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FIRST AMENDMENT — RIGHT OF PUBLICITY — NINTH CIRCUIT REJECTS FIRST AMENDMENT DEFENSE TO RIGHT-OF-PUBLICITY CLAIM. — *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013).

The right of publicity is the right of individuals “to control the use of their names and likenesses for commercial purposes.”<sup>1</sup> Because this right naturally implicates speech interests, it can be exercised only insofar as it comports with the requirements of the First Amendment. To date, however, courts have disagreed on how best to draw this line. Recently, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*<sup>2</sup> (*Keller*), the Ninth Circuit employed a test derived from copyright law in determining that the maker of a football video game was not shielded by the First Amendment from the right-of-publicity claim of a former player whose likeness appeared in the game. The court instead should have adopted a more speech-protective test that carves out a narrower scope for the right of publicity.

Samuel Keller played collegiate football for two seasons, in 2005 and 2007.<sup>3</sup> Electronic Arts, Inc. (EA) is a California software company that makes, among other titles, the *NCAA Football* series of video games.<sup>4</sup> In these games, EA seeks to reproduce the college football experience as realistically as possible.<sup>5</sup> One element of this reproduction is the players themselves. In each edition of the game, EA creates an in-game avatar corresponding to every real-life player.<sup>6</sup> Each avatar shares its real-life counterpart’s “jersey number . . . [,] height, weight, build, skin tone, hair color, and home state,” among other distinctive features.<sup>7</sup> In the 2005 and 2008 editions of *NCAA Football*, EA included avatars modeled on Keller.<sup>8</sup>

In 2009, Keller filed a putative class action complaint in federal district court alleging that EA’s use of his likeness without his consent “violated his right of publicity under California Civil Code § 3344 and California common law.”<sup>9</sup> EA moved to strike the suit under a Cali-

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<sup>1</sup> Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1162 (2006).

<sup>2</sup> 724 F.3d 1268 (9th Cir. 2013).

<sup>3</sup> *Id.* at 1271.

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1272.

<sup>9</sup> *Id.* Keller’s complaint also named as defendants the National Collegiate Athletic Association and the Collegiate Licensing Company, and included other allegations not relevant on appeal. *See Keller v. Elec. Arts, Inc.*, 94 U.S.P.Q.2d (BNA) 1130, 1132–33 (N.D. Cal. 2010). There were also several other named plaintiffs, all former college football or basketball players. *Keller*, 724 F.3d at 1272 n.2.

ifornia law addressing strategic lawsuits against public participation (SLAPP).<sup>10</sup> In denying the motion, the court rejected EA's argument that its use of Keller's likeness was protected by the First Amendment.<sup>11</sup> Applying the "transformative use" test developed by the California Supreme Court, the court held that because "EA does not depict [Keller] in a different form," its "depiction . . . is not sufficiently transformative to bar [Keller's] California right of publicity claims as a matter of law."<sup>12</sup> EA subsequently appealed from the denial of the motion to strike under California's anti-SLAPP statute.

The Ninth Circuit affirmed. Writing for the majority, Judge Bybee<sup>13</sup> began by explaining that the anti-SLAPP statute "subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim."<sup>14</sup> EA conceded that Keller had stated a right-of-publicity claim but argued that it was entitled to several affirmative defenses based on the First Amendment.<sup>15</sup>

Judge Bybee turned first to the transformative use defense. As articulated by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>16</sup> this defense, which draws on copyright principles, involves "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."<sup>17</sup> Judge Bybee described the "five factors" that the California court had considered in making this determination.<sup>18</sup> He then discussed the cases in which

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<sup>10</sup> *Keller*, 724 F.3d at 1272. California's anti-SLAPP statute subjects suits "arising from any act . . . in furtherance of [a] person's right of petition or free speech . . . in connection with a public issue . . . to a special motion to strike." CAL. CIV. PROC. CODE § 425.16(b)(1) (Deering 2004 & Supp. 2013).

<sup>11</sup> See *Keller*, 94 U.S.P.Q.2d (BNA) at 1139.

<sup>12</sup> *Id.* at 1135.

<sup>13</sup> Judge Bybee was joined by Senior District Judge Quist, sitting by designation.

<sup>14</sup> *Keller*, 724 F.3d at 1273 (quoting *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002)) (internal quotation marks omitted).

<sup>15</sup> *Id.*

<sup>16</sup> 21 P.3d 797 (Cal. 2001).

<sup>17</sup> *Keller*, 724 F.3d at 1273 (quoting *Comedy III*, 21 P.3d at 799) (internal quotation marks omitted).

<sup>18</sup> *Id.* at 1274. As laid out by Judge Bybee, the *Comedy III* factors are: (1) whether the celebrity's likeness is one of the "raw materials" of the work, *id.* (quoting *Comedy III*, 21 P.3d at 809) (internal quotation marks omitted), or whether it is "the very sum and substance" of the work, *id.* (quoting *Comedy III*, 21 P.3d at 809); (2) "whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity" or an expressive work, *id.*; (3) "whether the literal and imitative or the creative elements predominate in the work" — an inquiry that must be "more quantitative than qualitative," *id.* (quoting *Comedy III*, 21 P.3d at 809) (internal quotation marks omitted), if the court is to "avoid making judgments concerning 'the quality of the artistic contribution,'" *id.* (quoting *Comedy III*, 21 P.3d at 809); (4) "whether 'the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted,'" *id.* (quoting *Comedy III*, 21 P.3d at 810); and (5) whether the "artist's skill and talent is manifestly subordinated to

California courts had applied the test, relying heavily on the Court of Appeal's decision in *No Doubt v. Activision Publishing, Inc.*,<sup>19</sup> a case with facts very similar to *Keller's*.<sup>20</sup> Arguing that, like the game at issue in *No Doubt*, *NCAA Football* let "users manipulate the characters in the performance of the same activity for which they are known in real life" with a high degree of realism, Judge Bybee concluded that "EA's use of Keller's likeness does not contain significant transformative elements such that EA is entitled to the defense as a matter of law."<sup>21</sup>

Judge Bybee next considered EA's argument that it should be entitled to a defense based on the so-called *Rogers* test. In *Rogers v. Grimaldi*,<sup>22</sup> the Second Circuit held that the use of a trademark in the title of an expressive work was protected by the First Amendment, "unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work."<sup>23</sup> As Judge Bybee explained, the Ninth Circuit adopted the *Rogers* test in *Mattel, Inc. v. MCA Records, Inc.*<sup>24</sup> and extended it in *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*<sup>25</sup> to cover the use of a trademark not only in the title, but also in "the body of the work."<sup>26</sup> The *Keller* court declined, however, to "import[] [the *Rogers* test] wholesale for right-of-publicity claims."<sup>27</sup> Judge Bybee explained that the *Rogers* test "was designed to protect consumers from the risk of consumer confusion."<sup>28</sup> By contrast, "[t]he right of publicity protects the *celebrity*, not the *consumer*."<sup>29</sup> As a result, "[t]he reasoning of the *Rogers* and *Mattel* courts . . . is simply not responsive to Keller's asserted interests here."<sup>30</sup>

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the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame," *id.* (quoting *Comedy III*, 21 P.3d at 810) (internal quotation marks omitted).

<sup>19</sup> 122 Cal. Rptr. 3d 397 (Ct. App. 2011). In *No Doubt*, the eponymous rock band prevailed in a right-of-publicity claim against a video game maker that had used its likeness in a game. The court held that because the band's avatars in the game were "literal recreations of the band members" who performed "the same activity by which the band achieved and maintains its fame," their depiction was not transformative and thus not protected by the First Amendment. *Id.* at 411.

<sup>20</sup> *Keller*, 724 F.3d at 1276.

<sup>21</sup> *Id.*

<sup>22</sup> 875 F.2d 994 (2d Cir. 1989).

<sup>23</sup> *Id.* at 999.

<sup>24</sup> 296 F.3d 894 (9th Cir. 2002).

<sup>25</sup> 547 F.3d 1095 (9th Cir. 2008).

<sup>26</sup> *Id.* at 1099.

<sup>27</sup> *Keller*, 724 F.3d at 1280.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1281.

<sup>30</sup> *Id.* The majority also rejected two defenses based on California state law that protect the publication of matters of public interest, on the grounds that *NCAA Football* "is a game, not a reference source." *Id.* at 1283.

Judge Thomas dissented. While agreeing that the transformative use test “provides the proper analytical framework”<sup>31</sup> for evaluating First Amendment defenses to a right-of-publicity claim, Judge Thomas argued that the majority applied that test incorrectly. While the majority “confine[d] its inquiry to how a single athlete’s likeness is represented in the video game,” in fact “[t]he salient question is whether the entire work is transformative, and whether the transformative elements predominate.”<sup>32</sup> Applying the test “in proper holistic context, the [*Comedy III*] considerations favor First Amendment protection”<sup>33</sup> because “[a]t its essence, EA’s *NCAA Football* is a work of interactive historical fiction.”<sup>34</sup> Judge Thomas emphasized the freedom enjoyed by a player of *NCAA Football*, who can change the attributes of the players in the game, create entirely new players, or pit existing players against each other in novel configurations.<sup>35</sup> He distinguished *No Doubt*, pointing out that there, “[t]he literal representations . . . were not, and could not be, transformed in any way.”<sup>36</sup> Finally, Judge Thomas argued that because *NCAA Football* includes thousands of players, each “individual’s publicity right is relatively insignificant.”<sup>37</sup> The sheer quantity of players in the game underscores the importance of considering the game as a whole and the “inappropriateness of analyzing the right of publicity through the lens of one likeness only.”<sup>38</sup>

The Supreme Court has held that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>39</sup> As a result, “[c]ontent-based regulations are presumptively invalid.”<sup>40</sup> Such regulations may be upheld only if they survive strict scrutiny — that is, if they are narrowly tailored to achieve a compelling government interest.<sup>41</sup> But despite the fact that the right of publicity is, on its face, a clear example of a content-based regulation,<sup>42</sup> courts have generally not evaluated it within the strict-scrutiny framework. The Ninth Circuit continued this trend by evaluating Keller’s

<sup>31</sup> *Id.* at 1284 n.1 (Thomas, J., dissenting).

<sup>32</sup> *Id.* at 1285.

<sup>33</sup> *Id.* at 1286.

<sup>34</sup> *Id.* at 1285.

<sup>35</sup> *See id.* at 1285–86.

<sup>36</sup> *Id.* at 1286.

<sup>37</sup> *Id.* at 1288.

<sup>38</sup> *Id.*

<sup>39</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>40</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>41</sup> *See, e.g., Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (applying strict scrutiny to content-based restrictions on video games).

<sup>42</sup> *See Eugene Volokh, Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 912 n.35 (2003) (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s names or likenesses).”).

claim under the copyright-based transformative use test, which subjugates speech values to market concerns. The court instead should have employed an alternative, trademark-based test under which EA's use of Keller's likeness would have been protected. In so doing, the court would have carved out a narrower scope for the right of publicity that would have been more consistent with the First Amendment.

Modern right-of-publicity doctrine is rooted in the Supreme Court's only case addressing the right, *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>43</sup> In *Zacchini*, the Court held that the First Amendment did not shield a television station from a right-of-publicity claim when it broadcast, without permission, a performer's entire act.<sup>44</sup> In his majority opinion, Justice White conceptualized the right as a kind of copyright protection and justified its burdens on speech in the same way that such burdens have been justified in the copyright context: as marginal incentives to produce expression. He wrote: "[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment."<sup>45</sup> Furthermore, "the protection provides an economic incentive for [a performer] to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."<sup>46</sup>

Although *Zacchini*'s holding was self-consciously narrow, explicitly acknowledging that the balance of interests might be different in situations where the defendant did not appropriate the plaintiff's "entire act,"<sup>47</sup> subsequent courts have extended its reasoning beyond the scope of its justification. *Zacchini* looked very much like a traditional copyright case: the right of publicity was employed to protect a performer's creative expression. Since that case, however, the right has expanded greatly to apply to the use of any aspect of a person's identity — indeed, courts have found that it extends to the mere *mention* or *evocation* of a celebrity.<sup>48</sup> Nonetheless, courts have continued to view the right as copyright-like and to explain it using the same incentive rationale that underlies *Zacchini*.<sup>49</sup> As numerous commentators have

<sup>43</sup> 433 U.S. 562 (1977).

<sup>44</sup> *See id.* at 575.

<sup>45</sup> *Id.* at 573.

<sup>46</sup> *Id.* at 576.

<sup>47</sup> *Id.* at 574; *see also id.* at 574–75. The dissent, too, understood the majority's holding to depend on "a quantitative analysis . . . — is this or is this not [the performer's] entire act?" *Id.* at 581 (Powell, J., dissenting).

<sup>48</sup> *See* Dogan & Lemley, *supra* note 1, at 1174–75 (collecting cases). Admittedly, the present case does not go quite so far. Still, it is readily distinguishable from *Zacchini*. The re-creation of an individual likeness, however realistic, is simply not analogous to the wholesale appropriation of an entire performance. What is at stake is merely Keller's *image*, not his expressive work.

<sup>49</sup> *See, e.g.,* Hart v. Elec. Arts, Inc., 717 F.3d 141, 151 (3d Cir. 2013) ("[T]he goal of maintaining a right of publicity is to protect the property interest that an individual gains and enjoys in his

observed, this practice makes little sense.<sup>50</sup> It is one thing to incentivize the creation of performances that might not be viable without protection; it is quite another to incentivize people to become famous as an end in itself. Even leaving aside the question of whether such incentives would be socially beneficial,<sup>51</sup> there are already ample incentives to pursue fame. Individuals who do so successfully tend already to be extremely well compensated, and even when, as in Keller's case, they are not, they enjoy the social benefits of widespread recognition and acclaim. Thus, the marginal incentive provided by the right of publicity is likely to be negligible.<sup>52</sup> In short, as the right of publicity has placed greater restrictions on more speech, the justification for those restrictions has become less credible.<sup>53</sup>

The *Keller* court adhered to this trend in adopting the transformative use test, which is a creature of copyright law, while rejecting an alternative test borrowed from trademark law. The majority explained its rejection of the *Rogers* test by noting that the right of publicity "protects a form of intellectual property [in one's person],"<sup>54</sup> which is to say that it "protects the *celebrity*, not the *consumer*."<sup>55</sup> But this rationale is not inevitable; as some scholars have observed, the right can also be explained by reference to the trademark principles that underlie *Rogers*.<sup>56</sup> Professors Stacey Dogan and Mark Lemley argue that "[b]oth [trademark and the right of publicity] are concerned not with the encouragement of new creation, like other forms of [intellectual property] rights, but with the protection of names in the context of commercial uses."<sup>57</sup> Trademark law is concerned primarily with avoid-

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identity through his labor and effort. . . . [A]s with protections for intellectual property, the right of publicity is designed to encourage further development of this property interest.").

<sup>50</sup> See, e.g., Dogan & Lemley, *supra* note 1, at 1186–90; F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1 (2003); Volokh, *supra* note 42, at 910–11.

<sup>51</sup> See Dogan & Lemley, *supra* note 1, at 1188 ("[I]t is not at all clear that society should want to encourage fame for fame's sake.").

<sup>52</sup> See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 974 (10th Cir. 1996); Volokh, *supra* note 42, at 910–11.

<sup>53</sup> Crucially, the incentive rationale for *copyright's* restrictions on speech has independent constitutional authorization. The Copyright Clause empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." U.S. CONST. art. I, § 8, cl. 8. There is no such basis for similar restrictions in the right-of-publicity context, especially in cases that are far removed from the traditional copyright context of protecting expressive works.

<sup>54</sup> *Keller*, 724 F.3d at 1280 (alteration in original) (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001)) (internal quotation marks omitted).

<sup>55</sup> *Id.* at 1281.

<sup>56</sup> See Dogan & Lemley, *supra* note 1, at 1190–208.

<sup>57</sup> *Id.* at 1190. It is important to distinguish the "commercial uses" identified by right-of-publicity laws from commercial speech in the First Amendment context. The Supreme Court has held that the latter, which is any speech that proposes a commercial transaction, receives less pro-

ing consumer confusion. The consumer has an interest in accurately assessing the source and affiliations of a given product. In the context of the right of publicity, when the creator of an expressive work misleads a consumer about the endorsement or involvement of a celebrity, he inflicts an injury that the government has a compelling interest in preventing.<sup>58</sup> A right of publicity based on trademark and evaluated using the *Rogers* test would thus withstand the heightened scrutiny that should properly be applied to content-based restrictions on speech.

By simply accepting the *Zacchini* rationale that publicity rights protect identity as a kind of intellectual property — and by failing to recognize that modern right-of-publicity cases concern content-based restrictions that do not support *Zacchini*'s copyright rationale for less-than-strict scrutiny — the Ninth Circuit missed an opportunity to apply a test that better comports with First Amendment principles by cabining burdens on expressive speech. The *Rogers* test would protect the use of a celebrity's likeness in an expressive work unless it either has “no artistic relevance . . . whatsoever” or “explicitly misleads” regarding the work's provenance or endorsement.<sup>59</sup> The test is therefore broadly and appropriately deferential to core protected speech while also protecting consumers from confusion.

As compared to the transformative use test, not only does the *Rogers* test offer a more coherent underlying rationale and surer constitutional footing, but it is also preferable as a matter of policy. Crucially, it draws a bright line between those uses of a celebrity likeness that are protected and those that are not. This is in stark contrast to the transformative use test, whose lack of administrability is borne out by the *Comedy III* court's five factors<sup>60</sup>: How is a court to determine the “primary motivation”<sup>61</sup> of a likely purchaser of a given work? At what point do “literal [or] imitative” elements come to “predominate” over “creative” elements in a given work?<sup>62</sup> Making these determina-

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tion under the First Amendment. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978). By contrast, the right of publicity in many states applies to any uses of a celebrity likeness “by which anyone makes money.” Dogan & Lemley, *supra* note 1, at 1175. Of course, construing the First Amendment's commercial speech exception so broadly would deny full speech protection to novels, films, and newspapers — clear examples of core protected speech. See Dougherty, *supra* note 50, at 39.

<sup>58</sup> Cf. *Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (“It is clear that the State's interest in protecting the public from the deceptive and misleading use of optometrical trade names is substantial and well demonstrated.”).

<sup>59</sup> *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

<sup>60</sup> See *supra* note 18.

<sup>61</sup> *Keller*, 724 F.3d at 1274.

<sup>62</sup> *Id.* (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001)). This is, of course, leaving aside the point that creative, expressive works may, as an entirely valid and purely aesthetic choice, strive for a high degree of realism. See Rebecca Tushnet, *Keller v. EA: Visual Elements Mean Game Isn't Protected by First Amendment*, REBECCA TUSHNET'S

tions inescapably requires judges to engage in the dubious task of making aesthetic judgments about creative works.<sup>63</sup> Furthermore, the difficulty in predicting how courts will apply the rule means that it will be likely to produce significant chilling effects. Judge Thomas worried that as applied by the court, the transformative use test “jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings.”<sup>64</sup> Judge Bybee denied that this would be the case,<sup>65</sup> but without a clear standard, even the possibility of costly litigation might be enough to suppress valuable creative expression.<sup>66</sup>

Under the *Rogers* test, Keller’s claim against EA would fail. Keller’s likeness is indisputably artistically relevant to EA’s project of realistically representing the college football experience. And there can be little doubt that the inclusion of a single player’s likeness — among thousands of others — poses no risk of consumer confusion about endorsement.<sup>67</sup> The Ninth Circuit’s adoption of the transformative use test to evaluate First Amendment defenses to right-of-publicity claims led it, in *Keller*, to impose unreasonable restrictions on expressive speech. Its choice, furthermore, may have the effect of chilling speech and threatens further restrictions on creative works. Future courts deciding similar cases should strongly consider adopting the *Rogers* test.

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43(B)LOG (Aug. 6, 2013, 7:45 AM), <http://tushnet.blogspot.com/2013/08/keller-v-ea-visual-elements-mean-game.html>; see also Volokh, *supra* note 42, at 923–25 (“What’s [s]o [b]ad [a]bout [n]ontransformative [u]ses?” *Id.* at 923.). Indeed, this was precisely the aesthetic choice made in *NCAA Football*.

<sup>63</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”). Ironically, the same panel that decided *Keller* cited Justice Holmes’s observation in a companion case decided on the same day, in which the court applied *Rogers* to a Lanham Act claim by a former National Football League player against EA for the unauthorized use of his likeness in a game. In finding that *Rogers* protected EA, the court approvingly noted the “black-and-white” rule that allowed them to avoid such judgments. See *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243 (9th Cir. 2013). It is all the more puzzling then, that the majority appeared to have no such qualms when it came to judging the extent to which *NCAA Football* aesthetically transformed its players’ likenesses.

<sup>64</sup> *Keller*, 724 F.3d at 1290 (Thomas, J., dissenting).

<sup>65</sup> *Id.* at 1279 n.10 (majority opinion). Judge Bybee distinguished *NCAA Football* from Judge Thomas’s hypotheticals on the grounds that, in contrast to those products, the primary motivation to purchase the game is the realistic reproduction of the celebrity players. This is an odd claim: consumer motivations are not monolithic, but in any case, the primary motivation to purchase a game, for most players, is surely the quality of the gameplay. Cf. Tushnet, *supra* note 62 (arguing that the Ninth Circuit engaged in “undeniable medium discrimination”).

<sup>66</sup> See *Amici Curiae Brief of Electronic Frontier Foundation, International Documentary Ass’n, the Organization for Transformative Works & the Digital Media Law Project in Support of Petition for Rehearing En Banc at 6, Hart v. Elec. Arts, Inc.*, No. 11-3750 (3d Cir. June 4, 2013) (arguing in a similar case that the failure to protect the use of celebrity likenesses in realistic video games “could have a devastating impact on creative works that relate to real people and real stories”).

<sup>67</sup> See *Keller*, 724 F.3d at 1281.