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Fumbling the First Amendment: The Right of Publicity Goes 2-0 Against Freedom of Expression

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COMMENT

FUMBLING THE FIRST AMENDMENT: THE RIGHT OF PUBLICITY GOES 2–0 AGAINST FREEDOM OF EXPRESSION

Thomas E. Kadri*

Two circuits in one summer found in favor of college athletes in right-of-publicity suits filed against the makers of the NCAA Football videogame. Both panels split 2–1; both applied the transformative use test; both dissenters predicted chilling consequences. By insisting that the likeness of each player be “transformed,” the Third and Ninth Circuits employed a test that imperils the use of realistic depictions of public figures in expressive works. This standard could have frosty implications for artists in a range of media: docudramas, biographies, and works of historical fiction may be at risk. This Comment examines the tension between the right of publicity and the First Amendment and argues for a bright-line test that ensures greater protection for creators of expressive works.

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INTRODUCTION

Prominence has its pitfalls. A rich respect for commentary on public figures pervades our First Amendment tradition.¹ As Justice Frankfurter observed, “One of the prerogatives of American citizenship is the right to

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1. After all, “[t]hose who won our independence believed . . . that public discussion is a political duty.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967).

criticize public men and measures.”² We hold dear the “free flow of ideas”³ and insist that expression must remain “uninhibited, robust, and wide-open.”⁴ Behind these ideals lies a simple principle: limits on the content of speech must be scrutinized.⁵ When creators of expressive works fret about the content of those works, we all suffer from the chilling effects. Judges must proceed with care when they restrict an artist’s ability to engage with a particular subject.

Two circuits in one summer faced an identical question: When an expressive work contains a realistic portrayal of a public figure without that person’s permission, does the First Amendment protect the creator against a right-of-publicity claim?⁶ Both courts essentially said that it does not. If artists wish to depict public figures, they must now sufficiently “transform” the person’s likeness or obtain consent.⁷

This Comment argues that these courts erred in requiring that a likeness be “transformed” when used in an expressive work. Courts should instead shield creators of expressive works from right-of-publicity claims unless the creators use a realistic portrayal that is wholly unrelated to the content of their work or is simply a disguised commercial advertisement. Part I introduces the friction between the right of publicity and freedom of expression. Part II chronicles the haphazard balancing tests that laid the shaky foundations for both decisions last summer. Finally, Part III argues for a bright-line test that leaves artists unencumbered when they use realistic portrayal, while still preserving the right of publicity to combat false endorsement.

I. THE RIGHT OF PUBLICITY VS. FREEDOM OF EXPRESSION

The right of publicity emerged, paradoxically, from the right to privacy.⁸ States began to fashion statutory and common law remedies to protect the

2. *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944).

3. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

4. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

5. “The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion” *Roth v. United States*, 354 U.S. 476, 488 (1957) (footnote omitted).

6. *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

7. *Keller*, 724 F.3d at 1276–79; *Hart*, 717 F.3d at 166–69.

8. 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:23 (2013 ed. 2013). Compare *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 46 (1995) (“One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability”), with *RESTATEMENT (SECOND) OF TORTS* § 652C (1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).

property interests of people already in the public eye.⁹ Now, over half of the states have laws granting people a “right of publicity,” or “the right to prevent the unauthorized use of their names, likenesses, and other indicia of identity.”¹⁰ The right of publicity advances a variety of societal interests, including “fostering creativity, safeguarding the individual’s enjoyment of the fruits of her labors, preventing consumer deception, and preventing unjust enrichment.”¹¹

But the right of publicity creates problems for free speech. Friction between two competing ideals—a right to control the use of one’s identity and a right to create expressive works—presents a constitutional dilemma. This friction increases because the First Amendment protects not only political speech but also “[e]ntertainment . . . motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works.”¹² Moreover, the fact that many media are “published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”¹³ Thus, a right to protect the commercial worth of one’s identity and a right for others to comment expressively on that identity are natural foes, often at loggerheads.

The Supreme Court skimmed the surface of this issue in *Zacchini v. Scripps-Howard Broadcasting Co.*, its only foray into parsing the First Amendment in a right-of-publicity context.¹⁴ Mr. Zacchini was a “human cannonball” who performed his stunt at a local fair.¹⁵ When a news outlet

9. See, e.g., CAL. CIV. CODE § 3344 (West 1997); *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 684 S.E.2d 756, 760 (2009).

10. Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 166 (2010) (internal quotation marks omitted); accord 2 MCCARTHY, *supra* note 8, § 6:3.

11. Roberta Rosenthal Kwall, *The Right of Publicity v. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 54 (1994) (footnotes omitted); see also *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967) (“Perhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference. It is unfair that one should be permitted to commercialize or exploit or capitalize upon another’s name, reputation or accomplishments merely because the owner’s accomplishments have been highly publicized.” (citations omitted)).

12. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). Indeed, the First Amendment protects “[e]ven dry information, devoid of advocacy, political relevance, or artistic expression.” *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271–72 (2d Cir. 2010) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (internal quotation marks omitted)), *aff’d*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

13. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952); see also *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”).

14. 433 U.S. 562 (1977). The decision prompted a vigorous dissent from Justice Powell, who worried it “could lead to a degree of media self-censorship” and cabin broadcasters to “watered-down verbal reporting, perhaps with an occasional still picture.” *Zacchini*, 433 U.S. at 580–81 (Powell, J., dissenting). Ultimately, he sighed, “The public is then the loser.” *Id.* at 581.

15. *Id.* at 563 (majority opinion).

aired footage of the daredevil's entire act, he sued, claiming the broadcast violated his right of publicity.¹⁶ The news outlet sought refuge under the First Amendment, but to no avail; Zacchini's claim could proceed.¹⁷ The Court demanded a balancing test to weigh the interests underpinning the right of publicity and the right to free speech, although it failed to dictate precisely how that balancing should occur.¹⁸

As a result of *Zacchini*'s vague demands, lower courts haphazardly speculated about what test to apply. Chaotic application of these disparate standards left both courts and artists in a state of confusion and uncertainty.

II. HART, KELLER, AND THE TRANSFORMATIVE USE TEST

Last summer's two decisions emerged from the shaky foundations laid by *Zacchini*. The plaintiffs in both lawsuits were former college athletes. Ryan Hart and Sam Keller filed essentially identical complaints against Electronic Arts ("EA"), the creator of the *NCAA Football* videogame. The players alleged that the videogame violated their right of publicity by featuring their virtual avatars.¹⁹ EA sought protection under the First Amendment.²⁰ The main issue presented in each case was which test the court should apply to balance EA's First Amendment rights and the players' right of publicity.

16. *Id.* at 563–64.

17. *Id.* at 564, 578–79.

18. *See id.* at 574–75. Some commentators have rightly stressed the narrowness of *Zacchini*'s holding, which addressed the rare instance when a news outlet airs a performer's entire act. *See, e.g.,* Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 *Hous. L. Rev.* 903, 906 (2003). The dissenters in *Zacchini* expressed similar sentiments, remarking that the majority's decision was "based on repeated incantation of a single formula: 'a performer's entire act.'" *Zacchini*, 433 U.S. at 579 (Powell, J., dissenting).

19. EA did not pay the players—nor could it under the strict NCAA compensation rules. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967, 2013 WL 5778233, at *1–4 (N.D. Cal. Oct. 25, 2013). The complex antitrust issues at play merit their own Comment, and the battle surrounding their legality is still ongoing in federal court. *Id.* But the fact that professional athletes enjoy lucrative licensing agreements—while their collegiate counterparts may not—should not impact the First Amendment calculus. Just as a screenwriter might seek "life rights" to avert a lawsuit by a celebrity depicted in his film, so too videogame companies might wish to obtain waivers through costly agreements with the players and teams. The salient question is whether the First Amendment should render these precautionary measures superfluous.

20. EA could raise a First Amendment defense because videogames enjoy full protection as expressive works. The Supreme Court unequivocally so held in *Brown v. Entertainment Merchants Ass'n*, explaining that videogames "communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." 131 S. Ct. 2729, 2733 (2011). As such, they are "as much entitled to the protection of free speech as the best of literature." *Brown*, 131 S. Ct. at 2737 n.4 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948) (internal quotation marks omitted)).

Hart and Keller championed the *transformative use test*.²¹ Created by the California Supreme Court, this test considers five factors: *first*, whether the likeness is one of the “raw materials” from which an original work is synthesized; *second*, whether the work is primarily the defendant’s own expression; *third*, whether the literal and imitative or the creative elements predominate in the work; *fourth*, whether the marketability and economic value of the challenged work derives primarily from the fame of the person depicted; and *fifth*, whether an artist’s skill and talent have been manifestly subordinated to the overall goal of creating a conventional portrait of a public figure so as to commercially exploit the person’s fame.²²

In principle, the transformative use test asks whether the expressive work adds significant creative elements “so as to be transformed into something more than a mere celebrity likeness or imitation.”²³ The test recognizes—at least in theory—that “[w]hat the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame.”²⁴ The inquiry is “more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work.”²⁵ The rationale behind the test is that “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.”²⁶ At least according to the court that created it, the test should leave breathing room for creative contributions that engage with factual reporting and fictionalized portrayal.²⁷

In practice, however, the test has not proved so forgiving. In *No Doubt v. Activision Publishing*—a case that heavily influenced the *Hart and Keller* courts²⁸—a videogame creator was unable to present a successful First Amendment defense because its game did not “transform” the members of a

21. Appellee’s Brief at 25–33, *Keller v. Elec. Arts Inc.* (*In re* NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268 (9th Cir. 2013) (No. 10-15387); Appellant’s Opening Brief at 34–48, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (No. 11-3750).

22. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809–10 (Cal. 2001); see also 2 MCCARTHY, *supra* note 8, § 8:72.

23. *Comedy III*, 21 P.3d at 799.

24. *Id.* at 807.

25. *Id.* at 809. The *Comedy III* court invoked copyright law’s “fair use” doctrine, citing the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.* in holding that the central purpose of the fair use inquiry “is to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Comedy III*, 21 P.3d at 808 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (alteration in original) (internal quotation marks omitted)).

26. *Id.* at 808.

27. *Id.* at 809.

28. See *Keller v. Elec. Arts Inc.* (*In re* NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 1275–79 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166–69 (3d Cir. 2013).

famous band into anything other than “exact depictions” of them doing “exactly what they do as celebrities.”²⁹ The very fact that the portrayals were realistic led the court to deny protection to the artists.

Although two California state courts applied the transformative use test to protect expressive works that featured portrayals of public figures, those characters were *unrealistic* depictions. The first court protected a comic book featuring two “villainous half-worm, half-human offspring” named Johnny and Edgar Autumn, parodies of sibling rock duo Johnny and Edgar Winter.³⁰ Although the Winter brothers clearly inspired the mutant cartoons, the parody was enough to “transform” their likeness and earn the comic books First Amendment protection. Similarly, the second court protected a videogame starring a character easily identified as singer Kierin Kirby.³¹ Kirby’s avatar was “fanciful” and appeared “in outer space in the 25th Century.”³² Again, unrealism served as a proxy for transformation.

Against this backdrop, Hart and Keller pitched their twin cases to the Third and Ninth Circuits. The players were armed with *No Doubt* and launched a blunt attack on realistic portrayal in expressive works. Although the game’s virtual avatars are nameless, the physical attributes and statistical data leave no doubt as to their identity. For example, Hart’s digital persona sports his number 13 jersey, stands at 6’2”, weighs 197 pounds, and even dons the quarterback’s trademark wrist band on his left arm.³³ Up against a work that candidly strives for realism, the plaintiffs had plenty of ammunition.³⁴

The courts sided with the players and applied a narrow construction of the transformative use test.³⁵ Because the avatars were so realistic, the statistics were historically accurate, and the athletes starred for their actual colleges in their actual stadiums, both courts held that EA had not sufficiently “transformed” each individual player’s likeness.³⁶ The creators could not seek First Amendment protection because the videogame “literally recreates”

29. *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 400–01, 411 (Ct. App. 2011).

30. *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003).

31. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 609, 618 (Ct. App. 2006).

32. *Id.* at 610, 618.

33. *Hart*, 717 F.3d at 145–46, 147 n.8. Similarly, Keller appears in both Arizona State’s maroon and gold and Nebraska’s scarlet and cream; everything from his hairstyle to passing style is mimicked to near perfection. *Keller*, 724 F.3d at 1272.

34. Each edition of the *NCAA Football* videogame features over 100 virtual teams populated by thousands of players who resemble their real-life counterparts. EA’s playbook manager labors to replicate each team’s actual playbook, and the graphic artists create virtual versions of real stadiums filled with coaches, referees, mascots, cheerleaders, and fans. Even “the crunch of the players’ pads” and “the roar of the crowd” provide the avid gamer with a lifelike experience. *Keller*, 724 F.3d at 1271; *accord Hart*, 717 F.3d at 146 & n.6.

35. *Keller*, 724 F.3d at 1276; *Hart*, 717 F.3d at 165. The construction was “narrow” in the sense that the courts focused on whether each individual likeness was “transformed” as opposed to whether the work as a whole was “transformative.” *See Keller*, 724 F.3d at 1276; *Hart*, 717 F.3d at 165.

36. *Keller*, 724 F.3d at 1276–79; *Hart*, 717 F.3d at 166, 169.

each player “in the very setting in which he has achieved renown.”³⁷ The players had successfully used the game’s realism against its creators.

III. A BRIGHT LINE: PROTECTING REALISM IN EXPRESSIVE WORKS

The First Amendment requires a bright-line rule to protect the rights of those who use realistic portrayals of public figures in expressive works. The transformative use test is unwieldy and verbose. It tempts courts to judge the artistic value of expressive works in a manner that censors speech and belittles our rich First Amendment tradition. Most importantly, transformation and realism are antithetical: a test that requires one leaves no room for the other.

The skeleton of a better test already exists. Sometimes called the *Rogers test*,³⁸ sometimes the *Restatement test*,³⁹ it usually appears in the context of trademark law.⁴⁰ For consistency, let’s rechristen it the *bright-line test*.

For right-of-publicity claims, the bright-line test would first ask whether the challenged speech is commercial or expressive. Commercial speech does no more than propose a transaction.⁴¹ If the speech is purely commercial, the claim may proceed; if it is expressive, the inquiry continues.

The bright-line test would then presume that the use of the person’s likeness in the expressive work is permitted unless that use is “wholly unrelated” to the content of the work⁴² or is “simply a disguised commercial advertisement for the sale of goods or services.”⁴³ The use is wholly unrelated if it has no artistic relevance *whatsoever* to the underlying work.⁴⁴ And it is a disguised commercial advertisement if it *explicitly* misleads the public

37. *Keller*, 724 F.3d at 1271; *see also Hart*, 717 F.3d at 166 (“The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football This is not transformative . . .”).

38. *See Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

39. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995) (stating 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”).

40. *See, e.g., Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012); *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928 & n.11 (6th Cir. 2003); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Grp., Inc.*, 886 F.2d 490, 495 (2d Cir. 1989).

41. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 (1980); *see also Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004) (“[T]he core notion of commercial speech is that it does no more than propose a commercial transaction.” (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) (internal quotation marks omitted))).

42. *Rogers*, 875 F.2d at 1004 (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 457 n.6 (Cal. 1979) (en banc) (Bird, C.J., concurring) (internal quotation marks omitted)).

43. *Id.* (quoting *Frosch v. Grosset & Dunlop, Inc.*, 427 N.Y.S.2d 828 (App. Div. 1980) (internal quotation marks omitted)).

44. *See E.S.S. Entm’t 2000*, 547 F.3d at 1100 (“[T]he level of relevance merely must be above zero.”).

by making an affirmative statement of the person's sponsorship or endorsement beyond mere use of the likeness.⁴⁵

So far, this style of bright-line analysis has scarcely appeared in right-of-publicity suits.⁴⁶ But it is preferable because, unlike the transformative use test, it protects an artist's First Amendment right to use realistic portrayals of public figures in an expressive work—without needing to *transform* the person's likeness. The constitutional right to free expression should protect realism because realism serves two core First Amendment goals: commentary on public figures⁴⁷ and public enjoyment of expressive works.⁴⁸ The bright-line test also preserves the right of publicity for its principal use: preventing commercial exploitation through false endorsement.⁴⁹

Commentary on public figures is a fundamental feature of our First Amendment tradition.⁵⁰ It is therefore essential that courts do not permit the right of publicity to impede expressive works that realistically portray these public figures. The bright-line test protects media that rely on realism in a way that the transformative use test cannot.

Public figures are embedded in the fabric of our culture.⁵¹ They are “common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory.”⁵² One commentator aptly notes as follows:

[C]elebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not

45. *Dillinger, LLC v. Elec. Arts Inc.*, No. 1:09-cv-1236-JMS-DKL, 2011 WL 2457678, at *6 (S.D. Ind. June 16, 2011).

46. In *Matthews v. Wozencraft*, the Fifth Circuit found that the First Amendment protected a novel, noting that it made no difference whether the book was viewed as a historical or a fictional work, “so long as it is not ‘simply a disguised commercial advertisement for the sale of goods or services.’” 15 F.3d 432, 440 (5th Cir. 1994) (quoting *Rogers*, 875 F.2d at 1004). Similarly, in *Parks v. LaFace Records*, the Sixth Circuit considered whether a rap song entitled “Rosa Parks” violated the icon’s right of publicity by analyzing if the title was “wholly unrelated” to the lyrics. 329 F.3d 437, 461 (6th Cir. 2003). *But see* *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) (confining *Parks* to its facts and applying the transformative use test instead of the bright-line analysis).

47. *See* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–52 (1988).

48. *See* *Rogers*, 875 F.2d at 998.

49. *Supra* text accompanying note 45.

50. *Hustler*, 485 U.S. at 50 (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (observing that public figures “invite attention and comment”); *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944).

51. As the Court stressed in *Curtis Publishing Co. v. Butts*, “Our citizenry has a legitimate and substantial interest in the conduct of [public figures].” 388 U.S. 130, 164 (1967).

52. JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE* 163 (1990); *see also* *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996).

celebrities are “the chief agents of moral change in the United States,” they certainly are widely used—far more than are institutionally anchored elites—to *symbolize* individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.⁵³

Parody and satire can be powerful expressive tools. But artists should not be confined to those stylistic devices; realism is equally valuable. Importantly, the bright-line test does not allow for “alternative means” arguments.⁵⁴ In other words, it is irrelevant whether the use of a particular person’s likeness is absolutely necessary to the artist’s expressive goals. The use need not be the *only* way to express the content of the work; for it to have artistic relevance, what matters is that it is not “wholly unrelated.”⁵⁵

If courts adopt the bright-line test, they can ensure that public figures do not turn their right of publicity into a right of censorship.⁵⁶ Life under the transformative use test is wildly different: now, before an artist can use realistic depiction, he must obtain permission. EA, for example, must approach every one of the roughly 7,500 athletes who play NCAA Division I football to request a license. Each player has veto power; he could either refuse to be part of the work or—perhaps worse—condition his participation on EA’s agreement to distort reality by improving his skill level or diminishing that of his fiercest rival.⁵⁷ As one commentator notes, that leverage “would be anathema to the core concept of free speech and a free press.”⁵⁸ Robust commentary cannot survive under a system that elevates permission over expression.

The bright-line test’s protection of realism serves the second core First Amendment goal of public enjoyment.⁵⁹ Consumers of artistic works have

53. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 128 (1993) (footnotes omitted).

54. See *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 444 F. Supp. 2d 1012, 1043 (C.D. Cal. 2006), *aff’d*, 547 F.3d 1095 (9th Cir. 2008).

55. See *Dillinger, LLC v. Elec. Arts Inc.*, No. 1:09-cv-1236-JMS-DKL, 2011 WL 2457678, at *4 & n.2 (S.D. Ind. June 16, 2011) (quoting *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (internal quotation marks omitted)).

56. See 2 McCARTHY, *supra* note 8, § 8:64, at 223 (“If the law mandated that the permission of every living person . . . must be obtained to include mention of them in news and stories, both in documentary and docudrama telling, then they would have the right to refuse permission unless the story was told ‘their way.’”).

57. See Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 142 (2004).

58. 2 McCARTHY, *supra* note 8, § 8:64.

59. Justice Brandeis famously saw freedom of expression as “essential to effective democracy,” for “[i]t is the function of speech to free men from the bondage of irrational fears.” *Whitney v. California*, 274 U.S. 357, 376–77 (1927) (Brandeis, J., concurring). Justice Marshall echoed these lofty sentiments when he wrote that free speech serves the needs “of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity.” *Procnunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401

an interest in enjoying the results of an artist's free expression.⁶⁰ Realistic portrayal is an important feature of our diverse creative palate.

"[E]sthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree . . ."⁶¹ True to that sentiment, the bright-line test leaves no room for judges to be art critics because it sets clear standards that will not scare speech. Judges routinely distinguish between commercial and expressive speech,⁶² and the "wholly unrelated" and "disguised commercial advertisement" prongs establish plain factors for courts to analyze.⁶³

The *Hart* and *Keller* decisions offer no such clarity. Vague standards and free speech make a noxious cocktail: uncertainty creates a chilling effect on expression.⁶⁴ And standards that invite subjectivity breed uncertainty; as Justice Holmes warned, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."⁶⁵ The transformative use test fails to heed that warning. By asking, as one factor does, whether "an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait,"⁶⁶ the test supplies judges

(1989). To suppress it, he added, "is to reject the basic human desire for recognition and affront the individual's worth and dignity." *Id.*; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 787 (1985) (Brennan, J., dissenting) ("The breadth of this protection evinces recognition that freedom of expression is . . . intrinsic to individual liberty and dignity and instrumental in society's search for truth.").

60. *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 27(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts . . .").

61. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Wary that judges might be tempted to act on their own biases about the artistic worth of videogames, Justice Scalia was characteristically candid in his *Brown* opinion: "Reading Dante is unquestionably more cultured and intellectually edifying than playing *Mortal Kombat*. But these cultural and intellectual differences are not *constitutional* ones." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2737 n.4 (2011).

62. See, e.g., cases cited *supra* note 41.

63. See *supra* notes 44–45 and accompanying text.

64. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("[T]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." (quoting *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961) (internal quotation marks omitted))).

65. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); see also *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (App. Div. 1980) ("It is not for a court to pass on literary categories, or literary judgment. . . . [F]ree expression is so important that we should not extend any right of publicity . . . against the publication of a literary work . . .").

66. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001).

with a subjective standard and little guidance. Because artists now risk liability if they dabble in realistic portrayal, they might choose precaution over expression and refrain from realism altogether.⁶⁷

Even if artists do take the risk, the public might still be shortchanged. The requirement of transformation might tempt creators of expressive works to make pedantic alterations to their realistic portrayals in the hopes of adequately “transforming” the likeness. Instead of freely engaging with the subject, artists might resort to pointless gamesmanship to probe the limits of the transformative use test. The decisions in *Hart* and *Keller* leave no discernible standard to apply in assessing whether the players’ likenesses would have been sufficiently transformed if, for example, Hart’s avatar was “175 pounds (instead of 197), 5’9” (instead of 6’2”), and wore number 14 (instead of 13) with a wrist band on his right arm (instead of his left).”⁶⁸ Such questions may seem petty, but the putative class in *Keller* only included players whose virtual equivalents were “within one inch of the player’s roster height and . . . within 10% of the player’s roster weight.”⁶⁹ The First Amendment should not tangle with such trivialities.

Moreover, public figures like Hart and Keller may actually suffer if they encourage courts to adopt the transformative use test. Artists might shun accurate and flattering portrayals of public figures and instead resort to “over-the-top and insulting caricatures.”⁷⁰ Ultimately, public enjoyment of diverse expressive works will bear the brunt. Realism is too vivid an artistic tool to squander. The bright-line test ensures that artists do not sink to self-censorship for fear of litigation.

Admittedly, the transformative use test has appealed to courts for good reason. It is undeniable that “works containing ‘significant transformative elements’ are less likely to interfere with the economic interests implicated by the right of publicity”⁷¹ because such works tend to be poor “substitutes for conventional depictions of the celebrity.”⁷² As a result, “transformed”

67. This fear is precisely why “[f]reedoms of expression require ‘breathing space.’” *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Baggett*, 377 U.S. at 372 (warning that vague standards force potential speakers to “steer far wider of the unlawful zone” (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (internal quotation marks omitted))).

68. Brief *Amicus Curiae* in Support of Appellee by Advance Publications et al. at 5, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (No. 11-3750); see also *supra* note 33 and accompanying text.

69. Third Consolidated Amended Class Action Complaint at para. 331, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-01967 CW (N.D. Cal. July 19, 2013).

70. Len Niehoff, Letter to the Editor, *When Winning Could Get Ugly*, N.Y. TIMES, Nov. 21, 2010, at SP10, available at <http://www.nytimes.com/2010/11/21/sports/21inbox.html> (“Thus, Tim Tebow, the devoutly religious Florida Gator who wore No. 15, could become Tim Bowtie, the Satan-worshipping Florida Gator who wears No. 666. . . . [I]t may be hard for college athletes to think of it as much of a victory.”).

71. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 159 (3d Cir. 2013) (quoting *Comedy III*, 21 P.3d at 808).

72. *Comedy III*, 21 P.3d at 808.

works will not usually threaten the celebrity's ability to profit from the use of his likeness. Faced with a surge in statutory protection for the right of publicity,⁷³ courts reasonably sought to honor the legislative will. But in selecting the scales, those courts erroneously judged all weights as equal: they balanced a property *interest* against an expressive *right* as if the two were peers. The Constitution begs to differ. The right to free expression carries more clout than an interest in a property value—even property as personal as one's own likeness. In that sense, labeling it a “right” of publicity is perhaps a misnomer, and it is unsurprising that legislatures and courts have gradually given it undue weight when balancing it against the First Amendment.

Importantly, though, the bright-line test's enhanced protection of realistic portrayal will not prevent public figures from fighting misuse of their identity through other viable causes of action, including defamation, false light, invasion of privacy, and public disclosure of private facts.⁷⁴ The bright-line test also preserves two important targets for right-of-publicity claims. First, public figures may still challenge unauthorized use in purely commercial expression.⁷⁵ Speech that does no more than propose a transaction understandably merits a diminished level of protection: it does not benefit the public or serve the First Amendment's core goals to the same degree.⁷⁶ Second, the bright-line test's “disguised commercial advertisement” prong honors a principal goal of the right of publicity: it disavows commercial exploitation through false endorsement. If we accept that unauthorized use of a person's likeness can devalue the authorized use of that likeness, this prong can provide sturdy protection to public figures should an imposter seek refuge under the First Amendment's defense of expressive works.

CONCLUSION

Twenty-two years before the California Supreme Court invented the transformative use test, a wise predecessor on that court declared that “[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality.”⁷⁷ Indeed, “prominence invites creative comment.”⁷⁸ The decisions in *Hart* and *Keller* fail to honor the right to free

73. 2 McCARTHY, *supra* note 8, § 6:8 (providing a chart of state statutes protecting the right of publicity).

74. See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996); *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). Additionally, public figures will still be free to pursue lucrative contracts from those who seek to portray them in expressive works in exchange for unfettered access and nonpublic information that could enhance the piece. The bright-line test does not prohibit this form of negotiation; it merely aligns the balance of power in favor of the creators of expressive works.

75. See cases cited *supra* note 41.

76. See cases cited *supra* note 41.

77. *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979) (en banc) (Bird, C.J., concurring).

78. *Id.*

expression guaranteed by the First Amendment. By requiring transformation, courts could imperil expressive works of all kinds—not just videogames. How could Andy Warhol possibly begin to mount a defense of his acclaimed pop art when all he “transformed” was the color scheme? How much variation of shade or tone would suffice to earn him protection? These are questions that artists should not be forced to answer. But under *Hart* and *Keller* they must. The bright-line test promotes the core First Amendment goals of commentary and public enjoyment while also avoiding the chilling effect bred by a subjective balancing test. If we value realistic portrayal of public figures in expressive works, we cannot continue to fumble.
