

Case No. B285629

**COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 3**

**FX NETWORKS, LLC AND
PACIFIC 2.1 ENTERTAINMENT GROUP, INC.,**

Defendants-Appellants,

v.

OLIVIA DE HAVILLAND, DBE,

Plaintiff-Respondent.

Appeal from an Order of the Los Angeles County Superior Court
Honorable Holly E. Kendig, Judge
LASC Case No. BC667011

**AMICI CURIAE BRIEF OF A&E TELEVISION NETWORKS, LLC;
DISCOVERY COMMUNICATIONS, LLC; IMPERATIVE
ENTERTAINMENT, LLC; URBAN ONE, INC.; CRITICAL
CONTENT, LLC; REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS; AND FIRST AMENDMENT COALITION IN
SUPPORT OF DEFENDANTS-APPELLANTS**

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE
JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF
CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 3:

Amici Curiae A&E Television Networks, LLC; Discovery
Communications, LLC; Imperative Entertainment, LLC; Urban One, Inc.;
Critical Content, LLC; Reporters Committee for Freedom of the Press; and
First Amendment Coalition (collectively “Amici”) respectfully submit this
Amici Curiae Brief in support of Defendants-Appellants FX Networks,
LLC and Pacific 2.1 Entertainment Group, Inc. (collectively, “Appellants”
or “FX”).

As described in their concurrently-submitted Application, Amici
include companies that are actively involved in the creation, production,
and distribution of constitutionally-protected films and television programs,
including fact-based, semi-fictional, and fictional works. Often these works
depict, are inspired by, or are based on, real-life people or events. These
Amici and the non-profit organizations joining this Brief are actively
involved in supporting the important constitutional protections for these
kinds of expressive works.

The trial court’s decision in the underlying case threatens to
significantly restrict future creative expression by suggesting that
individuals referenced or depicted in such works are entitled to demand
payment, or otherwise exercise monopoly rights over public discourse

about them. The trial court’s ruling therefore allows a famous actress to pursue a right-of-publicity claim based solely on her depiction in a television program about an historical period in which she played a prominent role. If left undisturbed, this ruling will create a substantial disincentive for screenwriters, filmmakers, and television producers to create works that even arguably relate to or depict real people and events, to the substantial detriment of the public.

For this reason, and because the trial court’s decision did not apply the strict constitutional protections that apply to expressive works, like the television series at issue here, Amici urge this Court to reject the right-of-publicity claim asserted by Respondent Olivia de Havilland (“Respondent” or “Plaintiff”).¹ Instead, this Court should use this opportunity to ensure that First Amendment rights are safeguarded, by holding that the Constitution does not permit right-of-publicity claims to arise from expressive works that are inspired by, or based on, real people or events.

I.

SUMMARY OF ARGUMENT

Plaintiff was one of the leading actresses during Hollywood’s golden age, appearing in 49 feature films over a career that spanned more than fifty years. She was a longtime confidante and friend of iconic actress Bette

¹ By focusing their Brief on Respondent’s right-of-publicity claim, Amici do not intend to suggest that her other claims have merit. The legal issues raised by those claims are addressed at length in Appellants’ briefs.

Davis (“Davis”), and played a public and well-publicized role in the conflict between Davis and another leading actress of that time period, Joan Crawford (“Crawford”). Given this undisputed history, it is unsurprising that the creators of the Emmy-winning docudrama, “FEUD: Bette and Joan” (“Feud”), included a depiction of Respondent in their program.

As a result, Respondent joined the thousands (or even millions) of men, women, and children around the world, living and dead, famous and unknown, whose lives have served as the inspiration for authors, screenwriters, and playwrights since the advent of the written word. Many of those subjects have been people like Respondent, who invited public attention. Section II, infra. But she is wrong in claiming that by virtue of her celebrity, she is entitled to demand payment if she is referenced or depicted in a creative work.

The First Amendment’s broad protection for free speech and press simply does not permit this kind of monopolization of expression relating to real people or events. To the contrary, courts routinely reject claims like those alleged here, ensuring that important stories can be told in books, motion pictures, and television programs, without censorship. This Court should reject Respondent’s attempt to dramatically expand right-of-publicity claims, by holding unequivocally that such claims purporting to arise from films, television programs, and similar expressive works – even

if inspired by or based on real people or events – are constitutionally barred. Section II.A, infra.

This holding not only is consistent with California law, it is required by the strict constitutional scrutiny that should be applied to Respondent’s claim. Under the First Amendment, any law that would restrict speech based upon its content – including the law governing right-of-publicity claims in California – is “presumptively unconstitutional and may only be justified if the government proves that [it is] narrowly tailored to serve compelling state interests.” Sarver v. Chartier, 813 F.3d 891, 905-06 (9th Cir. 2016). This is an exacting standard that Respondent cannot meet here. Section II.B, infra.²

Finally, it has been widely recognized that the “transformative use” test, first articulated by the California Supreme Court in 2001,³ is subject to confusing and inconsistent application, as the underlying case here

² If any right-of-publicity claims are permitted for expressive works, this Court can and should apply a constitutionally based bright-line test that strictly limits such claims to scenarios where plaintiffs can prove that the use of their names, likenesses, or personas were wholly unrelated to the underlying work – such as a “disguised advertisement” for an unrelated product or service. See Restatement (Third) of Unfair Competition, § 47, cmt. c (misappropriation claims based on creative works are constitutionally barred unless name/likeness “is used solely to attract attention to a work that is not related to the identified person”). Only under such narrowly cabined circumstances can a plaintiff even conceivably meet the strict constitutional standards for content-based restrictions on speech.

³ See Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 406 (2001) (“Comedy III”); Winter v. DC Comics, 30 Cal. 4th 881, 890 (2003) (“Winter”).

demonstrates. If this Court concludes that the transformative use test applies to the constitutionally protected expressive work at issue here, it must be applied in a manner consistent with constitutional principles, and consistent with the express language articulated by the California Supreme Court in Comedy III and Winter, neither of which can be reconciled with the trial court’s decision here. Section II.C, infra.

II.

THE FIRST AMENDMENT DOES NOT PERMIT RIGHT-OF-PUBLICITY CLAIMS TO ARISE FROM EXPRESSIVE WORKS INSPIRED BY OR DEPICTING REAL PEOPLE AND EVENTS.

From William Shakespeare to Mark Twain, writers throughout history have drawn from their own life experiences, as well as from their knowledge of real-life events, to create great works of literature.⁴ Authors like Charles Dickens, Virginia Woolf, Ernest Hemingway, Gertrude Stein, Henry Miller, James Baldwin, Erica Jong, and David Foster Wallace, just to name a few, have drawn on their own experiences and the experiences of others to craft their works. Many of these authors themselves have become the subjects of fictional or semi-fictionalized works, including “Midnight in Paris,” “The Hours,” and “Shakespeare in Love.”

Similarly, since the advent of motion pictures, filmmakers have created works that have entertained, inspired, and educated the viewing

⁴ Mark Twain is often credited with originating the phrase adopted by generations of creative writing teachers: “Write what you know.”

public by drawing upon actual events and people. These films take many forms, including the adaptation of literary works by renowned authors;⁵ docudramas, which dramatize historical events;⁶ historical fiction, in which real people and events serve as a backdrop for a fictional story;⁷ and purely fictional works that may have been inspired by real events or people.⁸

Indeed, the list of Best Picture nominees in the last five years is crowded with films that were based on (or inspired by) real people and events. These include “Hidden Figures,” a biographical drama about three female African-American mathematicians who played a vital role at NASA during the early days of the U.S. space program; “The King’s Speech,” a Best Picture winner about the true story of King George VI and his efforts to overcome a speech impediment; “Moneyball,” which depicts how Billy Beane and his colleagues from the Oakland Athletics used statistics to change professional baseball; “The Social Network,” which chronicled the

⁵ See, e.g., “Richard III” (1955), “Tom Sawyer,” “Oliver,” and “A Farewell To Arms,” among many others.

⁶ “Spotlight,” “Snowden,” “Jackie,” “The Theory of Everything,” “Capote,” “Frost/Nixon,” “A Beautiful Mind,” “The Perfect Storm,” “The Blind Side,” and “Erin Brockovich” are just a few recent critically-acclaimed films based on real-life people and events.

⁷ The Academy-award winning film “Titanic,” for example, depicted a real event and historical figures, but was set against the backdrop of an entirely fictional story. In “Forrest Gump,” the filmmakers employed archival newsreel footage of prominent public figures and events to create the backdrop for the title character’s fictionalized life. And more recently, the acclaimed feature film “Dunkirk” told the story of the Dunkirk evacuation during World War II, using fictionalized characters.

⁸ “Citizen Kane,” “Primary Colors,” and “The Devil Wears Prada” all were inspired by (or even loosely based on) actual people or events.

rise of billionaire Facebook founder Mark Zuckerberg; and “The Big Short,” which told the story of a group of investors who foresaw the financial crisis of 2008. Other recent examples include “American Sniper,” “Philomena,” “The Help,” “Zero Dark Thirty,” and “The Hurt Locker.”

Television producers similarly draw on real people and events to create educational, entertaining, and critically acclaimed television shows. These include the 2017 Emmy-award-winning program “The Crown,” which follows a young Queen Elizabeth as she takes on the responsibilities of being the monarch of England; “The Wizard of Lies,” in which Emmy-nominated actor Robert De Niro depicted convicted felon Bernie Madoff; and “The People v. O.J. Simpson: American Crime Story,” which brought back vivid memories of that “trial of the century.”

All of these movies and television programs – and countless others that depict or are inspired by real people and events – constitute core expressive speech that is valuable to society. These stories entertain, educate, and enlighten the public, help foster public debate about important societal issues, and lead to a deeper understanding of the human experience. None of them would be possible if the creators had to compensate – or even get the permission of – the real-life individuals depicted in the works.

A. Courts Consistently Reject Publicity Claims Based On Expressive Works Depicting Real-Life People And Events.

Given the cultural and historical importance of expressive works throughout modern history, it is little surprise that courts in California and across the country long have held that works inspired by or based upon real people and events are constitutionally protected. Just as news coverage cannot constitutionally be censored by individuals seeking to avoid media attention, it is well established that unauthorized biographies, documentaries, or other expressive works based on real people and events enjoy full First Amendment protection. As one leading legal commentator explained, contrary to popular belief, “life-story rights” do not convey the “exclusive right” to tell a person’s life story; to the contrary, “[t]he law gives to no living person the ‘exclusive right’ to tell his or her life story.” McCarthy, Thomas J., 2 Rights of Publicity & Privacy § 8:64 (2d ed.).

There is good reason for this:

If the law mandated that the permission of every living person and the descendants of every deceased person must be obtained to include mention of them in news and stories, both in documentary and docudrama telling, then they would have the right to refuse permission unless the story was told “their way.” 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.

Id. Thus, in “life-story” contracts, “the subject can only promise two things: (1) cooperation by the subject; and (2) a waiver of suing for

defamation and invasion of privacy.” Id. These two things may be valuable enough in some circumstances that creators choose to pay for them,⁹ but that does not mean that a failure to do so gives rise to a constitutionally permissible right-of-publicity claim. Well-established constitutional principles make clear that the First Amendment does not permit a putative plaintiff – celebrity or not – to hold a monopoly on free speech.

Instead, California courts and other courts around the country repeatedly have held that the First Amendment bars right of publicity claims based on news and feature reporting, documentaries, and biographical works. See, e.g., Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 442-44 (1993) (documentary film about surfing protected); Cher v. Forum Int’l, Ltd., 692 F.2d 634, 638 (9th Cir. 1982) (magazine article); Rosa & Raymond Parks Institute for Self-Development v. Target Corp., 812 F.3d 824, 831 (11th Cir. 2016) (rejecting suit by heirs of civil rights activist Rosa Parks for alleged right-of-publicity violations based on sale of non-fiction books and film and a plaque documenting Parks’ role in the

⁹ As the Court of Appeal explained in Polydoros v. Twentieth Century Fox Film Corp., 67 Cal. App. 4th 318, 326 (1997), which was discussed at length in Appellants’ Briefs, the “entertainment industry custom of obtaining ‘clearance’ of all characters featured in both fictional and nonfiction motion pictures” establishes “nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one.”

civil rights movement); Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (dismissing misappropriation claim arising from reality television program on First Amendment grounds); Ruffin-Steinback v. dePasse, 82 F. Supp. 2d 723, 730 (E.D. Mich. 2000), aff'd, 267 F.3d 457, 461-62 (6th Cir. 2001) (right-of-publicity does not prohibit unauthorized depictions of life story); see also Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185-86 (9th Cir. 2001) (First Amendment protected magazine's use of altered photograph of celebrity); Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 404-05 (S.D.N.Y. 1980) (First Amendment protected magazine's reprinting of photograph from a movie scene); Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 692 (2010) (reference to independent bands in magazine article protected).

Following this rationale, courts similarly have found that the same broad constitutional protection shields fictional or dramatized works from misappropriation claims. Sixty years ago, in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 502 (1952), the United States Supreme Court confirmed that fictional films are “a significant medium for the communication of ideas” entitled to full First Amendment protection – just like books, newspapers and other forms of expressive communication. The Court made clear that these constitutional protections are not diminished by the fact that the work may be properly labeled as “entertainment,” noting that “[t]he importance of motion pictures as an organ of public opinion is

not lessened by the fact that they are designed to entertain as well as inform.” Id. at 501-02.¹⁰

In a seminal decision applying these principles, the California Supreme Court rejected a right-of-publicity claim brought by the heirs of actor Rudolph Valentino based on a biographical film that told a fictionalized version of Valentino’s life story. Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 866 (1979). As the Court explained, “[w]hether exhibited in theatres or on television, a film is a medium which is protected by the constitutional guarantees of free expression,” and therefore the First Amendment barred the claim. Id. at 865 (Bird, C.J., concurring).¹¹ The court noted that “[c]ontemporary events, symbols and people are regularly used in fictional works,” and observed that “[f]iction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers.” Id. at 869 (Bird, C.J., concurring). The Court found the

¹⁰ Accord Winters v. New York, 333 U.S. 507, 510 (1948) (both entertainment and news are fully protected by the First Amendment because “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right [of a free press]”).

¹¹ Respondent downplays the significance of this decision, referencing it as a “concurrence.” R.B. at 40 n.15. But as the Supreme Court later noted, Chief Justice Bird’s opinion “commanded the support of the majority of the court,” because her opinion was joined or endorsed by three other Justices. Comedy III, 25 Cal. 4th at 396 n.7; accord Winter, 30 Cal. 4th at 887-88 (noting Court’s approval of Guglielmi in Comedy III).

justifications for protecting works of fiction from right-of-publicity claims to be compelling:

It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories. Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. What may be difficult to communicate or understand when factually reported may be poignant and powerful if offered in satire, science fiction or parable. Indeed, Dickens and Dostoevski may well have written more trenchant and comprehensive on their times than any factual recitation could ever yield. ...

Thus, no distinction may be drawn in this context between fictional and factual accounts of Valentino's life. Respondents' election of the former as the mode for their views does not diminish the constitutional protection afforded speech.

Id. at 867-68 (Bird, C.J., concurring) (footnotes omitted). Addressing the right-of-publicity claims specifically, Justice Byrd explained:

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

Id. at 872 (Bird, C.J., concurring).

A similar decision by the Florida Supreme Court in Tyne v. Time Warner Entm't Co., 901 So.2d 802, 808-09 (Fla. 2005), is instructive.

There, the Court held that, due to First Amendment concerns, Florida’s commercial misappropriation statute did not apply to “The Perfect Storm,” a feature film that dramatized the disappearance of a fishing vessel and crew during a powerful storm. In a well-reasoned and thoughtful opinion that has been cited by many courts around the country, the Court reached this holding even though it found that the movie “presented a concededly dramatized account of both the storm and the crew of the Andrea Gail,” included “an admittedly fabricated depiction of [the captain] berating his crew,” and “took additional liberties with the land-based interpersonal relationships between the crewmembers and their families.” Id. at 804. Without such fictionalization of the events of the fateful journey of the Andrea Gail, the story never would have been told, because no one survived to tell the tale. The Court held that applying Florida’s misappropriation statute to the movie “would raise a fundamental constitutional concern,” and observed that other courts “have similarly concluded that works such as the picture in the instant case would be protected by the First Amendment and that they do not constitute a commercial purpose.” Id. at 808, 809.

Cases from around the country consistently have reached the same result, even though the tests articulated are not always the same. See, e.g., Polydoros, 67 Cal. App. 4th at 326 (fictional film inspired by screenwriter’s childhood experiences, including a character based on a member of his

sandlot baseball team, was protected); Sarver, 813 F.3d at 905-06 (First Amendment barred a right-of-publicity claim based on alleged use of Army sergeant's identity and life story in "The Hurt Locker"); Meeropol v. Nizer, 560 F.2d 1061, 1066-67 (2d Cir. 1977) (alleged fictionalized account of Julius and Ethel Rosenberg trial not actionable under misappropriation theory; both "historical" and "fictional" works are fully protected by the First Amendment); Matthews v. Wozencraft, 15 F.3d 432, 439 (5th Cir. 1994) (First Amendment protects use of persona in novel, including plaintiff's "character, occupation, and the general outline of his career, with many incidents of his life"); Vijay, a/k/a "Abrax Lorini" v. Twentieth Century Fox Film Corp., 2014 WL 5460585, *4, 42 Media L. Rep. 2618 (C.D. Cal. Oct. 27, 2014) (First Amendment barred publicity claim by actor based on re-use of film scene in a different film, because the films were expressive works, and the use of plaintiff's likeness was transformative); Ruffin-Steinback v. dePasse, 82 F. Supp. 2d 723, 730-31 (E.D. Mich. 2000) (holding, in light of First Amendment concerns, that Michigan misappropriation claim did not apply to a docudrama miniseries about the Temptations); Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (use of name and characteristics of Agatha Christie in fictional film protected under First Amendment); Seale v. Gramercy Pictures, 949 F. Supp. 331, 337 (E.D. Pa. 1996) (use of plaintiff's persona in dramatized film about Black Panthers was protected expression); Doe v. Roe, 638 So.

2d 826, 829 (Ala. 1994) (rejecting attempt to enjoin fictional novel about the murder of plaintiff's adoptive children's natural mother on constitutional grounds); Rosemont Enters., Inc. v. McGraw-Hill Book Co., 85 Misc. 2d 583, 587, 380 N.Y.S.2d 839 (N.Y. Sup. 1975) (unauthorized, fictional biography of Howard Hughes could not provide the basis for a misappropriation claim; "Howard Hughes is no different from any other person in that he cannot have a monopoly, nor can he give a monopoly to any entity, with respect to works concerning his life"); see also Newton v. Thomason, 22 F.3d 1455, 1461 (9th Cir. 1994) (fictional television character based on living person not a commercial use).¹²

Even where the works include fictionalization or dramatization, their importance to the public discourse is manifest. As one author explained:

In many respects, fiction is as useful to society as any major historical text in depicting the events, customs, and general state of morality or intellectual advancement of a given period. ...

The combined impact of the author's personal right to express his views through a creative medium and the public's right of access to his ideas leaves little doubt that works of fiction are included within the first amendment's guarantee of free speech.

¹² See also Katzev v. Los Angeles County, 52 Cal. 2d 360, 365-66 (1959) (ordinance prohibiting the sale of certain "fictional" accounts of crime in comic books was unconstitutional under the First Amendment and Article 1, § 9 of the California Constitution); Eastwood v. Superior Court, 149 Cal. App. 3d 409, 423 (1983) ("works of fiction are constitutionally protected in the same manner as topical news stories.").

Heidi Stam, Comment, “Defamation In Fiction: The Case For Absolute First Amendment Protection,” 29 AM. U. L. REV. 571, 572 (1980) (“Defamation In Fiction”) (citations and footnotes omitted).

After surveying the case law, Professor McCarthy concluded that no misappropriation claim should be permitted where a work of fiction essentially is an “unauthorized” biography that contains fictional episodes and dialogue intentionally inserted to embellish the story and give greater entertainment value. 2 McCarthy § 8.9[F] (Release #11). As he observed:

No commercial injury greater or different in kind is presented when the story is fictional rather than factual, and is clearly labeled as such. While the argument has been made that such a fictionalized biography is no different from use of identity on non-media merchandise and advertising, this argument ignores the history of the first amendment ... [which] makes it clear that books, magazines, newspapers, movies, television docudramas, and the like have a favored position in our law and culture. All these forms of media convey ideas, information, and role models, as well as entertain. ... the opinion of the California Supreme Court states the matter well in the Rudolph Valentino case: “[A]ny assertion that fictional accounts pose a unique threat to the right of publicity not found in truthful reports is simply not justified.”

Id. (citations omitted; emphasis added).

The suggestion that constitutional protection is somehow diminished merely because an expressive work is sold for a profit, as Respondent has made here (R.B. at 37-38, 47), is inconsistent with well-established law.

See, e.g., Joseph Burstyn, 343 U.S. at 501 (“[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from

being a form of expression whose liberty is safeguarded by the First Amendment”); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (noting that it is “beyond serious dispute” that the sale of speech alone does not render it “commercial” for purposes of the First Amendment); see also Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publishing, 94 N.Y.2d 436, 442 (2000) (“the fact that a publication may have used a person’s name or likeness ‘solely or primarily to increase the circulation’ of a newsworthy article – and thus to increase profits – does not mean that the name or likeness has been used for trade purposes within the meaning of the statute.”).

Thus, the accumulation of case law nationwide that is reflected in the Restatement limits liability for violating so-called rights-of-publicity to the unauthorized appropriation of the commercial value of a person’s identity “for purposes of trade.” Restatement (Third) of Unfair Competition, § 46. This term does not ordinarily include the use of a person’s identity in “news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” Id. § 47 (emphasis added). Instead, the Restatement presumes that “use in entertainment and other creative works is permitted,” unless “the name or likeness is used solely to attract attention to a work that is not related to the identified person.” Id. § 47, cmt. c (emphasis added).

This is consistent with the approach articulated by the Second Circuit Court of Appeals in Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989). There, actress Ginger Rogers brought right-of-publicity and other claims against the producers of the film “Ginger and Fred” – a title that alluded to Rogers’ collaboration with Fred Astaire, although the film was not about the iconic American performers, but instead related the story of two fictional Italian cabaret singers who once earned their livings by imitating the real Ginger and Fred. Id. at 996-97. The court cautioned that right of publicity claims pose great danger to free speech because they have no likelihood of confusion requirement. “Perhaps for that reason, courts delineating the right of publicity, ... have recognized the need to limit the right to accommodate First Amendment concerns.” Id. at 1004. Relying heavily on Justice Bird’s analysis in Guglielmi, the court held that “the right of publicity [would not] bar the use of a celebrity’s name in a movie title unless the title was ‘wholly unrelated’ to the movie or was ‘simply a disguised commercial advertisement for the sale of goods or services.’” Id. at 1004. Applying that standard, the court held that because “the title ‘Ginger and Fred’ is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product,” Rogers’ right-of-publicity claim was barred by the First Amendment. Id. at 1004-05.¹³

¹³ Notably, Respondent does not cite a single California case

The need for broad protection of such creative works, as these and other courts have recognized, is obvious: if right-of-publicity claims are permitted to proceed based on the depiction of real-life people or events, or even characters based on or inspired by real people, there would be an unprecedented – and all but insurmountable – hurdle for authors and creators. The end result would be to stifle any creative work derived from an author’s life experiences, or other real-life people or events, unless the creator can undertake the hugely expensive and often impossible task of obtaining releases from every single individual who might claim that his or her identity was used in the work.

Indeed, under Respondent’s theory of the law, many acclaimed motion pictures about or inspired by real people likely would never have been made. Orson Welles might well have simply shelved the film “Citizen Kane,” which includes a character who was inspired by William Randolph Hearst, since it is inconceivable that Hearst would have consented to having his “persona” depicted in that manner. Steven Spielberg might have confined himself to movies about extraterrestrials, instead of making the epic film “Saving Private Ryan,” which was inspired by the true story of Sgt. Frederick Niland – a real-life paratrooper in the 101st Airborne Division whose three brothers were killed in action in

permitting a right-of-publicity claim based on a fact-based, semi-fictional, or even fictional work. R.B. at 21-24, 38-41. Because Appellants’ Reply addresses the cited authorities, Amici will not do so again here.

different theatres of war around the same time. Writer/director Cameron Crowe might have been reluctant to produce the fictional motion picture “Almost Famous,” which is a semi-autobiographical account of his real-life experience as a 15-year-old journalist for Rolling Stone magazine. Kathryn Stockett might never have found a publisher – let alone a film producer – for her best-selling novel, “The Help,” which drew upon her childhood experiences in the Deep South to vividly depict the perspective of African-American maids in the 1960s. James Cameron might have skipped to avatars rather than producing the blockbuster film “Titanic,” which set a fictional story against the backdrop of the real-life, tragic sinking of the British passenger liner. And the many non-fiction or semi-fictional works described above – including literary masterpieces, Academy-Award winning films, and critically acclaimed television programs – might well not have been attempted.

B. Respondent’s Claim Does Not Survive The Strict Scrutiny Required By The First Amendment.

Although Appellants persuasively explain why “Feud” should be protected, even under the oft-confusing “transformative use” test, First Amendment jurisprudence provides a broader and more robust basis for rejecting Respondent’s claim: such claims cannot survive constitutional strict scrutiny, which must be applied to content-based claims – including right-of-publicity claims. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (a

speech regulation is content-based when it cannot be “justified without reference to the content of the regulated speech”); see also Sarver, 813 F.3d at 903-04 (applying strict scrutiny to right-of-publicity claim arising from feature film).¹⁴

It is well recognized that the First Amendment requires content-based restrictions on expressive speech to be subjected to strict scrutiny. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (content-based speech regulation subject to the highest level of scrutiny); Sable Comm’ns of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (content-based speech restrictions must be narrowly drawn to serve a compelling government interest); Matal v. Tam, 137 S. Ct. 1744, 1765-66 (2017) (Kennedy, J. concurring) (plurality opinion) (“[t]he First Amendment guards against laws ‘targeted at specific subject matter,’ a form of speech suppression known as content based discrimination”) (quoting Reed v. Town of Gilbert,

¹⁴ Neither Comedy III nor Winters considered strict scrutiny; however, courts have noted that the transformative-use test adopted by the California Supreme Court is not the “only” First Amendment defense applicable to right-of-publicity claims arising from expressive works. See, e.g., Hilton v. Hallmark Cards, 599 F.3d 894, 909 n.11 (9th Cir. 2010) (taking “no position on whether there is a First Amendment defense to misappropriation of the right of publicity that is distinct from the [transformative-use test],” “leav[ing] for another day the question of whether the First Amendment furnishes a defense to misappropriation of publicity that is broader than the transformative use or public interest defenses”).

Ariz., 135 S. Ct. 2218, 2230 (2015).¹⁵ Because right-of-publicity claims protect against the commercial use of a person’s identity, which is not implicated by the use of a plaintiff’s name or likeness in an expressive work, there is no compelling government interest to weigh against the public’s significant interest in free expression.¹⁶

The Ninth Circuit recently applied this stringent First Amendment standard to a right-of-publicity claim targeting a motion picture, holding that “California’s right of publicity law clearly restricts speech based upon its content” and was therefore “presumptively unconstitutional and may only be justified if the government proves that [it is] narrowly tailored to serve compelling state interests.” Sarver, 813 F.3d at 903-04. In that case, an Army sergeant claimed that the film “The Hurt Locker” violated his publicity rights because the main character was based on him and the time he spent as an ordnance disposal technician in Iraq. Noting that “‘The Hurt Locker’ is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life –

¹⁵ Even content-neutral speech restrictions must satisfy intermediate scrutiny: the restriction must be narrowly tailored to further a substantial government interest. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

¹⁶ The right-of-publicity tort is a modern innovation that falls outside the historical categories where limitations on speech have been accepted. McCarthy, Preface (noting right of publicity is “still a relatively raw and brash newcomer”). The rationale for permitting individuals to restrict the use of their personas in advertising commercial products is not sufficiently compelling to warrant restrictions on expressive works. See also note 2, supra.

including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies, or plays,” the court concluded that the plaintiff’s claim could not survive strict scrutiny. *Id.* at 905-06.¹⁷

Although courts have tended to neglect well-established First Amendment strict scrutiny tests in this area, instead struggling with various

¹⁷ In *Sarver*, the Ninth Circuit strained to reconcile its holding that the right of publicity is subject to strict scrutiny under the First Amendment with previous cases that had failed to consider the strict scrutiny standard. In so doing, the court stated in dicta that the state’s interest might be sufficiently compelling to survive strict scrutiny if the defendant’s work “either appropriates the economic value of a performance or persona or seeks to capitalize off a celebrity’s image in commercial advertisements.” 813 F.3d at 905. The court reasoned that any such interest was especially weak in *Sarver*’s case, because the film was not commercial speech, and because *Sarver* was a private person who did nothing to cultivate his fame. *Id.* at 905. The court did not, however, directly address whether applying the right of publicity to use of a celebrity’s name or likeness in a purely expressive work could survive strict scrutiny. That is also a highly dubious proposition, given the significant free-speech value in permitting filmmakers, television producers, novelists, and other artists to comment on and tell stories about public figures, and the weak government interest in promoting the purely economic interests of celebrities who already possess fame and fortune. See Diane Leenheer Zimmerman, *Money As A Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. REV. 1503, 1524 (2009) (arguing that economic interests cannot outweigh free-speech concerns, except in highly unusual circumstances where denying a celebrity’s claim would result in “significant, highly particularized, and non-speculative” risk of “failure in the primary market for his talents”); see also generally Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 134, 178-236 (1993) (demonstrating that the main arguments advanced in favor of publicity rights “are significantly less persuasive than commonly believed,” and that “publicity rights exact a higher cost in important competing values (notably, free expression and cultural pluralism) than has generally been appreciated”).

kinds of “balancing” tests, that anomaly does not change the well-entrenched Supreme Court precedent requiring strict scrutiny of content-based restrictions on expressive works. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986); see also Frazier v. Boomsma, No. CV07-08040, 2007 WL 2808559 at *15 (D. Ariz. Sept. 27, 2007) (right of publicity is a content-based restriction on protected speech, subject to strict scrutiny). The conflicting and confusing body of case law in misappropriation rights cases militates in favor of a return to the “strict scrutiny” analysis and a categorical exemption protecting expressive works from publicity rights liability.

Such a finding would not mean that prospective plaintiffs are without a remedy if filmmakers cross the line of protected speech. If a plaintiff can meet the constitutional requirements for a defamation claim, or for a public disclosure of private facts claim, the law does and would continue to provide a remedy. But that differs from allowing an individual to have a monopoly on public events or historical facts. As discussed above, giving individuals the ability to demand payment for any “use” of their names or likenesses in expressive works, or in works that may have been “inspired” by a real-life person, is the equivalent of censorship, giving them the power to control what may be said about them. Section A, supra. The First Amendment flatly prohibits states from giving individuals that

kind of control over expressive works like the television series at issue here.¹⁸

C. This Court Should Reject Respondent’s Narrow Interpretation Of The Law.

The limitations of the transformative-use test are apparent. Just two years after its first articulation in Comedy III, the California Supreme Court had to clarify its earlier ruling. Even though the Court noted that the application of the test to a comic-book’s phantasmagoric depiction of celebrity musicians was “not difficult,” its statement came in a decision reversing an intermediate appellate court’s unanimous holding that the test did not protect the publisher’s depiction of the musician-brothers as “worm-like” creatures. Winter, 30 Cal. 4th at 890, 892.

In the nine years since Winter, the confusion caused by the transformative-use test has not abated. Instead, courts have continued to struggle with its proper application, resulting in inconsistent opinions that have created substantial confusion and uncertainty in this area of the law.¹⁹

¹⁸ Respondent’s citation to Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), is misplaced. There, the Court repeatedly emphasized the sui generis nature of the case, which arose from the appropriation of the plaintiff’s entire act, thereby precluding him from engaging in his given occupation. The same could hardly be said for Respondent, or even for an actor who was still engaged in the acting profession.

¹⁹ Compare No Doubt v. Activision Publg., Inc., 192 Cal. App. 4th 1018 (2011) (suggesting that transformative-use test requires defendant to alter the name or likeness of a plaintiff within an expressive work) with Arenas v. Shed Media U.S., Inc., Case No. CV11-05279 DMG, 2011 U.S.

Thus, it is not surprising that leading commentators have criticized this test. Professor McCarthy, for example, observed that the transformative-use test is “extremely difficult to predict and apply because it requires a court to make an aesthetic judgment” about “the degree of the artistic transformation” required for a work to qualify for First Amendment protection. 2 McCarthy § 8:72, at 248, 269.²⁰ As he explained:

Unclear rules with resulting unpredictability of results are always dismaying in any area of the law. But it is especially undesirable when First Amendment issues of free speech and free press are implicated. First Amendment rights are said to need ‘breathing space’: uncertainty about the legal rules governing speech protected by the First Amendment is viewed as having a ‘chilling effect’ on freedom of speech.

Id. at § 8:9.

Respondent’s articulation of the transformative-use test, which was apparently accepted by the trial court, would create even greater confusion and inconsistencies. She argues that because the producers of the program tried to “give the docudrama authenticity” and “use Respondent’s name and identity, doing what she did as a celebrity,” the work “does not transform the character into anything other than an exact depiction of Respondent.”

Dist. LEXIS 101915 (C.D. Cal. Aug. 22, 2011) (recognizing that the transformative-use test does not require a defendant to alter the name or likeness of a plaintiff within an expressive work).

²⁰ For additional criticisms of the test, see Eugene Volokh, “Freedom of Speech and the Right of Publicity,” 40 HOUS. L. REV. 903, 916-925 (2003); 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, at 35-71 (2003).

R.B. at 43. As a result, Respondent maintains that her alleged portrayal in “Feud” was not transformative. Id.

But this articulation ignores the fundamental nature of the transformative-use test. Under Respondent’s interpretation, the test would shield only highly fanciful or surreal works and would strip constitutional protection from an entire genre of expressive works that, up to now, have enjoyed full constitutional protection. This is contrary to the California Supreme Court’s admonition that “[n]o author should be forced [by threat of a right-of-publicity claim] into creating mythological worlds or characters wholly divorced from reality.” Guglielmi, 25 Cal. 3d at 869.

Indeed, works that depict real people and events (or that are inspired by actual people and events) never could qualify for First Amendment protection under Respondent’s test, because the characters in such works necessarily would share the attributes of the people they are intended to depict. This would turn decades of well-established constitutional jurisprudence on its head, and threaten an entire genre of expressive works.²¹

²¹ Because many states’ laws allow post-mortem right-of-publicity claims – including California’s – Respondent’s restrictive theory of First Amendment rights could eliminate even historical figures from the public discourse. The film “Darkest Hour,” depicting Winston Churchill, or “Jackie,” portraying Jackie Kennedy and other members of the Kennedy family, and even the Broadway sensation “Hamilton” might give rise to lawsuits by heirs eager to cash in.

The context in which the transformative-use test arose also is relevant. The California Supreme Court created this test when faced with a claim arising from mass-produced consumer products with incidental expressive elements – namely, T-shirts emblazoned with celebrity images. Comedy III, 25 Cal. 4th at 393, 408-09. Before Comedy III, the California Supreme Court already had ruled in Guglielmi that motion pictures are categorically exempt from right-of-publicity claims under the First Amendment. 25 Cal. 3d at 871-72 (Bird, C.J., concurring). Both Comedy III and Winter reaffirmed that Guglielmi remains good law. Comedy III, 25 Cal. 4th at 397 (citing Guglielmi with approval in discussion of how expressive works about real people play an important role in society and quoting its statement that “prominence invites creative comment”); Winter, 30 Cal. 4th at 887-88 (same). Those decisions make clear that the focus must be on the broader work, and not merely whether the particular plaintiff’s persona was “transformed.” Under the Court’s plain language, a comic book, or television series, or motion picture that uses a plaintiff’s image or persona as only one part of a larger whole – and here, a minor part – remains entitled to constitutional protection. Winter, 30 Cal. 4th at 890.

In Comedy III, the Court explained that its earlier decision distinguished “protected from unprotected appropriation of celebrity likenesses: ‘an action for infringement of the right of publicity can be maintained only if the proprietary interests at issue clearly outweigh the

value of free expression in this context.” 25 Cal. 4th at 401-02, citing Guglielmi, 25 Cal. 3d at 871. It criticized a case that allowed a claim based on “a new play featuring characters resembling the Marx Brothers,” declaring:

[T]he First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. The necessary implication of this observation is that the right of publicity is essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame through the merchandising of the “name, voice, signature, photograph, or likeness” of the celebrity. (§ 990.)

Id. at 403 (citations omitted; emphasis added). The Court explained that “[w]hen artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass,” it loses the protection of the First Amendment. Id. at 405. But significantly, it found that such a claim is allowed only to the extent that the work “threaten[s] markets for **celebrity memorabilia** that the right of publicity is designed to protect.” Id. (citation omitted; emphasis added). This is where Respondent’s analysis goes astray: it ignores that the essence of a right-of-publicity claim is protecting against the commercialization of a likeness or persona by the sale of commercial products or services – t-shirts, coffee mugs and similar memorabilia. See id. at 407 (discussing questions courts

can ask in deciding if work infringes plaintiff's right of publicity). Viewed in this context, even the transformative-use test distinguishes between a functional item like t-shirts, and items like trading cards that may include a likeness of an athlete, but also add "significant transformative elements" as in Cardtoons, L.C. v. Major League Baseball Players Association, 95 F.3d 959, 974 (10th Cir. 1996). Comedy III, 25 Cal. 4th at 405-06.

The Supreme Court's clarification of its test, in a case involving an expressive work, also demonstrates that Respondent's focus on the depiction of her character, rather than the docudrama as a whole, is woefully misplaced:

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

Winter, 30 Cal. 4th at 406 (emphasis added).

Winter did not turn on the fact that the characters were fanciful creatures rather than replications of the plaintiffs. R.B. at 43 n.18, 44 n.19. In reversing an appellate decision allowing a right-of-publicity claim to proceed, the Court focused on the broader work, explaining that "in contrast to a drawing of The Three Stooges, the comic books do contain

significant creative elements that transform them into something more than mere celebrity likenesses.” 30 Cal. 4th at 885 (emphasis added). The Court carefully analyzed Comedy III before declaring that “[a]pplication of the test to this case is not difficult.” Id. at 890. The Court pointed out that the comic books “are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs’ mere likenesses,” and that “plaintiffs are merely part of the raw materials from which the comic books were synthesized.” Id. It went on to emphasize that the claim failed because the comic books did not misappropriate the commercial value of the plaintiffs’ personas – harming plaintiffs’ ability to monetize their right of publicity – given that they are more than a “conventional depiction” of the plaintiffs. Id.

An earlier decision by this Division, Ross v. Roberts, 222 Cal. App. 4th 677 (2013), is instructive. There, this Court easily rejected a claim by a musician who alleged that another musician appropriated his “music and persona as a rap musician.” Id. at 687. Even though the name that was allegedly misappropriated – “Rick Ross” – was not “transformed,” the court found that plaintiff’s persona was “not the ‘very sum and substance’ of [defendant’s] work.” Id. (citation omitted). The decision elaborated:

He was not simply an imposter seeking to profit solely off the name and reputation of Rick Ross. Rather, he made music out of fictional tales of dealing drugs and other exploits – some of which related to plaintiff. Using the name and certain details of an infamous criminal’s life as basic

elements, he created original artistic works. “A work is transformative if it adds ‘new expression.’” ... [Defendant’s] work clearly added new expression.

Id. at 687-88 (citations omitted; emphasis added).

This Court held that the secondary inquiry required by Comedy III – whether the value of the work derived from the plaintiff’s celebrity – also supported the rejection of the plaintiff’s claims. “It defies credibility to suggest that [defendant] gained success primarily from appropriation of plaintiff’s name and identity, instead of from the music and professional persona that he (and the other defendants) created.” Id. at 688. Invoking the California Supreme Court’s explanation in Winter that “the Winter brothers were merely cartoon characters ‘in a larger story, which is itself quite expressive,’” this Court held that defendant’s music “may be analogized to a work of fiction in which the protagonist bears some resemblance to the original Rick Ross. The resemblance is one ‘raw material’ upon which the story is based, but it is merely a minor detail when viewed in the context of the larger story – [defendant’s] music and persona are much more than literal depictions of the real Rick Ross.” Id. at 689 (citing Winter, 30 Cal. 4th at 890).

This focus on the broader work, as opposed to the treatment of a particular plaintiff in that work, is the minimum required to conform to the important First Amendment interests at stake. Because right-of-publicity claims protect against the commercial use of a person’s identity, which is

not implicated by the use in an expressive work, there is no compelling government interest to weigh against the public's significant interest in free expression. Any contrary holding would be anathema to any meaningful concept of freedom of speech, and would serve to deprive the public of many culturally important films and television shows. Section A, supra. This is not and cannot be the standard for liability in California.

III.

CONCLUSION

The United States Supreme Court has recognized that “[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion[.] The door barring ... intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.” Roth v. United States, 354 U.S. 476, 488 (1957).

Adoption of Respondent's interpretation of the transformative-use test would dramatically expand these claims, and in the process, create a seismic shift in the scope of First Amendment protection available for fictional works depicting characters that are based on or inspired by real people and events. Such a change inevitably would stifle the creativity of

future Hemingways, Spielbergs, and Twains, with the nation's literary discourse all the poorer for it.

Dated: January 25, 2018

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), the text of this brief, including footnotes and excluding the caption page, table of contents, table of authorities, the signature blocks and this Certificate, consists of 8,378 words in 13-point Times New Roman type as counted by the Microsoft Word word-processing program used to generate the text.

Dated: January 25, 2018

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PROOF OF SERVICE

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On January 25, 2018, I hereby certify that I electronically filed the foregoing **AMICI CURIAE BRIEF OF A&E TELEVISION NETWORKS, LLC; DISCOVERY COMMUNICATIONS, LLC; IMPERATIVE ENTERTAINMENT, LLC; URBAN ONE, INC.; CRITICAL CONTENT, LLC; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; AND FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANTS-APPELLANTS** through the Court's electronic filing system, TrueFiling.

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Print Name



Signature