

October 2015

A New Test to Reconcile the Right of Publicity with Core First Amendment Values

Mark Joseph Stern

Nat Stern

Florida State University College of Law

Follow this and additional works at: <https://digitalcommons.law.uga.edu/jipl>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), [First Amendment Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Mark J. Stern & Nat Stern, *A New Test to Reconcile the Right of Publicity with Core First Amendment Values*, 23 J. INTELL. PROP. L. 93 (2015).

Available at: <https://digitalcommons.law.uga.edu/jipl/vol23/iss1/4>

This Article is brought to you for free and open access by Digital Commons @ Georgia Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ Georgia Law. [Please share how you have benefited from this access](#) For more information, please contact tstriepe@uga.edu.

A NEW TEST TO RECONCILE THE RIGHT OF PUBLICITY WITH CORE FIRST AMENDMENT VALUES

*Mark Joseph Stern** and *Nat Stern***

TABLE OF CONTENTS

I.	INTRODUCTION	94
II.	THE MODERN RISE OF PUBLICITY RIGHTS.....	95
III.	THE RIGHT OF PUBLICITY’S EMERGING THREAT TO CRITICAL SPEECH	101
IV.	THE PROPOSED TEST	105
V.	VINDICATING FIRST AMENDMENT INTERESTS.....	108
VI.	CONCLUSION.....	112

* Legal analyst and Supreme Court correspondent, *Slate Magazine*.

** John W. and Ashley E. Frost Professor of Law, Florida State University College of Law.

I. INTRODUCTION

In July of 2014, Manuel Noriega—the infamous drug-trafficker, arms dealer, and deposed military dictator of Panama¹—filed a lawsuit in California state court against the video game publisher Activision. His complaint alleged that Activision had violated his “right of publicity” under California law by publishing *Call of Duty: Black Ops II*, a popular video game.² *Black Ops II* features a character named Manuel Noriega who bears the real Noriega’s likeness and is depicted as a brutal murderer.³ According to Noriega, this use of his persona constituted “blatant misuse, unlawful exploitation and misappropriation of plaintiff’s image and likeness for economic gain.”⁴

In October 2014, a judge for the Superior Court of California in the County of Los Angeles dismissed Noriega’s suit under California’s anti-SLAPP suit statute.⁵ According to the court, *Black Ops* constituted a “transformative work”—meaning Noriega’s likeness was but one small piece of a broader, expressive original creation—and was therefore shielded by the First Amendment from a right of publicity suit.⁶ Thus, Activision’s free speech rights trumped Noriega’s publicity rights.⁷

Though this result is undoubtedly correct, the court’s logic—while accurately reflecting the state of the law—is troubling. Activision was permitted to use Noriega’s likeness primarily because his character played a minor, fanciful role in a sprawling, imaginative work of fiction.⁸ In this situation, the “transformative work” test constituted a sufficient First Amendment buffer. It is disturbingly easy, however, to imagine a similar situation with a dramatically

¹ See generally JOHN DINGES, OUR MAN IN PANAMA: HOW GENERAL NORIEGA USED THE UNITED STATES-AND MADE MILLIONS IN DRUGS AND ARMS (1990); Simon Hooper, *The rise and fall of Noriega, Central America’s strongman*, CNN (July 7, 2010, 10:19 AM), <http://www.cnn.com/2010/WORLD/americas/07/07/panama.manuel.noriega.profile/>; Seymour M. Hersh, *Panama Strongman Said to Trade in Drugs, Arms and Illicit Money*, N.Y. TIMES (June 12, 1986), <http://www.nytimes.com/1986/06/12/world/panama-strongman-said-to-trade-in-drugs-arms-and-illicit-money.html>.

² Complaint for Damages at 4, *Noriega v. Activision Blizzard, Inc.*, 2014 WL 3G11852 CC21 Super. Ct. 2014 (No. BC 551747).

³ Eugene Volokh, *Can Manuel Noriega really win his “right of publicity” lawsuit against Activision?*, WASH. POST (July 17, 2014), available at <https://www.washingtonpost.com/news/volokh-conspirac-y/wp/2014/07/17/can-manuel-noriega-really-win-his-right-of-publicity-lawsuit-against-activision/>.

⁴ Complaint for Damages at 4, *Noriega v. Activision Blizzard, Inc.*, 2014 WL 3G11852 (C21 Super. Ct. 2014) (No. BC 551747).

⁵ Order on Defendants’ Special Motion to Strike at 6, *Noriega v. Activision/Blizzard, Inc.*, 2014 WL 5930149 (Cal. Super. Ct. 2014).

⁶ *Id.* at *5. The nature of the “transformative work” test is discussed at note 63 *infra* and accompanying text.

⁷ Order of Defendants’ Special Motion to Strike at 6, *Noriega v. Activision/Blizzard, Inc.*, 2014 WL 5930149 (Cal. Super. Ct. 2014).

⁸ *Id.* at *5.

different outcome. Noriega's right of publicity suit was—it seems obvious—an intentional infliction of emotional distress suit in disguise. The former dictator was clearly agitated by his portrayal as a madman, not by his portrayal per se. His suit failed because his character appeared on screen so briefly. However, this reasoning leaves in question the outcome if the game's creators had used *Black Ops II* to criticize and mock Noriega more thoroughly and included him as a central character. Under those circumstances, the “transformative work” test would have offered no shield; indeed, Noriega may well have won his lawsuit.

Part II of this Article presents an overview of the history of right of publicity claims, explaining how they grew out of, and ultimately detached from, the right of privacy. Part III will explore the unnerving emergence of a new breed of right to publicity lawsuits: those designed to censor criticism of, and commentary upon, a public official or public figure. This Part will then describe why recent right to publicity rulings fail to protect artists, especially video game makers, from lawsuits designed to suppress political speech. Part IV proposes a new legal test to help guard expressive works—especially video games—against such suits, even when the works themselves are not legally “transformative.” Finally, Part V explains how the proposed test promotes principles and values that lie at the heart of the First Amendment's protection of speech.

Although this proposed test is novel, its underpinnings are not. The Supreme Court has previously encountered the conundrum of a tort that, while neutral on its face, allows public figures to make an end run around the First Amendment. In response, it has imported First Amendment jurisprudence into tort law to stymie ingenious attempts by public figures to silence their critics.⁹ Courts should perform a similar analysis when faced with a right of publicity suit that seems designed to curb free speech. This analysis becomes especially important when a publicity suit targets a video game. The fact that video games have emerged as a favored target of such suits suggests that the very thing that makes video games so revolutionarily expressive—their ability to realistically depict interactive, fictional worlds—also puts them at a heightened risk of censorship under the guise of lawsuits.

II. THE MODERN RISE OF PUBLICITY RIGHTS

The right of publicity is thoroughly modern in every sense of the word. Its philosophical and legal foundations would have been utterly foreign to the founding generation, who had no conception of fame as a commercial asset to be monetized. In fact, the Founders seem to have viewed their own fame as “a

⁹ See *infra* notes 83–87 and accompanying text.

kind of common republican property,” to be deployed as a means of promoting “independence and nation building.”¹⁰ Fame for the Founders was not “an instrumental good,” but rather a “‘final’ good,” valued “for its own sake” as a reward for “disinterested civic virtue.”¹¹

This view of fame was also held by most Americans in the century following the founding. As the civic fame of the Founders broadened into less high-minded realms, a vibrant celebrity culture flourished among authors and performers.¹² Although these celebrities’ likenesses were often exploited for commercial gain—the names and faces of popular figures adorned a wide array of products, from toys and bicycles to furniture and cigars—no corresponding “right of publicity” emerged.¹³ The notion of fame as a “species of common property” persisted, even as commercial exploitation skyrocketed.¹⁴

However, in the last two decades of the nineteenth century, these “unspoken assumption[s]” about one’s right to one’s own image shifted dramatically.¹⁵ As photography and printing technology grew more sophisticated, pictorial advertisements exploded, and famous people began to attempt to assert commercial control over their likenesses.¹⁶ Predictably, most courts rejected these early suits; still, a few prescient courts recognized an individual’s proprietary interest in his own identity.¹⁷

A very different theory of publicity rights took center stage, however, as a result of Samuel Warren and Louis Brandeis’s seminal 1890 article proposing the existence of a right to privacy.¹⁸ Warren and Brandeis intended the right to protect primarily against journalistic intrusiveness and seem not to have intended their privacy doctrine to extend to an explicitly proprietary conception

¹⁰ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127, 150 (1993); see also DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* 33 (Trevor Colbourn ed., 1974); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 736 (1997).

¹¹ Madow, *supra* note 10, at 151.

¹² See Amy Henderson, *From Barnum to “Bling”: The Changing Face of Celebrity Culture*, 7 HEDGEHOG REV. 37, 38 (2005).

¹³ Madow, *supra* note 10, at 152.

¹⁴ Neil Harris, *Who Owns Our Myths? Heroism and Copyright in an Age of Mass Culture*, 52 SOC. RES. 241, 251 (1985).

¹⁵ Madow, *supra* note 10, at 152.

¹⁶ *Id.* at 154; see also Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1131–32, 1142–45 (2013).

¹⁷ See, e.g., *Edison v. Edison Polyform Mfg.*, 67 A. 392, 394 (N.J. Ch. 1907) (indicating that “the peculiar cast of one’s features is . . . also one’s property” and that “its pecuniary value . . . belong[s] to its owner, rather than to the person seeking to make an unauthorized use of it”).

¹⁸ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

of one's identity.¹⁹ Yet the first legislature to enshrine a right to privacy in statute, New York, turned the concept into an early right of publicity, creating criminal and civil liability for the unauthorized use of the “‘name, portrait or picture’” of any living person for “‘advertising purposes, or for the purposes of trade.’”²⁰ Similarly, the first state supreme court to find a common law right to privacy²¹ interpreted this right as a *publicity* right one that forbade the unauthorized use of a person's picture in advertising.²²

These early successes, however, turned out to be outliers. Most legislatures that codified a right to privacy²³—as well as most courts that developed the right into common law²⁴—required plaintiffs who alleged a violation to prove embarrassment or emotional distress. But a movie star who sees her face on an unauthorized advertisement could hardly claim to be emotionally disturbed, and so courts generally rejected the idea of a right of publicity that grew out of generalized privacy rights.²⁵ Under one especially popular theory, celebrities waived any rights of publicity when they achieved a significant measure of fame.²⁶ In one case, the court rejected the publicity rights claim of a famous college football player whose image had been used in advertising, without permission, by a beer company.²⁷ “[T]he publicity he got,” the court wrote of the player, “was only that which he had been constantly seeking and receiving.”²⁸ In another case, an actress sued a burlesque theater for placing her photograph at its entrance, despite the fact that the actress did not, and had never, appeared in any burlesque shows.²⁹ The court ruled against the actress,

¹⁹ See Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1821 (2010); Diane L. Zimmerman, *Requiem for A Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 296 (1983).

²⁰ Frederick R. Kessler, *A Common Law for the Statutory Era: The Right of Publicity and New York's Right of Privacy Statute*, 15 FORDHAM URB. L.J. 951, 952 (1986). This law was passed in response to a much-maligned appeals court decision holding that New York State had no common law right to privacy. *Id.* at 958–61. The case involved a flour company that had used a minor's picture—without her authorization—to sell flour. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902).

²¹ See Benjamin E. Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 642 (2002).

²² See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 79–81 (Ga. 1905).

²³ See, e.g., LA. CODE CIV. PROC. ANN. § 2315 (2011); N.Y. CIVIL RIGHTS CODE §§ 50–51 (2011); see also RESTATEMENT (SECOND) OF TORTS § 652D (1977).

²⁴ See, e.g., *Faison v. Parker*, 823 F. Supp. 1198 (E.D. Pa. 1993); *Doe v. Mills*, 536 N.W.2d 824 (Mich. Ct. App. 1995); *Flores v. Mosler Safe Co.*, 164 N.E.2d 853 (N.Y. 1959).

²⁵ See, e.g., *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485 (N.Y. 1952).

²⁶ See *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941).

²⁷ *Id.*

²⁸ *Id.* at 170.

²⁹ *Paramount Pictures, Inc. v. Leader Press*, 24 F. Supp. 1004, 1007 (W.D. Okla. 1938).

finding that, by appearing in films, she had entirely surrendered her right to privacy.³⁰

Other courts developed a slightly more nuanced interpretation of publicity rights, holding that only offensive or defamatory misappropriation of celebrity likenesses was actionable.³¹ And some courts that jettisoned the offensiveness requirement in establishing a cause of action still preserved it when establishing damages.³² In one high-profile case, Zelma Cason sued the author Marjorie Kinnan Rawlings for invasion of privacy after Rawlings's autobiography described Cason, using her real forename, as "an ageless spinster resembling an angry and efficient canary."³³ The Florida Supreme Court—confronting the right of privacy issue for the first time—held that though Cason had sufficiently established a cause of action, she could not collect damages because "[t]here was no mental anguish—no loss of friends or respect in the community—no injury to character or reputation."³⁴ Tellingly, Cason's suit had originally included a libel claim, which the court threw out.³⁵

The Second Circuit's decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,³⁶ however, brought a sea of change in the courts' conceptualization of privacy rights and the right of publicity. *Haelan Laboratories* involved a chewing gum manufacturer (Haelan) that contracted with a famous baseball player to obtain the exclusive right to use his photographs in advertisements.³⁷ Soon after, *another* chewing gum company (Topps) used the same player's photographs to sell its own product.³⁸ Haelan sued Topps for violating the right to publicity that it had contractually obtained from the baseball player.³⁹

Haelan Laboratories presented a thorny legal issue. Because only individuals can hold privacy rights, Haelan could not argue its case under a privacy-based theory of the right to publicity. Instead, Haelan argued that the right to publicity is a separate right, related to but not dependent upon privacy, which was fundamentally property-based—and could thus be transferred.⁴⁰ In a groundbreaking opinion by Judge Jerome Frank, the court agreed, introducing

³⁰ *Id.* at 1007.

³¹ *See, e.g., Gill v. Hearst Publ'g Co.*, 253 P.2d 441 (Cal. 1953).

³² *Cason v. Baskin*, 20 So. 2d 243, 253 (Fla. 1944).

³³ *Id.* at 245.

³⁴ *Cason v. Baskin*, 30 So.2d 635, 640 (Fla. 1947).

³⁵ *Cason*, 20 So. 2d at 253.

³⁶ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

³⁷ *Id.* at 867.

³⁸ *Id.*

³⁹ *See id.* ("The plaintiff maintains that defendant invaded plaintiff's exclusive right to use the photographs of leading baseball-players.")

⁴⁰ *Id.*

the phrase “right of publicity” into the legal lexicon for the first time.⁴¹ Each of us, Judge Frank wrote, holds a publicity value in our own likeness, and that value can undoubtedly be licensed or assigned to a third party. Intriguingly, Judge Frank apparently felt compelled to push back against the offensiveness requirement already in use in several states, writing: “it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.”⁴²

Accordingly, the court held that a right to publicity exists “in addition to and independent of” the right of privacy, and that famous people have “a right in the publicity value of [their] photograph[s].”⁴³ Judge Frank did not attempt to prove that this right was firmly entrenched at common law. Instead, he simply asserted that such a right *must* exist, for celebrities would otherwise have few legal means by which to control the use of their likeness—and reap the financial gain that comes with such use.⁴⁴

One year after *Haelan Laboratories*, Melville Nimmer wrote a widely read article⁴⁵—pitched as something of a sequel to Warren and Brandeis’s disquisition⁴⁶—proposing that courts should recognize a broad right to publicity.⁴⁷ Nimmer interpreted *Haelan Laboratories* as a “culmination” of a growing trend in the courts toward erecting legal protections for individuals’ “publicity values,”⁴⁸ encouraging other courts to adopt Judge Frank’s vision of an independent right of publicity.⁴⁹ Then, in 1960, William Prosser wrote an influential article including “misappropriation”—his term for publicity rights—as one of his four privacy-based torts, adding that the right primarily protects

⁴¹ *Id.* at 868; see Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1453–54 (2015). Judge Frank, however, shrugged off the “immaterial” question of whether publicity rights qualify as property rights, writing that “the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.” *Haelan Laboratories*, 202 F.2d at 868. In spite of this dismissive dicta, his entire opinion seems to be premised on the notion that the right of publicity is, in fact, a property right.

⁴² *Haelan Laboratories*, 202 F.2d at 868.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

⁴⁶ See *id.* at 203–04, 223.

⁴⁷ *Id.* at 216.

⁴⁸ *Id.* at 204.

⁴⁹ See *id.* at 222–23 (describing *Haelan Laboratories* decision as “persuasive” and “a major step in the inexorable process of reconciling law and contemporary problems”).

“property” interests.⁵⁰ When Prosser later served as the Chief Reporter of the Second Restatement of Torts, he codified “misappropriation” in the Restatement, more explicitly describing the protected right as “in the nature of a property right.”⁵¹

The same year that the Second Restatement was released, the Supreme Court held in *Zacchini v. Scripps-Howard Broadcasting Co.*⁵² that the general principle of publicity rights passed First Amendment scrutiny.⁵³ Following *Zacchini*, as an increasing number of courts accepted Prosser’s conception of misappropriation⁵⁴—and an increasing number of legislatures passed laws codifying this right into statute⁵⁵—the right to publicity gained widespread acceptance throughout the country.⁵⁶

⁵⁰ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401–07 (1960). According to Prosser, the three other torts comprising the law of privacy are intrusion upon seclusion, public disclosure of private facts, and false light. *Id.* at 389. Some commentators believe that Prosser may have considered misappropriation to be less tethered to the right of privacy than the other three torts. See Roberta Rosenthal Kwall, *Is Independence Day Darning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 193 (1983).

⁵¹ RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977).

⁵² 433 U.S. 562 (1977).

⁵³ *Zacchini* involved an entertainer whose fame lay in his “human cannonball” act, which lasted only about fifteen seconds. *Id.* at 563. A reporter filmed the entirety of *Zacchini*’s act and sold the footage to a broadcasting company, which aired it on television. *Id.* at 564. *Zacchini* sued, claiming that the broadcasting company had violated his publicity rights by televising the entirety of his signature act. *Id.* A majority of the Supreme Court agreed, focusing on the fact that, by disseminating footage of *Zacchini*’s act to the public, the broadcasting company had reduced *Zacchini*’s economic incentive to perform the act in the future. *Id.* at 576. Thus, the Court seemed to conceptualize the right of publicity as a fundamentally proprietary one. In a vigorous dissent, Justice Powell argued that the First and Fourteenth Amendments should have barred *Zacchini*’s suit. *Id.* at 579–82 (Powell, J., dissenting). *Zacchini*, then, shows that the right of publicity does not inherently violate the First Amendment. However, it should be noted that the judgment in *Zacchini* was exceedingly narrow, focusing only on instances in which a performer’s entire act was broadcast without the performer’s authorization. See *id.* at 576.

⁵⁴ See, e.g., *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 647 (Cal. 1994); *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 (Ind. 2001); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998).

⁵⁵ See Robert M. Connallon, Comment, *An Integrative Alternative for America’s Privacy Torts*, 38 GOLDEN GATE U. L. REV. 71, 79 (2007) (collecting statutes).

⁵⁶ See Alicia M. Hunt, *Everyone Wants to Be A Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 1615 (2001); Eleanor Johnson, Note, *Henley v. Dillard Department Stores: Don Loves His Henley, and Has A Right to It Too*, 45 VILL. L. REV. 169, 180–81 (2000).

III. THE RIGHT OF PUBLICITY'S EMERGING THREAT TO CRITICAL SPEECH

Over two dozen states currently recognize some form of the right of publicity—some by statute, some by common law, some by both.⁵⁷ California protects publicity rights through both common law and statute.⁵⁸ The basic components of this right are somewhat similar in every state, though they occasionally vary in significant ways.⁵⁹ California's statutory right of publicity contains these fundamental elements:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.⁶⁰

Recognizing the dangers that an overly broad right of publicity could pose to the First Amendment, various courts have struggled to create a test that balances publicity interests with free speech rights. These tests fall into roughly

⁵⁷ See Laura Hock, Note, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 355 n.43 (2008).

⁵⁸ *Timed Out, LLC v. Youabian, Inc.*, 177 Cal. Rptr. 3d 773, 776 (Ct. App. 2014) (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001)).

⁵⁹ Leaving aside free speech issues, there are two main areas in which right of publicity laws usually differ. The first is inheritability—i.e., should an individual's right of publicity be transmissible to one's heirs? See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983); *Reeves v. United Artists*, 572 F. Supp. 1231, 1235 (N.D. Ohio 1983). The second is the breadth of the right—i.e., how much of an individual's persona can be used before the right of publicity is triggered? See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726 (S.D.N.Y. Mar. 3, 1978). Although the inheritability question divided states for several decades, most states today recognize publicity rights as inheritable. See, e.g., *Bell v. Foster*, 2013 WL 6229174, at *6–7 (N.D. Ga. 2013); *In re Estate of Reynolds*, 235 Ariz. 80, 84 (Ariz. Ct. App. 2014). That is because the right has come to be seen as proprietary (and thus transmissible) rather than moral (and thus individualized). See *Toffoloni v. LFP Publishing Group, LLC*, 572 F. 3d 1201, 1207 (11th Cir. 2009); *Bell v. Foster*, 2013 WL 6229174, at *6 (N.D. Ga. 2013); *Reynolds*, 235 Ariz. at 83. There is not yet a consensus, however, as to how broad the right should be. Compare *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446 (S.D.N.Y. 2008) (holding that New York's right of publicity law to a literal "portrait" or "picture" and does not encompass a general likeness), and *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (holding that Michigan's right of publicity law includes an extremely broad definition of "likeness" that includes a famous person's catchphrases).

⁶⁰ CAL. CIV. CODE § 3344 (amended 1985).

five categories. The first, which might be called the *CBC* test,⁶¹ asks whether the defendant's likeness has been used explicitly to sell a product; if it has, the right of publicity claim may proceed. The second, which might be called the core speech test, asks whether the defendant's likeness has been used in news, entertainment, creative works, or political contexts; if it has, the right of publicity claim must fail.⁶² Although these tests are commendably protective of speech, neither has gained much currency in recent years.

The third test, commonly called the "transformative work" test, asks whether a work uses the plaintiff's likeness as merely one piece of a much broader work; if it does, the right of publicity claim must fail.⁶³ The fourth test, the "transformative use" test, asks whether the celebrity's likeness *itself* has been distorted or altered; if it has not, the right of publicity claim may proceed.⁶⁴

The fifth and final test, the "predominant use" test, asks whether the use of the defendant's likeness has a predominantly expressive purpose.⁶⁵ If not, and the purpose is predominantly commercial, the right of publicity claim may proceed.⁶⁶ This test allows strikingly little breathing room for freedom of

⁶¹ See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007). In *C.B.C.*, the Eighth Circuit held that online fantasy baseball products' use of baseball players' names and statistics may violate those players' common law right of publicity. See *id.* at 822–23. However, the court decided that the First Amendment barred these players from bringing suit because the information resided in the public domain. *Id.* at 823. The court rejected the notion that, because the players' information was used by an entertainment company seeking a profit, the fantasy baseball website's First Amendment interests were diminished. *Id.* Accordingly, under the *C.B.C.* ruling, the Eighth Circuit now permits right of publicity claims only against defendants who used a person's likeness for explicitly—and exclusively—commercial purposes, as in advertising. See *id.* at 824.

⁶² See *Hart v. Elect. Arts, Inc.*, 717 F.3d 141, 159–60 (3d Cir. 2013); *World Wrestling Fed'n Entm't Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 426 (W.D. Pa. 2003); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

⁶³ See *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 159–60 (3d Cir. 2013); *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 928 (N.D. Ohio 2004); *World Wrestling Fed'n Entm't Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 426 (W.D. Pa. 2003).

⁶⁴ See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1273–76 (9th Cir. 2013).

⁶⁵ See *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003).

⁶⁶ See *id.* at 369. *TCI* is arguably another instance of a famous person using a right of publicity lawsuit in order to circumvent the First Amendment concerns that would be present in a false light or intentional infliction of emotional distress suit. The case involved Tony Twist, a professional hockey player who sued Todd McFarlane for including a murderous character named Anthony "Tony Twist" Twistelli in his comic book *Spawn*. Tony Twist and Twistelli bore no physical resemblance—their only analogue was their "tough guy persona"—and *Spawn* was undoubtedly an expressive work. *Id.* at 366. Still, the Missouri Supreme Court held that the First Amendment did not bar Twist's right of publicity suit against McFarlane. *Id.* at 374.

expression and has been rejected by most courts that have had occasion to consider it.⁶⁷

In recent years, courts have generally relied upon the third or fourth tests—transformative work or transformative use—when dealing with right of publicity in video game lawsuits.⁶⁸ The transformative use test in particular has risen to prominence in a number of jurisdictions, though this test significantly cramps expression and has led to some questionable results. In one case, a California court allowed members of the band No Doubt to sue Activision for including lifelike avatars in one of its video games—despite the fact that the No Doubt avatars constituted a tiny fraction of the many characters from which viewers could choose.⁶⁹ In another case, the California Supreme Court held that an artist's creation and sale of t-shirts and prints featuring charcoal renderings of the Three Stooges had no First Amendment protections against a right of publicity suit.⁷⁰ And in two prominent cases, the Third and Ninth Circuits used versions of the test to hold that former NCAA college football players could sue Electronic Arts for including their avatars in a video game that featured hundreds of other avatars.⁷¹

The NCAA and No Doubt cases are particularly troubling because they suggest that one of video games' chief virtues—their ability to closely replicate reality in a digital medium—also opens them up to legal liability. Had Activision produced a movie featuring a scene at a No Doubt concert (and depicted the band through lookalikes), it probably would have been immune from a suit. Likewise, had Electronic Arts produced a graphic novel with a chapter set at a college football game, with illustrated players clearly modeled after real-world athletes, the First Amendment would likely have shielded it from suit. But because these companies produced video games with

⁶⁷ Michael Feinberg, Comment, *A Collision Course Between the Right of Publicity and the First Amendment: The Third and Ninth Circuit Find EA Sports's NCAA Football Video Games Infringe Former Student-Athletes Right of Publicity*, 11 SETON HALL CIR. REV. 175, 195 (2014); Redish & Shust, *supra* note 41, at 1476.

⁶⁸ See, e.g., *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013) (transformative use); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 164 (transformative use); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 400 (Cal. Ct. App. 2011) (transformative use); *Kirby v. Sega of America, Inc.*, 50 Cal. Rptr. 3d 607, 616 (Cal. Ct. App. 2006) (transformative work).

⁶⁹ See *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 400–01 (2011).

⁷⁰ *Comedy III Prods., Inc. v. Gary Saderup*, P.3d 797 (Cal. 2001).

⁷¹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1273–76 (9th Cir. 2013); *Hart v. Electronic Arts*, 717 F.3d 141 (3d Cir. 2013). The avatars did not bear the players' actual names or their true hometowns. *In re NCAA*, 724 F.3d at 1271. They did, however, bear the players' jersey number and physical characteristics. *Id.* at 1271–72; *Hart*, 717 F.3d at 146.

meticulously rendered, lifelike details, they found themselves open to right of publicity lawsuits.

Legally speaking, there is no clear reason why the right of publicity should apply more vigorously to realistic, lifelike representations than it does to less realistic, approximate representations where both representations are a part of an expressive work. And images constitute only one aspect of the law; in California, even the use of a famous person's *name* may be enough to trigger a right to publicity claim.⁷² Yet video games have recently emerged as a prime target for right of publicity suits. One reason for this trend may be that, until the Supreme Court's 2011 ruling in *Brown v. Entertainment Merchants Association*,⁷³ the First Amendment protections granted to video games were unclear.⁷⁴ But it appears more likely that, because they may replicate a famous person's likeness so precisely, video games seem, to many plaintiffs, like a more aggressive and intrusive offense against their right to publicity.

The inroads on protection of expression resulting from these lower court rulings threaten to lay the groundwork for the use of publicity rights to silence criticism. Under a transformative *use* test, Manuel Noriega's suit against Activision would have almost certainly succeeded. *Black Ops II*'s creators did nothing to distort or alter Noriega's image. Indeed, part of their artistic achievement was to depict his face with utmost realism. Perversely, though, this artistic achievement constitutes a legal liability. By faithfully rendering Noriega's image Activision opened itself up to a right of publicity lawsuit. This fact alone illustrates why the transformative use test poses such a significant threat to fundamental First Amendment values.

Under a transformative work test, on the other hand, Noriega's suit was hopeless from the start. His character has only a brief role in *Black Ops II*. His screen time is limited, and his character has little bearing on the broader work. Thus, examining *Black Ops II* as a whole under the transformative work test, the California Superior Court properly held that Noriega's suit must fail.⁷⁵

Nevertheless, the transformative work test cannot always serve as such a sturdy First Amendment buffer. To understand why, consider this hypothetical. Activision develops a new game titled *Noriega: A Madman Returns* in which the Noriega character takes a star turn. The game allows viewers to play the role of an undercover CIA operative infiltrating Noriega's inner circle in order to halt his murderous activities. In promotional materials, Activision explains that the game is intended to serve as a sharply critical condemnation of

⁷² See WEST ANN. CAL. CIV. CODE § 3344 (amended 1985).

⁷³ 131 S. Ct. 2729 (2011).

⁷⁴ See *infra* notes 103–04 and accompanying text.

⁷⁵ *Noriega v. Activision/Blizzard, Inc.*, Cal. Super. Trial Order, Los Angeles County, Oct. 27, 2014.

Noriega's appalling misdeeds. By drawing players into Noriega's web of madness and allowing them to interact with the psychopaths who inhabit this horrific, deranged world, the game strips away the veneer of glamour that sometimes glazes the criminal lifestyle. Instead, players must make a series of moral decisions and practical sacrifices in order to accomplish their ultimate mission.

The transformative work test would provide no protection to this hypothetical game, nor would the transformative use test. If Noriega had brought a right of publicity suit against the creators of this hypothetical game, he likely would have won it. The game, after all, uses his unaltered image and features him as a central character. He would have a strong case under both the transformative work *and* the transformative use tests. It would not matter that *A Madman Returns* is an expressive work that harnesses the interactive nature of the video game medium to deepen the artists' criticism and intensify its impact. It would not matter that Noriega's actual grievance is that Activision depicted him in a harshly negative light. His suit would be, in essence, an intentional infliction of emotional distress suit in disguise—and he would very likely win it. This flaw in the transformative work test poses a problem; it is, however, a fixable one.

IV. THE PROPOSED TEST

Borrowing concepts from intellectual property law and First Amendment jurisprudence, we propose a new test for courts to perform when faced with a right of publicity lawsuit.⁷⁶ Initially, the court should pose two threshold inquiries. As in First Amendment defamation doctrine, the first of these inquiries should ask whether the plaintiff is one of two types of public figures: all-purpose or limited-purpose.⁷⁷ To qualify as an all-purpose public figure, a plaintiff must be widely known and discussed⁷⁸ (e.g., a movie star, a famous athlete, or a well-known business leader).⁷⁹ To qualify as a limited-purpose

⁷⁶ Although this Article specifically examines intentional infliction of emotional distress lawsuits dressed in the guise of publicity rights, the test we articulate is equally applicable to other lawsuits. Defamation suits, for example, may be easily dressed in the garb of publicity rights, as may false light suits.

⁷⁷ See *Gertz v. Welch*, 418 U.S. 323, 345 (1974) (describing these categories for purposes of determining evidentiary burden placed on defamation plaintiffs).

⁷⁸ See *id.* at 351 (noting that some individuals achieve "such pervasive fame or notoriety" that they become public figures for all purposes and contexts).

⁷⁹ See *Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1253–54 (5th Cir. 1980); *Carson v. Allied News Co.*, 529 F.2d 206, 209 (7th Cir. 1976); James C. Mitchell, *The Accidental Purist: Reclaiming the Gertz All Purpose Public Figure Doctrine in the Age of "Celebrity Journalism,"* 22 LOY. L.A. ENT. L. REV. 559, 573–74 (2002).

public figure, a plaintiff must have thrust herself “to the forefront of particular public controversies” in order to influence debate.⁸⁰

If the plaintiff is not an all-purpose public figure or limited-purpose public figure, the court should simply move on to the transformative work test. If the plaintiff does qualify as a public figure, however, the court should proceed to the second threshold inquiry. That threshold inquiry asks whether criticizing, mocking, or commenting upon the plaintiff is a significant purpose of the work.⁸¹ If not, the court should move on to the transformative work test. If the work is deemed to have such a purpose, the court should proceed to the test outlined below.

If the plaintiff is some breed of public figure, and the work can reasonably be viewed as criticizing or commenting on the plaintiff, the court should then ask three questions. The first of these asks whether the work presents a false statement of fact about the defendant made with actual malice—i.e., knowledge of the statement’s falsity or reckless disregard for whether it was true.⁸² This prong explicitly draws from the Supreme Court’s decision in *Hustler Magazine, Inc. v. Falwell*,⁸³ in which the Court imported the actual malice standard from *New York Times Co. v. Sullivan*⁸⁴ into tort law in order to forestall disguised intentional infliction of emotional distress suits.⁸⁵ In “the world of debate about public affairs,” speech that is harshly disparaging, even when “motivated by hatred or ill-will . . . [or] bad motive,” must be granted First Amendment protection.⁸⁶ Expression that might be censorable if it targeted private persons

⁸⁰ These categories are borrowed from *Gertz v. Welch*, 418 U.S. 323, 345 (1974). *Gertz* reaffirmed that the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), that the actual malice standard applies to public officials bringing libel suits, *Gertz*, 418 U.S. at 342–43, and, as a matter of logic and coherence, public officials should be treated like public figures for the purposes of the test we propose. As a practical matter, we doubt that the plaintiff’s status as a public official would prove independently decisive. If a public official were sufficiently known to have a colorable right of publicity in the first place, then she would presumably qualify as a public figure as well.

⁸¹ This is not to say that the entire work must be devoted to criticizing the defendant. Rather, this inquiry asks whether the defendant has used the plaintiff’s likeness as a means of criticizing him. For example, Activision’s use of Noriega’s likeness was extremely limited—but was also clearly intended to criticize. Thus, Activision’s use would satisfy this inquiry.

⁸² See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (defining actual malice as a standard that public officials must meet in defamation suits).

⁸³ 485 U.S. 46 (1988).

⁸⁴ 376 U.S. 254, 279–80 (1964).

⁸⁵ *Hustler Magazine, Inc.*, 485 U.S. at 56 (ruling that public figures and public officials must show defendant published false statement of fact with actual malice in order to recover for the tort of intentional infliction of emotional distress).

⁸⁶ *Id.* at 53; see also *Snyder v. Phelps*, 562 U.S. 443 (2011) (overturning verdict for emotional infliction of emotional distress notwithstanding that defendant’s picketing had “inflict[ed] great

is shielded by the First Amendment when it pertains to “public debate about public figures.”⁸⁷

The second question asks whether a reasonable person would think that the plaintiff endorsed the work or licensed the use of his image. This prong seeks to protect plaintiffs who may have a genuine grievance with companies that have misappropriated their likeness to sell its product. It is critical to note that, despite its occasional misapplication, the right of publicity is a fundamentally sound means of protecting an individual’s control over his own likeness. A recent lawsuit brought by Michael Jordan neatly demonstrates the right’s continued utility. In 2009, the supermarket chain Dominick’s Finer Foods ran an advertisement congratulating Jordan on his induction into the Basketball Hall of Fame and offering a \$2 coupon for steak. The ad included the phrase “Michael Jordan . . . You are a cut above.”⁸⁸ Dominick’s did not ask Jordan for permission to use his name, despite the fact that its ad arguably implied that he had endorsed its steaks.⁸⁹ Jordan sued, and a Chicago jury awarded him \$8.9 million in damages.⁹⁰ Without state protection of his publicity rights, Jordan may not have been able to protect his name and identity against such purely commercial exploitation with de minimis expressive value. Jordan’s suit illustrates that in evaluating this prong of the test, courts should especially focus on the use of the plaintiff’s likeness in advertising or promotional materials. If a video game’s marketing campaign centers around a public figure’s image, without any clear critical or parodic intent, this prong may be satisfied.

The third question asks whether the defendant’s work is likely to impede the defendant’s ability to profit from his image. Allowing famous individuals to profit off their own celebrity is a fundamental underpinning of the right to publicity.⁹¹ This prong does *not* inquire into whether the defendant’s work was

pain,” *id.* at 1220, on plaintiff, where pickets “addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials,” *id.*)

⁸⁷ *Id.*

⁸⁸ Arthur Weinstein, *Michael Jordan awarded \$8.9M in civil suit against supermarket*, SPORTING NEWS, Aug. 21, 2015, available at <http://www.sportingnews.com/nba/story/2015-08-21/michael-jordan-awarded-89-million-in-civil-suit-against-chicago-supermarket>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992). A similar right is also a pillar of broader intellectual property law, such as copyright law. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (noting that whether or not an alleged infringement of copyright impedes the plaintiff’s ability to profit off his own work is a central prong of fair use analysis). A major difference between the two rights is that copyright rests more heavily on the rationale of economic incentive. Compare *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”), with *White v. Samsung*, 971 F.2d at 1399 (“The law protects the celebrity’s sole right to exploit

so effective in criticizing the plaintiff that no one would want to buy a product that the plaintiff endorses. Rather, this prong asks whether the defendant has capitalized upon a portion of the market that rightfully belongs to the plaintiff. For instance, if the defendant produces a video game that allows the character to assume the role of a famous singer who has not authorized the use of her likeness, this prong may be satisfied.

An application of this test to the hypothetical Noriega video game described above illustrates its utility. Noriega is, as a former military dictator and notorious international criminal, undoubtedly a public figure. Moreover, the hypothetical video game would obviously be using Noriega's likeness to criticize his brutality and avarice. Thus, the two threshold inquiries would be satisfied.

Moving onto the three-prong test, the makers of the hypothetical game would almost assuredly not be putting forth false statements of fact about Noriega with actual malice or reckless disregard of the truth. Rather, the expressive, creative nature of the video game medium would make clear to players that the game was an imaginative fantasy about what Noriega's bloody rule *could* have looked like—not a fact-based statement of any sort. Further, no reasonable person would think that Noriega, who pled not guilty to the federal charges against him,⁹² licensed his image to the makers of the hypothetical game. Noriega maintained his innocence throughout his trial and resulting prison sentence.⁹³ He would surely not authorize his image to be used in a video game that depicted him as a madman. Finally, the hypothetical game would probably not capitalize upon a portion of the market that rightfully belongs to Noriega, since, as previously discussed, Noriega would presumably never license a video game so deeply critical of him. At a minimum, the burden would rest heavily on Noriega to demonstrate that such a game undercut his own efforts to capitalize on his notoriety.

V. VINDICATING FIRST AMENDMENT INTERESTS

The test we propose may complicate certain right of publicity lawsuits. However, it would also bring a welcome clarity to cases that seem to pit the right of publicity against freedom of speech. It is worth explaining briefly why this clarity is so vital.

this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.⁹¹)

⁹² James LeMoyne, *A Thin Paper Trail in Noriega Inquiry*, N.Y. TIMES, June 10, 1990, available at <http://www.nytimes.com/1990/06/10/us/a-thin-paper-trail-in-noriega-inquiry.html>.

⁹³ See *Noriega Fights His Conviction in Drug Case*, N.Y. TIMES, Dec. 5, 1996, available at <http://www.nytimes.com/1996/12/05/us/noriega-fights-his-conviction-in-drug-case.html>.

The Supreme Court has recognized the potential for a clash between intellectual property and free expression at least since *International News Service v. Associated Press*,⁹⁴ nearly a century ago, where the defendant news agency had reproduced the plaintiff agency's posted news as the defendant's own. Recent Court decisions demonstrate the persistence of this tension.⁹⁵ With the profusion of creative expression spurred by proliferating media, this struggle will doubtless arise with increasing frequency as expressive works borrow and build upon ideas that originated elsewhere.

Admittedly, courts have sent mixed messages with regard to the importance of placing First Amendment limitations on intellectual property claims. In *Eldred v. Ashcroft*,⁹⁶ the Supreme Court dismissed, almost out of hand, the argument that extending copyright terms could cause serious speech-related harms in violation of the First Amendment.⁹⁷ And in 2003, the influential Judge Richard Posner wrote that "[d]isputes over intellectual property . . . are not profitably conducted in the idiom of the First Amendment. They are the subject of specialized bodies of law regulating intellectual property."⁹⁸

Nevertheless, the right of publicity doubtless implicates at least to some degree a central principle of the First Amendment. As the Court recently reaffirmed, "[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."⁹⁹ By its own terms, the right of publicity regulates the content of speech.¹⁰⁰ Granted, countervailing considerations associated with intellectual property support a level of review less stringent than the strict scrutiny applied when government seeks to suppress the communicative impact of ideas and information. Still, the need for searching judicial inquiry to prevent content-based regulations from chilling or punishing constitutionally protected expression does not disappear altogether when the interest in reaping gains from one's fame is involved.

Indeed, some prominent judges have advocated stronger First Amendment protection against intellectual property claims. Perhaps most notably, Ninth

⁹⁴ 248 U.S. 215 (1918).

⁹⁵ See *Golan v. Holder*, 132 S. Ct. 873, 891–92 (2012) (considering whether a treaty removing certain foreign works from the public domain violates the First Amendment); *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (considering whether an extension of federal copyright protection unconstitutionally trenches upon free expression).

⁹⁶ 537 U.S. 186 (2003).

⁹⁷ *Id.* at 218.

⁹⁸ *McKevitt v. Pallasch*, 339 F.3d 530, 534 (7th Cir. 2003).

⁹⁹ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citations omitted).

¹⁰⁰ See Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 912 n.35 (2003) ("The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people's names or likenesses).").

Circuit Chief Judge Alex Kozinski has penned two widely discussed opinions in which he argued for strong First Amendment limitations on both right of publicity and trademark claims. In one well-known case, Kozinski dissented from a ruling that allowed Vanna White to sue Samsung for misappropriating her image after the company made a commercial humorously featuring a White-like robot in a blonde wig.¹⁰¹ In Kozinski's mind, White's suit dangerously undermined Samsung's freedom of expression.

I can't see how giving White the power to keep others from evoking her image in the public's mind can be squared with the First Amendment. Where does White get this right to control our thoughts? The majority's creation goes way beyond the protection given a trademark or a copyrighted work or a person's name or likeness. All those things control one particular way of expressing an idea, one way of referring to an object or a person. But not allowing any means of reminding people of someone? That's a speech restriction unparalleled in First Amendment law.¹⁰²

These concerns should be heightened in the realm of video games, which are not commercial speech, but pure expression, as the Court affirmed in *Brown v. Entertainment Merchants Association*.¹⁰³ In *Brown*, the Court dispensed with any notion that video games might merit lesser First Amendment protection:

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.¹⁰⁴

The Court's holding in *Brown* resonates powerfully in the arena of right of publicity suits against video game makers. Many of these companies have produced video games that “communicate ideas” and “messages” to viewers that fall squarely within the realm of speech most fiercely protected by the Court's lawsuit attempted to silence criticism of a dictator and criminal; other

¹⁰¹ *White v. Samsung*, 989 F.2d 1512, 1519 (9th Cir. 1993).

¹⁰² *Id.* at 1519 (Kozinski, J., dissenting).

¹⁰³ *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011).

¹⁰⁴ *Id.* at 2733.

suits may endeavor to muffle sardonic commentary upon celebrities.¹⁰⁵ Either way, the apparent purpose of these suits—to curtail public discourse by abridging video game companies’ freedom of expression—contradicts First Amendment fundamental values.

There may be an initial inclination to dismiss the constitutional importance of expression like *Black Ops II*, which combines violent entertainment with political commentary. As the Supreme Court explained in *Brown*, however, “it is difficult to distinguish politics from entertainment, and dangerous to try”¹⁰⁶ when determining the appropriate protection for speech. Moreover, right of publicity claims by public figures are especially likely to implicate matters of public importance, since the plaintiff himself is involved in public or political affairs. Political speech, of course, “is central to the meaning and the purpose of the First Amendment”¹⁰⁷ and lies “at the core of our . . . First Amendment freedoms.”¹⁰⁸ The Constitution affords political expression “unequivocal protection.”¹⁰⁹ Such is its import that political speech must be given “breathing space”¹¹⁰ to prevent any “chilling effect”¹¹¹ by threatened litigation. Similarly, as Chief Justice Warren explained when the Court extended the actual malice standard to public figure libel plaintiffs, a similar rationale applies to expression about those individuals as well. Because these figures often wield power and influence comparable to that of officeholders, application of the actual malice standard helps to safeguard the public’s right to “be informed on matters of legitimate interest.”¹¹² The current framework protecting public figures’ right of

¹⁰⁵ For example, the actress Lindsay Lohan—who has been mired in legal problems for years as her acting career has declined precipitously, see Associated Press, *Lindsay Lohan’s Court Saga by the Numbers*, available at http://www.huffingtonpost.com/2015/05/28/lindsay-lohan-court-saga-numbers_n_7461614.html (last visited May 28, 2015)—sued Rockstar Games and Take Two Interactive for including a Lohan-esque character in *Grand Theft Auto V*. The character, who appears only briefly but seems to bear some similarities to Lohan, is humorously depicted as a witless, fame-obsessed fool. See Abigail Elise, *Lindsay Lohan “GTA 5” Lawsuit: Actress Adding Charges Against Rockstar Games For Alleged Character Likeness*, INT’L BUS. TIMES (Oct. 11, 2014), available at <http://www.ibtimes.com/lindsay-lohan-gta-5-lawsuit-actress-adding-charges-against-rockstar-games-alleged-1703225>. The character’s likeness was also used in some promotional materials. *Id.*

¹⁰⁶ *Brown*, 131 S. Ct. at 2733.

¹⁰⁷ *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 329 (2010).

¹⁰⁸ *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

¹⁰⁹ *Brown v. Hartlage*, 456 U.S. 45, 58 (1982).

¹¹⁰ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

¹¹¹ *Brown*, 456 U.S. at 61.

¹¹² *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 163–65 (1967) (Warren, C.J., concurring); see Harry Kalven, Jr., *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 275–78 (explaining how Chief Justice Warren’s opinion proved pivotal on a splintered Court).

publicity fails to provide the breathing space needed to preserve robust commentary on those whose actions and words exert a powerful impact on society. Its potential to chill political expression and other commentary on public matters is strong, and must be met by an equally strong First Amendment counterweight.

VI. CONCLUSION

In *Black Ops II*, Activision intended to make a critical statement about Manuel Noriega. Noriega did not appreciate this depiction of him, and so he did what people who wish to be free from criticism have done for centuries: he sued. Had Noriega challenged Activision with an intentional infliction of emotional distress claim, his odds of prevailing would have been negligible. However, because Noriega filed a right of publicity claim, he stood a real chance of winning his suit. Indeed, had Noriega filed in the Ninth Circuit rather than in California state court, he probably would have won.¹¹³

The test set forth in this Article is designed to prevent close calls like this one by creating a clearly delineated framework through which to analyze potentially censorious right to publicity claims. First, the court should ask whether the plaintiff is any breed of public figure. If he is not, the court should proceed with a transformative work test. If he is, the court should ask whether the expression in question undertakes to criticize or comment upon the plaintiff. If not, the court should proceed with a transformative work test. If so, the court should ask three questions. First, does the work present a false statement made with actual malice? Second, would a reasonable person believe that the plaintiff endorsed the use of his likeness in this work? Third, might the defendant's work impede the plaintiff's ability to profit from his own image? If the answer to all these questions is no, the court should reject the lawsuit as an effort to punish and chill constitutionally protected speech.

Public figures should not be permitted to circumvent the First Amendment through a loophole in intellectual property law. Noriega may have a limited right over his own image, but the rest of us have a right to engage critically with his legacy. That his face appeared in a video game—rather than his name appearing in a book—should not nullify First Amendment protection. Expression does not lose its constitutional protection merely because it is accessed through a video game console.

¹¹³ This is because, as previously noted, the Ninth Circuit uses a transformative *use* test, see *supra* note 71 and accompanying text, and Noriega's actual image was not notably altered.