¹ Michael Wood, *Prologue*, LIES AND FICTION IN THE ANCIENT WORLD xvi (Christopher Gill & T.P. Wiseman, eds. 1995).

¹² Richard A. Bartle, *Virtual Worldliness*, THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 34 (Balkin & Noveck, eds.) (2003).

¹³ Edward Castronova, *The Right To Play*, THE STATE OF PLAY at 68.

These definitions—which *Time* announced and New York courts adopted—focus protections for “works of fiction” on the source of their constitutional value, because “[w]hat may be difficult to communicate or understand when factually presented may be poignant and powerful if offered in satire, science fiction or parable.” *Guglielmi*, 603 P.2d at 459.

Videogames are a particularly powerful source of protected fiction. “The original virtual worlds were created in fiction,”¹⁴ and interactive works effect through technology what playwrights evoke in prose, offering unprecedented immersion in virtual worlds, with “deeper and richer access to the mental states evoked by play, fantasy, myth, and saga, states that have immense value to the human person.”¹⁵ So it is no less true for Mr. Huntley than Aristophanes, whom *Binns* and *Spahn* would also censor,¹⁶ that “[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality.” *Guglielmi*, 603 P.2d at 460.

¹⁴ Greg Lastowka & Dan Hunter, *Virtual Worlds: A Primer*, THE STATE OF PLAY at 17.

¹⁵ Castronova, *supra* n. 15 at 68.

¹⁶ Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1304 (1976).

C. A Pop Star And A Mob Wife Walk Into A Videogame...

It is “difficult to imagine anything more unsuitable, or more vulnerable under the First Amendment, than compulsory payment, under a theory of appropriation,” for videogame developers to use “an individual’s identity in a work of fiction.” *Guglielmi*, 603 P.2d at 460 & 462 (quoting Hill, *supra* n. 16 at 1305).

The First Department recognized this in a single sentence, and the “work of fiction” doctrine answers every question the Celebrities present.

1. Lohan’s Concerns Are Meritless.

The pop star presents a single question: whether GTAV’s inclusion of a still image in a transition screen makes it an “advertisement in disguise” or an “invented biography.” Lohan Br. at 1, 6. She admits that works of fiction are “categorically” excluded from publicity claims pled under Section 51. *Id.* at 19-20. But she butchers the doctrine, limiting it to works that “tell a real biography story or make a satirical/parody comment,” mistaking the “fictional character *Costanza* exception” as inconsistent with *Messenger* by conflating factual and fictional works. *Id.* at 9.

By her account, the doctrine affords no protection if a use “is directly related to defendant’s primary purpose of commercialization,” and she relies on *Binns*, the *vacated* opinion in *Spahn* opinion, and *Messenger* to argue that GTAV is an “advertisement in disguise” and “nothing more than [an] attempt to trade on” her fame. *Id.* at 19-21.

But as the Second Circuit recognized, the “work of fiction” doctrine does not protect naked commercial appropriation, and excludes uses that are “wholly unrelated” to a work, and works that are “simply a disguised commercial advertisement for the sale of goods or services.” *Rogers*, 875 F.2d at 1004 (following *Hicks* and *Notre Dame*). If courts had to do more than identify a “minimal relationship between the expression and the celebrity,” however, “grave harm would result.”

Only upon satisfying a court of the necessity of weaving the celebrity’s identity into a particular publication would the shadow of liability and censorship fade.

Guglielmi, 603 P.2d at 460. So those judgments are for “the reader or viewer, not the courts.” *Id.*

And Lohan’s discussion of “invented biographies” fails grammar. Spawned by *Binns*, the phrase describes works that “invented” (*verb*) biographies by peddling falsehood as fact. *Messenger*, 94 N.Y.2d at 446.

But *Time* (and the New York cases that actually applied it) clarified that Section 51 does not apply to works of fiction, which are “invented” (*adjective*) stories that are instead *known to be fictional*. Her argument misuses language, conflates fiction with falsity, and ignores *Burstyn’s* holding that works of fiction make expressive, not commercial use, inviting the very confusion the “work of fiction” doctrine resolved. And her claim is unfounded, for the doctrine accommodates *valid* concerns about endorsements masquerading as art without unconstitutionally limiting authors’ rights to use persona. Hers, as to GTAV, are not.

2. Gravano’s Concerns Are Illusory.

The mob wife presents just one substantive question: whether the First Amendment bars all claims against videogames. Her question is irrelevant, and the answer is no. Works of fiction are protected whether published on consoles or stone tablets, but uses that lack any conceivable artistic relevance, or endorse collateral products, are not.

Like Lohan, Gravano acknowledges categorical protections for works of fiction, but denies that GTAV qualifies because it has an “overtly commercial nature” and “is not meant to be an artistic expression but rather an imitation of the real world.” Gravano Br. at 16-17.

Her dichotomy is false (when art imitates life, it is still art) and her premise is flawed. Anyone who plays GTAV knows it does not state facts, and Rockstar had an absolute right (which it does not fully defend, cheapening fiction for those that might wish it) to depict her *overtly* in GTAV and deepen its verisimilitude. That is an expressive, not a commercial purpose, known from ancient Greece to *Notre Dame*.

Had the game knowingly purported to provide a false factual account of true events, and concealed its fiction from its players, she might have pled cognizable claims even under *Binns* and *Spahn*, but her commercial interest in persona is constitutionally insufficient to withdraw her famous likeness from an author's palette.

3. *Porco* Is An Aberration.

The Celebrities do this Court one small favor: highlighting a conflict between the First Department's correct decision below and a Third Department opinion in a pending Section 51 lawsuit filed *pro se* by an incarcerated murderer against a *Lifetime* movie inspired by his crime. *Porco v. Lifetime*, 147 A.D.3d 1253 (3d Dep't 2017).

The movie disclaimed that it was “a dramatization based on a true story” in which “some characters are composites” and “other characters and events have been fictionalized.”¹⁷ It was also close to home for the Third Department,¹⁸ which vacated and reversed Supreme Court’s pre-broadcast injunction on emergency motion because Section 51 interests cannot justify prior restraints. 116 A.D.3d 1264, 1266 (3d Dep’t 2014).

But it has no bearing on GTAV, even by the Third Department’s unexplained account, because it “purport[ed] to depict the events . . . surrounding the plaintiff’s murder trial.” *Id.* Supreme Court assumed the same, dismissing Porco’s claims without considering whether the movie concealed the fictional nature it expressly declared. 48 Misc. 3d 419, 420 (N.Y. Sup. Ct. 2015). And an ensuing Third Department opinion (upon which the Celebrities rely) inverted the “work of fiction” doctrine by conflating “fiction” with “falsity,” finding it “reasonable to infer that the producer indicated that the film was considered to be a fictitious program” by inviting Porco’s family to participate in a *different* and “*non-fictional* program.” 147 A.D.3d at 1255.

¹⁷ *Romeo Killer: The Chris Porco Story* (Lifetime 2013), at 1:27:40.

¹⁸ The plaintiff murdered his father, Peter Porco, who served as law clerk to the Third Department’s then-Presiding Justice Cardona.

Even under the false-light cases the last *Porco* panel misapplied, the producer's intent would only matter if the movie was understood *not* to be a work of fiction. Its juxtaposition with a nonfiction program did not conceal its dramatized nature; the juxtaposition highlighted it, just as reasonable audiences know to restore their disbelief when credits roll and state facts about the real people that play characters. In any event, the Third Department never asked whether viewers of the disclaimed *Lifetime* movie could think every "fact" it depicted was "true."

Porco invites chaos. Its guiding lights are the *vacated* decision in *Spahn* and every abrogated holding from the *Binns* line, which the panel wove together to conclude that the very feature that *protects* works of fiction (that that they are known by authors and audiences to be fictional) makes them *actionable*. 147 A.D.3d at 1254-55. Like the anachronisms upon which it relies, *Porco* would ban everything from *Citizen Kane* to *Seinfeld*, and overrule cases this Court has affirmed from *Notre Dame* forward. It encourages speech-chilling litigants to file frivolous suits, and better demonstrates the need for this Court to clarify the "work of fiction" doctrine than any ink spilled here.

Conclusion

The Supreme Court has repeatedly instructed this Court that if the First Amendment protects knowledge, it protects imagination. By affirming the “work of fiction” doctrine, it did. The decision below did as well, and should be affirmed on grounds that clarify categorical protections for “works of fiction” against claims under Section 51, even when published in videogames.

Dated: November 15, 2017

Respectfully submitted,

A handwritten signature in cursive script that reads "Patrick S. Kabat". The signature is written in black ink and is positioned above the printed name.

Patrick S. Kabat

Certificate of Compliance

This foregoing brief was prepared using 14-point Century Schoolbook, double-spaced. It contains 6981 words, including headings and footnotes and excluding the table of contents, table of citations, proof of service, and this certificate of compliance. It is not a work of fiction, and purports to state the law.