

THE RIGHT OF PUBLICITY: THROUGH THE THICKET?

THE REPORT OF THE RIGHT OF PUBLICITY WORKSHOP AT YALE LAW SCHOOL¹

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- and -

The Abrams Institute for the Freedom of Expression

October 16-17, 2015

Yale Law School, New Haven, CT

¹ The Workshop was organized by Sandra S. Baron, Senior Fellow, Information Society Project and the Floyd Abrams Institute for Freedom of Expression at Yale Law School, with support provided by the Abrams Institute, the Information Society Project and its staff, and the Oscar M. Reubhausen Fund.

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PREAMBLE

This Report summarizes insights shared by leading First Amendment practitioners and scholars at a Workshop convened to address widespread concern about troubling developments in the right of publicity. There was a sense of urgency to the enterprise: when the Workshop was convened, several federal appellate courts, and potentially the Supreme Court, were poised to wade into the doctrinal morass through which courts adjudicate right-of-publicity (“RoP”) claims, a long-problematic area of law recently worsened by threats to previously settled principles in a series of appellate decisions involving video games. With a petition for certiorari in one of those cases pending before the Supreme Court,³ two fully submitted federal appeals awaiting decision,⁴ and a number of RoP claims winding their way through the lower state and federal courts, a remarkable concentration of leading First Amendment thinkers were fully immersed in the RoP. It was the ideal time to lay conceptual foundations for a more coherent and lasting resolution of the tension between First Amendment principles of free expression, and the censorial effects of the right of publicity.

Those foundations are badly needed. With the denial of certiorari in the *Davis* case, Supreme Court guidance is, at least for now, unforthcoming. As RoP caselaw continues to respond to troubling new developments, the Workshop participants’ insights deserve the widest possible audience, that they might help bring order and restraint to the right of publicity.

Confusion in this area of law is, however, nothing new. It has been endemic since inception to the RoP, a patchwork quilt of state-law causes of actions for using names, likenesses and other indicia of persona without permission. What we have come to know as a person’s “right” of publicity (often referred to as misappropriation) was awkwardly birthed from the “right” of privacy famously announced by Warren and Brandeis in 1890,⁵ incorporated into the common law of a number of states and codified by a multiplicity of state statutes as a privacy oriented cause of action. But the RoP, as several Workshop participants have written, has assumed a far broader reach than its original incarnations support. Initially constrained to remedy emotional and dignitary harms caused by associating persons of character with sundry

³ Petitioner’s Brief, *Electronic Arts v. Davis*, No. 15-424.

⁴ *Sarver v. Chartier*, No. 11-56986 (9th Cir.); *Dryer v. N.F.L.*, No. 14-3428 (8th Cir.).

⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

commercial advertisements, the tort took a “property turn” in the mid-twentieth century towards its present focus on commercial interests as courts began recognizing claims arising from non-advertising uses (“moving pictures” and beyond), and used the right as a vessel to regulate expanding licensing markets for celebrity persona in evolving consumer and entertainment economies.⁶ This “turn,” however, was neither clean nor coherent. By the 1950s, after half a century of largely privacy-driven jurisprudence, RoP claims were broadly recognized enough to warrant their own collective name,⁷ but neither the court that christened it nor others that followed it had a coherent understanding of what this “right” protected, and quickly complained that “[t]he state of the law is still that of a haystack in a hurricane.”⁸

Unfortunately, as the Workshop participants agreed, this is even truer today. Despite another half-century of spilled ink and periodic efforts to impose order on this increasingly chaotic body of law, including Dean Prosser’s influential article,⁹ inclusion in both the Restatement (Second) of Torts and the Restatement (Third) of Unfair Competition,¹⁰ the Supreme Court’s first (and only) glancing brush with the tort in *Zacchini*, the states’ various attempts to impose order by statute, and the courts’ continuing efforts to impose order through constitutional limitations, we are left with more confusion than clarity. As discussed Jennifer Rothman’s recent statewide survey effectively demonstrates, a messy patchwork of state law is ineffectually and unevenly “constrained” by an equally messy patchwork of constitutional tests, and we lack clear answers to basic questions about which uses of persona are permitted in which contexts and in which media.¹¹ This unsightly state of affairs continues to preclude reliable guidance for publishers in a variety of genres and mediums that depict real people in furtherance of their expressive purposes.

⁶ Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L. J. 185, 219 (2012) (discussing shift in discourse “from dignitary to monetary harms”); *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984) (RoP originally protected “the sentiments, thoughts and feelings of an individual” but expanded to apply even “where the plaintiff generally seeks publicity, or uses his name, portrait, or picture, for commercial purposes”).

⁷ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.* 202 F.2d 866 (2d Cir. 1953); *but see* Rothman, *Inalienable RoP* at 193 n.29 (*Haelan* “may have been the first case to adopt a ‘right of publicity,’” but “was not the first to suggest that there was a property right in personality. Nor did the court coin the term.”) (citing *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) (justifying a right to privacy because there already existed a “right to publicity”).

⁸ *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956).

⁹ William L. Prosser, *Privacy* 48 CAL. L. REV. 383, 406 (1960).

¹⁰ Restatement (Third) Unfair Comp. § 47 cmt. c (1995).

¹¹ Jennifer Rothman, *Rothman’s Roadmap to the Right of Publicity* (Loyola Law School 2015), available at <http://www.rightofpublicityroadmap.com/>.

Worse, this fractured body of law has long been a virtual invitation to results-driven constitutional error. Confusion chills lawful speech, but codification of inadequately protective principles can forbid it entirely, and courts have demonstrated a worrisome tendency to alter expressive protections where they are skeptical that the challenged speech is worthy. As the Workshop participants agreed, we are entering another cycle in which courts confront relatively new forms of expression with opprobrium, withholding settled constitutional protections on the basis of improper high/low art distinctions, or judgments about the social value of a new medium, and freshly infusing RoP doctrine with aberrant caselaw.

This, too, is nothing new. Comic books and moving pictures suffered similar reactionary value judgments: courts once quaintly inveighed that “[t]he ‘show’ business is clearly different from the newspaper business” and unworthy of equivalent constitutional protection because “those who engage in the show business are none too likely to confine their productions to the things which are just, pure and of good report . . . in order to continue to attract patrons, many would cast discretion and self-control to the winds, without restraint, social or moral. . . . Certainly there are some things which are happening in actual life to-day which should not have pictorial representation in such places of amusement.”¹² Only after the motion picture industry achieved fuller acceptance in society did the Supreme Court repudiate this reasoning, pronouncing unequivocally in *Burstyn* that entertainment content was entitled to no less constitutional protection than news;¹³ it was for later courts to incorporate that principle and rationalize or abandon their early missteps. By and large, they have done so, clearing much of the detritus from superseded caselaw and widely accepting that uses of persona in entertainment formats like docudramas and biopics are constitutionally insulated from publicity claims.

An optimist might see in this a virtuous cycle. As RoP claims were brought against an ever-expanding universe of uses, limiting principles emerged--perhaps authors, producers, and other creators of expressive works should simply hold their collective breath through every technological or legal period of disruption, and allow the doctrine to right itself. But bad

¹² *Pathe Exch., Inc. v. Cobb*, 202 A.D. 450, 457 (3d Dep’t 1922), aff’d, 142 N.E. 274 (N.Y.1923).

¹³ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); see also *Winters v. New York*, 333 U.S. 507, 510 (1948) (“We do not accede to appellee’s suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.”).

decisions do not always go gently in the night, as we have seen with comic books, where some lingering law seems to treat graphic novels with less solicitude than is their due,¹⁴ and sea changes in First Amendment jurisprudence do not always sweep away anachronistic decisions. Even today, such guiding principles as have coalesced in the RoP are punctuated with incompatible caselaw that threatens to chill lawful speech.¹⁵ And judicial missteps during adjustment periods can easily become calcified: outliers become rules; bugs become features. This, unfortunately, appears already to have begun.

Workshop participants agreed that recent RoP decisions involving video games evince the same inappropriate high art/low art authorial biases and old arts/new arts medium-based biases that have been swept away *de jure* in the past, but show no signs of receding *de facto*. To the contrary, these biases have been tacitly rationalized by new, increasingly entrenched constitutional holdings, as federal appellate courts have doubled down on the application of a state-law constitutional test that represents the perfection of this particular dark art.

That test is the transformative use test, and the Workshop participants agreed that, in its increasingly ungoverned application to video games, it represents the single greatest threat to free expression within RoP jurisprudence today. The justices of the California Supreme Court that propounded the transformative use test adopted a loose, copyright-based analysis to police the boundary between the First Amendment and the RoP, and it was clear from the outset that despite the California court's claim to have no concern for the "quality of the artistic contribution" in a challenged work, the test required courts to judge precisely that. Within its

¹⁴ As one Workshop participant observed, *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), reflects the merchandise-like approach to graphic novels of earlier eras, rather than the more enlightened posture of contemporary courts. *E.g. Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003) (finding comic's "larger story . . . quite expressive"). *See* Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J. L. & ARTS 1, 10 (2015) ("courts have treated comics as less valuable than other kinds of art.").

¹⁵ One pre-*Burstyn* case still echoes in New York jurisprudence, involving a film about a dramatic rescue at sea facilitated by the use of new wireless communications, and including a fictionalized re-enactment of the actions of the heroic wireless operator. *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108, 1111 (N.Y. 1913) (rejecting First Amendment defense because studio "used the plaintiff's alleged picture to amuse those who paid to be entertained," and "[i]f the use of the plaintiff's name and picture as shown in this case is not within the terms of the statute, then the picture of any individual can be similarly made and exhibited for the purpose of showing his peculiarities as of dress and walk, and his personal fads, eccentricities, amusements and even his private life. By such pictures an audience would be amused and the maker of the films and the exhibitors would be enriched."). While at odds with now-settled principles, *Binns* has yet to be explicitly overruled, and has been cited even after the RoP became firmly commercial in character. *E.g. Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 836 (N.Y. 1967) (permitting "the defendants to publish the kind of knowing fictionalization presented here would amount to granting a literary license which is not only unnecessary to the protection of free speech but destructive of an individual's right – albeit a limited one in the case of a public figure – to be free of the commercial exploitation of his name and personality.").

four corners the *Comedy III* opinion presumed that the California judiciary would serve as something of a Salon, scrying valid artistic contributions from Andy Warhol's silkscreen reproductions of Marilyn Monroe's likeness but recognizing a lithographer's depiction of the Three Stooges as artistically valueless.¹⁶ As discussed below, the Workshop participants agreed that the transformative use test has been inappropriately expanded by federal courts to effectively withdraw constitutional protections from entire categories of media and expressive works based on unstated (and unlawful) value judgments.

More broadly, as the discussants generally agreed, courts are prone to make these qualitative missteps in cases involving visual representations, treating claims arising out of printed textual material in settled literary genres that "use" persona but leave the visual imaging to the reader's imagination unjustifiedly differently.¹⁷ A chaotic array of other constitutional tests has emerged from judicial encounters of the non-canonical kind: mass-marketed works considered "low" or "popular" – videogames, comic books, t-shirts, greeting cards and other visual art forms. The artistic value judgments and medium biases undergirding these decisions have infused the RoP with problematic analyses, with significant negative consequences for creative content in emerging or unconventional expressive mediums – innovative expression that the First Amendment ought to nurture, not freeze.

Each of these unfortunate tendencies – new-medium prejudice, high-art bias, and visual-image preoccupation – played prominent roles in the judicial trend that mobilized the Workshop. Recent years have seen an eruption of results-driven, speech-chilling RoP jurisprudence emerging from the wave of RoP litigation against the developers and publishers of video games. This trend is dangerous because, unlike the arguably virtuous cycles of the past, courts have not only failed to correct missteps, but even after *Brown v. Entertainment Merchants Association*,¹⁸ the Supreme Court's unambiguous repudiation of medium bias in video games and image preoccupation in the regulation of speech, and alongside an increasingly robust social acceptance of the medium's potential, federal appellate courts continue undeterred down that forbidden path.

Brown was decided in 2011, but arose from development in the early years of the twenty-first century, an inflection point for the medium. Advances in gaming technology brought

¹⁶ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

¹⁷ Tushnet, *supra* n. 14 at 15.

¹⁸ *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2737 (2011).

interactive entertainment to wide audiences and enabled a new level of verisimilitude, but familiar concerns about the “poisonous charm” of new media¹⁹ resurfaced in state-law regulations targeting the video game industry around the turn of the twenty-first century. Those notions were once again put to bed, or seemingly so, by *Brown*, which clarified that constitutional protection for works of entertainment includes works of interactive entertainment, and specifically acknowledged the ebb and flow of judicial overreactions to new mediums of expression. Noting that in every constitutionally meaningful sense, violent entertainment was “nothing new,” nor was the imaginative interaction between an audience and a work novel, whether accomplished through technology or the mind’s eye, the Court marched step-by-historical-step through an unmistakable pattern of overwrought, constitutionally invalid judicial reactions to new expressive genres. Suspicions about “dime novels” and “penny dreadfuls” of the nineteenth century gave way to concerns about film: “when motion pictures came along, they became the villains instead,” and were subjected to regulation for a time until the Supreme Court “eventually reversed course” in *Burstyn*, refusing to sanction claims against radio dramas and comic books, television and music lyrics.²⁰

An optimist might reasonably have hoped that, following *Brown*, equivalent constitutional protections for interactive entertainment would supersede initial judicial missteps, just as full constitutional protections for uses of persona in biopics and docudramas gradually made their way into the multiplicity of constitutional tests policing the bounds of the RoP after *Burstyn* and *Winters*. Thus far, however, the trend has been precisely the opposite. In addition to what seems to be an impulse by courts to treat video games as mere commodities, rather than expressive works,²¹ the Workshop participants agreed that courts are troubled by the role of technology, and its ability to recreate individuals as avatars in an interactive environment, performing tasks akin to what the individuals they represent performed in life. To be sure, we have arrived at the technological moment where an avatar can take the place of a human performing artist—the watershed “performance” of deceased rapper Tupac Shakur at a music festival was the harbinger of things to come, and at least one holographic production company

¹⁹ *Pathe*, 20 A.D. at 457.

²⁰ *Brown*, 131 S. Ct. at 2737.

²¹ William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 6 (2013).

has emerged to develop and license “performances” by deceased singers. But, as the Workshop participants agreed, uses of this sort are different in kind (and cannot be the basis for removing settled constitutional protections) from technologically activated forms of expression like videogames, or less technologically advanced mediums that give artists complete control over the replication (and alteration) of their subjects, such as artistic and graphic prints, comic books, and other expressive and artistic materials.

Nonetheless, courts have done precisely this, carving constitutional protections away from interactive entertainment in a manner that would be unthinkable in the context of more established mediums of expression. In so doing, courts have exposed deep-seated faults in RoP jurisprudence, undermining hard-won, previously well-settled constitutional assurances upon which the creators of fundamental forms of cultural expression rely. In 2013, notwithstanding the Supreme Court’s opinion in *Brown*, the Third and Ninth Circuits held (and refused to reconsider) that the use of images of student-athletes in football-based video games was not protected by the First Amendment, drawing from that problematic California state-law test to rule that the games were insufficiently “transformative” to warrant constitutional protection because they depicted the athletes “as they were best known.”²²

A wave of RoP litigation has surrounded those decisions, not only against interactive entertainment companies, but against works for which constitutional protections were previously thought to be well-settled. Sports broadcasters, news organizations, and film studios alike find themselves defending expensive lawsuits that purport to hold them accountable for the extent to which they should have “transformed” a likeness, rather than simply depicting the person as he or she achieved renown, such as the lawsuit arising from *The Hurt Locker*, a celebrated film about a bomb technician that was *sub judice* before the Ninth Circuit for years as various video-game-related cases made their way toward the Supreme Court. The Ninth Circuit finally decided the appeal in February 2016, but failed to resolve the problems created by prior applications of the transformative use test.²³ As commentators feared (and still more recent lawsuits confirm), footnoted assurances by the Third and Ninth Circuits in 2013 that *Hart* and *Keller* were not

²² *Hart v. Electronic Arts Inc.*, 717 F. 3d 141 (3d Cir. 2013); *Keller v. Electronic Arts Inc.*, 724 F. 3d 1268 (9th Cir. 2013). As some Workshop participants have noted in briefs, by insisting that the likenesses of the players themselves had to be transformed, the federal cases parted ways with language in controlling state-law cases that acknowledge that including an accurate likeness in a creative work can itself be transformative.

²³ *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016). Sarver has filed a petition for rehearing or rehearing *en banc* with the Ninth Circuit, which remains pending at the time of this writing.

meant to unwind settled constitutional protections for works in other genres, including motion pictures and docudramas, simply do not provide any principled basis for the distinctions the courts are using the transformative use test to draw between mediums.

This is the troubling backdrop against which the Workshop convened. Participants gathered in New Haven just days after the *Davis* petition was filed before the U.S. Supreme Court, seeking definitive guidance on the question that a century of legal rulemaking has still produced no conclusive answer: “Whether the First Amendment protects a speaker against a state-law right-of-publicity claim that challenges the realistic portrayal of a person in an expressive work.”²⁴ Leading practitioners, representing prominent speakers who must make content-related decisions in the face of newly uncertain doctrine, and leading First Amendment scholars, many of whom have written authoritatively on the problematically ungoverned state of RoP jurisprudence,²⁵ gathered to share knowledge and lay the groundwork for a coherent, First Amendment-compliant approach to the unruly RoP.

By combining insights from the academy with the experience of the bar, the Workshop sought to explore doctrinal approaches that would bring the scope of the RoP in line with First Amendment principles, theorize a remedy for the damage to those principles done by the video game cases, and strategize a more conclusive end to the speech-chilling cycle of doctrinal readjustments that has plagued the RoP since its inception.

To permit participants (particularly those involved in pending litigations) to speak freely, the Workshop was conducted under Chatham House Rules, and this Report shares the principal insights from the discussants without identifying any individual contributions. The Workshop was organized into a series of topical sessions led by one of the discussants, and though the sessions interrelated, an internal logic emerged from the Workshop. For its structure, therefore, rather than presenting a panel-by-panel overview, this Report follows the chief substantive insights developed at the Workshop.

Section I addresses *Zacchini*, the Supreme Court’s only glancing encounter with the RoP,²⁶ which was generally (but not universally) agreed to be an unavoidable starting point for challenges to existing constitutional protections. The discussants took issue with *Zacchini*’s

²⁴ Petitioner’s Brief, *Electronic Arts v. Davis*, No. 15-424.

²⁵ The Discussants are listed in the Appendices.

²⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

applicability to the RoP, and the inappropriately ambivalent “balancing” approach it has engendered among the lower courts between a constitutional right (to speak freely) and state-created claims (that propertize persona). Workshop participants agreed that *Zacchini* has been widely misapplied in the lower courts to permit a wider range of constitutional tests and less protection for uses of persona than the First Amendment requires.

Section II addresses First Amendment constraints on the RoP, and the Workshop’s consensus that a more coherent doctrinal articulation is badly needed to clarify how the First Amendment, liberated from the various tests that have emerged to date, limits state-created rights of publicity. It reviews three approaches suggested by discussants:

Under one line of thinking, courts should directly apply strict scrutiny to the tort as a content-based restriction on speech, treating the RoP as an inherently content-based restriction on speech under the Supreme Court’s recent decision in *Reed v. Town of Gilbert*.²⁷ This approach, which was recently adopted by the Ninth Circuit in deciding the *Hurt Locker* case,²⁸ would have sweeping reformative consequences for the RoP. The various state interests that have been advanced to justify protecting what are generally understood as property rights in persona are weak, and the limiting tests that purport to constrain the RoP are not sufficiently narrowly tailored: most if not all RoP claims would likely fail to meet the constitutional standard.

According to a second line of thinking, however, imposing constitutional limitations on particular aspects of RoP claims would be more practical. Courts, including the Supreme Court, have generally avoided direct application of strict scrutiny to what one discussant usefully termed “communications torts,” preferring to impose constitutional overlays on the elements of speech or IP-related torts, such as the laws of defamation (e.g., fault standards for public figures), privacy (e.g., matters of public concern), and copyright (e.g., the fair use defense). In the context of the RoP, the most promising overlays would excise inappropriate analogies copyright law from RoP jurisprudence and the limiting tests they have engendered (particularly the transformative use test), and incorporating trademark-based limitations to rationalize adjudication of what was felt by some to be the core interest protected by the RoP: preventing unauthorized commercial endorsements. This approach would, in effect, achieve a narrow

²⁷ 135 S. Ct. 2218 (2015). This approach might also eliminate the distinction between commercial and noncommercial speech, dramatically narrowing a tort that the lower courts have widely accepted may validly limit speech in the advertising context. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

²⁸ *Sarver*, 813 F.3d at 903 (“California’s right of publicity law clearly restricts speech based upon its content.”).

tailoring of the tort without the direct application of strict scrutiny, by forcing core aspects of the RoP to justify themselves against the narrow range of valid state interests advanced by the tort.

Third, the discussants explored how the RoP might still be constrained by the direct application of constitutional standards, but without abandoning existing distinctions between commercial and noncommercial speech drawn from commercial speech doctrine. Some were concerned that constitutional overlays would be problematic in the context of the RoP: unlike torts like defamation, where the piecemeal imposition of constitutional standards was smoothed by shared pre-Colonial principles and a relatively homogenous historical development of elements and defenses across the states, the RoP is so new and inconsistently incarnated that fashioning a generally applicable set of constitutional privileges would be unfeasible. By acting within the established constitutional division between commercial and noncommercial speech, however, courts could directly apply constitutional standards to the states' varying incarnations of the tort, demanding satisfaction of strict scrutiny outside of the commercial speech context, and vindicating valid concerns about false endorsements or other misleading commercial speech under the more permissive *Central Hudson* test.

Section III draws together strategic considerations and outlines practical steps identified by the discussants. Reflecting a major theme of the Workshop that the speech-chilling effects of bad law and inappropriate judicial impulses linger even when squarely repudiated by subsequent caselaw, and that, as one discussant noted, the nature of celebrity in contemporary culture has created a normative expectation that persons should be rewarded economically whenever their images are displayed, this Section briefly summarizes positions the discussants thought worth particular emphasis in future briefing and analysis.

The Workshop aspired to galvanize leading thinkers around a shared set of concerns, and, through this Report (in which any errors and omissions are strictly the responsibility of its author) to provide a touchstone for practitioners and academics in their continuing efforts to clarify the proper boundaries of this problematic cause of action. It was organized by Sandra S. Baron, with support provided by the Floyd Abrams Institute for Freedom of Expression, the Information Society Project and its staff, and the Oscar M. Ruebhausen Fund. But its principal debt is to the discussants and attendees, who are listed in the Appendices. As reflected below, their scholarship, briefing, and thoughtful participation in the Workshop has added considerably to the quality of public thinking on a serious problem facing authors and audiences alike.

I. *ZACCHINI* AND ITS DISCONTENTS

For better or worse, judicial consideration of the proper boundaries of the RoP contends with *Zacchini v. Scripps-Howard Broadcasting Co.* (1977). This is not only because it was the first and only time the Supreme Court has even obliquely addressed the RoP, but because it has been widely misconstrued by the lower courts to authorize the variegated balancing tests that have proliferated in its wake. As the discussants roundly agreed, *Zacchini*'s holding is far narrower than courts have taken it to be, and any effort to bring order to existing doctrine must banish misconceptions about what the problematic case stands for.

To begin with, *Zacchini* does not purport to broadly adjudicate the RoP. Rather, as the Workshop discussants noted (and emphasized in a number of amicus briefs and petitions for certiorari), the claim at issue in *Zacchini* was not a “right of publicity” claim as we know it today, but a unique variant involving the wholesale appropriation of a *performance*, rather than an individual likeness. Indeed, the Supreme Court to pains to distinguish Hugo Zacchini’s claim from conventional RoP claims, observing in an important footnote that the claim at bar was not, strictly speaking, an RoP claim at all:

[T]he Ohio Supreme Court expressed the view ‘that plaintiff’s claim is one for invasion of the right of privacy by appropriation, and should be considered as such[.]’ . . . the 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; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.

The problem is that *Zacchini* is a case about performance, not likeness. As one discussant observed, the plaintiff’s claim in *Zacchini* would have been the same if he had launched a pig, rather than himself, from the canon—the claim was for that *act* and about the plaintiff’s right to monetize it by performing it in its entirety, not the plaintiff’s personal likeness and his right of publicity to enjoin depictions of it. As another discussant noted, “the right of publicity as accepted in *Zacchini* is arguably simply common-law copyright” in an unfixed performance, because *Zacchini* predated the 1976 Copyright Act and its express preemption provision.²⁹

²⁹ 17 U.S.C. § 301(a).

Nonetheless, courts have interpreted *Zacchini* to authorize the development of myriad tests that purport to balance various and ill-defined interests as the only constitutional restraint on the right of publicity. A brief signed by a number of discussants identified at least five tests, which are summarized in Section II, *infra*, and Workshop participants agreed that the resulting chaos places publishers of comic books, films, books, video games, and expressive works in every conceivable medium in an impossible bind. Not only are these tests unpredictable in application, but the absence of consistent national standards means that publishers cannot meaningfully predict which test will apply to a prospective use of persona, or the scope of their constitutional right to make that use.

To be sure, *Zacchini* is not wholly responsible for the present state of affairs: it is as much symptom as cause. As one Workshop participant observed, “the lack of clarity on what it is that the right does and doesn’t protect is intimately bound up with the lack of clarity of why we have this right in the first place.” Over the course of an extended discussion, the participants identified six imperfectly aligned and occasionally overlapping rationales, all of which have emerged at varying times and jurisdictions across RoP caselaw: (1) an incentive-based rationale to create or efficiently manage valuable personae; (2) a form of consumer protection to stave off false personal endorsements; (3) a privacy-based rationale accepting that persons have emotional interests in controlling untoward disseminations of their likenesses; (4) an expression-based right that protects an individual’s freedom to make use of her image as an aspect of public self-definition; (5) a sense of moral authorship in one’s person, that we own our personas and should be able to control their use; and (6) an equitable intuition that such control is inherently fair, or necessary to prevent unjust enrichment.

The discussants were generally dissatisfied that any of these rationales furnished an adequate basis to restrain the publication of what many RoP doctrines have deemed “expressive” works, as contrasted to commercial advertising, though one discussant wryly noted that the term is bizarre in the larger landscape of First Amendment jurisprudence: practitioners unfamiliar with the niceties of the RoP might reasonably be aghast to hear that any speech can be categorized as “inexpressive.”³⁰ Some felt that no incentive was needed for persons to chase celebrity; one

³⁰ Nonetheless, the term has achieved currency and was widely used by Workshop participants as a general shorthand for speech that elements of RoP statutes or balancing tests exempt *per se*, or nearly so, from liability, such as the “use in trade” requirement of New York’s statute, or the extremely forgiving standards for uses in “artistic works” under the *Rogers* test. For the sake of convenience, this Report uses the term in this general manner, not

observed that “there is no God-given right to a business model” and that the law should not be in the business of ratifying expectancy interests that have accompanied changes in advertising and consumer culture. And if the RoP should serve an incentive-based interest, it serves an incentive to do what? To become a celebrity? To encourage efficient management in an economic sense of one’s celebrity image? Would such an interest only apply to those who actually worked to achieve fame, or those thrust into the limelight? It was noted that social interest in celebrity would serve interests in notoriety as well, and one discussant pointed out that John Gotti was more likely to be well known than the most recent winner of the Nobel Prize for Chemistry, a point that exceeds the hypothetical in light of dictator Manuel Noriega’s RoP claim arising from his alleged depiction in a video game.³¹

Moreover, as another discussant pointed out, these property- and incentive-based rationales subvert a fundamental First Amendment presumption: that the restriction, not the speech, must justify itself. As the RoP has achieved broader recognition – and, perhaps more importantly, as the marketplace has embraced extensive licensing and endorsement practices – we have failed to remark that these justifications ask *speakers* to show that a claimed licensing interest is not offended, rather than asking the censor to show how its interest was harmed.

Zacchini failed to account for any of these issues. By addressing itself to a wholly different interest – Hugo Zacchini’s economic, copyright-like interest in the reproduction of his whole act – *Zacchini* left the lower courts without badly-needed guidance as to which of the myriad interests courts have packed into RoP claims can be constitutionally squared against countervailing First Amendment concerns. To that extent, certainly, the ensuing confusion as to what the RoP protects can be attributed to *Zacchini* and its progeny.

The discussants largely agreed that though these competing rationales splinter current caselaw, unjust-enrichment intuitions have more or less captured the field in expression-hostile RoP cases. But as one discussant observed, unjust enrichment rationales do not fully appreciate that the right of publicity is sometimes used to censor particular content, rather than to efficiently allocate due profits from trading on persona. In that connection, another discussant suggested that publishers of conventionally “expressive” works should admit some responsibility for being

only because repetition of “noncommercial speech” becomes clumsy, but because it implicates commercial speech doctrine in ways that can be equally problematic.

³¹ *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747 (Cal. Super. Ct. July 15, 2014).

less than vigilant to developments in advertising caselaw than businesses more attentive to commercial speech, for those cases squarely implicate unjust-enrichment interests in the context of untrue but not misleading associations with products – the most intuitively compelling form of trading on persona – and have produced a corpus of RoP caselaw that accepts unjust enrichment almost uncritically as a valid RoP interest across the board. The accumulated weight of those cases -- the judicial acceptance of a broader RoP in the context of commercial speech -- lends force to unjust-enrichment intuitions even in the context of conventionally “expressive” works like video games and feature films, where, notwithstanding that the use of persona is a matter of narrative or creative freedom rather than an elective commercial advantage, it is claimed that the use “trades” on persona. This doctrinal creep is particularly problematic to the extent that courts see non-explicit alleged endorsements as potentially misleading: strictly limiting the RoP to false-endorsement concerns, as discussed *infra*, would address much non-commercial speech, but without clearly articulated boundaries around commercial and non-commercial speech, also discussed *infra*, even that limitation would be unhelpful in addressing the suppression of non-commercial speech.

The Workshop participants also generally agreed that unjust enrichment concerns played differently when the concern was not simply trading on fame, but trading on skill and labor, as in the context of working actors. A number of discussants remarked that the active participation of the Screen Actors Guild in many of the higher-profile RoP cases and legislative efforts reflects a nontrivial intuition that those who make a living by manipulating their own likenesses present more complicated false-endorsement and unjust-enrichment concerns. It was felt that SAG will continue to use the RoP as a vehicle for policing professional interests as technology permits others to depict actors ‘performing’ without their involvement. As another discussant remarked, however, the state statutes (particularly descendability provisions) have been driven largely by the heirs of celebrities seeking to profit more fulsomely, rather than livelihood-based concerns of working actors, bringing a further-removed set of interests into the mix.

For the purposes of *Zacchini*, the discussants agreed that the Supreme Court provided no helpful guidance to the poorly understood bases for, and boundaries of, the RoP. Worse, lower courts read the case as a license to balance this disjointed bundle of rationales and establish a chaotic array of constitutional tests, producing in some instances diametrically opposed results depending on the state and applicable limiting test – such as certain uses of real persons in comic

books and graphic novels, where the same use would be permitted in certain jurisdictions and forbidden in others, or commemorative artwork, where equally stark inconsistencies remain.³² The discussants agreed that the Supreme Court should disavow prevailing misconstructions of *Zacchini*, clarify the limited nature of its holding, and clear the way for a universal and conclusive resolution of First Amendment limitations on the RoP. As one discussant opined, “a Supreme Court decision on the First Amendment . . . that wipes out all the differences in all the statutes, in all of the states” “is the only practical solution.”

II. FIRST AMENDMENT PROTECTIONS

But how *should* the First Amendment limit the right of publicity? The discussants agreed that, with the possible exception of the *Rogers* test,³³ nearly all of the existing judicial frameworks for rendering the RoP compliant with First Amendment freedoms are inconsistent and inadequately protective of expressive interests. A number of the discussants were signatories to the petition for certiorari in *Davis* or a law professors’ *amicus* brief filed shortly after the Summit making this very point: the Third and Ninth Circuits apply a variation of California’s state-law transformative use test,³⁴ the Fifth Circuit followed the Second Circuit in *Rogers*,³⁵ the Eighth Circuit applies its own *sui generis* balancing of public value and commercial exploitation considerations,³⁶ as did the Tenth,³⁷ to say nothing of the state courts that have developed their own tests and analyses. To provide speakers with consistent protections, the discussants agreed, First Amendment constraints needed to be liberated from the various ‘balancing’ tests that emerged from the shadow of *Zacchini*. The discussants rejected the notion of a federal RoP statute out of hand – the history of state legislation reveals a powerful and organized celebrity-estate lobby that has already dramatically expanded the descendability of the right in a number of jurisdictions, and any new statute would subject the already formidable task of developing coherent constitutional limitations to the rough-and-tumble compromises of

³² Compare *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003) (artist’s inclusion of Tiger Woods in painting with other professional golfers protected by First Amendment) with *Hart & Keller*, *supra* n. 20 (First Amendment does not protect depiction of athletes as they were best known).

³³ See *infra* Section II(B)(2).

³⁴ See *infra* Section II(B)(1).

³⁵ *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994).

³⁶ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball*, 505 F.3d 818, 824 (8th Cir. 2007).

³⁷ *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 963 (10th Cir. 1996).

interest-group politics, exacerbating rather than lessening the problem. The solution must come from the courts.

But what form should this solution take? As noted above, Workshop participants considered three approaches: (1) outright First Amendment strict scrutiny of the claim or applicable tests; (2) a more surgical overlay of constitutional limitations on RoP elements that would limit the reach of the tort to protecting valid interests and repudiate inappropriate analogies to other bodies of law; and (3) a constitutional standards-based limitation based on an RoP-sensitive distinction between commercial and noncommercial speech. Though the discussants disagreed on the likelihood that particular approaches might be adopted by the lower courts or provoke the Supreme Court's interest, they agreed that whatever course the law took, it must provide clear national standards and hew far more closely to valid RoP interests than does prevailing law.

A. Strict Scrutiny

One discussant pointed out that the various “constitutional” tests that courts have created to address First Amendment constraints on the RoP seem to have the burdens backwards. Where the RoP is concerned, *speakers* seemingly must justify their uses of likeness, while in all other aspects of the law it is a First Amendment truism that the burden runs the other way: the *restriction*, not the speech, must be justified. The most direct way to restore the burdens to their proper place, and bring the myriad tests to heel, is the application of strict scrutiny, for each limiting test is itself a state-sanctioned rule of law that restricts the freedom of speech on the basis of its content.

As the Supreme Court has recently clarified in *Sorrell* and *Reed*, courts must apply strict scrutiny to legal doctrines that, on their face, require courts to look at content, even if the purpose of the doctrine is content or viewpoint neutral: “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification or lack ‘animus toward the ideas contained’ in the regulated speech.”³⁸ Thus, various ways lower courts have parsed “commercial” from “artistic” or “expressive” speech by looking at the speech itself – such as New York’s statutory “use in trade” requirement – do not excuse the tests from strict scrutiny merely because the tests appear to have a neutral purpose. As the Court stated:

³⁸ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015).

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech,” . . . [t]hose laws, like those that are content based on their face, must also satisfy strict scrutiny.³⁹

There can be little doubt that right of publicity (and the tests that constraint the right) requires reference to the content of the challenged speech. Certainly distinctions between commercial and noncommercial uses of persona, which suffuse various states’ RoP jurisprudence in various forms, require an analysis of the message expressed by the content, and seem to require strict scrutiny. In *Sorrell*, the precursor to *Reed*, the majority held that the fact that the restricted speech was commercial did not categorically exempt regulation of it from “heightened scrutiny,”⁴⁰ and *Reed* carried that reasoning forward to strict scrutiny, holding that “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”⁴¹ Thus, the Supreme Court and lower courts could be expected to require any RoP law, common law or statutory, or any test that governs the scope of liability under that law, to satisfy strict scrutiny regardless of whether the underlying expressive material is characterized as commercial or noncommercial speech.

The discussants generally agreed that in most aspects, the current range of available RoP tests would not survive strict scrutiny, which requires that the speech-restricting rule “furthers a compelling governmental interest and is narrowly tailored to that end.”⁴² Most agreed that, with the possible exception of deceptive or misleading speech, state interests simply are not weighty enough to justify restricting expression, and to the extent significant state interests are at stake, the RoP, as constrained by available balancing tests, is insufficiently narrowly tailored to those interests.⁴³ Indeed, even false speech is not denied First Amendment protection wholesale.⁴⁴

³⁹ *Id.* at 2227.

⁴⁰ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

⁴¹ *Reed*, 135 S. Ct. at 2227.

⁴² *Id.* at 2231.

⁴³ One discussant noted that the narrow tailoring requirement, if taken seriously, might eliminate the RoP entirely: there is, in theory, *always* a less restrictive alternative than outright prohibition on speech where the interests are fundamentally commercial: a bounty or compulsory licensing regime could be established to appropriately direct revenues without interfering with the act of expression itself.

⁴⁴ *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012); *New York Times v. Sullivan*, 376 U.S. 254, 271-2 (1964).

These were prescient observations in light of the Ninth Circuit’s long-anticipated decision in *Sarver v. Chartier*,⁴⁵ ultimately handed down in February 2016, which applied *Reed* to a right-of-publicity claim against the makers of the film *The Hurt Locker*. At the Workshop, the discussants acknowledged that the application of strict scrutiny in this fashion would be a watershed, and some expressed skepticism that the Supreme Court would be willing to go so far, but the Ninth Circuit became the first Court to put it front and center. As one discussant noted, the prospect of widespread, direct application of strict scrutiny to the RoP should not be discounted: lawyers and practicing academics expert in particular areas of law have a tendency not to take decisions as seriously as the judges who render them. The *Iqbal/Twombly* pleading standard, for example, was itself a watershed when announced, rewriting the requirements of civil practice to have judges pass on the plausibility of a claim based on nothing more than the allegations in a complaint. The federal bar didn’t quite believe it, the lower courts initially resisted it, and only with time did courts come universally to take the Supreme Court at its word and render plausibility judgments. In the First Amendment arena, as one discussant observed, *New York Times v. Sullivan* came to be known as a watershed, but was initially seen as a civil rights case: the notion that the law of libel had been constitutionalized was at first resisted. The application of current First Amendment doctrine to the loose amalgam of RoP tests, therefore, should not be tempered by assumptions about how the law was, or the limits of courts’ willingness to break sensible new ground; there was a general consensus that defendants should insist in every case that the RoP satisfy strict scrutiny as required by *Reed* and *Sorrell*, and emphasize that each of the purported justifications for the claim do not meet that extremely demanding test. As one discussant put it, “we don’t value highly most of those interests.”

Whatever its other faults, including that it did not expressly find the transformative test itself inadequately protective, but rather appears to have held that its application to *The Hurt Locker* did not satisfy strict scrutiny, *Sarver* represents an important first step in garnering widespread application of strict scrutiny to right-of-publicity claims, because the Court was rightly skeptical that there was any meaningful government interest in incenting a soldier to do his job. Though *Sarver* did not reach its logical conclusion, feebly distinguishing without taking head-on the cases that permitted publicity claims to proceed against video game publishers who depict student athletes (would a biopic involving those athletes fail the transformative use test?)

⁴⁵ *Sarver*, 813 F.3d 891.

and reinforcing the appearance that *Hart*, *Keller*, and other transformative use cases involving video games are driven primarily by a sense that video games are not sufficiently “valuable” to merit full constitutional protections, a number of discussants believed that uncompromising application of strict scrutiny would be a promising avenue to achieve a highly – and appropriately – narrowed tort.

B. Constitutional Overlays and Borrowed Legal Principles

Other discussants, however, were not only skeptical that courts would be willing to directly apply strict scrutiny to the various constitutional tests, but worried that this would be the wrong approach.⁴⁶ Instead, some felt that constraining the scope of the right to particular contexts that implicate specific, valid regulatory interests would be more promising. This view found particularly strong purchase with those discussants who believed that some concerns, like false commercial endorsements, might conceptually pose a sufficiently significant interest to survive strict scrutiny and warrant carefully and narrowly tailored rules, but in practice, would mean that speech meeting that scrutiny must be clearly defined. Without clear definitions, even strict scrutiny may not provide a sufficiently refined tool to address the scope of valid RoP claims, and dissuade courts for whom those impulses also had purchase from applying it.

Indeed, as one discussant noted, the Supreme Court has not applied strict scrutiny directly to quasi-property rights and dignitary torts. Defamation, for example, has been constitutionalized by the imposition of constitutional limitations on particular aspects of the cause of action—the appropriate fault standard, the evidentiary standards, the burdens of proof—rather than the naked application of strict scrutiny to the law of defamation itself, or as the tort applied to particular claims. A similar approach to the RoP might be more pragmatic than a bid for strict scrutiny, some felt, and several participants proposed ways to refine aspects of the RoP that would do for the tort what *Sullivan* did for defamation.

The discussants recognized, however, that these more surgical alterations to the RoP would require clear answers to a number of unsettled questions. Unlike defamation, which came before the *Sullivan* Court with decades (or centuries, if the tort’s pre-Colonial inheritance is

⁴⁶ As one observed, “putting all of the work on the First Amendment” improperly concedes that the underlying speech is subject to regulation in the first instance, just as a person’s right to walk down the street should not be “subject to a First Amendment defense”; such perambulations should be simply non-actionable in the first instance. Along similar lines, Justice Breyer wrote a separate opinion in *Reed* emphasizing that a consequence of the majority’s analysis, and the far broader application of strict scrutiny to longstanding state statutes and regulations, could ultimately water down strict scrutiny itself. *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring in the judgment).

considered) of experience with the claim, and well-developed privileges and defenses that were generally common among the states, the RoP would arrive before the Supreme Court with fundamental aspects of the tort poorly developed and inconsistently applied. Indeed, as one discussant noted, the relatively well-coordinated development of common law privileges in defamation law may have, prior to *New York Times v. Sullivan*, lessened the pressure on courts to articulate Constitutional limitations on defamation claims.⁴⁷ Nonetheless, it took intervention by the Supreme Court to reduce the claim to the reach of its compelling state interest, governed by rules that are narrowly tailored to protect that interest but no more.

Accordingly, some felt that a more practical solution than strict scrutiny would be a *Sullivan*-like constitutional overlay on those aspects of the various tests that are most dangerous to First Amendment interests. The most important steps, by this view, would be to ensure that the various tests do not draw piecemeal from bodies of law that serve different state aims, particularly trademark and copyright, but rather focus on protecting only valid RoP interests.

1. Copyright Principles

The Workshop participants agreed that some courts' reliance on copyright principles to limit the right of publicity was uncritical and produced unconstitutionally censorial effects. The law of copyright protects an entirely different interest (rewarding the creation of original expressive works, therefore permitting more expansive restrictions on speech that is *less* factual or realistic, instead of regulating the use of realistic, essentially factual images) pursuant to more powerful authority (copyright protections are of constitutional stature,⁴⁸ while the RoP is a relatively recent creature of state law). Also unlike the law of copyright, the RoP implicates images and other forms of likeness of which the RoP rightsholder is not the "author," and has

⁴⁷ Various state-law methods for distinguishing commercial RoP uses, "uses in trade," and outright advertisements, from speech on matters of public concern, newsworthy or artistic works reflect a general movement in this direction that has been given room to grow under the avoidance canon. In *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824 (11th Cir. 2016), for example, involving books, a movie and a plaque about Rosa Parks, the Eleventh Circuit affirmed dismissal of RoP claims entirely under Michigan law, avoiding the federal constitutional analysis entirely -- as it did under Florida's RoP statute in *Valentine v. C.B.S. Inc.*, 698 F.2d 430 (11th Cir. 1983). The problem, of course, is that bases for avoidance are so disparate among the states that even the rough, emerging distinction between essentially commercial uses and other uses would require exhaustive explication.

⁴⁸ U.S. Const. art. 1, § 8, cl. 8.

played little or no role in creating.⁴⁹ Finally, to any extent that asserted state interests could support the analogy, the law of copyright should arguably preempt an RoP claim.

a. The Transformative Use Test

With the implications of *Hart*, *Keller*, *Davis*, and the other decisions applying copyright principles to the RoP prominently in mind, the Workshop participants generally agreed that the transformative use (or work⁵⁰) test represents the most dangerous importation of copyright principles. First conceived by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,⁵¹ the transformative use test adopts one factor of the four-part fair use analysis as a condition for First Amendment protections against RoP claims, demanding that the use of likeness is “transformed” by the overall context of the larger work or alteration of the likeness itself, depending upon the court applying it.

Comedy III involved images of the Three Stooges drawn by an artist named Gary Saderup, who oversaw the creation from his original artwork of lithographs and of silkscreen reproductions on t-shirts.⁵² After concluding that at least two of the four fair use factors could not sensibly be applied in the context of the RoP, the California Supreme Court determined to condition First Amendment constraints on the RoP entirely on one:

whether the new work merely ‘supersede[s] the objects’ of the original creation [citations], or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’⁵³

Despite its flaws, *Comedy III* had promising features. The California Supreme Court required consideration of the totality of the work in question, and the Court expressly adopted an earlier plurality decision holding that fictionalized use in a narrative was *per se*

⁴⁹ People gain celebrity by chance of birth, or circumstance beyond their control, or in ways simply irrelevant to any desire to achieve wide renown or monetize their fame. Moreover, as was discussed, *see supra* at 13, criminals may be well known “celebrities,” which perverts any putative governmental interest in allowing them to censor or demand payment for use of their likeness. *See also infra* n. 31 (RoP claim brought by Panamanian dictator).

⁵⁰ Though the gloss put on the transformative *work* test by the Third and Ninth Circuits warrants critical analysis, for the sake of simplicity this Report refers to them collectively as “transformative use” tests. *See* fn. 21, *supra*.

⁵¹ 21 P.3d 797 (Cal. 2001).

⁵² Saderup was “an artist with over 25 years’ experience in making charcoal drawings of celebrities.” *Id.* at 393. But he was not Andy Warhol, and, as one discussant has written, “the California Supreme Court reacted to Warhol’s reputation, not the content of his work or its conditions of production.” Tushnet, *supra* n. 14 at 13.

⁵³ *Id.* at 405.

“transformative.”⁵⁴ But subsequent caselaw has taken a dramatically different turn: a lower California appellate court in *No Doubt v. Activision*,⁵⁵ the Ninth Circuit in *Keller* and the Third Circuit in *Hart*, have focused on whether the individual him- or herself has been transformed, presenting questions about the adequacy of transformative exertions that range from innocuous to ridiculous. Musicians turned into worms in a comic book? A celebrity’s face and key phrase on a greeting card? Avatars with blank faces in videogames? Were these likenesses sufficiently transformed, or is it enough for that they are portrayed doing what they did that made them famous to ground a plaintiff’s claim?

These lines of analysis – *Comedy III*’s acceptance, on the one hand, that the act of using persona (even an untransformed likeness) as raw material in a larger story is transformative, and the *Hart/Keller* cases, which also require that the likeness itself be transformed – are squarely at odds. Accordingly, the *Hart/Keller* transformativeness analysis contravenes longstanding precedent precluding claims against works ranging from documentaries to blockbuster films even where a likeness is not radically transformed, or transformed at all.⁵⁶

The Third and Ninth Circuits (particularly the dissenting judges) saw the problem they created, as reflected by the feeble explanatory passages that purport to give comfort to docudramatarians, historical novelists, and others on the basis of more constitutionally sound decisions interpreting *Comedy III*.⁵⁷ But neither Circuit provided any analysis that might square their incompatible holdings with the directly contrary analysis in the very cases they adopt.⁵⁸

⁵⁴ *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979).

⁵⁵ *No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App. 4th 1018 (2011).

⁵⁶ *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318 (1997).

⁵⁷ *E.g. Keller*, 724 F.3d at 1290 n. 10 (claiming not to jeopardize “the creative use of historic figures in motion pictures, books, and sound recordings”) (citing *Comedy III*, 21 P.3d at 809); *Hart*, 717 F.3d at 173 (“The First Amendment extends protection to biographies, documentaries, docudramas, and other expressive works depicting real-life figures, whether the accounts are factual or fictional.”) (citing *Guglielmi*, 603 P.2d at 458-59).

⁵⁸ *Comedy III* accepted that rendering a “fictionalized portrayal” in a work is itself transformative and compels First Amendment insulation against RoP claims. *Comedy III*, 21 P.3d at 809. It did so by incorporating *Guglielmi*, which essentially applied strict scrutiny to the RoP in the context of “expressive activities” and concluded that the interests protected by the RoP cannot not “outweigh the value of free expression.” *Guglielmi*, 603 P.2d at 460-62 (otherwise, “the creation of historical novels and other works inspired by actual events and people would be off limits to the fictional author. . . it is difficult to imagine anything more unsuitable, or more vulnerable under the First Amendment, than compulsory payment, under a theory of appropriation, for the use made of (an individual’s identity in a work of fiction).”) (citations omitted; emphasis added).

The Third and Ninth Circuits lost this particular game of judicial telephone, for as long as a video game is considered “expressive” and a “work of fiction” (conclusions both reason and *Brown* appear to demand) *Comedy III*

Many hoped that the Ninth Circuit’s recent decision in *Sarver* would provide that analysis. It did not. The panel sidestepped the transformative use test, applying strict scrutiny to the bomb technician’s RoP claim with little more to resolve the dissonance with *Keller* than a brief, analytical aside: that “unlike the plaintiffs in *Zacchini*, *Hilton*, and *Keller*, Sarver did not ‘make the investment required to produce a performance of interest to the public,’ or invest time and money to build up economic value in a marketable performance or identity,” and that enlistees need no rights-based incentive to soldier.⁵⁹ Thus, rather than providing a principled basis for limiting the viability of publicity claims, *Sarver* compounds the existing dissonance between *Keller* and prior authority within the transformative use test that has insulated expressive works in traditional genres from RoP claims.⁶⁰ And it seems to affirm the suspicions of many Workshop attendees that *Hart* and *Keller* were simply results-driven decisions based largely on the courts’ underlying skepticism about the expressive value of video games as a medium, notwithstanding their perfunctory citations to *Brown*. Indeed, under the Ninth Circuit’s analysis, *Sarver*’s award-winning film was entitled to heightened protection because it was a celebrated work in a traditionally accepted expressive medium that warranted consideration as transformative “art”:

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—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.⁶¹

Workshop participants universally agreed that the transformative use test is intolerable. As the lower court proceedings in *Sarver* reveal, it requires defendants to expend punishing levels of resources to vindicate their expressive freedoms. The transcript of the motion hearing

and *Guglielmi* would deem uses of likeness therein *per se* transformative, notwithstanding any realistic likenesses it may include. Yet the Third Circuit repeatedly cited *Guglielmi*, including some of its most relevant analysis, to provide comfort to authors in more conventional genres, *Hart*, 717 F.3d at 164 & n. 32, and the Ninth Circuit, in its brief reassurance footnote to that effect, cited the very section of *Comedy III* that incorporates this aspect of *Guglielmi*. *Keller*, 724 F.3d at 1290 n. 10. Neither Circuit has addressed this medium-based dissonant analysis to date, but the Ninth Circuit has compounded it in *Sarver*. See *infra* n. 59.

⁵⁹ *Sarver*, 813 F.3d at 905 (quoting *Zacchini*, 433 U.S. at 576).

⁶⁰ The Ninth Circuit footnoted that, in light of *Guglielmi*, “it is not clear that California would extend its right of publicity to Sarver’s situation.” *Id.* n. 9 (*Guglielmi* “cautioned that the defendants’ fictionalized portrayal of Valentino’s life was entitled to greater First Amendment protection than the conduct in *Zacchini*, and explained that they wrote in an effort ‘to define one boundary of this state’s common law right of publicity.’”).

⁶¹ *Sarver*, 813 F.3d at 905.

before the district court is parodic, reflecting extensive factual proffers meant to tease out distinctions between the film protagonist and the plaintiff that would be meaningless under other constitutional tests, but are necessary to demonstrate a transformative alteration of persona.

Worse, the manner of transformation courts appear willing to require is directly at odds with the values of realism and verisimilitude from which constitutional protections for works of fiction derive.⁶² As a number of workshop participants emphasized in the *Davis* briefing, the test perverts the First Amendment's historic solicitude for true, realistic speech, requiring authors to distort true events or inaccurately render their participants to be protected against publicity claims.⁶³ Even to the extent that Ninth Circuit's corrective as-applied holding might comfort producers of high-art biopics about non-celebrities who need no incentive to do their job, it not only leaves the transformative use test in place, but begs a number of important questions, such as whether the application of *Keller*'s version of the transformative use test could survive strict scrutiny. At bottom, the transformative use test, as it has been applied by recent federal courts, appears to do precisely what *Comedy III* promised not to: constrain authors entirely to the realm of the fantastical.⁶⁴ Though the *Hart/Keller* line of cases disclaimed any intent to limit creative freedoms acknowledged by *Comedy III* in the context of traditional mediums, they provide no principled basis for imposing liability on publishers of interactive works, and with the denial of certiorari in *Davis* and the *Sarver* panel's ratification-by-distinguishing *Keller*, leave the transformative use test alive and well.

b. *Zacchini* and its Progeny

Here again, the discussants concluded, *Zacchini* bears a substantial share of the blame, because the Supreme Court analogized the claimant's interest (in his performance, one of the rights secured by the Copyright Act) to the commercial interests protected by copyright:

[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part

⁶² *E.g. Burstyn*, 343 U.S. at 501. The Supreme Court recognized the importance of protecting these values even though they appeared only aspirationally in the medium *sub judice*. As the Court's authority on this point observed, though "only a small percentage of total film production is concerned directly with political and social issues, the percentage is rising steadily." *Motion Pictures and the First Amendment*, 60 YALE L. J. 696 (1951).

⁶³ Brief Of Entertainment Software Association As *Amicus Curiae* In Support Of Petitioner, *Electronic Arts v. Davis*, No. 15-424.

⁶⁴ *Guglielmi*, 25 Cal. 3d 860.

to encourage such entertainment. As we later note, the State’s interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.”⁶⁵

The Court’s copyright analogy derives entirely from the feature of *Zacchini*’s claim (his full performance) that is most unlike contemporary RoP claims (for the use of indicia of likeness): “The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight, or a baseball game.”⁶⁶ The similarity with copyright (and patent) law derived entirely from the interest in providing “an economic incentive for [*Zacchini*] to make the investment required to produce a performance of interest to the public.”⁶⁷

Though this language has been read by lower courts and state legislatures as an invitation to import copyright principles into the analysis of RoP claims that have nothing to do with the replication of full performances, *Zacchini* requires precisely the opposite. *Zacchini* did not sanction the importation of copyright principles into the RoP; it analogized to copyright law because the RoP was *not* the basis for the performer’s claim. As one discussant observed, subsequent RoP decisions have ignored the fact that most of the cases to which *Zacchini* cites are unfair competition decisions involving not individual performers but producers of content, and *Zacchini*’s references to copyright show its age: it was decided before the effective date of the 1976 Copyright Act, when an unfixed performance such as *Zacchini*’s might have had protection under common law copyright before express provisions of the 1976 Act took effect.

Workshop participants agreed that importing copyright principles into RoP tests is particularly threatening because copyright is given a fair bit of grace under the First Amendment and would seem to invite a more ambivalent balancing than the RoP otherwise deserves. First Amendment-based limitations on copyright, such as fair use and disallowance of copyright protection for facts and ideas, rather than specific expressions thereof, reflect the shared

⁶⁵ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

⁶⁶ 433 U. S. at 574-5. Importantly, the Supreme Court recognized that the larger aim of copyright was to “afford greater encouragement to the production of works of benefit to the public,” and “reward to the owner” was a “secondary consideration.” *Id.* at 576-77.

⁶⁷ *Id.* at 576.

constitutional stature of copyright and the First Amendment.⁶⁸ But the RoP enjoys no constitutional solicitude, so the importation of copyright factors like “transformativeness” presumes a constitutional weight to which the RoP is not entitled. Moreover, copyright law in this particular regard is not itself a model of clarity – fair use, from which the transformativeness analysis derives, is notoriously unpredictable. Even to the extent that the Supreme Court may be unconcerned with the chilling effect of the fact-intensive fair use doctrine,⁶⁹ to thrust this quagmire on already fractured RoP jurisprudence threatens to exacerbate an interpretative framework already sufficiently unmoored to permit results-driven adjudication.

Compounding the problem, courts have borrowed the speech-restricting analyses without the speech-protective aspects of copyright law. The transformative use test omits key features of copyright law that effectuate constitutional limitations, such as the idea/expression doctrine and other crucial factors of the fair use analysis. Indeed, the multiplicity of “likeness”-invoking speech included within the RoP suggests that the RoP forbids expression that embodies the *idea* of a person, not the manner in which that person has reduced that idea to tangible expression through individual authorship, putting the analogy at odds with well-recognized limitations on copyright. And unlike the law of copyright, where restrictions on speech are only permitted to the extent that they can be shown to promote *more* original expression, the RoP is purely negative. Though the RoP is generally acknowledged to be an economic, not dignitary, claim, the basis of that claim is a right to prevent speech: to ensure that persons can forbid or extract rents for uses of a likeness that already exists.⁷⁰ By contrast, copyright is fundamentally speech-promoting, providing limited monopolies in order to incent *new, original* speech, and imposing limitations on the scope of those monopolies to avoid preventing valuable, new uses of old building blocks. The RoP, by contrast, serves primarily as a wealth generating or censorial device by likeness-holders and their assigns.

⁶⁸ *E.g. Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication. . . . Second, the fair use defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.”).

⁶⁹ *Id.* at 221 (“copyright’s built-in free speech safeguards are generally adequate to address [First Amendment concerns]”).

⁷⁰ *Cf. Comedy III*, 21 P.3d at 807 (stating that the RoP is not a censorial right).

Finally, by drawing elements from a body of law that incents original expression to impose limits on claims that are inherently based on un-“original” personae, the transformative use test cannot coherently follow even such limited guideposts for what manner of “transformation” requires insulation from liability, producing incompatible results. As mentioned above, some decisions say the “work” must be transformed, so even an accurately represented likeness could be transformed by the larger context of the work that tells a larger story,⁷¹ but other decisions seem to require the likeness itself to be disguised or fantastically altered, leaving unclear where, on a spectrum between a half-worm, half-man creature,⁷² and a blonde starlet in a video game,⁷³ the appropriate degree of transformation falls.

The Workshop participants agreed that it would be an enormous and probably fruitless jurisprudential undertaking to rationalize copyright principles within the RoP. The better course, they agreed, was for the Supreme Court to unwind the RoP from the copyright analogy it articulated in the limited context of Hugo Zacchini’s act.

c. Copyright Preemption

Nonetheless, Workshop participants agreed that copyright preemption must be emphasized to limit the damage from these misaligned principles. It is a straightforward proposition: to the extent copyright rationales are implicated by a particular RoP claim, the preemption doctrine should have a correspondingly powerful preclusive effect. In application, however, both express and conflict preemption are problematically unreliable.

The Copyright Act expressly preempts “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.” 17 U.S.C. § 301(a). But because the RoP interfaces so poorly with copyright principles, express preemption decisions are a hodge-podge and provide little reliable guidance. As Nimmer put it: “The interplay between copyright preemption and the right of publicity has seen more volatility

⁷¹ *Guglielmi*, 25 Cal. 3d 860.

⁷² *Winter v. DC Comics*, 69 P.3d 473, 480 (Cal. 2003).

⁷³ *Lohan v. Take-Two*, No. 156443/2014 (N.Y. Sup. Ct. 2014).

than just about any other doctrine canvassed throughout this treatise. Tremendous disarray punctuates the cases.”⁷⁴

The discussants focused on *Dryer v. N.F.L.*, a class-action RoP and Lanham Act lawsuit brought by former professional football players on behalf of players who appear in copyrighted films containing footage of historic games. Most settled their claims early on, but three putative class representatives opted out of the settlement, and the district court dismissed their claims on a number of grounds, chiefly that their claims were subject to express preemption under Section 301(a) of the Copyright Act, and that the films were expressive works protected by the First Amendment. At the time of the Workshop, the three players’ appeal from that decision was fully submitted, and one of the discussants had given oral argument shortly before the Workshop, so the participants were particularly interested in the Eighth Circuit’s most recent express preemption decision in *Ray v. ESPN*, which, in distinguishing a number of non-preempted RoP cases, demonstrates the volatility Nimmer describes.⁷⁵ Ray, a former professional wrestler in the Universal Wrestling Federation, had agreed with the UWF that films could be made of the matches and that the films could be used by UWF and even sold. UWF apparently did sell the films to ESPN. Ray sought compensation for the reuses under theories of RoP, privacy, and interference with prospective advantage claims, all of which were held by the District Court and the Court of Appeals to be preempted.

[T]he crux of Ray’s case is that ESPN re-telecast Ray’s filmed performances. Thus, because Ray’s state-law rights have been “infringed by the mere act of reproduction, performance, distribution or display” of his performances, his state-law rights are equivalent to the exclusive rights “within the general scope of copyright.”⁷⁶

Following the Workshop, the Eighth Circuit affirmed the district court’s preemption ruling in *Dryer*, reinforcing *Ray* and leaving express preemption on much stronger ground in the context of rote telecasts of multi-person “performances.”

Nonetheless, given imperfect analogies to “authorship,” and problematic issues arising from RoP protection for inchoate aspects of “likeness” or “persona” that are at odds with

⁷⁴ 1–1 Nimmer on Copyright § 101[B][3][b][i].

⁷⁵ 783 F.3d 1140.

⁷⁶ *Id.* at 1144.

copyright's fixation requirement and permit claims for the "idea" of a person rather than the reproduction of images,⁷⁷ express preemption remains an unsteady basis for constraining the ill effects of copyright analogies. Even courts willing to enforce express preemption may do so only after satisfying themselves that no additional (and therefore separately regulable by the RoP) use of likeness was made beyond the copyrightable material itself, a potentially expansive analysis that implicates abstracted questions about whether a particular use evokes aspects of identity, communicates values, proposes transactions, or suggests affiliation, all common RoP issues that render preemption potentially unavailable in all but the simplest cases involving the direct sale of copyrightable material.⁷⁸ Accordingly, some Workshop participants opined that conflict preemption, derived from the Supremacy Clause's invalidation of "state laws that 'interfere with or are contrary to' federal law,"⁷⁹ and applicable where state laws undermine the underlying goals of the Copyright Act notwithstanding that they contain extra regulable elements or survive express preemption, might furnish a stabler basis for drawing boundaries around RoP claims that seem to invoke copyright-like interests.⁸⁰

Both forms of preemption implicate issues of waiver and consent, and the Workshop participants discussed whether, as one discussant argued in a leading study, initial permission by a putative plaintiff for the use in a copyrightable work required preemption of a publicity claims.⁸¹ A number of decisions have addressed defenses on this ground: the district court in *Dryer* did so, as did the district court in *Marshall*, which is pending on appeal to the Sixth Circuit at the time of this writing.⁸² But the issue of consent presents different complications: is

⁷⁷ Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1212 (2006); see also Tushnet, *A Mask That Eats into the Face*, 38 COLUM. J. L. & ARTS at 44 ("Preemption has given courts such conniptions because they lose track of the intangible rights conferred by copyright when looking at the intangible rights conferred by the right of publicity.").

⁷⁸ E.g. *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1133 (C.D. Cal. 2015).

⁷⁹ The Supremacy Clause of the United States Constitution "invalidate[s] state laws that 'interfere with or are contrary to' federal law." *Hillsborough Cty., Fla., v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

⁸⁰ See Dogan & Lemley, 58 STAN. L. REV. at 1189.

⁸¹ Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U. C. DAVIS L. REV. 199, 254 (2002) ("Copyright law should preempt the right of publicity if the right of publicity holder consented to the original use of his or her identity as long as the work at issue was not created by an unlicensed entity.").

⁸² *Marshall v. ESPN, Inc.*, 111 F. Supp. 3d 815 (M.D. Tenn. 2015), appeal docketed, No. 15-5753 (6th Cir. July 13, 2015). In *Marshall*, the college football players claimed not to have consented to any the broadcast of their game play, or that whatever consents they gave to their respective universities was coerced and not voluntary. Permissions from college athletes, governed by NCAA rules, are, at best, a controversial and controverted issue that

permission only relevant where the plaintiff could have, himself or herself, been the “author” of the work, such as arguably was the case in *Zacchini*? Conversely, a single athlete in a team game, such as football, would not be an “author” capable of holding a copyright to his performance in the game.⁸³ Moreover, uses that exceed contractual provisions are addressed by bodies of law that are unlikely to implicate free expression issues, like an agreement by a model to pose for a photograph for a specific use and/or timeframe that is later used outside of that agreed-upon scope or timeframe. And preemption based on implied consent would leave unaddressed core speech concerns: it would only preclude RoP claims involving planned or staged performances, such as red-carpet or sporting events, leaving much valuable, spontaneous speech, like that of news photographers, outside the preemption umbrella.⁸⁴

Copyright preemption, it was generally agreed, is an important tool to address the symptoms of copyright’s infection of RoP caselaw, but it does not provide a stable platform for attacking the cause, and should not replace a sustained focus on the unsuitability of applying copyright principles to RoP claims *vel non*.

2. Trademark and Unfair Competition Principles

The Workshop participants agreed that the strongest – and, with a few dissenting voices, perhaps only valid – interest protected by the RoP is the right not to be depicted endorsing a product in a commercial advertisement without consent. The discussants generally agreed that the strongest foundation for this “right” is society’s interest in preventing confusion from false or misleading advertisements, rather than enforcing purely property-based rights in persona, and frequently finds expression in trademark-like language. As the Eighth Circuit stated in *Dryer*, one of the “primary rationales” for the RoP is “to protect consumers from misleading advertising,”⁸⁵ and one scholar has gone so far as to claim that the RoP “emerged from trademark’s shadow.”⁸⁶ And given the extent to which the RoP has primarily become a vessel

arguably can only be resolved between NCAA and the student athletes themselves, as NCAA rule bar student athletes from accepting compensation for their athletic endeavors.

⁸³ See, e.g., *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014).

⁸⁴ Tushnet, *A Mask That Eats into the Face*, 38 COLUM. J. L. & ARTS at 44.

⁸⁵ *Dryer v. Nat’l Football League*, 814 F.3d 938, 943 (8th Cir. 2016).

⁸⁶ Dogan & Lemley, 58 STAN. L. REV. at 1220 (quoting Gerard N. Magliocca, *From Ashes to Fire: Trademark and Copyright in Transition*, 82 N.C. L. REV. 1009, 1027 (2004)).

for concerns about false endorsements, many RoP cases also include parallel claims under the Lanham Act.⁸⁷ Accordingly, the discussants considered how valid concerns about false or misleading assertions of personal endorsement could be addressed by the RoP without permitting the tort to trample expressive freedoms where those interests are not sufficiently threatened.

As two discussants have written: “Reconceiving the right of publicity as a trademark-like right offers significant benefits in defining the right’s scope and limitations.”⁸⁸ Trademark law primarily serves to police the commercial marketplace, focusing on the right of consumer-audiences to be free of confusion and misrepresentation, and the analogy certainly avoids some of the problems engendered by copyright. Trademark rights are not, strictly speaking, property rights,⁸⁹ leaving the doctrinal focus squarely on the public interest in keeping the marketplace free from misleading or false endorsements, without permitting ownership-based claims to the idea of a particular person, or facts about that person, to thwart valuable speech where there is no meaningful threat of confusion.

Accordingly, to the extent courts focus on property-like interests in persona, trademark law analogizes poorly to the RoP. The RoP has increasingly been described as serving an individual’s property-like interest in controlling the use of their likeness, and the discussants generally agreed that this was an inadequate interest to justify restraining speech, unlike the narrower trademark-like concern with consumer confusion caused by the suggestion of false personal endorsements.

As was noted, Lanham Act claims require plaintiffs to establish the element of consumer confusion, which serves as an additional barrier to claims that the RoP simply does not require. True, First Amendment constraints on the Lanham Act had scarcely begun to emerge when the RoP was christened in 1953,⁹⁰ but to the extent that the RoP validly addresses similar interests, it should have developed roughly in step with the more robust constitutional limitations around which courts would ultimately coalesce in the context of Lanham Act claims. Indeed, some discussants felt it worth considering whether the Lanham Act now renders the RoP unnecessary to protect the government interest at stake, though others agreed that there might be a role for the

⁸⁷ *E.g. White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1400 (9th Cir. 1992), *as amended* (Aug. 19, 1992).

⁸⁸ Dogan & Lemley, 58 STAN. L. REV. at 1165.

⁸⁹ *Id.*

⁹⁰ *Haelan*, *supra* n. 7.

RoP in false-endorsement circumstances where trademark protections would be unavailing, such as in claims brought by relatively private individuals who did not participate in the commercial marketplace and asserted essentially privacy-based interests.⁹¹ But it is disturbing that the Lanham Act, which serves a public purpose in protecting consumers, is bounded by elements and constitutional constraints that provide greater protection for free expression than does the RoP, which is frequently described to serve private, alienable, and descendible property-based interests in the profits of celebrities and their assignees.⁹² Surely, many discussants felt, the RoP should be at least as speech-protective as trademark.

Accordingly, there was substantial support among the Workshop participants for the Second Circuit’s widely-followed constitutional limiting test announced in *Rogers v. Grimaldi*.⁹³ Articulated in the context of a parallel trademark claim, and owing its analysis to Lanham Act jurisprudence, *Rogers* seemed to a number of discussants to provide the best available mechanism for focusing the RoP on its strongest interest: preventing false personal endorsements in advertising. In that case, Ginger Rogers brought Lanham Act and RoP claims challenging the title of a motion picture – *Fred and Ginger* – about an Italian dance couple known to be the “Fred and Ginger” of their region. After examining decisions about titles for expressive works from several jurisdictions, the Second Circuit concluded that there would be no RoP liability unless the use of a celebrity’s name in a movie title “was ‘wholly unrelated’ to the movie or was ‘simply a disguised commercial advertisement for the sale of goods or services or a collateral commercial product.’”⁹⁴

The participants generally agreed that this test hewed the RoP more closely to its strongest validating interest than the transformative use test. *Rogers* drew an entirely different conclusion than the Ninth and Third Circuits in *Keller* and *Hart*, in part because, as the panel noted, the RoP needs greater constraints than trademark precisely because it does not require demonstration of a likelihood of consumer confusion as an element, and a constitutional overlay

⁹¹ See Dogan & Lemley, 1166 n. 12.

⁹² In football player Jim Brown’s action for compensation for the presence of an avatar that could be programmed to represent him in a videogame, for example, the Lanham Act claim was dismissed by the Ninth Circuit, while the California state-law based claim for RoP withstood early dismissal. *Brown v. Electronic Arts*, 724 F.3d 1235 (9th Cir. 2013).

⁹³ *Rogers v. Grimaldi*, 875 F.2d 992 (2nd Cir. 1989).

⁹⁴ *Id.* at 1004-1005. *Rogers* has been construed to apply beyond titular uses. See *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008).

would be necessary to supply equivalent constraints and keep the tort within the bounds necessary to defend that interest.⁹⁵ Under *Rogers*, the video game cases would have been resolved in much more straightforward fashion than the convoluted analysis undertaken by the *Hart* and *Keller* panels: the challenged works did not explicitly assert an endorsement by the players, and the use of the players was certainly artistically relevant to the works, which even by the *Hart* and *Keller* panels' analysis would have handily qualified as expressive works to which *Rogers* would apply.

There was some discussion about what would constitute a gratuitous use of persona in such a work that would lie beyond *Rogers*' protection, and the panelists proffered Paris Hilton as a cheerleader as a hypothetical, a nod to the greeting card case involving the heiress.⁹⁶ Though even that use could have artistic relevance, the discussants were troubled by the possibility that the nature of an "explicitly misleading" use might be subject to judicial expansion. In its trademark analysis, the *Rogers* court held that Constitutional interests trump false endorsement concerns where a use has artistic relevance, but not where a use misleads as to source or content:

We believe that in general the Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression. In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.⁹⁷

Accordingly, the Workshop participants discussed a number of ways uses of persona might arguably mislead as to the source of a work, or as to its content, or misleadingly convey endorsement of or affiliation with a particular creative project or brand as to implicate a valid interest the RoP should protect. Sophisticated advertising practices ranging from advertorials, advertainment, product placement, sponsored content, social media "influencers," native advertising, and so on have problematized easy distinctions between editorial and promotional

⁹⁵ *Id.* at 1004 ("Because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement, it is potentially more expansive than the Lanham Act. Perhaps for that reason, courts delineating the right of publicity, more frequently than in applying the Lanham Act, have recognized the need to limit the right to accommodate First Amendment concerns.") (internal citations omitted).

⁹⁶ *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010).

⁹⁷ *Rogers*, 875 F.2d at 999.

content, and as one Workshop participant noted, it is difficult to imagine a (non-media) corporation speaking for any purpose other than to propose, however distantly or circuitously, a commercial transaction. This is not a conclusion the law requires or permits, but the intuition may influence the adjudication of RoP claims arising from very different works, from long-form narrative advertisements, guerrilla marketing campaigns, concert tour promotions, “promotional consideration” or product placement in otherwise conventional television and film properties.

It was agreed that First Amendment principles militate against any judicial recognition of overarching presumption that, whatever the funding sources of particular and otherwise “expressive” content might be, the appearance of likeness in content necessarily suggests an endorsement-like relationship with the project or to a collateral product. But though some trademark cases provide strong support for the proposition that audiences do not necessarily assume, from the mere appearance of a product, the existence of a sponsorship relationship, ownership, or affiliation,⁹⁸ the increasing participation by sponsoring entities in conventionally “expressive” content might give stronger intuitive force to contemporary claims. Additionally, as the discussants observed, such a presumption would present the further problem of potentially permitting regulation of true speech,⁹⁹ as in a hypothetical proposed by one Workshop participant in which Coca Cola hires an army of paparazzo to run around Los Angeles and take pictures of celebrities drinking their product for an advertising campaign that states no more than the true fact that the celebrity was seen drinking the product, or in the circumstances surrounding New York drugstore Duane Reade’s post on social media of a photograph of actress Katherine Heigl exiting the store with one of its bags.¹⁰⁰

Courts would face similar questions in determining whether the *Rogers* test applies, for they would be called to draw lines between works sufficiently “artistic” or “expressive” to implicate “artistic relevance,” and what one discussant helpfully called, for want of a term of art, “tchotchkes.” Trademark law has sustained this distinction, but advanced advertising practices

⁹⁸ *Wham-O, Inc. v. Paramount Pictures Corp.*, 286 F. Supp. 2d 1254, 1264 (N.D. Cal. 2003) (use of Slip-n-Slide in film did not suggest endorsement by or affiliation with manufacturer); *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913, 919-20 (C.D. Ill. 2003) (film villain’s use of Caterpillar bulldozers did not suggest endorsement: “the appearance of products bearing well known trademarks in cinema and television is a common phenomenon”).

⁹⁹ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

¹⁰⁰ *Katherine Heigl v. Duane Reade, Inc.*, No. 1:14CV02502 (S.D.N.Y. Apr. 9, 2014).

and a dearth of adequately direct analysis or guidance as to when the *Rogers* test should apply in the context of the RoP presented concerns that the discussants felt worthy of note.¹⁰¹

Nonetheless, these were generally agreed to be solveable problems to which courts could be more or less trusted to develop workable, appropriate answers. Brought within the rubric of a trademark-like analysis that would focus judicial attention on the public's interest in policing false endorsements, a trademark-based overlay like the *Rogers* test was generally agreed to be far preferable to the intractable problems inherent in the transformative use test.

C. Commercial Speech

One discussant proposed a different way through the endorsement thicket: to eliminate *Rogers* as the RoP middle-man and apply the commercial speech doctrine directly. This approach, it was proposed, provided a cleaner, authoritative resolution to some of the trickier problems encountered under the *Rogers* analysis. The commercial speech doctrine would draw lines around speech that was sufficiently commercial to avoid the application of strict scrutiny of an RoP claim arising therefrom, and the Supreme Court's well-trodden *Central Hudson* test would determine when potentially valid state interests in preventing false endorsements might be implicated by that speech.

As a threshold matter, the discussants acknowledged that the categorically disparate treatment of commercial and noncommercial speech under the First Amendment is clearly under question, if not outright challenge, by what was (prior to the death of Antonin Scalia) a five-person majority of the Supreme Court.¹⁰² Conceivably, following *Sorrell* and *Reed*, much of what is thought of as "commercial speech" would be protected from rules that regulate or subject it to liability by a strict scrutiny analysis, rather than the lower protection otherwise afforded commercial speech. Pending cases will doubtless test the breadth of the decisions, but if *Sorrell* and *Reed* provide a basis for eliminating, or even limiting, the distinction between commercial and noncommercial speech, all or virtually all applications of the RoP could arguably be subject

¹⁰¹ *E.g. Univ. of Alabama Bd. of Trustees v. New Life Art, Inc.*, 683 F.3d 1266, 1279 (11th Cir. 2012) (analyzing printed material but not "mugs and other 'mundane products'" under *Rogers*: "paintings, prints, and calendars very clearly are embodiments of artistic expression, and are entitled to full First Amendment protection").

¹⁰² *Sorrell*, 131 S. Ct. at 2664 (subjecting content- and speaker-based restrictions of commercial speech to "heightened scrutiny," holding that characterizing speech as commercial speech does not categorically exempt regulation of it from heightened scrutiny); *Reed*, 135 S. Ct. at 2228. As one discussant noted, *Sorrell* did not alter the viability of the distinction between commercial speech that is not false or misleading and commercial speech that is false or misleading, so as long as that distinction remains viable, commercial speech theory could provide a promising basis for narrowing the RoP.

to strict scrutiny. *Sarver*, however, the first guidepost among the lower courts on this issue, assumes that the distinction will persist.¹⁰³

Assuming, then, that the distinction between commercial and noncommercial speech remains viable in the context of the RoP, this third approach would focus on where that line should be drawn, and use it to determine the appropriate constitutional standard that RoP claims must meet. Noncommercial speech would be subject to strict scrutiny, which for the reasons discussed in Section IIA, *supra*, would nearly always preclude a claimant's recovery. Commercial speech, by contrast, would be subject to reduced First Amendment protections. If expressly false and misleading, it would receive no protection at all against RoP claims.¹⁰⁴ An outright false endorsement of a product, therefore, would likely support a valid RoP claim – the First Amendment would not intrude.¹⁰⁵

Under this approach, the problematic middle ground is occupied by commercial speech that contains uses that aren't explicit endorsements, like the Coca Cola hypothetical, or the Katherine Heigl tweet. If references to celebrities in advertising are determined to cause confusion among a substantial number of consumers about whether the celebrities endorsed the advertised products, they would likely be deemed false and misleading and plaintiffs would prevail. Only a reconceptualization of the concept of "misleadingness" based on constitutional grounds would then provide further First Amendment limits on the RoP in commercial contexts.

If, instead, such speech were found to be truthful and nonmisleading as a general rule, it would be addressed under the Supreme Court's well-trodden *Central Hudson* test,¹⁰⁶ which provides that a restriction on non-misleading commercial speech satisfies First Amendment scrutiny if: (1) "the asserted government interest is substantial"; (2) the restriction "directly advances the governmental interest asserted" and does not "provide[] only ineffective or remote

¹⁰³ In applying strict scrutiny, the *Sarver* panel footnoted that "[t]his case does not concern a law that governs commercial speech . . ." *Sarver*, 813 F.3d at 903 n. 5. Of course, an apparent effect of the *Sarver* decision was to draw this line between video games and films, rather than commercial and noncommercial speech.

¹⁰⁴ See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.")

¹⁰⁵ See, e.g., *Comedy III*, 21 P.3d at 802 ("Because the First Amendment does not protect false and misleading commercial speech . . . the right of publicity may often trump the right of advertisers to make use of celebrity figures."). But the Supreme Court made clear in *Alvarez* and elsewhere that not all false speech can be sanctioned by the state, *Alvarez*, 132 S. Ct. at 2544, and the impact of *Alvarez* on regulation of false and misleading speech is not fully known.

¹⁰⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–566 (1980).

support for the government’s purpose”; and (3) it is narrowly tailored to achieve that purpose, for “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”¹⁰⁷

Proponents of this approach suggested that it would both appropriately constrain the scope of the RoP and improve the efficiency of its adjudication. Based on existing legal distinctions, it would provide a nearly bright-line bar to claims arising from noncommercial speech, and impose a consistent constitutional standard that forces RoP claims in the confusion-fraught middle ground between false endorsement and mere depiction to hew closely to particular and demonstrably valid interests, rather than subject those claims to the states’ many different flavors of analysis that respond, in undifferentiated fashion, to innumerable interests of questionable constitutional weight. If adopted, this approach could replace many of the questions that are inconsistently resolved under existing tests with constitutional standards based on fully fleshed out boundaries of commercial speech.

So where should these boundaries be drawn in the context of the RoP? Speech that proposes a commercial transaction? Defining the boundaries of commercial speech is an issue of concern beyond the RoP, and was beyond the scope of the Workshop,¹⁰⁸ but the discussants agreed that under this approach, a film that used Tom Cruise’s likeness to depict him -- that is, a character in the film is the real person Tom Cruise -- would not be commercial speech. An RoP claim challenging this use would be subject to strict scrutiny, and the Workshop participants agreed that the proper result would be that Tom Cruise should have no publicity claim, whatever recourse he might otherwise have in defamation or false light invasion of privacy.

A more troublesome hypothetical, however, would be where Tom Cruise was portrayed in a film not as himself, but as an actor playing a character -- using a Tom Cruise avatar rather than hiring Cruise himself to perform. This scenario is of concern to the Screen Actors Guild has raised, and seem to have purchase with courts in the Ninth Circuit: the manner in which the *Sarver* panel distinguished *Keller* evinces sympathy for a labor/investment theory of recovery, even in its analysis of a work that triggered strict scrutiny, and the Ninth Circuit panel presiding

¹⁰⁷ *Id.* at 563-4.

¹⁰⁸ *Central Hudson* characterized commercial speech as “expression related solely to the economic interests of the speaker and its audience.” 447 U.S. at 562; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (reviewing development of commercial speech doctrine).

over another video game case was concerned, at oral argument, that Elvis or Sean Connery could be forced to virtually perform.¹⁰⁹

But the use of a Tom Cruise avatar to play characters in a film would not deprive the performer of his right to perform, before a live audience or in any medium. For an avatar representing an individual performer to have value, the individual would have had to establish a solid persona with the public, and the actor's interest in being able to monetize his or her talent would only be jeopardized if audiences preferred the fictional version to the real individual as a performer, begging the question what talent, exactly, is being stolen? Such a film would be noncommercial speech, and an RoP claimant would have to survive strict scrutiny, and would likely fail. The discussants agreed, however, that substantial concern for actors might, under the right fact pattern, drive courts to results-driven decisions and might do further violence to existing tests, or pollute an otherwise clear analysis like the commercial speech approach.

This approach would have to accommodate concerns that were beyond the scope of the Workshop but likely to emerge in the context of the RoP, such as where the line between commercial and noncommercial speech should be drawn in the context of the RoP claims arising from sponsored narrative content. It was generally agreed, however, that by repudiating the one-size-fits-all (or all-sizes-fit-all) approach to valid RoP interests and promising clear, nationally consistent standards for particular kinds of content that could be meaningfully predicted and evaluated in advance of adjudication, the approach was well worth further development.

III. CONCLUSIONS

Where, then, to go? If, as major themes that emerged from the Workshop reflect, the RoP has always been prone to jurisprudential 'lag' involving cases arising from emerging mediums that courts simply don't very much (yet) like, and (2) the infection of otherwise good law with the tortured analysis of results-driven video-game cases has finally reached a tipping point from which the Circuits appear unwilling to return, what strategies should advocates and scholars concerned about the attendant chilling effects on free expression adopt?

The viability of a federal statute as a salve for the inconsistent was dismissed out of hand. Workshop participants noted that legislative solutions for other aspects of state RoP laws, most notably with respect to descendability provisions, had proven profoundly unbalanced. Powerful

¹⁰⁹ Oral Argument, *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013), <http://perma.cc/5XB4-KNQB>.

lobbies in states with significant concentrations of celebrity interests (or the interests of rights management companies) capture the field, prevailing over more abstracted interests in free expression.

Given the recalcitrant Third and Ninth Circuits, and the fact that even in jurisdictions where the law is less hostile, it is often unclear, the discussants agreed that the clearest path toward a coherent, predictable, and appropriately bounded RoP will be guidance from the Supreme Court in a properly postured case. At the time the Workshop was held, there was cautious optimism that the Supreme Court would grant certiorari review in *Davis*. With the denial of EA's petition, the need for authoritative guidance remains. Perhaps the Ninth Circuit's decision in *Sarver*, or subsequent appellate decisions that follow or disregard *Sarver*, will furnish the right opportunity. In the meantime, the discussants agreed that it will be important to vigilantly brief (and emphasize as *amici*) a number of features of existing law, to ensure that all of the issues are squarely teed up, and amply considered among the lower courts, by the time the opportunity arises to put the question again before the Supreme Court.

First, the discussants generally agreed that visual bias must be firmly and consistently repudiated. Future RoP claims will increasingly be entirely visual or audiovisual in nature, and it will be important to prevent courts from forgetting that settled principles protecting speech in the written context must be carried forward even as we have increasingly sophisticated ways to replicate likeness. Those technologies are compelling, but distracting: they do not meaningfully alter the nature of the governmental interests in play, and if anything, the novelty of visual and interactive media should militate in favor of greater, not less, protection. The Supreme Court afforded full First Amendment protection to movies in the 1950s, despite a dearth of socially or politically conscious films, so that they might "earn" the role for which commentators saw potential. To the extent that courts seem prone to make medium-based judgments, they should be reminded that the reach of expressive works in mediums like video games is not only unfixed, but is not always obvious to judges, who should, to the extent practicable, be educated by the active participation of amici.

Second, the emergence (and calcification) of social expectations that celebrities must be paid for the use of likeness cannot be permitted to continue expanding the appropriate legal bounds for the RoP. The historical unmooring of the RoP must be emphasized in briefing so that courts are equipped to repudiate the increasingly prevalent instinct (which has no basis in law)

that whenever a person's image appears on a screen, in whatever format and for whatever purpose, someone should have been paid.

Third, and relatedly, courts should be exhorted to focus intently on particular justifications for RoP claims, rather than accept the basic property-like intuitions or copyright analogies. Attempts to borrow from areas of law that address different interests must be consistently opposed to avoid packing interests into the RoP that it was never intended to protect, and the boundaries between those areas of law and the RoP must be refined through preemption and other arguments.

Fourth, the practical consequences of uncertainty in the caselaw must continue to be highlighted. As in other areas of First Amendment law, where courts have been sensitive to the chilling effects of uncertainty in the caselaw, practitioners should emphasize that without clearer standards and constitutional rulings, their clients must leave valuable and lawful speech on the cutting room floor, and without early rulings as matter of law in litigation, their clients must pay lawyers to defend valuable and defensible speech, depriving the public of the speech those resources otherwise would have supported.

Finally, active participation by *amici* who have strong interests but do not often draw lawsuits must continue, so that the speech-chilling consequences of inadequately clear or protective rulings for the very mediums and genres that should be given latitude to fully emerge remain prominent in the judicial mind. In recent years a strong coalition of major media companies whose First Amendment interests are chilled by recent developments in RoP caselaw has maintained an active presence in high-profile RoP cases, but RoP claimants tend to be sympathetic individuals suing large companies. Though their threatened interests are unquestionably valid, the optics generated by a host of large media companies rushing in to defend what RoP plaintiffs would characterize as a freedom from paying licensing fees in the development of blockbuster films and video game franchises do not reflect the range of creative interests in play; only those who can afford sophisticated First Amendment counsel. And to courts with David and Goliath sympathies, their defenses and participation as *amici* may lack the strength of concerns that might be presented by a small collective of independent game designers huddled for months over a narrative, interactive virtual reality gamespace based on the life and times of a recently deceased American writer with a litigious estate.

The concerns that motivated the Workshop reflect the impact that discrete lower-court decisions can have. Until *Hart* and *Keller* became *Hart* and *Keller*, they were complaints susceptible to fairly well-trodden principles about the scope of the RoP in expressive works. Every decision (and every lawsuit) can affect the landscape that speakers must consider in handicapping RoP liability, whether they are content companies or creative individuals. And until we have a binding, authoritative RoP decision from the Supreme Court, courts presiding over RoP cases do not merely adjudicate disputes, they write future freedoms. Those courts should more fully know the range of interests they affect, and the potential of the mediums they consider, before doing so.

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APPENDIX C: PENDING AND RECENT CASES¹¹⁰

Pending Cases

Davis v. EA, No. 12-15737 (9th Cir.) (sports video game)

Sarver v. Chartier, No. 11-56986 (9th Cir.) (film)

Jordan v. Jewel Food Stores, No. 10 C 340 (N.D. Ill.) (print advertisement)

Jordan v. Dominick's Finer Foods, No. 10 C 407 (N.D. Ill.) (print advertisement)

Dryer v. National Football League, No. 14-3428 (8th Cir.) (NFL game footage)

Marshall v. ESPN, No. 15-5753 (6th Cir.) (college sports broadcasts)

Maloney v. T3Media, No. 15-55630 (9th Cir.) (college athlete photographs)

Brown v. EA, No. BC520019 (Cal. Super. 2013) (sports video game)

Recent Cases

O'Bannon v. NCAA, Nos. 14-16601, 14-17068 (9th Cir. Sept. 30, 2015) (video games)

Greene v. Paramount Pictures, No. 14-cv-1044 (E.D.N.Y. Sept. 30, 2015) (film)

Sondik v. Kimmel, No. 2013-07373 (2d Dep't Sept. 16, 2015) (variety TV show)

Ray v. ESPN, Inc., 783 F.3d 1140 (8th Cir. 2015) (professional wrestling re-broadcast)

¹¹⁰ As of the date of the Workshop.