

2d Civil No. B340401
(LASC Case No. 23STCV27581)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

LANCE HARA, p/k/a VICKY VOX,
Plaintiff-Respondent,

v.

NETFLIX, INC. et al.,
Defendants-Appellants.

Honorable Jon R. Takasugi, Judge of the Superior Court
Los Angeles Superior Court Case No. 23STCV27581

**APPLICATION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF; AMICUS CURIAE BRIEF OF
MOTION PICTURE ASSOCIATION, INC. IN
SUPPORT OF DEFENDANTS-APPELLANTS**

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TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES..... | 3 |
| APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF..... | 5 |
| AMICUS CURIAE BRIEF | 11 |
| INTRODUCTION..... | 11 |
| LEGAL ARGUMENT..... | 15 |
| I. Filmmakers and Television Producers Rely on Clearly Defined First Amendment Protections for Use of Individuals’ Likenesses in Artistic Works. | 15 |
| II. The Trial Court Erred in Its Assessment of Whether the Alleged Use of Plaintiff’s Likeness Was Expressive..... | 22 |
| III.Trailers Portraying Protected Artistic Works Should Be Subject to Similar Protection. | 29 |
| CONCLUSION..... | 33 |

TABLE OF AUTHORITIES

CASES

| | |
|---|-----------------------|
| <i>Comedy III Productions, Inc. v. Gary Saderup, Inc.</i> , 25 Cal. 4th 387 (2001) | 25 |
| <i>de Havilland v. FX Networks, LLC</i> , 21 Cal. App. 5th 845 (2d Dist. 2018) | 16, 20, 22 |
| <i>Dora v. Frontline Video, Inc.</i> , 15 Cal. App. 4th 536 (2d Dist. 1993) | 16, 26 |
| <i>E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.</i> , 547 F.3d 1095 (9th Cir. 2008) | 26 |
| <i>Frosch v. Grosset & Dunlap, Inc.</i> , 75 A.D.2d 768 (N.Y. App. Div. 1st Dep’t 1980) | 29 |
| <i>Good Government Group of Seal Beach, Inc. v. Superior Court</i> , 22 Cal. 3d 672 (1978) | 20 |
| <i>Guglielmi v. Spelling-Goldberg Productions</i> , 25 Cal. 3d 860 (1979) (en banc) | 16, 17, 19, 26, 30-31 |
| <i>Hara v. Netflix, Inc.</i> , 146 F.4th 872 (9th Cir. 2025) | 7, 14, 27, 32 |
| <i>Hara v. Netflix, Inc.</i> , No. 23-cv-3456, 2023 WL 12121289 (C.D. Cal. Oct. 26, 2023), <i>aff’d</i> , 146 F.4th 872 (9th Cir. 2025) | 14 |
| <i>Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston</i> , 515 U.S. 557 (1995) | 17 |
| <i>Louis Vuitton Malletier S.A. v. Warner Brothers Entertainment Inc.</i> , 868 F. Supp. 2d 172 (S.D.N.Y. 2012) | 26 |
| <i>Mattel, Inc. v. MCA Records, Inc.</i> , 296 F.3d 894 (9th Cir. 2002) | 21 |
| <i>Polydoras v. Twentieth Century Fox Film Corp.</i> , 67 Cal. App. 4th 318 (2d Dist. 1997) | 17 |
| <i>Punchbowl, Inc. v. AJ Press, LLC</i> , 90 F.4th 1022 (9th Cir. 2024) | 28 |

| | |
|---|----------------|
| <i>Rogers v. Grimaldi</i> , 875 F.2d 994 (2d Cir. 1989)..... | 14 |
| <i>Sarver v. Chartier</i> , 813 F.3d 891 (9th Cir. 2016) | 16, 20, 22 |
| <i>Stewart Surfboards, Inc. v. Disney Book Grp., LLC</i> , No. 10-cv- 2982, 2011 WL 12877019 (C.D. Cal. May 11, 2011) | 28 |
| <i>Stewart v. Rolling Stone LLC</i> , 181 Cal. App. 4th 664 (1st Dist. 2010)..... | 21 |
| <i>Twentieth Century Fox Television v. Empire Distribution, Inc.</i> , 875 F.3d 1192 (9th Cir. 2017) | 32 |
| <i>Washington Post Co. v. Keogh</i> , 365 F.2d 965 (D.C. Cir. 1966)..... | 20 |
| <i>Winter v. DC Comics</i> , 30 Cal. 4th 881 (2003) | 22, 24, 25, 30 |
| <i>Yankee Publishing Inc. v. News American Publishing Inc.</i> , 809 F. Supp. 267 (S.D.N.Y. 1992) | 28-29 |
| STATUTES | |
| Cal. Civ. Code § 3344..... | 13, 21 |
| OTHER AUTHORITIES | |
| Cal. Rules of Court, rule 8.200(c)(3)..... | 10 |
| 2 J. Thomas McCarthy & Roger E. Schechter, <i>Rights of Publicity and Privacy</i> § 8:64, Westlaw (2d ed. database updated May 2025) | 20 |

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF**

Pursuant to California Rules of Court, rule 8.200(c), Motion Picture Association, Inc. (MPA) requests permission to file the attached amicus curiae brief in support of Defendants-Appellants Netflix, Inc., Titmouse Inc., LOL Send, Inc., Gabe Liedman, Fremulon, LLC, Michael Schur, Universal Television LLC, Hazy Mills Productions, Inc., Sean Hayes, Todd Milliner, Ben Heins, 3 Arts Entertainment, LLC, David Miner, and Max Silvestri.

The MPA is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and supporting the creative ecosystem that

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brings entertainment and inspiration to audiences worldwide. The MPA’s member companies—Amazon Studios LLC, Netflix Studios, LLC,¹ Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC,² Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.—and their affiliates produce and distribute the vast majority of filmed entertainment in the United States through the theatrical and home entertainment markets. Indeed, the MPA’s members create thousands of film and television shows that entertain, educate, and inform the public.

The MPA often has appeared as an amicus curiae in cases involving claims that implicate the First Amendment rights of its members, including cases (like this one) in which the plaintiff is attempting to assert a claim based on allegations that their name, likeness, or persona was used in an expressive work without permission. For example, the MPA filed an amicus brief before the United States Court of Appeals for the Ninth Circuit in the federal proceedings brought by Plaintiff-Respondent, arguing that the Lanham Act must be interpreted to provide adequate First Amendment protections to the use of trademarks in creative works, and that this

¹ Defendant-Appellant Netflix, Inc. is the parent company of MPA member Netflix Studios, LLC.

² Defendant-Appellant Universal Television LLC is a corporate affiliate of MPA member Universal City Studios LLC.

protection extended to the alleged use of Plaintiff’s likeness in *Q-Force*. The Ninth Circuit agreed, holding that the First Amendment barred Plaintiff’s Lanham Act claims because the alleged use of Plaintiff’s likeness was “used not to designate a work’s source, but solely to perform some other expressive function.” *Hara v. Netflix, Inc.*, 146 F.4th 872, 879–82, 884 (9th Cir. 2025) (quoting *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 154 (2023)).

The creative works produced and distributed by MPA members and other creators across the country may depict or emulate real-life people for many reasons—such as to comment on a real-life event, to create a realistic setting, to imbue the work with a sense of place or time, or to create comedic or dramatic effect. The ability to reference real-life people helps invoke a shared cultural vocabulary between the viewer and the characters in a film or television show, serving as a key tool for creators to develop the worlds they envision. The MPA and its members thus have an interest in ensuring First Amendment protections for this core element of the creative process and in promoting consistency and predictability in how the law is applied. The MPA agrees with Defendants-Appellants’ position that the trial court erroneously applied a “transformative use” test to the alleged use of Plaintiff’s likeness in *Q-Force*, and that, even if a transformative-use test applies, the trial court erred in its application of that test.

As counsel for the MPA, we have reviewed the briefs filed in this case and believe this Court will benefit from additional briefing illustrating the stakes for the MPA, its members, and other creators if this Court endorses the trial court's analysis. Film and television creators often "clear" works—*i.e.*, subject the content of their films and television shows to legal vetting before release—to ensure compliance with applicable law. Upholding clear and predictable First Amendment protections for the use of names or likenesses in films and television shows provides breathing room for creative decisions on multiple levels. It avoids the uncertainty that inheres in a case-specific resolution by an individual factfinder, so creators need not try to read the tea leaves of how a court might interpret a particular creative decision. It also enables early resolution of claims rather than subjecting a creator to the threat of protracted discovery and litigation. If this rule were replaced by a case-by-case assessment of whether a particular use of a person's name, likeness, or persona is "transformative" in the context of the work in which it appears, the MPA's members and other creators may self-censor rather than face these risks.

Moreover, even if a "transformative use" standard applied, the trial court's particular application of that standard would significantly burden creators. The trial court's analysis gives insufficient weight to the myriad reasons why a creator might choose to use a real person's name, likeness, or other identifying characteristics to contribute to an expressive work,

including by invoking a sense of realism or shared set of cultural touchpoints between the viewer and the characters. If applied broadly, the trial court’s assessment that the alleged depiction of Plaintiff’s likeness had no “actual expressive purpose” and was therefore not “transformative” would undermine First Amendment protection for creative expression and again stifle creators by requiring them to second-guess how their creative choices would be perceived. That approach would also require judges to regularly make fine-grained decisions about artistic merit—a role courts have recognized in numerous contexts that they are not well equipped to play.

Likewise, the trial court’s approach to promotional material for *Q-Force*, if adopted more broadly, would force filmmakers and television producers to advertise their works with one hand tied behind their back by threatening liability based on the protected use of a person’s name, likeness, or persona in advertisements and promotional materials.

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 (*excluding* MPA members Netflix Studios, LLC, Universal City Studios LLC, or any of their affiliates), 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).

Dated: September 25, 2025

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AMICUS CURIAE BRIEF

INTRODUCTION

The creative works produced and distributed by MPA members tell stories that depict the world in which we live. Sometimes, creators include a recognizable person in film or television to create a realistic setting, provide a sense of place or time, or produce a comedic or dramatic effect—regardless of what role that person ultimately plays in the overall plot of the work. Other times, the real person takes center stage—think works about Marilyn Monroe, Elvis, Freddie Mercury, or Queen Elizabeth II. Regardless of the specific purpose, a creator’s choice to depict a real-life person in a creative setting is expression at the heart of the First Amendment. To respect this constitutional value, California right-of-publicity law provides breathing space for creative expression by targeting only the unauthorized *commercial* uses of an individual’s name, voice, signature, photograph, or likeness—for example, to advertise a product or adorn merchandise. Defendants have done nothing of the sort here, so right-of-publicity law should have no bearing.

In recognition of the First Amendment interests in crafting expressive works like movies and television shows—and the challenges inherent in requiring judges to render their own artistic judgments on those works—courts afford broad protection for uses or depictions of individuals’ names or likenesses in those works. Importantly, this body of case law

applies separately from the “transformative” use doctrine, which asks courts to individually assess whether the alleged use of a particular plaintiff’s name, likeness, or persona in connection with consumer goods or products was sufficiently “expressive” or “transformative.”

The MPA’s members and other creators rely on the First Amendment to protect their ability to realize a creative vision in films and television shows, without an additional requirement to analyze whether a factfinder would deem a particular alleged use of someone’s name, likeness, or persona to be “transformative.” Creators often “clear” works—*i.e.*, subject the content of their films and television shows to legal vetting before release—by assessing whether those works are likely to be viewed by a court as violating the right of publicity and similar law. In doing so, they have relied on the longstanding precedent protecting uses of individuals’ names or likenesses against state right-of-publicity claims without the need for a fact-sensitive, individualized prediction of how a court would rule. This clarity enables the MPA’s members, and all creators, to engage in acts of creative expression without the threat of a torrent of unfounded litigation.

The trial court’s decision in this case throws a wrench in this framework, with potentially calamitous consequences for free speech. Rather than determining whether *Q-Force* was an expressive work and applying First Amendment protection on that basis, the trial court

scrutinized the “expressive aims” of *Q-Force*’s creators and determined that the alleged use of Plaintiff-Respondent’s likeness did not contribute sufficiently to those aims.³ This approach has opened the door to uncertainty over whether the right-of-publicity would or would not apply. Compounding the issue, this approach wrongly assumed that the California right-of-publicity statute applies to *Q-Force* in the first place, even though television shows are not “products, merchandise, goods or services” within the meaning of California Civil Code § 3344.

Then, when applying the transformative-use test, the trial court held that Plaintiff had made a prima facie showing that “Defendant’s use of Plaintiff’s likeness was fundamentally not expressive, and thus not transformative,” and therefore that the alleged use did not enjoy First Amendment protection. AA0189. This approach disregarded the ways in which the alleged use of Plaintiff’s likeness contributes to *Q-Force*, grounding the animated series in realism by evoking a West Hollywood gay bar with several distinctive-looking drag queens as clientele.

In contrast, the federal courts have expressly held that Plaintiff’s alleged depiction in *Q-Force* does contribute to the expressive work. Those courts rejected Plaintiff’s Lanham Act claims at the pleading stage,

³ The MPA assumes for the purposes of this amicus brief that Plaintiff’s likeness was actually depicted in *Q-Force*, but does not concede that the use of Plaintiff’s likeness has been established.

applying the seminal decision in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), which provides First Amendment protection for references to trademarks in creative works. *See Hara v. Netflix, Inc.*, No. 23-cv-3456, 2023 WL 12121289 (C.D. Cal. Oct. 26, 2023), *aff'd*, 146 F.4th 872 (9th Cir. 2025). These decisions necessarily hinged on the “expressive function” performed by the alleged use of Plaintiff’s likeness in *Q-Force*. *See Hara v. Netflix, Inc.*, 146 F.4th 872, 874 (9th Cir. 2025) (quoting *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 154 (2023)). And they held that the alleged use of Plaintiff’s likeness unquestionably had “artistic relevance” to *Q-Force*. *Id.* at 882–83.

The MPA submits this brief to illustrate the importance of a clear standard protecting creators’ ability to invoke individuals’ names and likenesses in creative works, and the reasons why the “transformative use” standard does not provide that clarity—as exemplified by the trial court’s decision in this case. The unpredictability of the “transformative use” standard has significant implications for the MPA’s members and other creators: Faced with the specter of drawn-out litigation, even on right-of-publicity claims that would likely prove meritless down the road, many creators may voluntarily self-censor rather than take the chance that a particular creative decision will trigger such claims. The First Amendment protects against chilling effects like these.

Moreover, even if the “transformative use” standard does apply, the trial court was wrong to find that the alleged depiction of Plaintiff’s likeness had no “actual expressive purpose” and was therefore not “transformative.” AA0189–90. Creators routinely make fleeting allusions to public figures in expressive works for a variety of reasons, such as to imbue the work with a sense of place or time. The trial court’s unnecessarily stringent application of the transformative-use test would strip these commonplace depictions of First Amendment protection.

Finally, the trial court’s analysis of promotional material for *Q-Force* would also impose an unworkable burden on creators. This Court should follow the lead of other courts, which have applied a common-sense rule that if the underlying expressive work is protected, then advertising or promotion of that expressive work is equally protected.

LEGAL ARGUMENT

I. Filmmakers and Television Producers Rely on Clearly Defined First Amendment Protections for Use of Individuals’ Likenesses in Artistic Works.

As detailed in Defendants-Appellants’ briefing, decades of precedent establish a categorical First Amendment defense to right-of-publicity claims based on the portrayal of a real-life person in an artistic work. This line of cases recognizes that the First Amendment “safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them

into art, be it articles, books, movies, or plays.” *de Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 860 (2d Dist. 2018) (quoting *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016)). It also recognizes that “[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality.” *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 869 (1979) (en banc) (Bird, C.J., concurring).

A critical feature of this First Amendment defense is that it provides blanket protection for creators’ decisions regarding their works—rather than a nebulous, case-by-case assessment of how a particular likeness is used. Courts apply this rule to reject right-of-publicity claims involving a wide variety of expressive works that use the “raw materials of life.” Some involve the prominent use of a plaintiff’s name, likeness, story, or other distinguishing characteristics as a central component of the neighborhood—such as the film *The Hurt Locker*, based on the real-life experiences of an army sergeant who served as an IED technician in Iraq. *Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016). Others use the plaintiff’s name or likeness only incidentally, such as the portrayal of Olivia de Havilland in 17 minutes of a 392-minute, 8-episode docudrama miniseries about the feud between Joan Crawford and Bette Davis, *see de Havilland*, 21 Cal. App. 5th at 851, 859–61; footage of a successful Malibu surfer in a documentary about Malibu in the early days of surfing, *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542 (2d Dist. 1993); or introduction of a

character in the film *The Sandlot* with a last name and physical appearance resembling the plaintiff's as a child, *Polydoras v. Twentieth Cent. Fox Film Corp.*, 67 Cal. App. 4th 318, 323–25 (2d Dist. 1997).

These decisions afford broad constitutional protection for television shows and similar expressive works because, “[w]hether exhibited in theaters or on television,” these works are “a ‘significant medium for the communication of ideas.’” *Guglielmi*, 25 Cal. 3d at 865 (Bird, C.J., concurring) (citation omitted). That holds true regardless of the message conveyed: the “painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll” are “unquestionably shielded.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). The MPA’s members and other creators have been able to rely on the clarity this blanket rule provides in clearing films and television shows that depict—or could arguably be alleged to depict—real-life people, without having to factor in the threat of baseless litigation or assess how a court might view particular creative decisions.

The trial court here rejected categorical First Amendment protection for expressive works, instead holding that for Plaintiff’s claims to be barred by the First Amendment, the alleged use of Plaintiff’s likeness must be placed in a context that creates “something new, with a further purpose or different character, altering the first [likeness] with new expression, meaning, or message.” AA0188 (quoting *No Doubt v. Activision Publ’g*,

Inc., 192 Cal. App. 4th 1018, 1034 (2d Dist. 2011)). Asking whether the alleged use has an “actual expressive aim[],” the trial court reasoned that “Defendant[s]’ use of Plaintiff’s likeness was fundamentally not expressive, and thus not transformative.” AA0189.

This approach destroys the clarity upon which creators rely. To assess whether the alleged use of Plaintiff’s likeness here had an “expressive aim,” the trial court considered a wide variety of factors—including whether Plaintiff was “a character in the Series,” whether Plaintiff’s alleged inclusion was “part of any storyline or expressive feature of the series itself,” whether Plaintiff had a speaking role, and, ultimately, whether “Plaintiff [was] depicted without any commentary or actual expressive purpose.” AA0189. The MPA’s members and other creators are left without any ability to predict how a court would apply these various factors.

For example, if Plaintiff’s alleged cartoon portrayal on *Q-Force* had spoken, would that have made a difference? What if Plaintiff’s alleged cartoon portrayal were depicted without speaking and for the same amount of time, but in a scene involving protestors at a drag show? The clear First Amendment protection long upheld in California courts does not require creators to predict how courts would answer these questions.

In turn, this risk of unpredictable and arbitrary results threatens to chill the creation of new works. Under the trial court’s approach, creators would

need to predict the outcome of a court's exegesis of a particular use of a person's name, likeness, or persona and how that use relates to the "expressive aims" of the work as a whole. *Cf.* AA0189. Faced with the risk that a court may not agree with an explanation of how the use contributed to a broader creative vision, creators may instead cede authority to potential plaintiffs and opt not to depict real-life people in their creative works without consent. This stifling of creative decisions is precisely the harm that Chief Justice Bird warned against in *Guglielmi*. If courts were to "compel the author to justify the use of the celebrity's identity," she explained, it "would inevitably chill the exercise of free speech limiting not only the manner and form of expression but the interchange of ideas as well." *Guglielmi*, 25 Cal. 3d at 869 (Bird, C.J., concurring).

Indeed, self-censorship would be particularly likely where a depiction of a real-life person could be perceived as unflattering or critical. As one leading treatise puts it:

If the law mandated that the permission of every living person ... must be obtained to include mention of them in news and stories, both in documentary and docudrama telling, then they would have the right to refuse permission unless the story was told "their way." That would mean that those who are the 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.

2 J. Thomas McCarthy & Roger E. Schechter, *Rights of Publicity and Privacy* § 8:64, Westlaw (2d ed. database updated May 2025).

Making matters worse, the chilling effect caused by the trial court’s decision is likely to be especially pronounced because it would kick practically all questions in right-of-publicity cases like this one to factfinders at the end of litigation—undermining the ability to dispose of meritless claims early in litigation and undercutting the critical role the anti-SLAPP statute plays in protecting creative works. Properly applied, the First Amendment defense weeds out meritless litigation that stifles expression at its early stages by enabling creators to, for example, bring a successful anti-SLAPP motion. *See, e.g., de Havilland*, 21 Cal. App. 5th at 871 (reversing denial of anti-SLAPP motion to strike); *Sarver*, 813 F.3d at 905–06 (affirming dismissal on anti-SLAPP grounds). This rapid resolution of meritless claims is necessary because otherwise, creators can feel pressure to capitulate to unsubstantiated claims in cease-and-desist letters in lieu of enduring protracted litigation. *See Good Gov’t Grp. of Seal Beach, Inc. v. Super. Ct.*, 22 Cal. 3d 672, 685 (1978) (“[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable.”); *see also, e.g., Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (recognizing that “[i]n the First Amendment area, summary procedures are ... essential” because speakers “tend to

become self-censors” when subjected to “the harassment of lawsuits”).

Such dramatic chilling effects reinforce the need for broad First

Amendment protection for creators—rather than uncertain, fact-sensitive adjudication—in right-of-publicity cases like this one.

* * *

The First Amendment’s broad protection for expressive works, properly understood, underscores the fundamental mismatch between California’s statutory right of publicity and expressive works like films or television series. The Superior Court proceeded on the assumption that the right of publicity governs a series like *Q-Force*. This Court should clarify that this assumption is incorrect. The statutory right of publicity prohibits use of “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*.” Cal. Civ. Code § 3344 (emphasis added). That is a far cry from expressive works, which courts have held time and time again are not *commercial* speech. *See, e.g., Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 906–07 (9th Cir. 2002) (“Barbie Girl” song is noncommercial speech); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 684 (1st Dist. 2010) (*Rolling Stone* magazine is noncommercial speech).

Consistent with that principle, California state and federal courts have appropriately questioned whether “[b]ooks, films, and television

shows” are really “merchandise” or “products” within the meaning of the statute. *See de Havilland*, 21 Cal. App. 5th at 857; *see also Sarver*, 813 F.3d at 905–06 & n.9 (holding that film was “not speech proposing a commercial transaction” and questioning whether the right of publicity would apply). The California Supreme Court has not resolved this issue. In *Winter v. DC Comics*, the Court assumed without discussion that the right of publicity applied to comic books before holding that the comic book’s depiction was protected by the First Amendment. 30 Cal. 4th 881, 887–88, 890 (2003). Because California’s right-of-publicity protections address use of a person’s likeness in “products” and “merchandise,” applying right-of-publicity protections to expressive works is like trying to fit a square peg into a round hole. This exercise is unnecessary: The Court can and should decide that the right of publicity simply does not apply to expressive works.

II. The Trial Court Erred in Its Assessment of Whether the Alleged Use of Plaintiff’s Likeness Was Expressive.

Even assuming the trial court was correct to consider whether the alleged portrayal of Plaintiff in *Q-Force* involved an expressive aim and was therefore “transformative,” the court was wrong to conclude that Defendants’ use had no “actual expressive purpose.” AA0189. As noted above, the trial court held that because “Plaintiff was not a character in the Series” but was “limited to a background nonspeaking role in a single

episode,” Plaintiff could show that Defendants used her likeness “without any actual expressive aims.” *Id.* For the trial court, this stood in contrast to the alleged use of a different celebrity’s likeness in another television series, where “the character was used to ... add expressive commentary about the treatment of women in Hollywood.” *Id.* (citing *De Havilland*, 21 Cal. App. 5th at 856–57).

As is evident in the Ninth Circuit’s conflicting assessment of the same facts, the trial court’s analysis here fails to account for the myriad ways in which even a brief portrayal of or reference to a real-life individual—particularly in a stylized animation—can contribute to a creative vision. The trial court’s crabbed application of the transformative-use standard would threaten to stamp out a rich and commonplace form of expression. Instead, this Court should make clear that there is no blanket rule that fleeting uses of celebrity names and likenesses are “fundamentally not expressive” if the plaintiff is not a character or included in a storyline, AA0189, even to the extent the transformative-use test applies. To the contrary, most such uses—and certainly the use here—are expressive as a matter of law.

In film and television, creators routinely invoke celebrity names and likenesses in a tangential manner, through cameos, cultural references and allusions, and other minor plot points. *The Simpsons* and *South Park* would not be the shows they are without fictionalized depictions of public figures.

But those are not the only examples. Consider the running gag in *Men in Black* that celebrities—from Al Roker to Newt Gingrich to Bill Gates—are, in fact, aliens. Or the recurring joke in *Unbreakable Kimmy Schmidt* that Lillian Kaushtupper used to date Robert Durst (played by Fred Armisen). In *How I Met Your Mother*, the gang agrees that every New Yorker has run into Maury Povich at least once. *Master of None* features a fictional Nicolas Cage movie called “Death Castle.” In *Ali G Indahouse*, Sacha Baron Cohen’s over-the-top Ali G character meets the quintessentially proper Queen of England. In *Schitt’s Creek*, the Rose family’s frequent mention of famous friends establishes their formerly extravagant lifestyle; in *The Good Place*, Tahani Al-Jamil’s constant name-dropping demonstrates the vanity that (spoiler alert) got her sent to the Bad Place. None of these examples constitute particularly deep or high-minded social commentary, or even require references to *those particular public figures* to achieve the same effect. Rather, these references further the unique sense of character and place of a work by drawing upon a body of knowledge about the world shared by the creator and the viewer.

In fact, in an expressive work, the *more* tangential the reference, the *more* transformative the use may be. Consider *Winter v. DC Comics*, in which the plaintiffs, a musical duo, brought a right-of-publicity claim over their alleged depiction in a comic book. 30 Cal. 4th at 886. The California Supreme Court found that the comic books did not “greatly threaten

plaintiffs' right of publicity" because the plaintiffs were depicted as "cartoon characters ... in a larger story, which is itself quite expressive." *Id.* at 890. As such, the California Supreme Court noted, "Plaintiffs' fans who want to purchase pictures of them would find the drawings of the [Plaintiffs' likenesses] unsatisfactory as a substitute for conventional depictions." *Id.* For that reason, the comic books were found to be "transformative and entitled to First Amendment protection." *Id.* at 891. Fundamentally, California's right-of-publicity law prohibits "depictions of [a person] amounting to little more than the appropriation of the [person]'s economic value." *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 400 (2001). Fleeting references to a real-life person's likeness in a film, movie, or other expressive work do not infringe upon that person's right of publicity because they are not market substitutes for depictions that the person could otherwise monetize.

Moreover, as courts across the country have recognized, portraying a real-life person or trademark—however fleetingly—can contribute to the expression in a work by imbuing the story with a sense of realism or by evoking a particular scene, even if a story is not specifically *about* a specific person or trademark. For instance, in applying the *Rogers v. Grimaldi* standard to assess the use of a trademark in connection with an expressive work, a court found that the portrayal of a knockoff Louis Vuitton bag in the *Hangover* met the "low threshold" of "artistic relevance"

because a character's remark about safeguarding his "Lewis Vuitton" instantly revealed both his snobbishness and his ignorance. *Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc.*, 868 F. Supp. 2d 172, 178 (S.D.N.Y. 2012). Likewise, the Ninth Circuit held that the virtual portrayal of a specific strip club in a video game was artistically relevant because it helped capture the particular "look and feel" of a particular Los Angeles neighborhood. *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008).

Courts have reached the same conclusion in the right-of-publicity context. As Chief Justice Bird recognized in *Guglielmi*, even uses of individuals' likenesses that may appear "unnecessary" often have expressive value: Creators "may be able to more persuasively, more accurately express themselves by weaving into the tale persons or events familiar to their readers." 25 Cal. 3d at 869 (Bird, C.J., concurring). For example, where several people's names, images, or personas could contribute to evoking the particular time and place of Malibu during the early days of surfing, even if "any one of them as individuals may not have had a particular influence," use of footage of one of them surfing was protected because it contributed to portraying the "great impact" of the work as a whole. *Dora*, 15 Cal. App. 4th at 543.

These principles apply just as strongly to the alleged use of Plaintiff's likeness in *Q-Force*. The alleged portrayal of Plaintiff's likeness

serves an obviously expressive purpose because it contributes to evoking a West Hollywood gay bar in an animated setting. This is precisely what motivated the Ninth Circuit in Plaintiff's parallel federal case for alleged violations of the Lanham Act, where that court held in no uncertain terms that the alleged use of Plaintiff's image and likeness *does* contribute to *Q-Force*'s expression. The Ninth Circuit determined that "Vox's likeness, along with three other distinctive-looking drag queens, helps ground the scene of a West Hollywood gay bar in realism," and that the alleged portrayal of Plaintiff's likeness "sets up the punchline to a joke about hunky Agent Maryweather, reflecting the banter and style of humor used in the series." *Hara*, 146 F.4th at 880. As such, "[t]he alleged use of Vox's likeness is an artistic choice" and "[r]ecreating an animated version of a West Hollywood bar with references to drag queens and cocktails is artistically relevant to the plot and social commentary of *Q-Force*." *Id.* at 883. For that reason, despite Plaintiff's argument that the alleged depiction of her likeness would falsely lead viewers to believe she was affiliated with *Q-Force*, the Ninth Circuit affirmed the application of the First Amendment to shield Defendants from Plaintiff's Lanham Act claims. Indeed, it would defy logic to hold that the First Amendment protects *Q-Force*'s alleged depiction of Plaintiff against a federal Lanham Act claim, but not against a California right-of-publicity claim.

The trial court in this case was evidently motivated by the view that the First Amendment should not protect gratuitous uses of a person’s likeness. That misunderstands the creative values at stake and the court’s role in protecting them, as explained above. *See supra* pages 23–26. But even if that concern were valid, the trial court’s decision to apply an exceedingly narrow form of the transformative test is the wrong medicine. The trial court instead could have looked to the context of the Lanham Act, where courts apply a stringent analysis—very different from what the trial court applied here—assessing whether use of someone’s likeness or a trademark has *no artistic relevance* or *no real relationship* to the work. *See, e.g., Punchbowl, Inc. v. AJ Press, LLC*, 90 F.4th 1022, 1028 (9th Cir. 2024) (requiring artistic relevance to be “merely above zero,” such that use of a mark is protected unless it “has ‘*no* artistic relevance to the underlying work *whatsoever*’” (citation modified; emphasis in original)).

The “no artistic relevance” standard would give more breathing room for First Amendment expression like that at issue here while addressing the trial court’s (in the MPA’s view, unfounded) concern about genuinely gratuitous uses of a plaintiff’s name or likeness. At the same time, it would ensure that courts are not required to make fine-grained determinations of artistic merit or value, a role they are “ill-equipped” to play. *Stewart Surfboards, Inc. v. Disney Book Grp., LLC*, No. 10-cv-2982, 2011 WL 12877019, at *5 (C.D. Cal. May 11, 2011); *see also Yankee*

Publ'g Inc. v. News Am. Publ'g Inc., 809 F. Supp. 267, 281 (S.D.N.Y. 1992) (similar). As a New York court put it in rejecting a right-of-publicity challenge to an unauthorized biography: “It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services.” *Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 768–69 (N.Y. App. Div. 1st Dep’t 1980). The trial court’s approach instead places a court at the center of assessing the merit of particular artistic decisions.

In this case, under any standard, the alleged portrayal of Plaintiff’s likeness serves a quintessentially expressive purpose. The trial court was wrong to conclude otherwise, and this Court should make clear that a depiction of a real-life person in an expressive work does not need to be extensive, include a speaking role, or include pivotal engagement in a plot to be eligible for First Amendment protection.

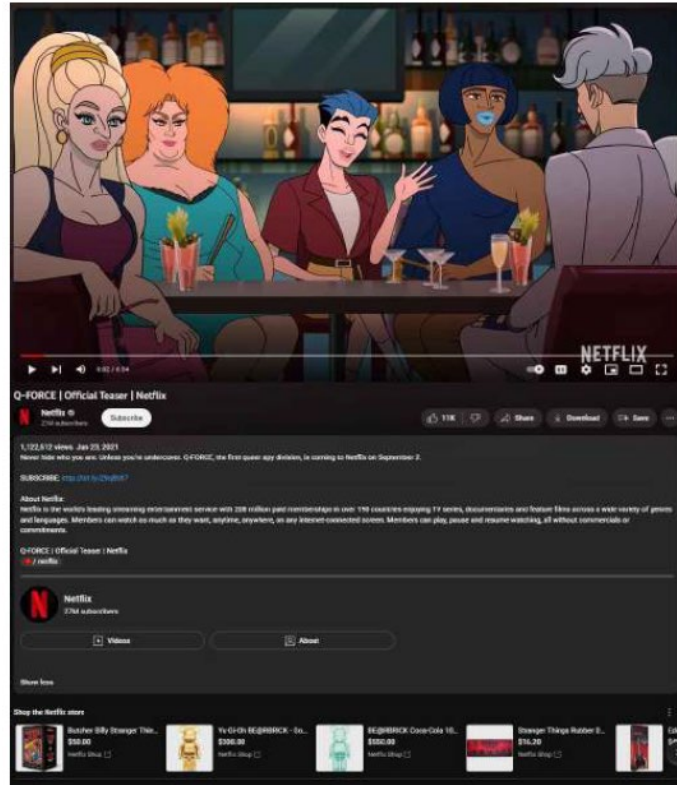
III. Trailers Portraying Protected Artistic Works Should Be Subject to Similar Protection.

Relatedly, the trial court’s approach to the *Q-Force* trailer undermines the ability of filmmakers and television producers to advertise their creative works. The trial court concluded that because the alleged portrayal of Plaintiff was included in advertisements for *Q-Force*, Plaintiff “could show that Defendant’s actual underlying aim in using Plaintiff’s

likeness in the series was to appropriate, without compensation, Plaintiff's image and character for the purpose of commercial promotion." AA0189–90. The trial court held that such uses would not be entitled to First Amendment protection because they were "not for expressive purposes but for the purpose of commercial promotion for an underlying audiovisual work." AA0190.

This approach conflicts with well-established precedent holding that creators are not forced to advertise their creative works with one hand tied behind their backs. The California Supreme Court has explicitly held that advertisements of a creative work are "irrelevant" to whether the use of a person's likeness in that work is "constitutionally protected." *Winter*, 30 Cal. 4th at 891. In *Winter*, the plaintiffs pointed to "evidence that defendants were trading on plaintiffs' likenesses and reputations to generate interest in the comic book series and increase sales." *Id.* The Court rejected this argument, holding that "[i]f the work is sufficiently transformative to receive legal protection, 'it is of no moment that the advertisements may have increased the profitability of the work.'" *Id.* (internal citation omitted). Similarly, Chief Justice Bird explained in *Guglielmi* that advertisements using a plaintiff's likeness were "merely an adjunct to the exhibition of the film" and that it "would be illogical to allow [Defendants] to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise." 25 Cal. 3d at 872–73

(Bird, C.J., concurring). Here, it is beyond dispute that the trailer for *Q-Force* at issue simply depicted portions of the show itself, placing it squarely in line with these precedents:



AA0022.

In other case law addressing advertising for artistic works, courts have likewise repeatedly recognized that where the use of a person’s likeness or a trademark in an underlying work is protected, displaying that work in advertising does not somehow undermine that protection. Indeed, in Plaintiff’s parallel federal case for alleged violations of the Lanham Act, the Ninth Circuit already held that “the scene in *Q-Force*, its official teaser, and the still image” are all subject to the same First Amendment

protections. *Hara*, 146 F.4th at 882. This decision followed a line of other federal cases holding that the protective *Rogers* test applies not just to the use of trademarks in expressive works, but also in advertisements for those works. See, e.g., *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192, 1196–97 (9th Cir. 2017) (holding that where use of a trademark in the title of an expressive work was protected by the First Amendment, “it requires only a minor logical extension” to hold that advertisements are similarly protected).

In particular, the trial court’s focus on the relative prominence of Plaintiff’s likeness in the trailer for *Q-Force* as opposed to the show itself would make it near-impossible for creators to identify the line between an acceptable depiction and an unacceptable depiction. The trial court noted that Plaintiff’s alleged likeness appears in one trailer “for more than 12% of the duration,” and takes up “more than 20% of the frame.” AA0190. The precision of this analysis betrays why it is an unworkable standard for creators. What if a celebrity’s likeness appears for just 10% of the duration of a trailer? Or takes up 10% of the frame? Is the use of a celebrity’s likeness in promotional materials more acceptable if the celebrity is more prominently featured, appearing for, say, 10% of the duration of the underlying work?

Just as the uncertainty the trial court’s analysis would generate about the degree of the protection of the underlying work chills freedom of

expression, so too does the uncertainty this analysis would generate about a permissible display of a person's likeness in connection with advertising. Instead, this Court should follow its sister courts and recognize that the same legal protections that apply to use of a person's likeness in an underlying creative work apply to auxiliary efforts to advertise and promote that work.

CONCLUSION

Creators should not be forced to second-guess their artistic decisions based on an uncertain and amorphous First Amendment test that requires them to guess whether a factfinder will deem a decision sufficiently creative or expressive to be protected. The trial court's standard would stifle creation and, over time, limit the release of new works to the public. The Court should instead hold that expressive works such as *Q-Force* enjoy First Amendment protection—both as a whole and for accompanying promotional materials. Plaintiff's alleged depiction here, however, should be deemed protected under any First Amendment standard. A contrary holding would chill expression on issues of public concern, with knock-on effects throughout the creative process.

Dated: September 25, 2025

Respectfully submitted,

By: /s/ Peter E. Davis

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CERTIFICATION

Counsel of Record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF MOTION PICTURE ASSOCIATION, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS** contains 6,335 words, not including tables of contents and authorities, the caption page, the verification page, signature blocks, or this certification page.

Dated: September 25, 2025

/s/ Peter E. Davis
Peter E. Davis (SBN 320256)

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PROOF OF SERVICE

I am employed in the City and County of Los Angeles, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of JENNER & BLOCK LLP, and my business address is 515 S. Flower Street, Suite 3300, Los Angeles, CA 90071.

On September 25, 2025, I hereby certify that I electronically filed the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF MOTION PICTURE ASSOCIATION, INC. IN SUPPORT OF DEFENDANTS- APPELLANTS** through the Court's electronic filing system, TrueFiling (Tf.3).

I certify that participants in the case who are registered TrueFiling users will be served via the electronic filing system pursuant to California Rules of Court, Rule 8.70.

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I certify that the superior court clerk will be served with a paper
copy at the following address.

Hon. James I. Montgomery, Jr.
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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 September 25, 2025, at Los Angeles, California.

Sarah Vuong
Print Name

/s/ Sarah Vuong
Signature

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