NORIEGA V. ACTIVISION/BLIZZARD: THE FIRST AMENDMENT RIGHT TO USE A HISTORICAL FIGURE'S LIKENESS IN VIDEO GAMES

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ABSTRACT

Panama's former dictator, Manuel Noriega, recently sued Activision Blizzard in the California Superior Court for using his likeness and image in the popular video game "Call of Duty: Black Ops II." In his complaint, Noriega alleged that the use of his likeness violated his right of publicity. Former New York Mayor, Rudy Giuliani, came to Activision's defense, and filed a motion to dismiss, which was granted. In granting Activision's motion, the court held that Activision's use of Noriega's likeness was transformative and did not violate his right of publicity. This Issue Brief argues that the California Superior Court should not have applied the transformative use test but should have held that Manuel Noriega did not have a right of publicity for his place in Panama's history.

INTRODUCTION

Call of Duty is Activision's most popular videogame franchise.[1] It involves a series of "first person shooter" video games where players take control of a foot soldier in a simulated warfare experience.[2] The first installments of the *Call of Duty* franchise took place during World War II and featured actual historical events.[3] Some of the later installments contained fictional storylines and events, such as World War III.[4] The *Call of Duty: Black Ops* storyline stretches over a long period of

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[1] Declaration of Daniel Suarez in Support of Defendant's Special Motion to Strike Plaintiff's Complaint Under the California Anti-SLAPP Statute at 2, CIV. PROC. CODE §§ 425.16–425.17, Noriega v. Activision/Blizzard, Inc., No. BC551747 (Cal. Sup. Ct. L.A. County Oct. 16, 2014) [hereinafter "Suarez Declaration"].

[2] *Id.*

[3] *Id.* at 5.

[4] *Id.* at 6.

time, starting in the Cold War and finishing in the future.[5] The storyline also features several real-world historical figures and events.[6]

Manuel Noriega is depicted as himself in *Call of Duty: Black Ops II*.[7] He is a non-player character (NPC), and appears in two missions during the 1980's portion of the *Black Ops II* story line.[8] He first appears in a cinematic, and then as the primary objective of a mission.[9] There are similarities between the Manuel Noriega character in *Black Ops II* and the real-life Manuel Noriega.[10] In fact, Activision created the Noriega character in *Black Ops II* by relying on "videos and stills from news coverage."[11] Anyone looking at a side-by-side comparison of the Manuel Noriega *Black Ops II* depiction and the real-life Manuel Noriega will see that the *Black Ops II* depiction has the same eye and hair color as the real-life Noriega, and a nearly identical facial structure and hairstyle.[12] Activision hired an actor to "provide voiceover and motion capture[13] . . . for the Noriega character."[14]

In 2014, Manuel Noriega sued Activision Blizzard for violating his right of publicity, by claiming that Activision had misappropriated his likeness and been unjustly enriched by using his likeness in order to increase sales of *Black Ops II*.[15] Activision subsequently moved to dismiss Noriega's claim under the California Anti-SLAPP (Strategic Lawsuits Against Public Participation) statute. Under this statute, causes of action that arise from the exercise of free speech under the United States Constitution or Constitution of California are "subject to a special

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[5] *Id.* at 7, 12.
[6] *Id.* at 7. Fidel Castro, John F. Kennedy, Robert McNamara and Manuel Noriega are just some of the historical figures featured in the *Call of Duty: Black Ops* series. *Id.* at 4, 7.
[7] *Id.* at 15.
[8] *Id.* at 4, 11, 16–17.
[9] *Id.* at 16.
[10] *Id.* at 18.
[11] *Id.*
[12] *See id.* The photos on page 18 show a side-by-side comparison of the *Black Ops II* Noriega and the real-life Noriega.
[13] Motion capture is the process by which "the complex motion of [a performer's] body (and face)" is transmitted "to an animated character." Steve Dent, *What You Need to Know About Motion Capture*, ENGAGDET (July 14th, 2014, 11:00 AM), http://www.engadget.com/2014/07/14/motion-capture-explainer/.
[14] Suarez Declaration, *supra* note 1, at 18.
[15] Complaint at 2, Noriega v. Activision/Blizzard, Inc., No. BC 551747 (Cal. Super. Ct., Los Angeles County, July 15, 2014)) [hereinafter "Noriega Complaint"].

motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[16] The Court granted Activision's anti-SLAPP motion and concluded that Activision was protected under the First Amendment.[17]

Part I of this Issue Brief will discuss the district court's decision, the legal framework underlying a theory of publicity claim, and the transformative use defense. Part II will analyze the district court's decision and argue that the district court should have held that Manuel Noriega did not have a right of publicity for his place in Panama's history, instead of applying the transformative use test.

I. BACKGROUND

A. The California Anti-SLAPP Statute

The Anti-SLAPP statute is designed to reduce the number of lawsuits "brought primarily to chill valid exercise of the constitutional right[] of freedom of speech."[18] Courts use a two step-process in determining whether an Anti-SLAPP motion should be granted.[19] First, "the defendant must make a threshold showing that the challenged cause of action arises from protected activity."[20] Once this showing is made the burden shifts to the plaintiff to show that there is a probability that he will prevail on the merits of the claim.[21] To determine whether the plaintiff has adequately demonstrated a probability of prevailing, the trial "court does not weigh the evidence or make credibility determinations," and must consider any Constitutional defense, such as a First Amendment freedom of speech defense.[22] The court assumes that the plaintiff's allegations are true and must grant the motion if the plaintiff fails to show a probability of prevailing, or if there is a valid Constitutional defense.[23]

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[16] CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2014).
[17] Order Dismissing Defendant's Special Motion to Strike at 4, Noriega v. Activision/Blizzard, Inc., No. BC 551747 (Cal. Super. Ct., Los Angeles County, Oct. 27, 2014), 2014 WL 5930149, at *4.
[18] CAL. CIV. PROC. CODE §425.16(a)).
[19] No Doubt v. Activision Publishing, Inc., 122 Cal. Rptr. 3d 397, 403 (Ct. App. 2011).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 404 (quoting Ross v. Kish, 51 Cal. Rptr. 3d 484, 491 (Ct. App. 2006)).
[23] *See id.*

B. The Common Law Right of Publicity

Under the common law right of publicity, a public figure may bring an "invasion of privacy tort" when his likeness is commercially exploited.[24] In order to prevail on a right of publicity claim, the plaintiff must show that his likeness has been appropriated and commercially exploited to the defendant's advantage.[25] The California Civil Code contains a provision for bringing claims similar to the common law right of publicity, but has one additional element.[26] Under California law, the defendant must *know* that he is appropriating the public figure's likeness.[27] "The misappropriation of likeness refers to a person's visual image."[28]

The right of publicity was created in *Zacchini v. Scripps-Howard Broadcasting Co.*,[29] where the Supreme Court held that the First Amendment does not protect infringements on the right of publicity.[30] In *Zacchini*, the plaintiff performed a "human cannonball" act, where he was shot out of a cannon, flew in the air for two hundred feet, and landed in a net.[31] He performed at fairs, where members of the public, who had paid to enter, were not charged an additional fee to watch his act.[32] A free-lance reporter, employed by the defendant broadcasting company, attended the fair and taped the entire act, despite the plaintiff's request that the act not be taped.[33] The act was then broadcasted on the 11 o'clock news.[34] After his act was broadcasted, the "human cannonball" sued the defendant broadcasting company claiming, among other things, that the defendant had "unlawf[ully] appropriate[ed] [his] professional property."[35] The defendant broadcasting company responded by arguing that broadcasting the plaintiff's act was protected under the First Amendment.[36]

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[24] Kirby v. Sega of America, Inc., 50 Cal. Rptr. 3d 607, 612 (Ct. App. 2006).
[25] *Id.*
[26] *See* CAL. CIV. CODE § 3344(a) (West 2014).
[27] *Id.*
[28] *Kirby*, 50 Cal. Rptr. 3d at 613 (citing Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988)).
[29] 433 U.S. 562 (1977).
[30] *Id.* at 578–79.
[31] *Id.* at 563.
[32] *Id.*
[33] *Id.* at 563–64.
[34] *Id*. at 564.
[35] *Id.*
[36] *Id*.

In deciding whether the defendant was protected under the First Amendment, the Court considered the state's interest in prohibiting the appropriation of a celebrity's likeness without his consent. The Court ultimately held that the state had an interest "in protecting the propriety interest of the individual in his act in part to encourage such entertainment."[37]

The Court compared the broadcasting of the human cannonball's act to copyright infringement, and was concerned that the broadcasting company had posed a "substantial threat to the economic value of [the performance]" by showing the "human cannonball's" act on the news.[38] The Court noted that, as in copyright, protecting a performer's act would "provide[] an economic incentive for [the creator of the performance] to make the investment required to produce a performance of interest."[39]

In a subsequent case, *Comedy III Productions v. Gary Saderup Inc.*,[40] the California Supreme Court further discussed the right of publicity, after an artist, who sold t-shirts bearing literal depictions of the "Three Stooges," was sued by the production company of the infamous trio.[41] The company claimed that its right to publicity had been violated when the "Three Stooges" depiction was appropriated to the t-shirts.[42]

The court ruled in favor of the production company, holding that the "Three Stooges" had a right of publicity to depictions of their likeness.[43] In coming to this conclusion the court found that the right of publicity protected a form of intellectual property that was the result of considerable labor.[44] The following quotation captures the court's reasoning:

> Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one's identity.[45]

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[37] *Id.* at 573.
[38] *Id.* at 575–76.
[39] *Id.* at 576.
[40] 25 Cal. 4th 387 (2001).
[41] *Id.* at 393.
[42] *Id.*
[43] *Id.* at 409–10.
[44] *Id.* at 399.
[45] *Id.* at 399 (citations omitted) (quoting Lugosi v. Universal Pictures, 25 Cal. 3d 813, 834–35 (1979)).

The court found that the "Three Stooges" had gone through a "long and arduous" journey to become famous and depictions of them "amounting to little more than the appropriation of [their] economic value [were] not protected under the First Amendment."[46] As a result of this reasoning, the court found that the literal depictions of the "Three Stooges" violated Comedy III's right of publicity.[47]

Similarly, in *Estate of Presley v. Russen*, a distinction was drawn between the use of a character's likeness for historical purposes and the exploitation of a character's likeness for commercial purposes.[48] In *Estate of Presley*, a production company that featured Elvis impersonators was sued by Elvis Presley's heirs, under the theory that the impersonators were commercially exploiting Elvis' fame.[49] In holding for Presley's heirs, the court concluded that portrayals of Elvis that served "the purpose of contributing information . . . to the public debate of political or social issues" would be immune from liability.[50] Portrayals of Elvis that "function[] primarily as a means of commercial exploitation," however, would not be immune from liability.[51] The court then applied a balancing test, which weighed the societal interests of free expression against Elvis' heirs' right to exploit his publicity. The court concluded that the Elvis imitation provided limited social value because it did not contain "its own creative component."[52] However, the court did note that biographical films or plays depicting Elvis' role in the history and development of Rock n' Roll would not infringe on the heirs' rights to exploit Elvis' publicity.[53]

Then, in *Keller v. Elec. Arts Inc.*[54] the Ninth Circuit delineated the interests that the right of publicity protects.[55] *Keller* revolved around a right of publicity claim brought by National Collegiate Athletic Association (NCAA) football players, against Electronic Arts (EA).[56] The players alleged that EA had misappropriated their likeness in EA's *NCAA Football* video game series.[57] EA argued that they were protected

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[46] *Id.* at 400.
[47] *Id.* at 409–10.
[48] 513 F. Supp. 1339 (D.N.J. 1981).
[49] *See id.* at 1344.
[50] *Id*. at 1356.
[51] *Id*.
[52] *Id.* at 1359.
[53] *Id.* at 1360.
[54] 724 F.3d 1268 (9th Cir. 2013).
[55] *Id.* at 1281.
[56] *Id.*
[57] *Id.* at 1269.

under the First Amendment because the *NCAA Football* games did not mislead consumers into believing that the players had endorsed EA or its products.[58] In rejecting this argument, the court noted that "[t]he right of publicity protects the *celebrity*, not the *consumer*," and that the players were entitled to compensation for appropriations of their likeness, when their celebrity status was earned through "talent and years of hard work on the football field."[59]

C. The Transformative Use Defense

Transformative use is an affirmative defense to a right of publicity claim.[60] Under the transformative use defense, a defendant cannot be found liable for violating another's right of publicity if "the product containing the celebrity's likeness is so transformed that it has become . . . the defendant's own expression rather than the celebrity's likeness."[61] For instance, in *Kirby v. Sega of America, Inc.*,[62] the California Supreme Court considered whether Kieran Kirby, the lead singer of a musical group, had a right of publicity claim against Sega, when Sega modeled a video game character, "Ulala," after her.[63] The court ultimately held that Sega's use of Kirby's likeness was protected under the transformative use test, because Sega's depiction of Ulala was not a literal depiction of Kirby but rather a "transformative work."[64] While the court noted several similarities between Ulala and Kirby, such as similarly shaped eyes; pink hair; and brightly colored shoes, the court found that Ulala was Sega's own creative work.[65] In coming to this conclusion the court noted that Ulala was not a literal depiction of Kirby, as she had a different physique, and that Ulala was a space age reporter, which was "unlike any public depiction of Kirby."[66]

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[58] *Id.* at 1281.
[59] *Id.*
[60] *See* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) ("[W]orks of parody or other distortions . . . do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect.").
[61] *Id.* at 809.
[62] 144 Cal. App. 4th 47 (Ct. App. 2006).
[63] *Id.* at 51–52.
[64] *Id.* at 61.
[65] *Id.*
[66] *Id.* at 59. The Court also noted that there were significant differences in the dance moves that Ulala and Kirby performed; Ulala's dance moves were short, with quick movements, which were unlike the movements Kirby had in her dance videos. *Id.*

Contrast the result in *Kirby* to the case mentioned earlier, *Comedy III Productions, Inc. v. Gary Saderup Inc*,[67] where the court concluded that t-shirts containing literal drawings of the Three Stooges were not protected under the transformative use test because the depictions were "subordinated to the overall goal of creating a conventional portrait of [the "Three Stooges" in order to] commercially exploit [their] fame."[68]

D. Historical Figures' Right of Publicity for Their Place in History

In *Guglielmi v. Spelling-Goldberg Productions*[69] the California Supreme Court held that the right of publicity "cannot be inherited by descendents."[70] However, in a concurring opinion, Justice Bird provided insight into the First Amendment's protection of the appropriation of public and historical figures:

> Contemporary events, symbols and people are regularly used in fictional works. Fictional writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality. The right to publicity derived from public prominence does not confer a shield to ward off caricatures, parody and satire. Rather, prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics of imaginations of authors and fictions.[71]

Justice Bird used this insight to conclude that historical figures do not have a right to publicity when their likeness is used in fictional works.[72]

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[67] 21 P.3d 797 (Cal. 2001).

[68] *Id.* at 810. The court contrasted the depiction of the "Three Stooges" with Andy Warhol's depictions of celebrities. The court noted that Warhol's depiction would receive protection under the transformative use test because, because Warhol's depictions went "beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of [the] celebrity itself. *Id.* at 811. Andy Warhol's portraits can be seen at *Celebrity Portraits*, THE ANDY WARHOL EXPERIENCE, http://puffin.creighton.edu/museums/archive/7_abarnett/page2.htm (last visited July 22, 2015).

[69] 603 P.2d 454 (Cal. 1979).

[70] *Id.* at 455.

[71] *Id.* at 460 (Bird, J., concurring).

[72] *Id.*

If it were otherwise "the creation of historical novels and other works inspired by actual events and people would be off limits to [authors]."[73]

E. The District Court's Decision

The district court granted Activision's anti-SLAPP motion, concluding that Activision's depiction of Noriega constituted Activision's own artistic expression, therefore it was protected under the transformative use test.[74] In its decision, the district court found it significant that Noriega was only featured in two of the game's eleven missions and was "just one of more than 45 characters, including other historical figures, who appear in the game."[75] The court also found it significant that players could not "assume the Noriega character's identity, control its movements, or experience game play through its eyes."[76]

II. ANALYSIS

While the district court was correct in granting the anti-SLAPP motion, it did so for the wrong reason. The district court grounded its decision based on the transformative use test, which is an affirmative defense to a right of publicity claim.[77] However, Noriega does not have a right of publicity to depictions of his place in history to begin with. The court should have granted the anti-SLAPP motion on the grounds that Noriega did not have a right of publicity on which to make a claim.

A. Manuel Noriega Does Not Have a Right to Publicity for His Place in Panama's History

Manuel Noriega does not have a right to publicity for his exploits as Panama's dictator. *Gionfriddo v. Major League Baseball*[78] supports this position. In *Gionfriddo*, four professional baseball players sued the Major League Baseball Clubs (MLB) for including their statistics and names in "assorted All-Star game and World Series programs,"[79] and for including videos and photographs of them in the "histories of major league baseball productions."[80] The court dismissed

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[73] *Id.* at 462.
[74] Order Dismissing Defendant's Special Motion to Strike at 4, Noriega v. Activision/Blizzard, Inc., No. BC 551747 (Cal. Super. Ct., Los Angeles County, Oct. 27, 2014), 2014 WL 5930149, at *4.
[75] *Id.* at 3.
[76] *Id.*
[77] *Id.* at 4.
[78] 114 Cal. Rptr. 2d 307 (Cal. Ct. App. 2001).
[79] *Id.* at 311.
[80] *Id.*

the players' claims and held that Major League Baseball could use photos, statistics and videos of these major league baseball players to "present[] historic events from long ago."[81] The court considered these to be "fragments from baseball's mosaic," or, in other words, pieces of baseball's history protected under the First Amendment.[82]

In a similar case, Mickey Dora, whose "exploits in Malibu . . . are the folklore of [surfing]," sued Frontline video for creating a "video documentary entitled 'The Legends of Malibu.'"[83] Dora alleged that Frontline had used, without authorization, his name, voice, and likeness in the documentary.[84] In dismissing Dora's complaint, the court held that the documentary was a matter of public interest afforded First Amendment protection because it had social value in documenting "a certain time and place in California history and, indeed, in American Legend."[85]

Estate of Presley v. Russen,[86] also supports the conclusion that Manuel Noriega does not have a right of publicity for his place in Panama's history. In *Estate of Presley*, the United States District Court for the District of New Jersey held that heirs of Elvis Presley had a right of publicity claim to shows that included Elvis impersonators.[87] However, the court differentiated between a biographical film or play of Elvis and an Elvis impersonator performing on a live stage.[88] The court found that the biographical films and plays are immune from right of publicity claims because the public has an interest in "tracing the role of Elvis Presley in the development of rock "n roll."[89]

Moreover, the policy reasons for giving celebrities right of publicity claims, do not apply to historical figures.[90] Right of publicity claims protect a "form of intellectual property that society deems to have

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[81] *Id.* at 314.
[82] *Id.*
[83] Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 791 (Cal. Ct. App. 1993).
[84] *Id.*
[85] *Id.* at 792.
[86] 513 F. Supp. 1339 (D.N.J. 1981).
[87] *Id.* at 1361.
[88] *Id.* at 1360.
[89] *Id.*
[90] *See, e.g.*, Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) (stating that right of publicity claims protect a form of intellectual property); Keller v. Elec. Arts Inc., 724 F.3d 1268, 1281 (9th Cir. 2013) (explaining that professional football had right to publicity for years of hard work and talent needed to become a college athlete).

some social utility."[91] For example, the "human cannonball" had the right of publicity for his act, which was popular among crowds at the fair, and the Three Stooges had a right of publicity for appropriations of their likeness due to their notoriety as a comedy trio.[92] Both the Three Stooges and the "human cannonball" had a right of publicity that derived from unique acts and years of labor. Appropriations of their likeness would allow third parties to benefit from their celebrity status, which in turn would reduce the economic value of the infamy that they earned through hard work and ingenuity.[93] Similarly, athletes have a right to publicity due to their great talent, which is generally the result of years of hard work and dedication to a particular sport.[94] Third parties who appropriate the likeness of athletes gain economic value from the athletes' hard work and talent, without having to invest the time and energy needed to become skilled in a particular sport.

The policy implications under the right of publicity claims do not apply to Manuel Noriega. He is not famous for being an actor, professional athlete, or entertainer. His infamy is not based in any talent or unique act, but rather in his place in Panama's history. In 1983, Manuel Noriega took control of the Panamanian army and engaged in "election fraud, drug trafficking, money laundering, and espionage against the United States."[95] Then in 1987 he declared a national emergency after a political opponent accused him of fixing the 1984 elections and ordering the killing of a prominent figure that had accused him of drug trafficking.[96] As part of his declaration of a national emergency, he "suspended constitutional rights, closed newspapers and radio stations, and drove his political enemies into exile."[97] In 1989 he declared an election void after the candidate he backed failed to win and instead installed a president of his choosing.[98] In 1990 he was captured

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[91] Comedy III Productions, 21 P.3d at 804.
[92] *See supra* notes 31–47 and accompanying text.
[93] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977) (stating that broadcasting defendant's act would cause significant economic damage to the value of his performance).
[94] *See* Keller, 724 F.3d at 1281 (stating that football player had to right to publicity for years of hard work and talent on football field).
[95] *Manuel Noriega*, THE ROBINSON LIBRARY (Feb. 18, 2015), http://www.robinsonlibrary.com/america/central/panama/noriega.htm.
[96] *Manuel Noriega Biography,* ENCYCLOPEDIA OF WORLD BIOGRAPHY, NOTABLEBIOGRAPHIES.COM (last visited July 22, 2015).
[97] *Id.*
[98] *Id.*

after fleeing an armed conflict with the United States and surrendering to the Vatican Embassy in Panama City.[99]

Manuel Noriega is but a historical figure, whose infamy stems from these criminal acts.[100] If Manuel Noriega had a right of publicity for his place in history, numerous other historical figures would have a right of publicity for scandalous or criminal conduct. Bill Clinton would have a right of publicity for depictions of his affair with Monica Lewinsky and James Holmes[101] would have a right of publicity for depictions of the shooting that took place in an Aurora movie theater. This would be an untenable result as there is no societal interest in allowing historical figures who gained infamy from their place in history, to reap economic value that stems from their depictions. To the contrary, allowing historical figures to bring right of publicity claims for depictions of their place in history would preclude the media from depicting historical events, which would deprive the public access to historical re-enactments.

Black Ops II includes depictions of Manuel Noriega in order to lend "authenticity" to its historical narrative.[102] And, as Activision pointed out in its motion to dismiss, numerous historical works would be chilled if Noriega were to successfully use the "right to publicity to censor fictional accounts of [his] place in history."[103] Among these works are *Ragtime*,[104] which features Harry Houdini, J.P. Morgan, Henry Ford, and Archduke Franz Ferdinand, and *Midnight in Paris*,[105] featuring Ernest Hemingway and F. Scott Fitzgerald.[106]

Furthermore, the depiction of Noriega in *Black Ops II* is not like the depiction of the "human cannonball" in *Zacchini*.[107] In *Zacchini* the plaintiff had created an act, the "human cannonball." The Court found

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[99] *Id.*
[100] *See supra* notes 95–99 and accompanying text.
[101] James Holmes killed 12 people and wounded 58 people in 2012. Erica Goode, Serge F. Kovaleski, Jack Healy & Dan Frosch, *Before Gunfire, Hints of 'Bad News'*, N.Y. TIMES, Aug. 26, 2012, at A1.
[102] Suarez Declaration, *supra* note 1, at 15.
[103] Memorandum of Points and Authorities in Support of Defendants' Special Motion to Strike Plaintiff's Complaint under the California Anti-SLAPP Statute, CIV. PROC. CODE §§ 425.16–425.16, Noriega v. Activision/Blizzard, Inc., No. BC 551747, at 7–9 (Cal. Sup. Ct., Los Angeles County, July 15, 2014) [hereinafter "Anti-SLAPP motion"].
[104] E.L. DOCTOROW, RAGTIME (1975).
[105] MIDNIGHT IN PARIS (Gravier Productions 2011).
[106] Anti-SLAPP motion, *supra* note 103, at 8–9.
[107] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

that the defendant's decision to film the "human cannonball" act went to the "heart of [the plaintiff's] ability to earn a living as an entertainer."[108] There is no such issue here. Manuel Noriega was a dictator of Panama, he was not an actor or athlete. The historical fact that he was a dictator is not commercially exploitable. Unlike the "human cannonball," Noriega has not created anything. And unlike athletes, Noriega's infamy did not arise from years of hard work and talent. Noriega's place in Panama's history does not belong to him any more than historical accounts and depictions belong to other historical figures. For instance, Richard Nixon does not own depictions of the Watergate scandal and George Bush does not own depictions of his presidency during the war with Iraq. To the contrary, just like the biographies and historical depictions of Elvis, depictions of Noriega belong to the public, which has an interest in his place in history.[109]

B. The District Court Should Not Have Applied the Transformative Use Test in Dismissing Noriega's Claim

The transformative use test is an affirmative defense to a right of publicity claim.[110] Thus, the court implicitly recognized that Noriega had a right of publicity claim by holding that Blizzard's use of Noriega's likeness was "transformative" and thereby protected under the First Amendment. This is concerning because it opens the door for right of publicity claims by historical figures, as long as their depictions are not transformative. For instance, imagine a similar case where Noriega sues a movie company for producing a film that realistically depicts the events of his life. It is unlikely that such a movie would be protected by the transformative use test if it attempted to depict Noriega's life as realistically as possible, and the economic value of the movie arose from Noriega's fame.[111] Similarly, Bill Clinton would have a right of publicity claim for depictions of his affair with Monica Lewinsky and George Bush would have right of publicity claims for depictions of him in his presidency. This would be an untenable result and contrary to the purpose behind right of publicity claims. Unfortunately, by applying the transformative use test, the district court's holding has opened the door for historical figures to bring these right of publicity claims in the future. This sets a dangerous precedent. The district court could have avoided an

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[108] *Id.* at 576.
[109] *See* Estate of Presley v. Russen, 513 F. Supp. 1339, 1360 (D.N.J. 1981) (stating that biographical film of Elvis was in public interest of learning his place in the American Rock and Roll movement).
[110] Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001).
[111] *See id.* at 810.

implicit recognition that these right of publicity claims are valid if it had dismissed Noriega's claim on the ground that he did not have a right of publicity for his place in Panama's history in the first place.

CONCLUSION

The Superior Court of California correctly dismissed Noriega's claim against Activision. However, it should have held that Noriega did not have a right of publicity for his place in history, rather than applying the transformative use test. The right of publicity only applies when the commercial exploitation of an individual's likeness arises from his artistic labor. Noriega is not famous because he is an athlete, magician, singer, or any other type of artist. His infamy comes from his place in history as Panama's former dictator.

By applying the transformative use test, the district court implicitly asserted that Noriega has a right of publicity for his place in history, which could have a chilling effect on the production of movies and other works of art featuring historical events. Moreover, the theory of publicity is based on the idea that an artist should have rights to profits from the appropriation of his likeness when his likeness has become economically valuable due to the fruits of his labor. There is no social value in allowing historical figures to bring right of publicity claims when they are depicted in their place in history. To the contrary, this would be detrimental to the public's access to depictions of historically important events.