Video games are cheated out of First Amendment rights

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When will video games get the respect they deserve? They have spawned tent-pole action films starring Hollywood's biggest stars and most respected actors. Steven Spielberg's most recent movie Ready Player One is based on a worldwide best-selling novel about a dystopian future in which the inhabitants seek salvation within a virtual reality video game. The emergence of ELeague and other competitions has made it more difficult for parents to complain that their kids are wasting their time honing their gaming skills. Watching others compete is now a big business in its own right. A record 680,000 people recently streamed Tyler "Ninja" Blevins playing Fortnite on Twitch. Yet, when it comes to right-of-publicity case law, video games are treated as second-class citizens.

As the recent de Havilland v. FX Networks, Inc. decision confirmed, expressive artistic works such as television shows and motion pictures are entitled to broad First Amendment protection. Legendary actress Olivia de Havilland brought a right-of-publicity lawsuit over her depiction in the FX television miniseries Feud about Bette Davis and Joan Crawford. FX conceded that it wanted the actress portraying Ms. de Havilland to appear as real as possible, but raised the First Amendment as a defense. The California Court of Appeal applied the transformative test and rejected her claim concluding that her 4.2 percent of screen time made her only raw material from which the series was synthesized.

While the decision begs the question of what would happen if Joan Crawford's estate had sued and shows the flaws in the transformative test, the court reached the right result, and Ms. de Havilland's threatened petition to the United States Supreme Court won't likely change the outcome. But what if Feud were a video game in which players controlled the battles between Bette Davis and Joan Crawford?

The case law makes clear that even though it is for financial gain, "entertainment" is non-commercial speech entitled to full First Amendment protection. This is true for television shows, whether based on fictional or factual accounts of a person's life. Guglielmi v. Spelling-Goldberg Productions, 25 Cal.3d 860 (1979). Accordingly, the Ninth Circuit dismissed a right-of-publicity suit brought by US Army Sergeant Jeffrey Sarver against the makers of the Academy Award-winning film The Hurt Locker, in which the protagonist was based on him. Sarver v. Charter, 813 F.3d 891 (9th Cir. 2016). "In sum, 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."

Overwatch and Grand Theft Auto should get the same treatment. "Video games are expressive works entitled to as much First Amendment protection as the most profound literature." Kirby v. Sega of America, Inc., 144 Cal.App.4th 47 (2006). But in applying the transformative test borrowed from copyright, the courts have made clear that they see video games as a lesser form of entertainment. For example, in No Doubt v. Activision Publishing, Inc., 192 Cal.App.4th 1018 (2011), the rock band No Doubt succeeded in convincing a California Court of Appeals that the
depiction of its members in Activision's Guitar Hero video game violated their rights of publicity. Although players could manipulate the band members' avatars and have them play and mouth the words to songs by other bands, the court concluded that it was not transformative because it did not alter their personas with sufficient new expression, meaning or message. Id. at 1034.

In order to level the playing field, perhaps courts should instead apply the test set forth in Rogers v. Grimaldi, 875 F.2d 994 (2nd Cir. 1989). Famed actress Ginger Rogers, best known for her movie roles alongside Fred Astaire, sued the producers and distributors of a motion picture entitled Ginger and Fred for violation of the Lanham Act and her right of publicity. The Federico Fellini film told the story of two fictional Italian cabaret performers who became known in Italy as "Ginger and Fred" and after retirement reunited on a television variety show. The Second Circuit articulated a test which protected such uses "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 of the content of the work." Id. at 999.

Video game developer and publisher Electronic Arts advocated for the application of the Rogers test in right-of-publicity claims brought by athletes depicted in its NCAA Football and Madden NFL video games. Keller v. Electronic Arts Inc., 724 F.3d 1268 (9th Cir. 2013), and Davis v. Electronic Arts Inc., 775 F.3d 1172 (9th Cir. 2015). Although the Ninth Circuit applied the Rogers test to Lanham Act claims, it declined to do so for publicity claims. Keller, 775 F.3d at 1280. The Ninth Circuit also declined to adopt the Tenth Circuit's flexible case-by-case approach set forth in Cardtoons, L.C. v. Major League Baseball Players, 95 F.3d 959 (10th Cir. 1996). Cardtoons produced parody trading cards featuring caricatures of major league baseball players on the front and humorous commentary about their careers on the back. The Tenth Circuit concluded that the cards were an important form of entertainment and social commentary deserving First Amendment protection and therefore application of Oklahoma's right of publicity would be a classic case of overprotection of intellectual property that would reduce the incentive to create. Id. at 976.

The trouble with right-of-publicity laws in the context of First Amendment protected works is that, unlike the Lanham Act, there is no requirement that there be a risk of consumer confusion. Rather, unauthorized use of the publicity right for a commercial purpose alone is sufficient.

While the development of publicity rights was much needed, it has gone too far and often runs counter to one of the primary goals of intellectual property laws – to maximize creative expression. The adoption of the murky transformative test has only made matters worse, particularly for video game makers. While courts recite the mantra that video games are entitled to full First Amendment protections, they then apply the transformative test in a manner which renders it hollow. Instead, courts should apply the Rogers test or a version of it, as in Cardtoons, to correctly put the emphasis on analyzing the way the publicity rights are used and whether consumers are likely to be confused by it.

Bringing it back to Ms. de Havilland and the hypothetical video game, the key question should be whether or not the work is likely to confuse consumers as to whether it was endorsed by or affiliated with the person depicted. So long as right-of-publicity laws remain untethered to this concept, the application of tests like the transformative test will continue to put courts in the role of an art critic without the necessary training or understanding of popular culture. No one watching Feud believed that Ms. de Havilland was involved in its production or somehow endorsed it. As the Cardtoons court observed, celebrities "are an important element of the shared communicative resources of our cultural domain" and therefore "[r]estricting the use of celebrity identities restricts the communication of ideas." 95 F.2d at 972. That does not leave Ms. de Havilland defenseless, as she can always assert a claim under the Lanham Act or for defamation, if appropriate. But, short of that, authors of artistic works, including video games, must be free to use the raw materials of creative expression without fear of right-of-publicity claims.

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