

No. 11-3750

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

RYAN HART

Plaintiff/Appellant,

v.

ELECTRONIC ARTS, INC.,

Defendant/Appellee.

On Appeal from the United States District Court
for the District of New Jersey
No. 3:09-CV-05990-FLW-LHG
The Honorable Freda L. Wolfson, District Judge

***AMICUS CURIAE* BRIEF OF THE MOTION PICTURE ASSOCIATION OF
AMERICA, INC. IN SUPPORT OF DEFENDANT AND APPELLEE
ELECTRONIC ARTS, INC.'S PETITION FOR REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *amicus curiae* Motion Picture Association of America, Inc. (“MPAA”) discloses the following:

1. MPAA is a non-profit trade association;
2. MPAA does not have any parent companies; and
3. There are no publicly held companies that own 10 percent or more of the MPAA.

RESPECTFULLY SUBMITTED this 6th day of June, 2013.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae Motion Picture Association of America, Inc. (“MPAA”) is a trade association that serves as an advocate for the domestic motion picture, home video and television industries;² its members and their affiliates include the largest producers and distributors of motion pictures and television programs in the United States.³ The MPAA’s core mission is to advance the business and art of filmmaking, and to champion the creative and artistic freedoms of filmmakers. As a result, the MPAA and its members have a significant interest in the important First Amendment issues that this case presents, concerning the use of characters based on or inspired by real people in expressive works such as documentaries, docudramas, biopics, and works of fiction.

The use of characters and stories adapted from real life – and based on the experiences and observations of artists and writers – is the life-blood of much

¹ Pursuant to F.R.A.P. Rule 29(a), the MPAA represents that Appellant and Appellee have consented to the filing of this *amicus curiae* brief.

² Pursuant to F.R.A.P. Rule 29(c)(5), the MPAA states that no counsel for a party has authored this brief in whole or in part; that no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and that no person or entity, other than the MPAA, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

³ The MPAA members are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

creative literary endeavor, and the inspiration for many motion pictures.⁴ Since the “transformative use” test adopted by the panel majority might be misapplied to right of publicity claims against all types of expressive works, and not just the sports videogames directly at issue here, the majority’s restrictive interpretation of that test could have a significant, if perhaps unintended, chilling effect on the free speech rights of motion picture writers and producers, as well as on the creators of other traditionally protected works. Accordingly, the MPAA respectfully urges the court to rehear this matter *en banc*, to ensure that the test ultimately delineated or adopted by this Circuit in right of publicity cases is sufficiently broad to give expressive works such as motion pictures the breathing room mandated by the Constitution, and to clarify that the test is not designed to constrain the traditionally protected creative output of filmmakers.

ARGUMENT

I. Overview

In concluding that the First Amendment does not shield Electronic Arts’ *NCAA Football* videogames from Ryan Hart’s right of publicity claim, the panel majority adopted an unduly narrow interpretation of the California Supreme

⁴ In the last dozen years alone, the following Academy Award nominees for and winners of the “Best Picture” Award have been based on or inspired by true life events and individuals: *Erin Brockovich*; *A Beautiful Mind*; *Seabiscuit*; *Ray*; *The Blind Side*; *Milk*; *Frost/Nixon*; *The Queen*; *Capote*; *Munich*; *127 Hours*; *The Social Network*; *The King’s Speech*; *Zero Dark Thirty*; and *Argo*.

Court's "transformative use" test, disregarding whether the videogames *as a whole* contain sufficient creative and expressive elements to make them "transformative" and therefore worthy of constitutional protection against right of publicity claims, and focusing instead on whether the singular "identity" of Appellant himself, as used in the challenged works, was in some manner "transformed."

That improperly restrictive inquiry has not heretofore been applied to more traditional expressive works like books and motion pictures; it is contrary to the California Supreme Court's articulation of the "transformative use" test in the first instance; and it works in opposition to the expansive constitutional protections routinely granted to core expressive works.

As pointed out forcefully in the dissent, the majority's crabbed formulation of the "transformative use" test creates an irreconcilable conflict with decades of constitutional jurisprudence in which the inclusion of real or fictionalized characters in books, plays and motion pictures has unquestionably been found to be clearly within the First Amendment's protections.

Uncertainty is anathema to unfettered freedom of expression, and the MPAA accordingly believes that proper deference to First Amendment interests supports a categorical exemption for expressive works against claims based on the right of publicity, or at most requires only a minimal showing that the use of a person's identity in an expressive work is not "wholly unrelated" to the content of that

work. *See Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989). But if the “transformative use” test is now to be the law of this Circuit, then the parameters of that test should broadly include and credit the expressive content of *the entirety* of a challenged work. Such an expansive application of the “transformative use” test remains true to the original formulation of the test as conceived by the California Supreme Court. Conversely, the more restrictive interpretation advanced by the panel’s majority could threaten an entire genre of formerly protected expressive works, and turn long-standing First Amendment jurisprudence on its head.

II. This Court’s Narrow Application of the “Transformative Use” Test Conflicts with Prior Established First Amendment Precedent and with the California Supreme Court’s Formulation of the Test

After considering the various methods by which courts in other jurisdictions have attempted to balance free speech interests with the interests protected by the right of publicity, the majority settled on the test first articulated by the California Supreme Court in *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001): “whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Id.* at 391. The test was conceived as a way to “balance” the constitutional interests protected by the First Amendment against the property interests protected by the right of publicity. *Id.* Though originally borrowed from the concept of

transformation in the first element of the copyright fair use test, the “transformative use” test has since developed separately from fair use jurisprudence.

But while the test established by the *Comedy III* Court contemplated an examination of the transformative qualities of the work as a whole, the majority’s reformulation of the test limits the inquiry to whether the Appellant’s identity – consisting of his likeness and his biographical information – is *itself* sufficiently transformed in the challenged videogames. *Hart* at 51 (“It is the combination of these two parts . . . that must be sufficiently transformed.”).

Finding that the Appellant’s “identity” was indeed used in the games, the court then moved to the next step in its analysis, “considering the context within which the digital avatar exists – effectively looking at how Appellant’s identity is ‘incorporated into and transformed’ by [the *NCAA Football* games].” *Hart* at 53. Applying this iteration of the test, the majority found that the inclusion of Appellant’s identity – alongside the identities of scores of other players – in Appellee’s college football videogames, was *not* sufficiently “transformative” to merit First Amendment protection. *Id.*

The majority rejected the argument that other graphic and creative elements in the videogames which do not directly affect Appellant’s avatar should be given weight in the “transformative use” analysis: “[W]hile we recognize the creative energies necessary for crafting the various elements of *NCAA Football* that are not

tied directly to reality, we hold that they have no legal significance in our instant decision.” *Hart* at 60.⁵ Thus, the majority found that Appellee was liable for the unauthorized use of Hart’s non-transformed identity in the challenged videogame. *Id.* at 61.

Although the majority has fashioned its stringent test in the context of a sports videogame containing visually realistic digital avatars of athletes, it is unclear whether further application of the test will be limited to similar situations, or if it might instead, contrary to the majority’s stated intention, be applied to right of publicity challenges brought in this Circuit against other types of expressive works. That uncertainty alone will have a substantial chilling effect on any number of creative endeavors, especially motion pictures, which involve large investments of time, money, and effort.

Real people and their experiences are a recurrent source of creative inspiration for both factual and fictional works. In this regard, motion pictures carry on an age-old cultural and literary tradition. In many movies (as in books and other traditional works of art) a person’s identity may be depicted closely or even exactly, with that person – as a literal or fictionalized character – doing the

⁵ The majority also found that the interactive features of the challenged games, and the manner in which the avatars of the various college football players – including Appellant – could be changed and manipulated, did not serve to make them sufficiently transformative to withstand a right of publicity claim. *Hart* at 57.

same things the real-life person is known for doing. These uses – in biographies, documentaries, docudramas, biopics, and the like – rightly enjoy full constitutional protection, and are therefore immune from right of publicity or other misappropriation-based torts.⁶ Indeed, courts have regularly extended to fictional and semi-fictional works the same level of First Amendment protections historically accorded to factual depictions.⁷ See *Guglielmi*, 25 Cal.3d at 867-68 (“Thus, no 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.”).

⁶ See, e.g., *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860, 866 (1979) (unauthorized use of Rudolph Valentino’s name and likeness in fictional movie); *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.App.4th 318, 326 (1997) (fictional film inspired by screenwriter’s childhood experiences, including a character based on a member of his sandlot baseball team); *Tyne v. Time Warner Ent. Co., L.P.*, 901 So.2d 802 (Fla. 2005) (motion picture dramatizing the loss of a fishing vessel and crew); *Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994) (use of plaintiff’s “character, occupation, and the general outline of his career, with many incidents of his life”); *Meerpol v. Nizer*, 560 F.2d 1061, 1066-67 (2d Cir. 1977) (fictionalized account of Julius and Ethel Rosenberg trial); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (fictional account about an event in the life of Agatha Christie); *Seale v. Gramercy Pictures*, 949 F.Supp. 331, 337 (E.D. Pa. 1996) (dramatized film about the Black Panthers); *Rosemont Ent., Inc. v. McGraw-Hill Book Co.*, 85 Misc. 2d 583, 587, 380 N.Y.S.2d 839 (N.Y. Sup. 1975) (unauthorized biography of Howard Hughes).

⁷ See W.L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 405 (1960) “[T]here is no liability when the plaintiff’s character, occupation, and the general outline of his career, with many real incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one.” (citations omitted.)

The majority acknowledges the deference due to these core First Amendment expressive works, and asserts that they will remain shielded from right of publicity claims under its iteration of the transformative use test.⁸ But other than making that largely-unsupported assertion, the majority opinion offers no guiding principles to assist creators in distinguishing which expressive uses will be protected, and which will not. This is demonstrated most starkly by comparing the majority's conclusions here with those of the Sixth Circuit in *ETW v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) – a case which the majority cited with approval and on which it expressly relied. *Hart* at 40-41.

In *ETW*, the Sixth Circuit considered the use of Tiger Woods' quite literal likeness in a painting commemorating his 1997 championship win at the Masters Tournament in Augusta, Georgia. The *ETW* Court described the work at issue as follows:

“In the foreground of Rush's painting are three views of Woods in different poses. In the center, he is completing the swing of a golf club, and on each side he is crouching, lining up and/or observing the progress of a putt. To the left of Woods is his caddy, Mike "Fluff"

⁸ See *Hart* at 51: “[A]dopting the Test ensures that already-existing First Amendment protections in right of publicity cases apply to video games with the same force as to ‘biographies, documentaries, docudrama, and other expressive works depicting real-life figures.’”; *cf. id.* at 50, fn 35: “[B]y our reading the Transformative Use Test best comports with the language in Restatement (Third) of Unfair Competition § 47 cmt. c . . . we believe that the various examples listed in Comment C [*e.g.* novel, play or motion picture] all exemplify the sort of transformative uses that would generally pass the analysis set forth in *Comedy III*.”

Cowan, and to his right is his final round partner's caddy. Behind these figures is the Augusta National Clubhouse. In a blue background behind the clubhouse are likenesses of famous golfers of the past looking down on Woods. These include Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus. Behind them is the Masters leader board.”

332 F.3d at 918.

That is, the artwork captured a realistic likeness of Tiger Woods doing what he is renowned for doing – playing golf – in a setting in which he actually played – the 1997 Masters Tournament. Yet the Sixth Circuit determined that the painting did *not* expose the artist to Woods’ right of publicity claim, because the “work consists of a collage of images in addition to Woods’ image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods’ achievement in that event.” 332 F.3d at 938.

The majority cited *ETW* approvingly, and pointed to it as a case where although there was use of literal depictions of celebrities, there was an additional “transformative aspect to the work, thereby altering the meaning behind the use of the celebrity’s likeness.” *Hart* at 41. Alas, there was no explanation of what that altered meaning was, or how showing several realistic poses of Woods as he was at the Masters Tournament, along with literal depictions of past winners, was transformative, while having a digital representation of Appellant, along with representations of other collegiate football players, depicted in the settings in which they most famously played, was not.

The majority's conclusion that the digital avatars and the virtual world in which they existed in *NCAA Football* was not transformative was doubly confusing given its holding, in the same opinion about the same games, that displaying an *actual photograph* of the Appellant, playing in an actual Rutgers game, *was* protected as a transformative use because its inclusion in a montage of other pictures "imbues the image with additional meaning beyond simply being a representation of the player." *Hart* at 61.

It is difficult to discern a principled distinction for the difference in constitutional protections afforded to the two types of use of the Appellant's "identity" in the challenged videogames, as well as between the unauthorized use of Tiger Woods' image in artwork depicting and commemorating a golf tournament on the one hand, and the unauthorized use of Appellant's identity in a videogame depicting and celebrating college football games on the other.

The creation of a digital avatar of Appellant, and its placement into a highly expressive and interactive play environment, is no less creative or "transformative" than placing a photograph of Appellant in a montage, or placing a realistic rendering of Tiger Woods on a commemorative poster. It is also arguably similar to incorporating a character based on or inspired by a real person into the realistic setting of a documentary or docudrama. Accordingly, a myopic formulation of the "transformative use" test as advanced by the majority, focusing only on how an

individual's "identity" – *i.e.*, his or her likeness and biography – is transformed, without regard to the other creative or expressive elements contained in the work that are not directly a part of that identity, threatens to erode constitutional protections previously routinely granted to expressive works.⁹

One of the reasons why the majority's opinion appears to be so out of sync with the existing body of First Amendment law is its misapprehension of the California Supreme Court's original formulation of the "transformative use" test in *Comedy III*. In that case, the entity holding the rights to the deceased Three Stooges' names and likenesses sued Gary Saderup, an artist, for selling t-shirts and posters bearing the image of his realistic charcoal drawing of the Stooges. The Court rejected the lower court's determination that the challenged uses were not shielded by the First Amendment because they were not original works of art and were precisely the types of "products, goods and merchandise" called out by California's post-mortem right of publicity statute,¹⁰ ruling instead that

⁹ See, e.g., McCarthy, Thomas J., *2 Rights of Publicity & Privacy* §8:64 (2d ed.): "If the law mandated that the permission of every living person and the descendants of every deceased person must be obtained to include mention of them in news and stories, both in documentary and docudrama telling, then they would have the right to refuse permission unless the story was told 'their way.' This would mean that those who are participants in news and history could censor and write the story and their descendants could do the same. This would be anathema to the core concept of free speech and a free press."

¹⁰ Former Cal. Civil Code § 990 (now Cal. Civil Code §3344.1).

“reproductions are equally entitled to First Amendment protection,” *Comedy III*, 25 Cal.4th at 391, and that “the fact that Saderup’s art appears in large part on a less conventional avenue of communications, T-shirts, [does not] result in reduced First Amendment protection” *id.* at 399. That is, the Court confirmed that the First Amendment reaches non-traditional expressive works, and did not attempt to unconstitutionally diminish the protections already existing for traditional First Amendment works.

In that context, the Court articulated its newly fashioned “transformative use” test as follows:

Another way of stating the inquiry is whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.

Id. at 406.¹¹

That is, the test contemplated a review of the *entirety* of defendant’s expression, including all of its creative contributions, and not just the image or identity of the plaintiff contained in the work. That holistic approach is revealed

¹¹ It is helpful to remember that although the *Comedy III* court did not limit the reach of its test to visual portraits, it was conceived in the context of reviewing a single, static, graphic image, with the Court noting that its newly articulated test would “protect the right-of-publicity holder’s core interest in monopolizing *the merchandising of celebrity images . . .*” *Id.* at 405, fn. 10 (emphasis added).

by the Court’s distinction between the Three Stooges portrait at issue and the works of Andy Warhol, which use literal, photographic, images of celebrities, but add color and context:

[W]e do not hold that all reproductions of celebrity portraits are unprotected by the First Amendment. The silkscreens of Andy Warhol, for example, have as their subjects the images of such celebrities as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.

Id. at 408-09.¹²

As the Court explained, “[t]he inquiry is in a sense more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work.” *Id.* at 408. Thus, if a challenged First Amendment work contains more than a trivial amount of defendant’s own creative and expressive contribution – so that the work *as a whole* is something more than a simple literal depiction of the claimant’s “identity,” then the work should be shielded from any claim based on the right of publicity. *Id.*¹³

¹² The panel majority rejected the “predominant use” test proposed by the Appellant for the reason that “it is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics.” *Hart* at 25. The same could be said for the transformative use test in general and for this court’s current formulation in particular.

¹³ See also *Winter v. DC Comics*, 30 Cal.4th 881, 890 (2003) (finding the characters are but part of a “larger story, which is itself quite expressive”), *id.* at

First Amendment jurisprudence has consistently looked to the entirety of a publication to determine the extent of applicable constitutional protection.¹⁴ There is no principled basis on which to constrain analysis of a work – as the majority did here – to a narrower focus to determine its constitutional protection from right of publicity claims.

Litigation against the writers and producers of motion pictures, based on the alleged violation of the right of publicity of an individual depicted in the picture, undermines this creative enterprise. Indeed, when the constitutional protections accorded to their creative endeavors turn on how closely their characters or plots hew to the characteristics and life stories of potential plaintiffs, creators of documentaries, biographies and docudramas will necessarily be impacted and likely be chilled in the nature of their expression. This is inconsistent with the test fashioned by the California Supreme Court and the existing body of First Amendment precedent.

891 (“What matters in whether *the work* is transformative . . .”), and *id.* (“Here . . . *the comic books* are transformative and entitled to First Amendment protection”) (emphasis added). *And see Kirby v. Sega of Am.*, 144 Cal. App. 4th at 61 (court must “discern if the *defendant’s work* contributes significantly distinctive and expressive content”) (emphasis added).

¹⁴ *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (paid editorial advertisements in newspaper are entitled to First Amendment protection); and *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1187 (9th Cir. 2001) (“[w]e must go beyond the altered photograph itself and examine the ‘totality of [defendant’s] presentation’”).

III. Conclusion

When striking a balance between the constitutional interests encompassed by the First Amendment, and the commercial rights protected by the right of publicity, substantial weight must be given to the freedom of expression, so that if the expressive work at issue contains creative contributions beyond the mere depiction of a claimant's identity, then that work should be immunized from a right of publicity claim. But by adopting an extremely constrained interpretation of the "transformative use" test, the majority opinion here has shifted the balance away from the First Amendment, and thereby threatens to undermine the solid foundation upon which expressive works can flourish without threat of liability. Accordingly, the MPAA respectfully urges the Court to reconsider the majority's opinion *en banc*, and to restore the proper constitutional balance between the First Amendment and the right of publicity.

RESPECTFULLY SUBMITTED this 6th day of June, 2013.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), the undersigned hereby certifies that she is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

This Petition complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

I further certify that the electronically filed brief and the hard copies of the brief are identical.

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CERTIFICATE OF VIRUS CHECK

I hereby certify that a virus check was performed on the electronically filed brief using Trend Micro Worry-Free Business Security Agent Software, version 8.0, and that no viruses were found.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2013, I caused the foregoing *Amicus* brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that I have caused ten copies of the foregoing *Amicus* brief to be delivered to the Court by Federal Express.

RESPECTFULLY SUBMITTED this 6th day of June, 2013.

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