

No. 15-424

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In the  
Supreme Court of the United States

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ELECTRONIC ARTS INC.,  
*Petitioner,*

*v.*

MICHAEL E. DAVIS, *ET AL.*,  
*Respondents.*

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On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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**BRIEF OF ENTERTAINMENT SOFTWARE  
ASSOCIATION AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*

The members of the Entertainment Software Association (“ESA”) create computer and video games. ESA was a respondent in *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011), which held that video games are entitled to the same First-Amendment protection as other forms of media. The decision below violates *Brown* and inhibits the rights of ESA’s members to create such expressive works. Pursuant to Sup. Ct. R. 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief and it is filed with their consent.<sup>1</sup>

## SUMMARY OF ARGUMENT

The Ninth Circuit’s decision in this and its predecessor case, *Keller v. Electronic Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013), *cert. dismissed*, 135 S. Ct. 42 (2014), conflicts with *Brown*’s holding that the First Amendment protects video games to the same extent as other media. 131 S. Ct. at 2733. *Brown* made clear that video games, like films and other forms or art, receive the protection of the First Amendment because they “communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).” *Id.*

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<sup>1</sup> No counsel for a party authored this brief in whole or in part. Electronic Arts (“EA”) is one of 30 member companies of ESA that pay annual membership dues, the amount of which is not related to the cost of this brief, which was funded entirely by ESA.



The video game at issue here, *Madden NFL*, is just one example of a whole genre of video games based on historical events and personalities. Video games are no less expressive or communicative when they are based on reality than when they are based on fantasy. However, the Ninth Circuit held that reality-based video games are not constitutionally protected from former athletes' right-of-publicity claims because the games successfully replicate the look and feel of real football games. *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1177-78 (9th Cir. 2015). This "real life" vs. "fantasy" distinction makes no sense and chills legitimate speech. The Third Circuit likewise has misapplied the law to similar video games. *See Hart v. Elect. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), *cert. dismissed*, 135 S. Ct. 43 (2014).

The reasons advanced by the two Circuits for disfavoring reality-based video games echo the arguments made by the petitioner in *Brown* that video games present "special problems" that other forms of media do not, an assertion this Court soundly rejected. 131 S. Ct. at 2737. Both Circuits' approach to depicting real people in video games also is reminiscent of the initial, but mistaken, response of many courts to other new media technologies when they first emerged, such as motion pictures a century ago. Some courts initially took a dim view of depicting real persons on film rather than in print. But that position was gradually abandoned by the 1950s once motion pictures gained widespread cultural acceptance.

The Ninth and Third Circuits also failed to consider the profound practical implications of granting every participant in historical events the

right to control how real events may be depicted in a video game. That rule may well inhibit the viability of many reality-based games, which have become a popular vehicle for people to immerse themselves in subjects ranging from sports to presidential elections to historic military campaigns. In fact, all of the video games or the specific features of them that were challenged in *Davis*, *Keller* and *Hart* no longer exist as a result of lawsuits.

Finally, the lower courts' analysis arises from their failure to recognize that the right of publicity is a content-based restriction on speech that requires strict scrutiny, rather than the ad-hoc balancing of equally-weighted interests. Their erroneous approach results largely from their misconstruction of this Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). These Circuits and some others erroneously construe *Zacchini* to require that any proprietary right denominated by state law as a "right of publicity" be balanced with the First Amendment in much the same way that the fair-use doctrine operates within copyright law. This construction seriously misreads *Zacchini*, which was not about the "right of publicity" as it is defined by most states, including California.

Moreover, this construction seriously undervalues the First Amendment. Unless this Court clarifies *Zacchini*, these errors will continue to proliferate. This case provides a good vehicle for the Court to re-visit *Zacchini* and give clear guidance to lower courts regarding the level of scrutiny that should be applied to state-law doctrines that protect names and likenesses.

## ARGUMENT

### I. VIDEO GAMES HAVE EXPRESSIVE VALUE WHETHER THEY ARE BASED ON REALITY OR FANTASY

Both the Ninth and Third Circuits recognized, in principle, that video games are protected by the First Amendment under *Brown*. *Davis*, 775 F.3d at 1176; *Hart*, 717 F.3d at 148. But they erroneously concluded that games like *Madden NFL*, which incorporate portrayals of real individuals and events, are not worthy of such protection because their digital avatars do not sufficiently “transform” either the images of their real-life counterparts or the settings in which NFL football is played. *Davis*, 775 F.3d at 1177-78; *Hart*, 717 F.3d at 165-69. Put simply, these Circuits fault those video games for being too realistic. Even before addressing the constitutional implications of that logic, it is important to recognize that both decisions misunderstand, and indeed undervalue, the nature and diversity of video-game content.

Video games vary as widely as literature and film. Some video games are entirely a product of the creator’s imagination, much like science-fiction novels and other works of fantasy. Others, like *Madden NFL*, incorporate elements based on real life, much like other media genres that focus on real persons and events, such as biographies and docudramas.

Reality-based video games enable gamers to place themselves within the interactive context of real people who participated in real events. They also offer gamers the experience of contributing their

own expression, whether by creatively altering events as they unfold in the game or creating new and imagined experiences. For example, the game *Kuma War* puts players in the position of simulating actual military missions that were undertaken by the United States Armed Forces. That game transmits a great deal of information about military history and strategy and contains highly realistic avatars of historical figures ranging from American enemies, like Osama Bin Laden and Saddam Hussein, to United States military commanders, such as General James Abizaid:



Other games, like *Political Machine 2012* and *VOTE!!! The Game*, simulate presidential elections using avatars of actual candidates:



iCivics' *Argument Wars* allows players to simulate arguing some of this Court's most famous cases. Judge Thomas' dissent in *Keller* presciently characterized this genre of video games as "interactive historical fiction." *Keller*, 724 F.3d at 1285 (Thomas, J., dissenting).

Whatever the subject matter of a particular game, allowing players to simulate, alter and control their own version of real events is both entertaining and educational. Through the interactive process, players absorb and communicate information about these games' subject matter, much like students learn by engaging in conventional, interactive simulation exercises like model United Nations debates. For example, while enjoying *Madden NFL*, players can learn about the history of professional football and immerse themselves in thinking about the strategy of the game, such as the nuances of offensive and defensive play-calling.

Video games thus facilitate creative thinking about their subjects, which is why engineers, architects, scientists and other professionals routinely use electronic-simulation programs to gain fresh insights into their crafts.<sup>2</sup> In fact, some professional athletes now use reality-based video games to help them prepare for real competition.<sup>3</sup> This year, hundreds of American colleges, universities and technical schools have recognized

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<sup>2</sup> See, e.g., *Industries*, Unity3d.com, <https://unity3d.com/unity/industries> (last visited November 2, 2015).

<sup>3</sup> See Joe Brescia, *For Pro Athletes, Practice That's All Thumbs*, N.Y. Times (April 2, 2010), available at <http://www.nytimes.com/2010/04/03/technology/03game.html>.

their utility by offering courses and programs that incorporate video games,<sup>4</sup> such as the Massachusetts Institute of Technology's Comparative Media Studies/Writing program, which offers "a distinguished studio and workshop curriculum featuring the techniques and traditions of contemporary fiction, poetry, creative non-fiction, journalism, digital media, video, and games."<sup>5</sup> As such, reality-based video games are important tools of speech, equally deserving of First-Amendment protection as those tools invented in previous generations, such as books, films and even word of mouth. *See Brown*, 131 S. Ct. at 2738.

## II. THE DECISION BELOW VIOLATES *BROWNS* FUNDAMENTAL MAXIM THAT VIDEO GAMES ARE PROTECTED BY THE FIRST AMENDMENT TO THE SAME EXTENT AS OTHER FORMS OF EXPRESSION

It is well settled that the First Amendment protects "entertainment" media as it does other forms of speech because "the line between the informing and the entertaining is too elusive" to justify any distinction. *Winters v. New York*, 333 U.S. 507, 510 (1948). *See also Brown*, 131 S. Ct. at 2733; *United States v. Playboy Entm't Grp.*, 529 U.S.

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<sup>4</sup> *See U.S. Colleges and Universities Offering Video Game Courses & Degrees*, Entertainment Software Ass'n Newsletters, <http://www.theesa.com/article/u-s-colleges-and-universities-offering-video-game-courses-degrees/> (last visited November 2, 2015).

<sup>5</sup> *See About MIT Comparative Media Studies/Writing*, Massachusetts Institute of Technology, <http://cmsw.mit.edu/about> (last visited November 2, 2015).

803, 818 (2000). In *Brown*, this Court removed any doubt about whether that principle applies to video games, and struck down California’s efforts to regulate them because the State had “singled out the purveyors of video games for disfavored treatment – at least when compared to booksellers, cartoonists, and movie producers – and [had] given no persuasive reason why.” 131 S. Ct. at 2740.

But that is exactly what the Ninth and Third Circuits did when they applied to EA’s reality-based video games their construction of the multiplicity of balancing tests that California has used for the right of publicity. Both Circuits acknowledged that, in principle, video games must be treated like other forms of media. *Keller*, 724 F.3d at 1270-71; *Hart*, 717 F.3d at 148. Yet both also suggested that the same “transformative use” and “public interest” tests would likely produce different results for movies, books and other more traditional, reality-based media than for video games. *Keller*, 724 F.3d at 1279 n.10; *Hart*, 717 F.3d at 165-66. That result cannot be constitutionally justified. Rather, the rationale both Circuits offered to try to distinguish reality-based video games makes clear that they have in fact “create[d] a medium-specific metric that provides less protection to video games than other expressive works.” *Hart*, 717 F.3d at 174 (Ambro, J., dissenting).

For example, *Keller* suggested that other media do not place a “primary emphasis on reproducing reality.” 724 F.3d at 1279 n.10. That assertion likely would surprise an actor like Jaime Foxx who won an Oscar for his stunningly precise portrayal of Ray Charles in the movie *Ray*. *Keller*

also theorized that courts could intuit “whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity” as opposed to “the expressive work of that artist.” *Id.* (quotation marks and citations omitted). That test is not only hopelessly vague and subjective, it is not a plausible basis for distinguishing these video games from other realistic media.

Consumers do not buy the *Madden NFL* games because they view them as a substitute for posters, trading cards or other mere reproductions of NFL athletes’ images. Rather, they purchase the games because they value the wholly different experience of playing the games – *i.e.*, “the expressive work of [the] artist.” *Id.* (quotation marks and citations omitted). In fact, consumers would be far more likely to purchase a lithograph, like the one below accurately depicting Tiger Woods that was at issue in *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003), merely because it was an attractive portrait of a few famous golfers:





Yet both *Hart* and *Keller* agreed that the Woods lithograph was transformative (and thus protected), but concluded that EA's video games, which are not still portraits and also include numerous interactive elements, are not:



That contradiction cannot be reconciled. It suggests that these courts would protect the Woods portrait simply because it was a more traditional work of art created by a critically-acclaimed artist, rather than a sports-themed video game – which somehow “felt” wrong to protect.

Furthermore, *Hart* reasoned that “[a]cts of blatant misappropriation would count for nothing so long as the larger work, on balance, contained highly creative elements in great abundance. *This concern is particularly acute in the case of media that lend themselves to easy partition such as video games.*” 717 F.3d at 169 (emphasis added). But video games do not lend themselves to “easy partition” between “digital avatars” and other “highly creative elements” any more than one can readily “partition” the movie

*Walk the Line* into Joaquin Phoenix’s highly realistic portrayal of the musician Johnny Cash and all the other “highly creative elements” that are contained in the film. Indeed, it is difficult to imagine any integrated, expressive work that could be partitioned in this manner.

The flawed reasoning both Circuits used to try to distinguish reality-based video games from other realistic media resembles California’s argument in *Brown* that the “interactive” nature of video games somehow renders them qualitatively different from other, more established media for purposes of regulating their content. 131 S. Ct. at 2737-38. This Court rejected that argument, noting that “all literature is interactive” and such interactivity does not negate its expressive value. *Id.* at 2738. Here, too, there is no legitimate constitutional distinction between creating digital avatars capable of mimicking the looks and performances of real people, and hiring actors, taking photographs or drawing animated characters to do the same thing.

### **III. THE LOWER COURTS’ TREATMENT OF REALITY-BASED VIDEO GAMES IS MUCH LIKE THE WAY OTHER GENRES OF REALISTIC MEDIA WERE DISFAVORED WHEN THEY FIRST EMERGED**

The analysis applied by these Circuits is similar to the arguments rejected in *Brown* in another important respect. *Brown* noted that the State’s argument that video games endanger minors likewise had been made about other forms of media when they first emerged, and initially those arguments likewise had been favorably received. *Id.* at 2737; *see also Mut. Film Corp. v. Indus. Comm’n*

*of Ohio*, 236 U.S. 230 (1915) (approving a state statute censoring motion pictures). However, as time wore on, the fallacy in regulating new forms of expression became clear and this Court reversed course. *Brown*, 131 S. Ct. at 2737; *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

Courts' analysis of the right of publicity has responded to novel forms of media in much the same way. For example, when motion pictures first began to emerge, some courts held that the depiction of real people in creative film media was an actionable misappropriation of their likeness, even though similar descriptions appearing in books and newspapers remained legally-protected. *See, e.g., Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913) (early example of a docudrama was actionable misappropriation); *Donahue v. Warner Bros. Pictures, Inc.*, 194 F.2d 6 (10th Cir. 1952) (same); *Humiston v. Universal Film Mfg. Co.*, 189 A.D. 467 (N.Y. App. Div. 1919) (holding that motion pictures were actionable, while newsreels were not); *Blumenthal v. Picture Classics, Inc.*, 235 A.D. 570 (N.Y. App. Div. 1932) (footage of a New York street vendor shown in a video travelogue was actionable misappropriation).

By the 1950s, however, movies had become an integral part of culture and courts began rejecting the validity of drawing distinctions between motion pictures and other media. *See, e.g., Stryker v. Republic Pictures Corp.*, 238 P.2d 670 (Cal. Ct. App. 1951) (finding no misappropriation for a docudrama about Iwo Jima, rejecting *Binns*); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177 (Utah 1954) (also rejecting *Binns* and finding that a

docudrama does not support a misappropriation claim). Ultimately, the initial judicial inclination to distinguish video and print media as qualitatively different for purposes of the right of publicity and other content-based torts largely disappeared from the law. *See, e.g.*, William Lloyd Prosser, *Law of Torts* § 118 (4th ed. 1971) at 824-25 (“The privilege of enlightening the public . . . extend[s] also to information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general, as well as the reproduction of the public scene in newsreels and travelogues.”).

This pattern of greeting new media technology with judicial suspicion is repeating itself in the decisions below. Digital avatar technology may be relatively unfamiliar to those who grew up without the graphics that today’s games feature. But 155 million Americans now play video games and four out of five U.S. households own a device used to play them.<sup>6</sup> In time, video games that depict individuals as digital avatars likely will seem no more unusual than television news stories that depict individuals in video clips, or films that depict individuals through actors who have been made up to look like and have perfected the voice and mannerisms of such individuals. It is important that this Court address this case to re-affirm the core principle established in *Brown* and appropriately protect this still-emerging genre of expressive speech.

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<sup>6</sup> *2015 Sales, Demographic & Usage Data: Essential Facts About the Computer & Video Game Industry*, Entm’t Software Ass’n, available at <http://www.theesa.com/wp-content/uploads/2015/04/ESA-Essential-Facts-2015.pdf>.

#### IV. THE DECISION BELOW HAS THE PRACTICAL EFFECT OF CHILLING THE ENTIRE GENRE OF REALISTIC VIDEO GAMES

*Davis*, *Keller* and *Hart* also have real-world consequences for the entire genre of reality-based video games that both Circuits failed to consider. Those decisions now require anyone interested in creating a video game like *Madden NFL*'s "historic" versions to first locate, and then obtain the individual permission of, thousands of retired athletes and coaches, as well as the heirs of any who may have died in a state in which the right of publicity is descendible. *See, e.g.*, Cal. Civ. Code § 3344.1. Games that focus on political campaigns would need to do the same for politicians; military-based games would need to track down scores of former officers; and the same would be true for any other game addressing historical events. This task would be especially difficult for events that involved large numbers of people.

The practical barriers to accomplishing that are likely prohibitive. In fact, EA already has stopped making all of the games, or including all of the game features, that were at issue in *Davis*, *Keller* and *Hart*.<sup>7</sup> In effect, the "balance" struck by these cases between the right of publicity and the

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<sup>7</sup> *Madden NFL* no longer includes the ability to use historic teams, the feature of the pre-2010 versions of that game that is at issue in *Davis*. Likewise, shortly before EA settled the *Hart* and *Keller* cases, it discontinued its *NCAA Football* and *NCAA Basketball* games altogether.

First Amendment has been not just to chill, but to eliminate the speech.

And even if consents could be obtained, that would invite a licensing regime premised on censorship. All of those athletes, politicians, military commanders and others would have the personal right to exercise censorial control over how their participation in historical events is depicted in a video game. For example, an athlete could choose not to participate at all in a game like *Madden NFL*, or could condition his participation on being depicted as faster and stronger than he really was or by requiring that some disfavored rival be slower. A former presidential candidate could condition a license on being better financed or a more adept debater. A general could demand more tank divisions to improve the odds that he will emerge the victor within the game. Such censorial powers could make it impossible for game creators to accurately depict history, or for consumers of the games to realistically simulate it.

Notably, other reality-based video games already have come under legal assault as a result of these decisions. For example, shortly after the *Keller* decision was published, former Panamanian dictator Manuel Noriega and the estate of General George Patton both filed lawsuits against creators of video games that simulate military operations. *See CMG Worldwide Inc. v. Maximum Family Games LLC*, Case No. 3:14-cv-05124-JST (N.D. Cal.); *Noriega v. Activision/Blizzard Inc.*, BC 551747 (Cal. Super. Ct., L.A. Cnty.). Noriega's case was dismissed, but only because the California state trial court refused to follow *Keller's* narrow construction of the

state's transformative-use analysis. *See* Appendix A at 9a n.4.

If this case had been about a book or a movie that depicted a real football team like *Brian's Song*, or a political controversy like *All the President's Men*, or a large-scale military campaign like Stephen Ambrose's book and HBO's television series *Band of Brothers*, surely no court would hold that the First Amendment permits states to grant to every individual who participated in those events a proprietary right to censor how history may be depicted in those works. Yet the decisions below effectively promulgate that rule for video games. It is important that the Court grant certiorari to address this fundamentally unconstitutional result.

## V. THE NINTH AND THIRD CIRCUITS ERRED BY NOT APPLYING STRICT SCRUTINY

### A. Both Circuits Erroneously Treated State-Law Publicity Rights As Equivalent To Federal Copyrights That Must Be Balanced With The First Amendment Accordingly

Both Circuits effectively penalized EA's video games for being too realistic after applying a balancing analysis that seriously undervalued the First Amendment. Since the right of publicity is triggered when speech incorporates a name or image, it cannot be "justified without reference to the content of the regulated speech." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (citation omitted). Publicity rights are therefore content-

based restrictions on speech that should be subject to strict scrutiny, not ad-hoc balancing of supposedly co-equal state interests. Yet both Circuits instead “balanced” publicity and First-Amendment rights by literally importing their construction of just one aspect of copyright’s fair-use doctrine (transformative use), because they deemed that the most readily transferable to the right-of-publicity context. *See, e.g., Hart*, 717 F.3d at 158-65.

That mistaken approach was premised on these Circuits assuming two principles, both of which are erroneous: that (1) state-law rights of publicity and the First Amendment must always be balanced, and (2) the right of publicity is a form of intellectual property that is closely related to copyrights and serves similar state interests. *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 149 (“To resolve the tension between the First Amendment and the right of publicity, we must balance the interests underlying the right to free expression against the interests in protecting the right of publicity.”). Other lower courts likewise have adopted those principles as the foundation for evaluating any First-Amendment defense to a right-of-publicity claim. *See, e.g., ETW*, 332 F.3d at 939; *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808-06 (Cal. 2001).

Taken together, those principles have produced fair-use-like balancing tests, such as these Circuits’ construction of California’s transformative-use test, that give undue weight to state-law publicity rights, to the point of relegating the First Amendment to the status of a mere “affirmative defense.” *Hilton v. Hallmark Cards*, 599 F.3d 899, 909 (9th Cir. 2010). In a copyright case, such a



balancing approach would not be surprising given that federal copyright laws are themselves authorized by the Constitution. Such laws therefore typically face little First-Amendment scrutiny beyond the speech-protective provisions embodied in the Copyright Act itself, such as the fair-use doctrine and the idea-expression dichotomy. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-57 (1985). However, that approach in the right-of-publicity context is constitutionally perverse. “[T]he right of free expression” and “the right to control, manage, and profit from one’s own identity” are not co-equal “fundamental protections” that merit the same type of equal balancing. *See Hart*, 717 F.3d at 157.

Rather, the right of publicity and copyrights are fundamentally different and should be subject to different degrees of constitutional scrutiny. Not only are copyrights authorized by Article I of the Constitution, their sole purpose is to incentivize the creation of more original speech. Copyright law thus penalizes the use of another’s copyrighted expression only when doing so serves the larger goal of promoting speech. *See Harper & Row*, 471 U.S. at 556-57.

By contrast, the right of publicity is a relatively recent state-law concept that has nothing to do with incentivizing speech. Rather, publicity rights protect “[t]he right to exploit the value of [an individual’s] notoriety or fame.” *McFarland v. Miller*, 14 F.3d 912, 923 (3d Cir. 1994). They may be invoked regardless of whether a person’s fame was achieved by accident or design, or serves any useful social purpose. For example, being born to a famous

parent or achieving notoriety as a criminal may create more valuable publicity rights than winning a lesser-known Nobel Prize.

Whatever the state interest in rewarding fame for its own sake might be, it is not at all comparable to the importance the Constitution itself places on protecting copyrights in order to create more original speech. *See* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 *Stan. L. Rev.* 1161 (2006). Nor, as the Third Circuit erroneously held, are the two doctrines co-equal “fundamental protections” that require “carefully calibrated balancing.” *Hart*, 717 F.3d at 157. Rather, the right of publicity penalizes speech merely for including a name or a picture, and such content-based restrictions should be subject to strict scrutiny.

**B. The Lower Courts’ Failure to Apply Strict Scrutiny Results From Misconstruing *Zacchini v. Scripps-Howard Broadcasting***

The mistaken view that rights of publicity and the First Amendment must be subjected to copyright-like balancing results largely from these Circuits’ misconstruction of this Court’s analysis in *Zacchini*, which they read broadly to actually *require* that approach. The California Supreme Court made this point explicitly to explain the basis for its transformative-use test, which both Circuits then attempted to apply:

[T]wo principles enunciated in *Zacchini* apply to this case: (1) state law may validly safeguard forms of intellectual property not

covered under federal copyright and patent law as a means of protecting the fruits of a performing artist's labor; and (2) . . . the state law interest and the interest in free expression must be balanced, according to the relative importance of the interests at stake.

*Comedy III*, 25 Cal. 4th at 401. See also *Keller*, 724 F.3d at 1271 (citing *Zacchini* for the proposition that “we must balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer to use his likeness in its expressive works”); *Hart*, 717 F.3d at 149. The same construction of *Zacchini* has been adopted by other lower courts. See, e.g., *Hilton*, 599 F.3d at 909 n.12 (citing *Zacchini* for the proposition that “[t]he cousinage between copyright liability and the right to publicity has long been recognized”); *ETW*, 332 F.3d at 959 (“the reasoning and transformative test set forth in *Comedy III* are in line with the Supreme Court’s reasoning in *Zacchini*”). And regardless of which balancing approach lower courts may ultimately employ, many accept the proposition that “*Zacchini* . . . is the sole case from the Supreme Court to *directly* address the right of publicity.” *Id.* at 955 (emphasis added); see also *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372 (2003) (“*Zacchini* . . . is the first and only right of publicity case decided by the Supreme Court.”).

However, that construction of *Zacchini* is fundamentally wrong. The state-law theory at issue in *Zacchini* was very different than the right to protect names and likenesses that is at issue in the vast majority of “right-of-publicity” cases, including this one. In *Davis* and *Keller*, as in most right-of-

publicity cases, the plaintiff classes asserted rights provided by California statutory and common law that protect “names” and “likenesses.”<sup>8</sup>

By contrast, Hugo Zacchini did not object to the fact that his name or image appeared on the news. Rather, he complained that a local television station had broadcast his original “entire act,” thus depriving him of his right to decide whether to license the right to broadcast his entire event. *Zacchini*, 433 U.S. at 569. Rather than asserting a conventional right of publicity, Zacchini’s cause of action asserted essentially the same proprietary right protecting the production of entire live entertainment *events* that has been asserted by many other producers of such events in a line of unfair-competition cases dating back to the 1930s.

In those cases, as in *Zacchini*, the producer of a live sports or other entertainment event objected to a radio or television station broadcasting an entire game without its permission. *See, e.g., Nat’l Exhibition Co. v. Fass*, 143 N.Y.S.2d 767 (N.Y. Sup. Ct. 1955); *Sw. Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230 (Tex. Civ. App. 1947) (*per curiam*); *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938)); *Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.*, 165 Misc. 71 (N.Y. Sup. Ct. 1937). To this day, the lower courts have consistently held that event producers enjoy a proprietary right to exclusively license the right to broadcast their entire events,

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<sup>8</sup> *See* Cal. Civ. Code. 3344(a); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 409 (2001); *see also Hart*, 717 F.3d at 147 (EA violated plaintiff’s New Jersey rights of publicity by “replicat[ing] his likeness” in video games).

because, much like copyrights, those rights incentivize the production of original events of interest to the public. *See, e.g., Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614 (7th Cir. 2011) (“*WIAA*”). For that reason, television and radio networks negotiate with event producers like the NFL or NCAA for exclusive rights to broadcast their entire games.

*Zacchini* involved the assertion of the same proprietary right to control the broadcast of an entire live event, but as applied to the unusual circumstance of a 15-second, one-man event (or “act”) that was both produced and performed by the same person. The Ohio Court of Appeals correctly understood that the case did not raise a conventional right-of-publicity claim. Instead, it construed *Zacchini*’s complaint to assert claims for the conversion of intangible property and the misappropriation of a common-law copyright, which it called “a concept protecting property rights in intellectual productions conferred by the common law.” *Zacchini v. Scripps-Howard Broad. Co.*, No. 33713, 1975 WL 182619, at \*4 (Ohio Ct. App. July 10, 1975).

However, the Ohio Supreme Court, perhaps inartfully, labeled the theory the “right to the publicity value of [a] performance,” a concept that court had not used before and has not used since. *Zacchini*, 433 U.S. at 565. But whatever label the Ohio court may have used, this Court recognized that *Zacchini* was not about the “right of publicity” as that concept is typically used in state law. 433 U.S. at 573 n.10 (“[T]he case before us is more limited than the broad category of lawsuits that may

arise under the heading of ‘appropriation.’ Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness . . . .”). Rather, this Court recognized that *Zacchini*’s claim was about proprietary rights in the production of his “entire act,” not in his identity or persona. *Id.* at 569; *see also id.* at 576 (“[T]he broadcast of petitioner’s entire performance, unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner’s ability to earn a living as an entertainer.”). Put another way, if *Zacchini*’s act had been to shoot a pig out of a cannon and his own likeness had never appeared on television, he would have had the same cause of action because his ability to either profit from or prevent the broadcast of the event he produced would have been equally impaired.

To resolve that cause of action, this Court balanced *Zacchini*’s proprietary right to control the broadcast of his entire live event with the television station’s asserted First-Amendment interests. It concluded that, because much like copyright law, *Zacchini*’s rights incentivize the creation of original entertainment events, the First Amendment did not protect the station’s right to broadcast his entire act without permission. *Id.* at 576.

But *Zacchini* never suggested that individuals have what amounts to a presumptive common-law copyright in the names their parents chose for them or the images divinity gave to them, or the right to control how expressive works like movies or video games may strive to accurately depict their performances. Nor did *Zacchini* suggest that such

publicity rights should be balanced with the First Amendment, or treated like federal copyrights for that purpose.<sup>9</sup> Because the Ninth Circuit misconstrued *Zacchini* to actually require the content-based regulation of reality-based video games, this case provides a good opportunity for this Court to clarify the appropriate relationship between the right of publicity and the First Amendment.

### CONCLUSION

For the reasons stated herein, *amicus curiae* requests that the petition be granted.

Respectfully submitted,

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<sup>9</sup> *Zacchini* would be relevant to a case involving NFL football if, for example, a media entity were to broadcast an entire actual football game that competed with the telecast authorized by the NFL, and then either the NFL (or its licensed broadcaster) sued to stop it, or the media entity sued to permit it. The Seventh Circuit recently decided such a case, and it correctly applied *Zacchini*. *WIAA*, 658 F.3d at 624-25 (applying *Zacchini* to hold that a high school athletic association has the right to exclusively license internet streaming of entire football games). The Tenth Circuit also has more accurately construed *Zacchini*, and both Circuits' jurisprudence thus conflicts with the decision below. See *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 973 (10th Cir. 1996) (“*Zacchini*, however, complained of the appropriation of the economic value of his *performance*, not the economic value of his *identity*”).

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## **APPENDIX**

**APPENDIX — ORDER OF THE SUPERIOR  
COURT OF CALIFORNIA, COUNTY OF LOS  
ANGELES, DATED OCTOBER 27, 2014**

NOREIGA V. ACTIVISION/BLIZZARD, INC., *et al.*  
BC 551747  
October 27, 2014

**ORDER ON DEFENDANTS' SPECIAL MOTION TO  
STRIKE**

On July 15, 2014, plaintiff Manuel Noriega filed his unverified complaint for damages, setting forth three causes of action: (1) a violation of Civil Code 3344; (2) unjust enrichment; and (3) unfair business practices.

Noriega's complaint alleges that he currently resides in Panama. The complaint further contends that defendants: (1) designed, created, advertised and sold the popular video game "Call of Duty: Black Ops II;" (2) "engaged in the blatant misuse, unlawful exploitation and misappropriation of plaintiff's image and likeness for economic gain;" (3) portrayed plaintiff as an antagonist and as the culprit of numerous fictional heinous crimes; and (4) damaged "his reputation."

In response, defendants filed their Special Motion to Strike, pursuant to CCP 425.16. Defendants' Motion asserts that the video game at issue constitutes protected expression on matters of public interest and that plaintiff cannot establish a probability that he will prevail on any of his claims. Defendants supported their Motion with a Request for Judicial Notice and several declarations.<sup>1</sup>

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1. Plaintiff filed no objection to defendants' evidence. The Court grants defendants' Request for Judicial Notice.

*Appendix*

Plaintiff's Opposition is supported by his own declaration and one from his counsel.

During oral argument on October 16, 2014, plaintiff's counsel conceded that the complaint's second cause of action was in fact a remedy and should be dismissed. Plaintiff's counsel next conceded that defendants have met the first prong of the anti-slapp statute, *i.e.*, defendants' video game constitutes protected speech. *See, e.g., Navellier v. Sletten*, 29 Cal. 4<sup>th</sup> 82, 88 (2002). As a result, the burden shifts to plaintiff to demonstrate a probability of prevailing on his claim. *Id.*

Plaintiff claims that the burden placed upon him at this juncture is relatively low. Relying on language from *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4<sup>th</sup> 1018, 1026 (2011), plaintiff argues that he needs only to show that his case has "minimal merit." But the "minimal merit" phrase must be read in conjunction with other language in *No Doubt*, *i.e.*, in considering the second prong of the anti-slapp analysis, the trial court must consider "the pleadings and evidentiary submissions of both plaintiff and defendant." *Id.* at 1026. "In addition, the trial court must also consider all available defenses to the claims, including constitutional defenses." *Id.*

*No Doubt* was a case with some similarities to the instant controversy. There, plaintiff was a rock band which had a licensing agreement with Activision. Relying on Civil Code 3344 and Business & Professions Code 17200, the band alleged that Activision used the likenesses of its members in objectionable ways outside that licensing

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agreement. Activision then filed a special motion to strike pursuant to CCP 425.16, which was denied by the trial court. The Court of Appeal affirmed.

As to the “probability of success” prong, the Court of Appeal was faced with the same argument that Activision raises in the instant case, *i.e.*, “that the First Amendment provides a complete defense to the claim.” *Id.* at 1029. Relying on the “transformative use” defense established by *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal 4<sup>th</sup> 387 (2001), the Court of Appeal noted that 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.” *No Doubt* at 1030-31.

Further informing the Court of Appeal’s analysis in *No Doubt* was the Supreme Court’s decision in *Winter v. DC Comics*, 30 Cal. 4<sup>th</sup> 881 (2003). In that case, the Supreme Court stated that it is important to determine whether the depictions are “distorted for purposes of lampoon, parody, or caricature” and whether the depictions are part of “a larger story, which is itself quite expressive.” *Id.* at 890. As for economic considerations, *Winter* teaches that “the question is whether the work is transformative, not how it is marketed. If the work is sufficiently transformative to receive legal protection, ‘it is of no moment that the

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advertisements may have increased the profitability of the work.” *Id.* at 891.<sup>2</sup>

In ultimately concluding that Activision’s use of No Doubt’s likenesses was not transformative, the Court of Appeal found it significant that the band “posed for motion-capture photography to enable Activision to reproduce their likenesses, movements, and sound with precision. Activision intentionally used these literal reproductions so that players could chose to ‘be’ the No Doubt rock stars.” *Id.* at 1033. It was also significant that “Activision’s use of lifelike depictions of No Doubt performing songs is motivated by the commercial interest in using the band’s fame to market Band Hero, because it encourages the band’s sizeable fan base to purchase the game so as to perform as, or alongside, the members of No Doubt. Thus, insofar as the depiction of No Doubt is concerned, the graphics and other background content of the game are secondary, and the expressive elements of the game remain ‘manifestly subordinated to the overall goal of creating a conventional portrait of [No Doubt] so as to commercially exploit its fame.’” *Id.* at 1035.

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2. See also *Comedy III Productions, supra* at 407 (“Does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If the question is answered in the negative, then there would generally be no actionable right of publicity. When the work comes principally from some source other than the fame of the celebrity - from the creativity, skill and reputation of the artist - it may be presumed that sufficient transformative elements are present to warrant First Amendment protection.”).

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Thirty-five years ago, in *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860 (1979), Justice Bird provided a thoughtful analysis of the tension between a public figure's right of publicity and the First Amendment right of free expression:

“Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality. The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction.” *Id.* at 869.

In applying these standards to the evidence presented here, this Court concludes that Noreiga's right of publicity is outweighed by defendants' First Amendment right to free expression.

A brief summary of defendants' uncontroverted evidence conclusively shows that Noriega is a notorious public figure, perhaps one of the more notable historical figures of the 1980's. *See, e.g., Guglielmi, supra* at 869 (observing that Valentino's life and career are part of the history of the era).

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As a General in the Panamanian army and later, as the Dictator of Panama, Noriega controlled all elements of the Panamanian government, including those essential to the protection of drug trafficking and money laundering. Noriega actively worked with the Medellin cocaine cartel. He also was involved in the arms business, including shipping weapons to the Sandinistas in Nicaragua and to rebels in El Salvador.

In 1987, pro-Noriega mobs attacked the U.S. Embassy, and the U.S. then cut off economic and military aid to Panama. On February 5, 1988, federal grand juries in Miami and Tampa, Florida indicted Noriega on numerous counts of drug trafficking. Noriega turned to Cuba, Nicaragua and Libya for economic and military assistance.

After Noriega overturned the election results in his country in 1989, President Bush became even more concerned about the safety of U.S. citizens in Panama and potential interference with the Panama Canal. On December 15, 1989, the Panama National Assembly passed a resolution that a state of war existed with the United States and Noriega named himself the "Maximum Leader." On December 17, 1989, Operation Just Cause began with U.S. Special Operations Forces attacking key installations in Panama. On December 19, 1989, President Bush spoke in a televised address to the nation, describing the actions of Noriega and explaining Operation Just Cause.

As they looked for Noriega, U.S. forces searched two of his residences. Among other things, it was reported that

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they found pictures of Hitler, an extensive pornography collection, a “witches diary,” over \$8 million, lists of bank accounts in Switzerland and the Cayman Islands and three diplomatic passports.

In fear of advancing U.S. forces, Noriega fled to the papal Nunciatura in Panama. Secretary of State Baker negotiated with the Papal Nuncio and later, with the Vatican. Meanwhile, U.S. forces commenced playing loud rock music outside the Nunciatura. The media depicted this as a form of press censorship.

On December 29, 1989, a Vatican newspaper reported that a high-level Vatican official would be traveling to Panama to attempt to persuade Noriega to turn himself into U.S. Officials. Noriega did so on January 3, 1990 and he was arrested and flown to Homestead Air Force Base in Florida. In 1992, Noriega was convicted of narcotics trafficking and racketeering. He was sentenced to 40 years in prison. He was later convicted in Panama and France of other offenses. He remains in a Panamanian prison to this day.

Noriega’s opposing papers do not contest any of this. Noriega’s short declaration states only that he was not aware, until advised by his grandchildren, that his image and likeness were being used without his consent. Noriega fails to provide any evidence of harm to his reputation. Indeed, given the world-wide reporting of his actions in the 1980’s and early 1990’s, it is hard to imagine that any such evidence exists.



*Appendix*

Consistent with the relevant authorities, Noriega's opposition invites the Court to examine all of the evidence submitted and conclude that the transformative test "mandates denial of defendants' motion." Defendants agree that the question before the Court is one of law and urges that its motion be granted.

Both sides have provided various excerpts from the video game, which this Court has reviewed. Defendants have also provided the declarations of Daniel Suarez and Todd Harvey. These declarations establish several important and undisputed facts, including: (1) the video game is a fictional "first person shooter game" where players assume the role of a foot soldier placed in simulated infantry and warfare scenarios; (2) the game is set in the context of the Cold War and incorporates clandestine CIA operations driven by specialized Black Ops soldiers; (3) defendants devoted two years, over \$100 million and a team of over 250 designers, engineers and talent to develop and produce the video game; (4) Noriega's character appears in but two of the 11 "missions," which in turn are divided into two campaigns, one set in the Cold War and one set in 2025; (5) Noriega is just one of more than 45 characters, including other historical figures, who appear in the game; (6) players of the game can never assume the Noriega character's identity, control its movements or experience gameplay through its eyes; (7) the Noriega character appears in the two missions for only a matter of minutes and voices less than 30 lines; and (8) defendants do not use the Noriega character in any marketing or advertising of the game.

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This evidence compels the conclusion that defendants' use of Noriega's likeness was transformative. The publicly available photographs of Noriega used to create his avatar were part of the extensive "raw materials" from which the game was synthesized. Noriega's depiction was not the "very sum and substance" of the work. The complex and multi-faceted game is a product of defendants' own expression, with *de minimis* use of Noriega's likeness. Because the video game is transformative, economic considerations are not relevant. Regardless, the Court concludes that the marketability and economic value of the challenged work in this case comes not from Noriega, but from the creativity, skill and reputation of defendants.<sup>3</sup>

As stated by Justice Bird, "public prominence does not confer a shield to ward off caricature, parody and satire." Plaintiff's claim pursuant to Civil Code 3344 cannot survive defendants' First Amendment defense.<sup>4</sup>

Plaintiff's third cause of action, premised on Business & Professions Code 17200, fares no better. Plaintiff's complaint makes clear that this claim is based on the

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3. Compare *No Doubt, supra*, where the Court of Appeal concluded that Activision's use of the band's images was motivated by the commercial interest in using the band's fame to market the video game.

4. Plaintiff places great reliance *Keller v. Elec. Arts Inc.*, 724 F.3d 268 (9th Cir. 2013). First, that case is not binding authority on this Court. Further, to the extent that *Keller* suggests that the entirety of the disputed work should not be considered under the second prong of the anti-slapp analysis, such reasoning is in conflict with the controlling California authorities cited herein and relied upon by this Court.

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same facts alleged in his other causes of action: “Plaintiff incorporates herein by this reference each and every allegation contained in each paragraph above.” Complaint, par. VI(I). Because this Court has concluded that the facts alleged cannot withstand First Amendment scrutiny, the third cause of action must fail.

Plaintiff’s opposition only briefly addresses this issue and suggests that this claim should survive based upon certain language in *No Doubt*, 192 Cal. App. 4<sup>th</sup> at 1040. However, as defendants correctly point out, the Court of Appeals there found that there was a non-transformative use of the bands’ image, unlike the situation in the instant case. As a consequence, the mere allegation in paragraph VI(2) of the complaint, *i.e.*, “defendants have deceived and confused the public into believing that plaintiff authorized, approves, and endorses the use of its [sic] name and likeness in Black Ops II,” is insufficient. In defending against an anti-slapp motion, plaintiff is required to provide admissible evidence demonstrating a probability of prevailing on his claim. Plaintiff has provided no evidence at all and his unfair business practices claim must be dismissed. *See DuPont Merck Pharmaceutical Co. v. Superior Court*, 78 Cal. App. 4<sup>th</sup> 562, 568 (2000) (allegations in an unverified complaint are insufficient to meet the second prong of the anti-slapp analysis). Accordingly, good cause having been shown,

IT IS ORDERED that defendants’ Special Motion to Strike is Granted and plaintiff’s complaint is dismissed with prejudice.

Notice by defendants.