

**B262873**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION ONE**

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**JAMES BROWN,**  
*Plaintiff and Respondent,*

*v.*

**ELECTRONIC ARTS INC.,**  
*Defendant and Appellant.*

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APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT  
MAUREEN DUFFY-LEWIS, JUDGE • CASE No. BC520019

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**APPLICATION FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF; AMICUS CURIAE BRIEF OF  
MOTION PICTURE ASSOCIATION OF AMERICA,  
INC. IN SUPPORT OF ELECTRONIC ARTS INC.**

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**APPLICATION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF OF  
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AMERICA, INC. IN SUPPORT OF  
ELECTRONIC ARTS INC.**

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Under California Rules of Court, rule 8.200(c), the Motion Picture Association of America, Inc. (MPAA) requests permission to file the attached amicus curiae brief in support of appellant Electronic Arts Inc.

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. Its members<sup>1</sup> and their affiliates are the leading

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<sup>1</sup> The members of the MPAA are: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century  
(continued...)

producers and distributors of audiovisual entertainment in the theatrical, television and DVD/home video markets. The MPAA often has appeared as amicus curiae in cases involving claims that potentially implicate the First Amendment rights of its members, including cases (like this one) in which the plaintiff is attempting to assert a right of publicity claim based on allegations that his name, likeness, or persona was used in an expressive work without permission.

The MPAA has long worked to ensure that the right of publicity evolves in a manner that protects the First Amendment right of self-expression and safeguards the free marketplace of ideas. Recently, for example, the MPAA filed an amicus brief in *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, arguing that the First Amendment does not permit right of publicity claims to arise from motion pictures inspired by real people and events. The Ninth Circuit agreed, holding that the defendant’s motion picture “is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.” (*Id.* at p. 905.) The MPAA also filed an amicus brief in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (9th Cir. 2013) 724 F.3d 1268 addressing an issue similar to one of the issues raised in this case: the proper application of the

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(...continued)

Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.



California Supreme Court’s transformative use test in a right of publicity case involving video games.

The MPAA also appeared before the California Supreme Court as amicus curiae in *Winter v. DC Comics* (2003) 30 Cal.4th 881 [arguing that the First Amendment requires courts to carve out a safe harbor from the transformative use test for motion pictures and similar expressive works], and before other courts addressing similar issues (see *Hart v. Electronic Arts, Inc.* (3d Cir. 2013) 717 F.3d 141 [MPAA submitted an amicus curiae brief urging that the First Amendment protects creators of expressive works from liability for right of publicity claims]; *Tyne v. Time Warner Entm’t Co., L.P.* (Fla. 2005) 901 So.2d 802 [MPAA appeared as amicus curiae in a misappropriation lawsuit arising from the motion picture, “The Perfect Storm,” arguing that expressive works are categorically exempt from Florida’s publicity rights statute]).

Although this case involves video games, not motion pictures, the MPAA is interested in and could be affected by its outcome. Like motion pictures, video games have been held, by no less an authority than the United States Supreme Court, to be constitutionally protected expressive works. (See *Brown v. Entertainment Merchants Ass’n* (2011) 564 U.S. \_\_ [131 S.Ct. 2729, 2733, 180 L.Ed.2d 708].) Because all expressive works—irrespective of their medium or message—are entitled to First Amendment protection, any ruling that abridges that protection in connection with video games risks being broadly and adversely applied, beyond video games, to more traditional works of audiovisual expression.

As discussed in the attached amicus brief, the California Supreme Court has instructed that motion pictures and similar expressive works that tell stories about or inspired by real people and events must maintain First Amendment protection against right of publicity claims, regardless of whether the story is told realistically, or fictionally. (*Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 861.) As explained below, that protection does not hinge on whether the expressive work is transformative, but instead is guided by the high Constitutional bar set by the compelling interest test.

The California Supreme Court later developed the transformative use test to analyze the First Amendment issues that arose in a right of publicity case involving a mass-produced consumer product that contained expressive elements. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 391, 404.) As originally conceived, that test looked to whether the work as a whole used the plaintiff's likeness as the raw material in creating new expression. In the video game context, many courts have applied a narrower version of this test, holding that video games lose their First Amendment protection if they fail to adequately transform the plaintiff's likeness and instead portray the plaintiff realistically engaged in the activity for which the plaintiff is famous.

In resolving Brown's claim, the MPAA urges this court not to issue an unduly broad opinion that might chill speech or stifle the freedom the California Supreme Court has recognized motion pictures and similar expressive works require to tell stories about or

inspired by real people—whether portrayed realistically or fictionally, and whether represented fancifully or accurately.

As counsel for the MPAA, we have reviewed the briefs filed in this case and believe this court will benefit from additional briefing. We have attempted to supplement, but not duplicate, the parties' briefs.

No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amicus, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (Cal. Rules of Court, rule 8.200(c)(3).)

This application is timely. It is being submitted within 14 days of the filing of appellant's reply brief. (Cal. Rules of Court, rule 8.200(c)(1).)

Accordingly, amicus requests that this court accept and file the attached amicus curiae brief.

April 18, 2016

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## AMICUS CURIAE BRIEF

### INTRODUCTION

Motion pictures often tell stories about or inspired by real people portrayed in realistic ways. Often they tell stories of real people in fictional ways. Sometimes motion picture depictions of real people change the way they appear in real life. Sometimes they do not. The First Amendment protects all such storytelling in motion pictures and in other similar expressive works. In part, this is because these works foster open public debate on important issues, embody individual creative expression, and lead audience members toward a deeper understanding of the human experience. Claims against filmmakers under California's right of publicity laws, brought by plaintiffs whose names, personas, or life stories appear in motion pictures, pose a serious threat to the freedom to tell these stories. For that reason, the California Supreme Court has a long and consistent tradition of rebuffing such claims.

This case involves a similar cause of action in a different context. Football legend James Brown alleges that Electronic Arts Inc. (EA) violated his right of publicity by creating an avatar football player with Brown's statistics for its video game *Madden NFL* and allowing users to actually simulate that they were Brown and manipulate the avatar athlete in a realistic football setting. The case presents a narrow question that can be decided on a narrow ground: how to analyze the First Amendment rights of

makers of a simulation-type video game against a right of publicity claim by a player whose likeness allegedly appears in the game, and what is the appropriate outcome of that analysis.

The MPAA believes that the decision below should be reversed for the reasons set forth in EA's brief, which will not be repeated here. However, if this Court does affirm the trial court ruling, this brief urges the court to issue an opinion that remains consistent with the California Supreme Court's recognition of broad First Amendment protection against right of publicity claims for motion pictures and similar expressive works that tell stories about and are inspired by real people.

As explained below, from its earliest cases addressing the right of publicity, the California Supreme Court has instructed that motion pictures and similar expressive works that tell stories about real people are entitled to broad First Amendment protection from right of publicity claims. Stories involving real people, whether politicians, celebrities, athletes, or less well known people, make an important contribution to the free marketplace of ideas. The Court has explained that permitting persons to bring right of publicity claims against these works would permit censorship and have a chilling effect on free expression. This robust First Amendment protection—which is generally discussed in terms of the often-dispositive strict scrutiny standard—exists regardless of whether the story or the portrayal of the plaintiff is fictionalized or realistic, transformative or life-like, documentary or satirical.

The California Supreme Court later recognized that some works that are not traditional expressive works—such as T-shirts—

may include expressive elements that are likewise entitled to First Amendment protection. In the context of this type of mass-produced consumer product, the Court developed the “transformative use” test to expand First Amendment protections to artists who create such works as a potential defense against the publicity rights claim of a plaintiff who is depicted on them. Under this test, First Amendment protection depends on the extent to which the plaintiff’s image was one of the raw materials from which the work as a whole was created. Importantly, the Court has never suggested that the transformative test should apply to a motion picture that tells a story about or is inspired by a real person. In that context, enforcing a “transformative” requirement on a right of publicity defendant would unconstitutionally chill First Amendment-protected activity.

In the context of video game cases where right of publicity claims have been asserted, most California courts have focused entirely on the amount of transformation that has occurred, and some have taken the narrow approach of only examining the extent to which the plaintiff’s likeness has been transformed (rather than on the transformativeness of the video game as a whole). As a consequence, courts have denied First Amendment protection in cases where the video game contains an electronic avatar that realistically simulates a celebrity engaging in the very activity for which the celebrity—whether a popular rock musician or a star athlete—is or was famous. The First Amendment interests of the video makers have generally prevailed only if the celebrity’s image is sufficiently altered or transformed. That was how the trial court

analyzed the plaintiff's claim in this case. The court found that First Amendment protection for *Madden NFL* had to yield to James Brown's right of publicity claim because the video game portrayed a highly realistic avatar of Brown doing exactly what he was famous for doing: playing football. The court concluded there was insufficient transformation of Brown's persona to justify giving EA First Amendment protection.

Even if this court concludes this analysis was correct (and the MPAA believes it was not), it would be a mistake to issue a ruling that suggests—directly or even by implication—that this analysis might apply to motion pictures and similar works. As discussed below, there are many reasons for this. In some video games, celebrities might be able to demonstrate their image was used simply to market the game without serving the game's creative goals, in which case the game maker's First Amendment interest might be relatively weak. By contrast, in motion pictures and similar expressive works, the realistic portrayal of an individual almost always enhances the expressive quality of the work and helps develop the story's narrative. Limiting First Amendment protection to cases where a motion picture *transforms* (i.e., alters) a real person would unduly—and unconstitutionally—restrict the First Amendment rights of filmmakers.

The MPAA believes EA's briefs offer several compelling reasons to reverse the judgment, and it will not repeat those arguments here. Rather, in this amicus curiae brief, the MPAA sets forth why, regardless of how the court decides this case, it should avoid issuing an opinion that may apply restrictively to motion

pictures and other similar expressive works, and should make clear that such works do not lose their First Amendment protection from publicity claims if they depict celebrities and other people in a realistic manner to tell a story. Denying filmmakers First Amendment protection from right of publicity claims would seriously threaten the vibrancy of a broad range of films, including biographies, political dramas, docu-dramas, historical fiction, and period pieces. Furthermore, it would be inconsistent with California Supreme Court precedent establishing that motion pictures depicting real people must retain First Amendment protection from all right of publicity challenges.



## LEGAL ARGUMENT

**I. THE FIRST AMENDMENT PROVIDES BROAD PROTECTION TO MOTION PICTURES AND SIMILAR EXPRESSIVE WORKS THAT DEPICT REAL PEOPLE, WHILE THE TRANSFORMATIVE USE TEST PROTECTS *OTHER* TYPES OF CREATIVE WORKS FROM LIABILITY IF THE WORK IS SUFFICIENTLY TRANSFORMATIVE.**

**A. The California Supreme Court has long held that the right of publicity must accommodate robust First Amendment protections for motion pictures and similar expressive works that tell stories about or are inspired by real people—whether fictional or realistic.**

California courts have consistently held that the First Amendment protects the right to portray real people in motion pictures and similar expressive works without fear that their depiction will be deemed a misappropriation of property rights. This protection extends not just to motion pictures about celebrities, athletes, politicians, and other public figures, but also to people who are not well known.

In the seminal California right of publicity case, *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860, 861 (*Guglielmi*), the successor-in-interest of actor Rudolph Valentino sued the creators of a biographical motion picture telling a

fictionalized version of Valentino’s life story. The Supreme Court held that “[w]hether exhibited in theaters or on television, a film is a medium which is protected by the constitutional guarantees of free expression” (*id.* at p. 865), and therefore the First Amendment furnished a complete defense to the claim.<sup>1</sup> The Court explained that “[f]ilm is a ‘significant medium for the communication of ideas.’” (*Guglielmi*, at p. 865, quoting *Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501 [72 S.Ct. 777, 96 L.Ed. 1098, 1105].) The Court then observed that “[c]ontemporary events, symbols and people are regularly used in fictional works.” (*Id.* at p. 869.) Indeed, “[f]iction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers.” (*Ibid.*) The Court explained—in language that would have directly refuted any transformation requirement—that “[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality” in order to avoid being charged with violating a plaintiff’s right of publicity. (*Ibid.*)

*Guglielmi* explained that this First Amendment defense was equally robust whether the plaintiff was an unknown person or a celebrity. “Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and

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<sup>1</sup> Chief Justice Bird’s opinion, although styled a concurrence, was endorsed by three other justices and therefore “commanded the support of the majority of the court.” (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 396-397, fn. 7 (*Comedy III*)). Accordingly, “all references to *Guglielmi* in this [brief] will be to the Chief Justice’s opinion.” (*Ibid.*)

recent past were forbidden topics for the imaginations of authors of fiction.” (*Guglielmi, supra*, 25 Cal.3d at p. 869.) Indeed, “prominence invites creative comment.” (*Ibid.*)

Turning to the specific question of right of publicity claims, the Court held:

Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person’s identity. Moreover, the creation of historical novels and other works inspired by actual events and people would be off limits to the fictional author. An important avenue of self-expression would be blocked and the marketplace of ideas would be diminished.

(*Id.* at p. 872, fns. omitted.)

In the years since *Guglielmi*, courts have continued protecting motion pictures and similar expressive works from right of publicity claims. In *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 320-321, a noncelebrity sued the makers of a motion picture called *The Sandlot*. He claimed the creators misappropriated his likeness in a character, similar in many ways to the plaintiff as a young boy, within a coming-of-age story about young boys on a sandlot baseball team in the San Fernando Valley. (*Ibid.*) Observing the importance of motion pictures as a medium for protected expression, the Court of Appeal held that the First Amendment barred the claim because California’s right of publicity law “was never intended to apply to works of pure fiction.” (*Id.* at

p. 322; see *id.* at p. 325 [“Because respondents were creating a fictionalized artistic work, their endeavor is constitutionally protected”].)

Courts have protected motion pictures and similar expressive works whether the plaintiff’s portrayal was documentary, biographical, or fictional—or any combination of these genres. (See *Guglielmi, supra*, 25 Cal.3d at p. 868 [“[N]o distinction may be drawn in this context between fictional and factual accounts of Valentino’s life. Respondents’ election of the former as the mode for their views does not diminish the constitutional protection afforded speech.”].) In *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 540-541, 546, the Court of Appeal held that a legendary Malibu surfer could not sue the makers of a documentary about the surfing life-style that included film footage of the plaintiff. In *Daly v. Viacom, Inc.* (N.D.Cal. 2002) 238 F.Supp.2d 1118, 1123, the plaintiff appeared in the reality TV show “Bands on the Run,” and sued over airing of footage showing her in a compromising position. The court held that “[u]nder the First Amendment, a cause of action for appropriation of another’s ‘name and likeness may not be maintained’ against ‘expressive works, whether factual or fictional.’” (*Ibid*; see also *Cher v. Forum Intern., Ltd.* (9th Cir. 1982) 692 F.2d 634, 638 [under California law, in a right of publicity claim arising from a magazine article, the court held the right of publicity must not be permitted to outweigh the value of free expression, or else commentaries on prominent people would be the

subject of censorship in the guise of protecting the value of the person's persona].)<sup>2</sup>

Most recently, in *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891 (*Sarver*), the Ninth Circuit reaffirmed the strong First Amendment protection for motion pictures and similar expressive works against right of publicity claims. Plaintiff Jeffrey Sarver brought a right of publicity claim against the creators of a critically-acclaimed motion picture called *The Hurt Locker*, based on a journalist's coverage of Sarver's experiences as a United States Army sergeant in Iraq. (*Id.* at p. 891.) The Ninth Circuit held that "California's right of publicity law clearly restricts speech based upon its content," and therefore is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." (*Id.* at pp. 903-904.) The court reasoned that a state's interest is only

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<sup>2</sup> Other jurisdictions also afford broad First Amendment protection against right of publicity claims for motion pictures and similar expressive works. (See, e.g., *Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 440 (*Matthews*) [whether viewed as historical or fictional work, novel telling plaintiff's life story as corrupt cop merited First Amendment protection against right of publicity claim]; *Meeropol v. Nizer* (2d Cir. 1977) 560 F.2d 1061, 1067 (*Meeropol*) [suit brought by heirs of Julius & Ethel Rosenberg against makers of book recounting Rosenberg trial, holding "[u]nauthorized biographical works are not subject to suits under [the right of publicity law] since they are viewed as legitimate dissemination of information on subjects of general interest"]; *Ruffin-Steinback v. dePasse* (E.D.Mich. 2000) 82 F.Supp.2d 723, 726, 730 (*Ruffin-Steinback*) [lawsuit brought by persons depicted in a docudrama about the Temptations barred because "the right of publicity does not extend to prohibit depictions of a person's life-story"].)

sufficiently compelling to survive strict scrutiny where the defendant's work "either appropriates the economic value of a performance or persona or seeks to capitalize off a celebrity's image in commercial advertisements." (*Id.* at p. 905.) *The Hurt Locker* did neither. Therefore, "*The Hurt Locker* is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." (*Ibid.*)

In reaching its conclusion, the Ninth Circuit cited the *Guglielmi* opinion, noting that *Guglielmi* expresses a strong preference for First Amendment protection from right of publicity claims for motion pictures that tell the stories of real people, and therefore "it is not clear that California would extend its right of publicity to Sarver's situation." (See *Sarver*, *supra*, 813 F.3d at p. 905, fn. 9.) It is this First Amendment protection that has allowed filmmakers to create popular motion pictures about or inspired by real people and events, free from censorious interference by their subjects, such as "Primary Colors" (Bill Clinton's first presidential campaign), "The Social Network" (Mark Zuckerberg and the founding of Facebook), "The Devil Wears Prada" (Anna Wintour, editor of *Vogue*), and "Citizen Kane" (William Randolph Hearst).

**B. In contexts outside motion pictures and similar expressive works, the transformative use test was adopted to help reconcile right of publicity claims with First Amendment rights.**

Long after establishing broad protection for the creators of motion pictures in *Guglielmi*, the California Supreme Court, in a different context involving a mass-produced consumer product and a right of publicity claim, adopted the transformative use test. *Comedy III, supra*, 25 Cal.4th at pp. 391, 404 involved T-shirts emblazoned with extremely realistic portraits of the faces of The Three Stooges. The owner of the rights to the Three Stooges filed suit against the artist who created the shirts, alleging that he had improperly exploited the publicity value of the former stars. (*Id.* at pp. 393-394.) T-shirts are not a traditional medium of First Amendment speech, but under the right circumstances, they are imbued with expressive qualities. The Court designed the transformative use test to expand First Amendment protection against right of publicity claims to this type of mass-produced consumer product that included an expressive element. (See *id.* at pp. 404-407; 5 McCarthy on Trademarks and Unfair Competition (4th ed. 2016) False Endorsement and the Right of Publicity, § 28:40.50 [the Court created transformative use test “for visual artistic images” challenged in right of publicity claims]; Bunker & Calvert, *The Jurisprudence of Transformation: Intellectual incoherence and doctrinal murkiness twenty years after Campbell v. Acuff-Rose Music* (2014) 12 Duke L. & Tech. Rev. 92, 110 [Court

“rejected the extant approaches” and created transformative use test for “charcoal drawing reproduced on t-shirts”]; Volokh, *Freedom of Speech and the Right of Publicity* (2003) 40 Houst. L.Rev. 903, 915-916 [Court developed transformative use test to assess “‘conventional’ celebrity memorabilia”].)

Under the transformative use test, an artist may prevail on a First Amendment defense to a right of publicity claim if the work “contains significant transformative elements” or the work’s value “does not derive primarily from the celebrity’s fame.” (*Comedy III, supra*, 25 Cal.4th at p. 407; see *id.* at p. 391 [“whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation”].)

In *Comedy III*, the Court provided several formulations of the test. (*Comedy III, supra*, 25 Cal.4th at pp. 404-407.) Under any given formulation, a court must decide whether, on the one hand, the plaintiff’s likeness is used as the raw material for someone else’s creative expression, or on the other hand, whether the defendant is simply merchandising the plaintiff’s image.<sup>3</sup> (See *Comedy III*, at pp. 404-407.) Much of *Comedy III* suggests that the transformative use test should consider whether the defendant’s work *as a whole* is transformative, as opposed to whether the depiction of the plaintiff within that work is itself significantly transformed. (See *id.* at pp. 391 [“whether *the work* in question adds significant creative

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<sup>3</sup> The transformative use test also denies First Amendment protection where the defendant’s work uses the plaintiff’s likeness to misleadingly suggest the plaintiff endorses some other product (see *Comedy III, supra*, 25 Cal.4th at p. 395), a scenario not generally implicated by motion pictures or other similar works.



elements” (emphasis added)], 406 [“whether the celebrity likeness is one of the ‘raw materials’ from which *an original work is synthesized*, or whether the depiction or imitation of the celebrity is the very sum and substance *of the work in question*” (emphasis added)], 407 [“does the marketability and economic value of the *challenged work* derive primarily from the fame of the celebrity depicted”].)

Notably, the *Comedy III* Court did not suggest that the transformative use test should be used in the context of motion pictures and similar expressive works. On the contrary, the *Comedy III* Court in 2001 reaffirmed the vitality of its *Guglielmi* decision more than two decades earlier, which had afforded strong First Amendment protection to motion pictures, and offered its own further caution that “the very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity’s meaning.” (*Comedy III, supra*, 25 Cal.4th at p. 397.)

The California Supreme Court next applied the transformative use test in *Winter v. DC Comics* (2003) 30 Cal.4th 881, 885 (*Winter*), albeit without addressing, as a threshold matter, the basis for applying that test to a comic book, a more expressive work than the T-shirts bearing celebrity portraits addressed in *Comedy III*. *Winter* concerned comic books and characters named Johnny and Edgar Autumn that evoked real-life musician brothers Johnny and Edgar Winter. (*Id.* at pp. 885-886.) As it did in *Comedy*

*III*, the Court indicated that the transformative use test should focus on whether the work as a whole is transformative. (*Id.* at pp. 885, 888, 890 [the comic books were transformative because they “contain significant expressive content other than plaintiffs’ mere likeness”].)

A part of *Winter*’s analysis dwelled on comparing the plaintiffs to their depiction within the work, i.e., whether the plaintiffs’ likeness itself was significantly transformed. (See *Winter, supra*, 30 Cal.4th at p. 890 [noting “the books do not depict plaintiffs literally”].) And, among the most salient facts about the comic book drawings of the Autumn brothers discussed in the opinion was that they were “distorted” into “half-human and half-worm” forms. (*Ibid.*) The *Winter* Court found that the defendant’s comic book was sufficiently transformative because it used the plaintiffs’ likenesses in a highly fictionalized and unrealistic form. (See *id.* at pp. 885, 887-888, 890.) But *Winter* did not suggest that *only* works with such dramatically altered uses of a plaintiff’s likeness would retain First Amendment protection, or that realistic portrayals of real people in such creative works would lose First Amendment protection.

Nor did *Winter* suggest it was overturning *Guglielmi* or the constitutional protections long afforded motion pictures and similar expressive works. To the contrary, in the process of applying the transformative use test to the fantastical comic book characters at issue in *Winter*, the Court *reaffirmed* the vitality of *Guglielmi*, returning to the theme that a person’s ““prominence invites creative comment” ’ ” and works telling stories about real people

play an important role in society. (*Winter, supra*, 30 Cal.4th at p. 885, quoting *Guglielmi, supra*, 25 Cal.3d at p. 869.) And, unlike *Comedy III*, in which the Court held that a T-shirt printed with a celebrity portrait did *not* merit First Amendment protection, in *Winter*, the Court held that a comic book that told a story using characters inspired by real people *did* merit First Amendment protection. (Compare *Comedy III, supra*, 25 Cal.4th at p. 391 with *Winter, supra*, 30 Cal.4th at pp. 885, 891-892.) Because the fantastical and obviously transformative depiction of the plaintiffs in *Winter* clearly satisfied the transformative use test, the Court did not need to consider whether there were grounds other than the transformative use test on which the work warranted full First Amendment protection.

In sum, the Supreme Court's analysis under the transformative use test in *Winter* was consistent with its holding in *Guglielmi* that motion pictures and similar expressive works receive essentially categorical protection by the First Amendment. Applying the transformative use test does not alter that result.

**C. In the video game context, some courts have applied a narrow version of the transformative use test that does not look at the work as a whole, and instead only provides First Amendment protection if the plaintiff's depiction is sufficiently transformed.**

Several courts have applied a *narrow* version of the transformative use test to video games that focuses the First

Amendment question entirely on whether the plaintiff's depiction within the work is sufficiently transformed. Specifically, courts in these video game cases have distinguished between characters or avatars that are fanciful or far removed from their source, and avatars that strive to be realistic representations of their inspirations. Most appellate courts deciding these cases have held that only the fanciful avatars are protected from right of publicity claims while the realistically portrayed ones are not. While the issue of whether this narrow interpretation of the transformative use test is proper in video game right of publicity cases does not directly impact upon right of publicity cases involving motion pictures or similar expressive works, the MPAA addresses it because the court's discussion of this particular issue may inflict particular and profound constitutional and other harm on filmmakers, screenwriters, and similar creators.

Among the several courts that have applied a narrow version of the transformative use test in the video game context that focused on whether or not the actual likeness of plaintiff was literally transformed is *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1022 (*No Doubt*). The Court of Appeal held that a video game's use of avatars resembling singers in the rock band No Doubt was not a First Amendment protected transformative use because the game did "not transform the images of No Doubt's band members into anything more than literal, fungible reproductions of their likeness." The avatars had been "painstakingly designed to mimic [the singers'] likenesses," and indeed "No Doubt posed for motion-capture photography to enable

Activision to reproduce their likenesses, movements, and sounds with precision.” (*Id.* at p. 1033.) The avatars “remain[e]d at all times immutable images of the real celebrity musicians, in stark contrast to the ‘fanciful, creative characters’ in *Winter* and *Kirby* [*v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47 (*Kirby*)].” (*Ibid*; see also *Davis v. Electronic Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172, 1178 [professional football simulation video game with avatar that “replicates players’ physical characteristics and allows users to manipulate them in the performance of the same activity for which they are known in real life” was not a protected transformative use of likeness of plaintiff professional football player]; *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (9th Cir. 2013) 724 F.3d 1268, 1276, 1279 (*Keller*) [college football simulation video game with avatar that replicated physical characteristics of plaintiff for purpose of playing realistic simulation of college football was not a protected transformative use]; *Hart v. Electronic Arts, Inc.* (3d Cir. 2013) 717 F.3d 141, 169 (*Hart*) [same, reasoning “[d]ecisions applying the Transformative Use test invariably look to how the *celebrity’s identity* is used in or is altered by other aspects of a work”].)

One court that applied this narrow version of the transformative test and reached a different result is *Kirby*. There, the Court of Appeal held that a video game made a First Amendment-protected transformative use of the likeness of the plaintiff, the lead singer of a 1990s retro-funk-dance band called Deee-Lite. The video game’s main character shared a similar style and fashion sense with the plaintiff, and her name appeared to be

eponymous with the plaintiff's signature catch-phrase, but the character was conceived as a 25th century reporter dispatched to investigate an invasion of dance-loving aliens. (*Kirby, supra*, 144 Cal.App.4th at pp. 50-53, 59, 61.) Because the plaintiff was sufficiently transformed, the court concluded the game maker was entitled to First Amendment protection.

The narrow version of the transformative use test, which focuses primarily on whether the plaintiff's likeness—rather than the work as a whole—is transformative, has drawn criticism, including by some judges. Dissenting in *Keller*, Judge Thomas argued “[t]he salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered.” (*Keller, supra*, 724 F.3d at p. 1285 [dis. opn. of Thomas, J.]; see also *Hart, supra*, 717 F.3d at p. 171 [dis. opn. of Ambro, J.] [“To determine whether an individual’s identity has been ‘transformed’ for purposes of the Transformative Use Test, I believe it is necessary to review the likeness in the context of the work in its entirety, rather than focusing only on the individual’s likeness”].) Several scholars agree. (See, e.g., Conrad, *A New First Amendment Goal Line Defense—Stopping the Right of Publicity Offense* (2014) 40 Ohio N.U. L.Rev. 743, 744 [“What began as a novel subset of traditional property rights has led courts and legislatures to create a property-based right of publicity jurisprudence that goes beyond its original goals and encroaches on the traditional First Amendment domain of protection of artistic and creative rights”],

745 [criticizing *Keller* and *Hart* as “case[s] of sympathetic parties making bad law”].)

Outside the video game context, courts that have extended the reach of the transformative use test have hewn more closely to an approach that focuses on the work as a whole. (See, e.g., *Ross v. Roberts* (2013) 222 Cal.App.4th 677, 687-688 (*Ross*) [rap musician who created a celebrity identity for himself inspired by, and adopting the name of, a cocaine kingpin turned rapper raised valid transformative use defense because he “was not simply an imposter seeking to profit solely off the name and reputation of Rick Ross. Rather, he made music out of fictional tales of dealing drugs and other exploits—some of which related to plaintiff.”].)<sup>4</sup>

EA argues in its briefs that if the transformative test is to apply at all, the version of the transformative use test that focuses on the *Madden NFL* video game at issue “as a whole” should apply here. (AOB 23-36.)

Respondent Brown, on the other hand, argues that *Madden NFL* should not be considered transformative because it “promises to deliver to its users Jim Brown doing what he is best known for,

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<sup>4</sup> The Ninth Circuit also applied a narrow formulation of the transformative use test that focused on the plaintiff’s likeness to assess a Hallmark greeting card that depicted reality star and socialite Paris Hilton in a setting similar to a TV show in which she appeared, using her signature catchphrase “‘that’s hot.’” (See *Hilton v. Hallmark Cards* (9th Cir. 2009) 599 F.3d 894, 899, 911.) Even in that context, however, the court questioned “whether the First Amendment furnishes a defense to misappropriation of publicity that is broader than the transformative use or public interest defenses.” (*Id.* at p. 909, fn. 11.)

playing football.” (RB 27.) Under this rule advanced by Brown, his image has not been transformed, and EA is liable for violating his right of publicity.

Whichever view the court adopts, the MPAA urges the court not to issue an opinion that even remotely hints that the transformative use test, and in particular not the narrow version which has been applied in video game cases, has any application in the context of right of publicity cases directed at motion pictures and similar expressive works.

**II. THE NARROW TRANSFORMATIVE USE TEST ADOPTED IN SOME VIDEO GAME CASES SHOULD NOT BE EXPANDED, EXPRESSLY OR IMPLIEDLY, TO DISPUTES INVOLVING MOTION PICTURES OR SIMILAR EXPRESSIVE WORKS THAT TELL STORIES BECAUSE DOING SO WOULD CHILL CREATIVE EXPRESSION.**

The narrow version of the transformative use test described above and which some courts have applied to video games—namely, that any work that portrays a plaintiff realistically is not sufficiently transformative to merit First Amendment protection (regardless of whether the defendant’s work as a whole is transformative)—is very seriously at odds with the broad First Amendment protection the California Supreme Court established in *Guglielmi* for motion pictures and similar expressive works.



In *Guglielmi*, the Supreme Court expressly addressed a right of publicity claim in the context of *motion pictures* and held: “No author should be forced into creating mythological worlds or characters wholly divorced from reality.” (*Guglielmi, supra*, 25 Cal.3d at p. 869.)

In stark contrast, in *No Doubt*, the Court of Appeal found that in the context of a *video game* the defendants’ work lacked First Amendment protection precisely because the avatars of the plaintiffs were not “‘fanciful, creative characters,’” but rather “exact depictions of No Doubt’s members doing exactly what they do as celebrities.” (*No Doubt, supra*, 192 Cal.App.4th at p. 1034.) And in *Kirby*, the Court of Appeal found that the defendants’ *video game* retained First Amendment protection only because the avatar of the plaintiff was depicted with an altered appearance in a mythological world—as a 25th Century reporter investigating dance-loving aliens. (*Kirby, supra*, 144 Cal.App.4th at p. 59.)

If the narrow version of the transformative use test articulated in *No Doubt* and *Kirby* were ever to be applied to motion pictures and similar expressive works, authors and producers of those works could avoid right of publicity claims only by creating mythological worlds or characters wholly divorced from reality—exactly what the Supreme Court said should never come to pass. (*Guglielmi, supra*, 25 Cal.3d at pp. 869 [“No author should be forced into creating mythological worlds or characters wholly divorced from reality”], 872 [“Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression” (fns. omitted)].)

Earlier this year the *Sarver* court, citing *Guglielmi*, suggested that right of publicity claims could *never* be asserted against films that tell stories about real people,<sup>5</sup> and held that the right of publicity law was an unconstitutional content-based restriction on speech that failed the strict scrutiny test. (See *Sarver*, *supra*, 813 F.3d at pp. 904-905 & fn. 6.) This analysis in *Sarver* is persuasive. Although the court need not decide the issue here, the transformative use test, and certainly its narrow formulation, should never be applied in the context of motion pictures and similar expressive works. To do so would undo the protections *Guglielmi* squarely held films and similar expressive works should receive. In the context of motion pictures and similar works, the First Amendment is designed to “preserv[e] an uninhibited marketplace of ideas and foster[] individual rights of self-expression. [Citation.] A right of publicity has the potential to frustrate these purposes, as it can lead to suppression of individual expression and censorship of the public display of ideas.” (*Ross*, *supra*, 222 Cal.App.4th at p. 685.)

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<sup>5</sup> Other jurisdictions have held the right of publicity does not extend to works that tell a person’s life story. (See, e.g., *Matthews*, *supra*, 15 F.3d at p. 440 [“ ‘[A] public figure has no exclusive rights to his or her own life story’ ”]; *Meeropol*, *supra*, 560 F.2d at p. 1067 [“[u]nauthorized biographical works are not subject to suits under [the right of publicity law] since they are viewed as legitimate dissemination of information on subjects of general interest”]; *Ruffin-Steinback*, *supra*, 82 F.Supp.2d at pp. 726, 730 [“the right of publicity does not extend to prohibit depictions of a person’s life-story”].)

In deciding this case, this court need not reconcile the perceived conflict between the First Amendment rights and the right of publicity that exists in certain contexts, but it should be careful to avoid needlessly deepening them, because “[t]he stakes are not small.” (*Keller, supra*, 724 F.3d at p. 1290 [dis. opn. of Thomas, J.]) The problem with the narrow version of the transformative use test applied to some video games is that, if taken to its logical extreme, “all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This [improper approach] jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. Absent the use of actual footage, the motion picture *Forrest Gump* might as well be just a box of chocolates.” (*Ibid.*)

Moreover, the very things found by some courts that make certain video game avatars nontransformative—a realistic depiction of the plaintiff doing the things for which he or she is famous—are sometimes essential to a motion picture or similar expressive work that tells a story incorporating that person. This court, therefore, should use care not to articulate a test that has evolved in the context of video games so broadly that it may later be applied to motion pictures and similar works, thus stripping them of protections that the Supreme Court has held are necessary to free expression.

Cases that have lessened First Amendment protection for video games on the ground that the plaintiff's likeness was being used in a simulation-type video game, where the player could pretend to "be" the plaintiff doing what he or she is famous for, should be distinguished from cases involving motion pictures and similar expressive works. Motion pictures and similar expressive works use the likenesses or other attributes of real people and events for storytelling purposes. In doing so, filmmakers and other authors make artistic decisions about whether to portray their subjects realistically or unrealistically, and whether with a critical or reverent tone. Even when they aim to portray subjects as realistically as possible, filmmakers and other authors make creative choices about which scenes from the person's life to include or omit, and in what order. Thus, realism in motion pictures and similar expressive works is not commercially exploitative but rather artistically expressive. Seeing persons portrayed realistically, whether as the primary subject of a motion picture or simply as part of the ensemble in a story about other persons or events, whether fictional or non-fictional, allows viewers to understand the motion picture in the context of history, culture, or personal experience. Indeed, it is hard to imagine how one could create a biographical motion picture that did *not* portray its subject realistically. Yet the rule advocated by Brown and adopted by some courts in some video game cases, if applied to motion pictures, would find that realistic biographical pictures are *not* protected by the First Amendment against right of publicity claims, thus chilling the ability of authors to tell—and audiences to experience—those stories, and enabling

censorship by individuals actually seeking to stifle critical portrayals in the guise of protecting the commercial value of their identity.

This case illustrates why the court should be careful not to suggest that the narrow transformative use test that has evolved for video games has any role in the context of motion pictures and similar expressive works. The trial court found that *Madden NFL* is not sufficiently transformative to merit First Amendment protection because the avatar’s “characteristics are substantively identical to that of Brown—the avatar has the same position on the field, number of years in the NFL, height, weight, age, home state, skill level, statistics and skin color.” (2 AA 535.) The same test could not be applied to a motion picture about Brown’s life because that film very likely (if not necessarily) would include precisely those realistic elements of his life. Indeed, actors have won awards for the realistic manner in which they embody a real person on screen, such as Michelle Williams’ performance as the iconic Marilyn Monroe in *My Week with Marilyn*, which received an Oscar nomination and a Golden Globe Award.<sup>6</sup> In motion pictures, a realistic portrayal of another person is part of the craft that enhances the creative power of the work.

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<sup>6</sup> (See *My Week with Marilyn* <<http://myweekwithmarilynmovie.com/>> [as of Mar. 9, 2016] [showing trailers of realistic performance of Monroe]; *My Week with Marilyn*, Awards <[http://www.imdb.com/title/tt1655420/awards?ref\\_=tt\\_awd](http://www.imdb.com/title/tt1655420/awards?ref_=tt_awd)> [as of Mar. 9, 2016].)

Similarly, the trial court found that *Madden NFL* failed the transformative use test because “[t]he action takes place on a football field, not in space or some altered environment.” (2 AA 535.) Yet, a motion picture about Brown’s rise to fame would almost necessarily portray Brown playing football on a football field—indeed on the very fields on which he earned his renown. (See, e.g., RB 12 [Brown’s respondent’s brief explains Brown “is most readily identifiable as the all-pro and record-breaking running back for the Cleveland Browns from 1957 to 1965”].) Similarly, realistic portrayals of accomplished professional and amateur athletes and their teams doing what they were known for have been essential to beloved sports motion pictures including “42” (Jackie Robinson), “Hoosiers” (a high school football team winning the 1954 Indiana state championship), “Chariots of Fire” (British track athletes competing in the 1924 Olympics), and the television series, “American Crime Story: The People v. OJ Simpson.”

## CONCLUSION

Filmmakers should not be prevented from telling stories about or inspired by politicians, celebrities, athletes or other real people—realistically—by right of publicity suits seeking censorship or financial compensation. Nor should the public be denied the opportunity to experience these works. Therefore, while the MPAA

agrees with EA that the trial court's order should be reversed, regardless of whether this court agrees with that position, it should not issue a decision that applies to motion pictures and similar expressive works or suggest that such works lose First Amendment protection from right of publicity claims if they tell realistic stories about or inspired by real people and events.

April 18, 2016

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**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, rule 8.204(c)(1).)**

The text of this brief consists of 6,694 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: April 18, 2016

  
\_\_\_\_\_  
Mark A. Kressel



## **PROOF OF SERVICE**

### **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On April 18, 2016, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF ELECTRONIC ARTS INC.** on the interested parties in this action as follows:

### **SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 18, 2016, at Encino, California.

  
\_\_\_\_\_  
Raeann Diamond

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**Court of Appeal No. B262873**

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