

THE FIRST AMENDMENT AND NEW MEDIA: VIDEO GAMES AS PROTECTED SPEECH AND THE IMPLICATIONS FOR THE RIGHT OF PUBLICITY

Abstract: Over the past four decades, video games have evolved from the niche market of arcade halls to a multibillion dollar home entertainment industry. At the same time, video games also advanced technologically from relatively simple forms of entertainment to a rich medium capable of communicating ideas and information. This Note discusses the possibility that this new medium constitutes protected speech and the implications that protection may have on an individual's right of publicity. First, the Note considers the precedent surrounding the validity of video games as protected speech. Beginning with the first cases on point that denied any First Amendment applicability, the Note then turns to more recent precedent granting protection and examines the unsettled question about whether video games ought to be considered individually or categorically. Second, the Note reviews an individual's right of publicity and the various tests used to balance it against free speech. In so doing, the Note concludes that, while video games may deserve categorical protection, the term "video games" is too broad a definition; such a category would cloak some non-expressive games with the protections of the First Amendment at the expense of other individual liberties, like the right of publicity.

INTRODUCTION

Films, music, and television are capable of delivering immersive, reality-escaping entertainment, and society has been using these media to deliver such experiences for decades.¹ These forms of media convey themes, ideas, and information.² In a word, they are capable of expression, and, as such, they are protected by the First Amendment.³

¹ See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); *Schacht v. United States*, 398 U.S. 58, 63 (1970).

² See *Winters v. New York*, 333 U.S. 507, 510 (1948). In *Winters v. New York*, the U.S. Supreme Court established that entertainment media, so long as it is capable of expression, is protected under the First Amendment. *Id.*

³ See *id.*

In addition to art galleries, theatres, and music halls, highly immersive, expressive experiences occur thousands of times a year in the comfort of living rooms through another medium: video games. For more than three decades, video games have been part of the entertainment landscape, and what began as a niche community has grown into a multi-billion dollar industry.⁴ Today, sixty-seven percent of American households play video games.⁵ In fact, only a handful of entertainment releases have ever eclipsed \$1 billion in gross sales, and sitting alongside James Cameron's *Avatar* and *Titanic* on that list are three video games: *Guitar Hero III*; *Call of Duty: Modern Warfare 2*; and *Call of Duty: Black Ops*.⁶ In addition to the economic growth of the industry, video games are gaining recognition for their artistic qualities by The Recording Academy⁷ and the Smithsonian Institute.⁸ It was not until 2001, however, in *American Amusement Machine Ass'n v. Kendrick*, that the

⁴ ENTMT'S SOFTWARE ASS'N, 2010 SALES, DEMOGRAPHIC AND USAGE DATA: ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 10–11, (2010), available at http://www.theesa.com/facts/pdfs/ESA_Essential_Facts_2010.PDF. Between 1996 and 2009, video game industry revenues in the United States grew more than four hundred percent from \$2.6 to \$10.5 billion. *Id.* at 11. In 2009, worldwide industry totals are estimated at \$46.5 billion. James Brightman, *Games Software Business to Approach \$65 Billion Worldwide by 2013*, *Says Strategy Analytics*, INDUSTRYGAMERS (Feb. 18, 2010), <http://www.industrygamers.com/news/games-software-business-to-approach-65-billion-worldwide-by-2013-says-strategy-analytics>.

⁵ ENTMT'S SOFTWARE ASS'N, *supra* note 4, at 2. Interestingly, for an industry thought to be dominated demographically by children and young adults, the average age of people who play games is thirty-five years old, and seventy-five percent of people that play video games are over eighteen years old. *Id.* This total includes the twenty-five percent of gamers who are over the age of fifty. *Id.*

⁶ Press Release, Activision, *Call of Duty: Black Ops Surpasses \$1 Billion in Sales Worldwide* (Dec. 21, 2010), available at <http://investor.activision.com/releasedetail.cfm?ReleaseID=538246>; Daniel Terdiman, *Modern Warfare 2 Joins 'Avatar' in Ultra-Elite \$1 Billion Club*, CNET NEWS (Jan. 13, 2010), http://news.cnet.com/8301-13772_3-10434464-52.html; *All Time Box Office: Worldwide Grosses*, BOX OFFICE MOJO, <http://boxofficemojo.com/alltime/world> (last visited Mar. 9, 2011).

⁷ See Geoffrey Boucher, *Grammy Awards: Lady Antebellum, Arcade Fire Take Top Honors*, L.A. TIMES, Feb. 14, 2011, <http://theenvelope.latimes.com/awards/grammys/la-et-0214-grammy-main-20110214,0,4003342.story>. For the first time a Grammy went to a composition written for a video game: Christopher Tin's "Baba Yetu," which was named best instrumental recording. *Id.*

⁸ See Michael McWhertor, *The Art of Video Games Comes to the Smithsonian in 2012*, KOTAKU (Dec. 4, 2009, 6:20 PM), <http://kotaku.com/#!5419173/the-art-of-video-games-comes-to-the-smithsonian-in-2012>. In fact, the Smithsonian Institute invited the public to vote on their favorite art from video games for an exhibit at the American Art Museum. Randy Nelson, *Vote on Games for Smithsonian's 'The Art of Video Games' Exhibit*, JOYSTIQ (Feb. 14, 2011), <http://www.joystiq.com/2011/02/14/vote-on-games-for-smithsonians-the-art-of-video-games-exhibit/>.

U.S. Court of Appeals for the Seventh Circuit held that some video games qualify as constitutionally protected speech.⁹

Before *Kendrick*, courts grouped video games together with non-expressive activities like pinball machines and chess;¹⁰ similar to these activities, the courts understood video games, as a medium, to be incapable of conveying ideas or information to the user and therefore incapable of expression.¹¹ Hence, video games were characterized as leisure activities not protected by the First Amendment.¹²

The recent conception of some video games as constitutionally protected forms of expression significantly impacts public policy, municipal ordinances regulating video games, and the availability of different tort actions.¹³ In particular, this development meaningfully affects a person's right of publicity because that right is often unavailable when the media in question is protected by the First Amendment.¹⁴

The right of publicity is a person's right to control his or her own name, likeness, or identity and to prevent others from using the same for commercial use without consent.¹⁵ The right of publicity was first understood as an aspect of one's right of privacy,¹⁶ but it was later recognized as a distinct cause of action.¹⁷ Eventually, in 1977, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the U.S. Supreme Court formally recognized the existence of a right of publicity.¹⁸ The Court acknowledged how that right was seemingly at odds with protections of free speech and therefore mandated that courts conduct a balancing test to decide which right should prevail in a particular case; the Court, however, did not specify what the balancing test should look like.¹⁹ Left with a clear

⁹ See *Am. Amusement Mach. Ass'n v. Kendrick (Kendrick II)*, 244 F.3d 572, 578 (7th Cir. 2001).

¹⁰ See *Am.'s Best Family Showplace Corp. v. City of New York, Dep't of Bldgs.*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

¹¹ See *id.*; see also *Malden Amusement Co. v. City of Malden*, 382 F. Supp. 297, 299 (D. Mass. 1983) (video games are incapable of expression); *Caswell v. Licensing Comm'n*, 444 N.E.2d 922, 927 (Mass. 1983); *City of Warren v. Walker*, 354 N.W.2d 312, 316–17 (Mich. Ct. App. 1984).

¹² See, e.g., *Caswell*, 444 N.E.2d at 925–26.

¹³ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 565–66 (1977); *Am.'s Best Family Showplace*, 536 F. Supp. at 174; see *infra* notes 178–221 and accompanying text.

¹⁴ See *Zacchini*, 433 U.S. at 565–66.

¹⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹⁶ See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69, 79 (Ga. 1905) (recognizing that the “form and features of the plaintiff are his own”).

¹⁷ See *Haelen Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

¹⁸ See *Zacchini*, 433 U.S. at 565–66.

¹⁹ See *id.* at 574–75.

indication of a balancing test but no guidance as to what it consists of, lower courts have devised several variations over time.²⁰

The right of publicity tort is of particular interest in the context of video games because games commonly use the likenesses of actors or athletes as characters, and this occasionally has been done without the individual's permission.²¹ At least one recent U.S. district court decision, however, held that, despite the use of such a likeness, video games' status as protected speech prevents a successful right of publicity claim.²²

This Note explores the history of video games as a protected form of expression, attempts to explain why certain games qualify for protection while others do not, and evaluates the possible implications an overly broad categorization of games could have on an individual's right of publicity.²³ Part I surveys the advancements in video games over the past thirty years, demonstrating in particular the ways in which the games have become more expressive.²⁴ Part II reviews the First Amendment and the protections it affords free speech in new media.²⁵ The Part begins by briefly exploring the basic jurisprudence and reasoning surrounding free speech before turning to the history of its application, or lack thereof, to early video games.²⁶ In so doing, the Part explores the initial rejection of video games as a medium capable of expression by reviewing the most significant cases of the early 1980s and how those cases lead up to the first serious consideration of video games as expression in the early 1990s.²⁷ The Part then turns to the impact *Kendrick* had

²⁰ See Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1355–64 (2009). Compare *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (using an ad hoc balancing test), with *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (establishing the transformative use test), and *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (establishing the predominant use test).

²¹ See *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010). The *Keller* case was consolidated with another case in the same federal district court, *O'Bannon v. NCAA*, on January 15, 2010, and renamed *In re NCAA Student-Athlete Name & Likeness Litigation*. See *In re NCAA Student-Athlete Name & Likeness Litigation*, No. C 09-1967 CW, 2010 WL 5644656, at *1, *6 (N.D. Cal. Dec. 17, 2010) (denying certain plaintiffs' motion to deconsolidate and referencing the January 15 order).

²² See *Brown v. Elec. Arts, Inc.*, 722 F. Supp. 2d 1148, 1151 (C.D. Cal. 2010).

²³ See *infra* notes 68–271 and accompanying text.

²⁴ See *infra* notes 36–67 and accompanying text.

²⁵ See *infra* notes 68–172 and accompanying text. For a similar discussion of First Amendment protections and video games, see Anthony Ventry III, Note, *Application of the First Amendment to Violent and Nonviolent Video Games*, 20 GA. ST. U. L. REV. 1129, 1133–43 (2004).

²⁶ See *infra* notes 68–112 and accompanying text.

²⁷ See *infra* notes 89–124 and accompanying text.

by extending free speech protections to video games, several subsequent decisions, and ambiguities created by viewing games categorically.²⁸

Part III of this Note describes a right particularly affected by the extension of First Amendment protection to video games—the right of publicity.²⁹ First, the Part examines the history and development of the publicity tort.³⁰ Second, it reviews the impact free speech protection has on the claim and the resulting balancing test required.³¹ Third, it summarizes the most common versions of this balancing test used by courts in evaluating a claim under the right of publicity.³² The Part then briefly explains why the treatment of video games under the First Amendment impacts right of publicity claims.³³

Finally, Part IV argues that the precedent concerning video games as protected speech is not necessarily dissonant and attempts to explain the disparity between how courts have evaluated games over time.³⁴ In so doing, it explores what constitutes expression, why video games have recently qualified as expression, and the implications this has on the right of publicity.³⁵

I. A QUICK HISTORY OF VIDEO GAMES: FROM *PONG* TO *HEAVY RAIN*

The history of video games stretches back more than three decades.³⁶ This Part describes the evolution of the medium, as understanding what video games are capable of is paramount to evaluating their possible protection under the First Amendment—and as it turns out, there is more to this business than Nintendo.³⁷

²⁸ See *infra* notes 125–157 and accompanying text.

²⁹ See *infra* notes 173–221 and accompanying text.

³⁰ See *infra* notes 173–177 and accompanying text.

³¹ See *infra* notes 178–189 and accompanying text.

³² See *infra* notes 190–212 and accompanying text.

³³ See *infra* notes 213–221 and accompanying text. For an analysis of how the right of publicity is affected by video games assuming video games are protected speech, see generally Christian Dennie, *Tebow Drops Back to Pass: Videogames Have Crossed the Line, but Does the Right of Publicity Protect a Student-Athlete's Likeness When Balanced Against the First Amendment?*, 62 ARK. L. REV. 645 (2009).

³⁴ See *infra* notes 222–271 and accompanying text.

³⁵ See *infra* notes 253–271 and accompanying text.

³⁶ See ENTM'T SOFTWARE ASS'N, *supra* note 4, at 2. Thirty-three percent of American households do not play video games. See *id.*

³⁷ See *infra* notes 38–67 and accompanying text. Although the brand name, Nintendo, is widely associated with video games, the video game industry dates back the early 1970s, and Nintendo did not become a significant company in the industry until the 1985 release of the Nintendo Entertainment System (NES). See *ClassicGaming Museum: Atari 2600; 1977–1984*, CLASSICGAMING, <http://classicgaming.gamespy.com/View.php?view=ConsoleMuseum.Detail>

Video games are an interactive form of visual software meant, most commonly, as entertainment.³⁸ In the early 1970s, video games started to appear in arcades, alongside pinball machines, as coin-operated standup boxes with built-in television screens mounted behind controls; the most successful of these early games was *Pong*, published by Atari, which was a digitized version of table tennis where users controlled one of two rectangles, or “paddles,” on the television screen in an attempt to deflect a bouncing square, or “ball.”³⁹ The commercial success of *Pong* spurred the industry forward, and by 1980 several games, including *Space Invaders*,⁴⁰ *Asteroids*,⁴¹ and *Ms. Pac-Man*⁴² ushered in what is commonly referred to as the “Golden Age” of video arcade games.⁴³

The objective of the vast majority of these early games was to accumulate as many points as possible and set “records” before losing the

&id=8&game=4 (last visited Mar. 1, 2011); *Company History*, NINTENDO, <http://www.nintendo.com/corp/history.jsp> (last visited Mar. 9, 2011).

³⁸ OXFORD ENGLISH DICTIONARY 614 (James A.H. Murray et al. eds., 2d ed. 1989).

³⁹ See *The Videogame Hall of Fame: Pong (Inducted 2007)*, IGN ENT., <http://games.ign.com/halloffame/pong.html> (last visited Mar. 9, 2011). *Pong* is a two-dimensional sports game that simulates table tennis where the user controls one of two white paddles on a black screen, and either a second user or the computer controls the opposing paddle. PONG (Atari 1972). The user moves the paddle up or down along the left or right side of the screen, depending on which paddle is being controlled, and the object of the game is to earn points by deflecting a bouncing ball icon past the opponent’s paddle. *Id.* The player with the most points wins. *Id.*

⁴⁰ SPACE INVADERS (Midway 1978). *Space Invaders*, originally released in 1978, consists of the user controlling a space craft horizontally at the bottom of the screen and shooting a laser toward moving rows of enemies located at the top of the screen. *The Videogame Hall of Fame: Space Invaders (Inducted 2007)*, IGN ENT., <http://games.ign.com/halloffame/space-invaders.html> (last visited Mar. 9, 2011). The game was the first single-player game that gave players “lives” instead of limiting the game by a timer. *Id.* The lack of a timer and the fact that the game never ends allows users to compete for higher and higher scores. *Id.*

⁴¹ ASTEROIDS (Atari 1979). *Asteroids*, released in 1979, gives the user control of a triangle space in the middle of free moving blocks, or asteroids. *The Videogame Hall of Fame: Asteroids (Inducted 2008)*, IGN ENT., <http://games.ign.com/halloffame/asteroids.html> (last visited Mar. 9, 2011). Distinct from many of its contemporary games at the time, *Asteroids* does not use blocks of colors (known as sprites) to depict objects on the screen. *Id.* Instead, the game uses a technique called vector graphics that uses line drawings to create hollow shapes. *Id.* As opposed to *Pong* or *Space Invaders*, *Asteroids* also gives the user the ability to move his character anywhere on the screen. *Id.*

⁴² MS. PAC-MAN (Midway 1981). *Ms. Pac-Man*, released in 1981, is a sequel to the 1980 game *Pac-Man*. *The Videogame Hall of Fame: Ms. Pac-Man (Inducted 2007)*, IGN ENT., <http://games.ign.com/halloffame/ms-pac-man.html> (last visited Mar. 9, 2011). The game consists of maneuvering a yellow character through mazes collecting dots and fruit to acquire points while avoiding pursuing ghosts. *Id.* Like several other games of its time, the game does not have an end, but instead allows users to play as long as they have more lives. *Id.*

⁴³ STEVEN L. KENT, *THE ULTIMATE HISTORY OF VIDEO GAMES* 116–22, 130–32, 167–73 (2001).

game; to that end, these games placed the player in direct competition with other players and did not rely heavily on themes, plotlines, or even stories.⁴⁴ This lack of narrative is most effectively evidenced by the fact that several of the most popular games were designed never to end, but rather allow a user to play indefinitely.⁴⁵

As technology continued to advance, more complicated game experiences became possible, and by the mid-1980s two significant innovations in the industry were underway: home consoles and game genres.⁴⁶ A home video game console is a personal computer that most commonly attaches to a television set and is capable of operating software designed specifically for it.⁴⁷ Early versions of home consoles included the Atari 2600⁴⁸ and Intellivision,⁴⁹ but the most famous and successful home console was the Nintendo Entertainment System (NES) released in 1985.⁵⁰ Selling over 60 million units worldwide,⁵¹ the NES popular-

⁴⁴ *About Twin Galaxies International*, TWIN GALAXIES INT'L, <http://www.twingalaxies.com/php/about-us.php?idx=> (last visited Mar. 20, 2011). Even after the popularity of early arcade and point-based games began to diminish, records for these early games continue to be sought by avid fans—an official record-keeping organization exists to this day. *Id.* The niche that still exists around classic arcade records was even strong enough to spawn a feature length documentary, centered on Steve Wiebe's attempt to be recognized as having broken the world record for *Donkey Kong*, then held by Billy Mitchell. *THE KING OF KONG: A FIST FULL OF QUARTERS* (New Line Cinema 2007).

⁴⁵ *See supra* notes 39–42. The combination of arcade fans seeking to break records and the perpetual nature of early arcade games revealed an interesting phenomenon known as “kill screens,” which suddenly end a game due to a glitch in a game's programming when a user plays past what programmers conceived possible. *See* KING OF KONG, *supra* note 44.

⁴⁶ *See infra* notes 48–52 and accompanying text. Nintendo, among others such as SEGA and Atari, popularized the home console while advancing the technology. *See infra* notes 48–52. Over the next decade, the Gameboy, Super Nintendo, and Sega Genesis would expand these innovations further. *See infra* notes 48–52.

⁴⁷ OXFORD ENGLISH DICTIONARY, *supra* note 38.

⁴⁸ *ClassicGaming Museum: Atari 2600; 1977–1984*, *supra* note 37. The Atari 2600 was one of the first home consoles and is credited with popularizing the home console market in 1977. *Id.* It allowed owners to take several arcade classics home such as *Pac-Man* (Namco 1980) and *Space Invaders* (Midway 1978), and most importantly it allowed owners to switch between games through the use of game cartridges. *Id.* As opposed to the multiple-button controllers later popularized by Nintendo and SEGA, the Atari 2600 was sold with a single-button joy stick. *Id.*

⁴⁹ Released in 1979 as a direct competitor to the Atari 2600, the Intellivision was marketed as a gaming console and computer. *ClassicGaming Museum: Mattel Intellivision; 1980–1984*, CLASSICGAMING, <http://classicgaming.gamespy.com/View.php?view=ConsoleMuseum.Detail&id=17&game=9> (last visited Mar. 9, 2011). It eventually spawned a few sequel systems, the Intellivision II and Intellivision III, but none competed with the success of the Atari or Nintendo systems. *See id.*

⁵⁰ *See ClassicGaming Museum: Nintendo Entertainment System (NES); 1985–1995*, CLASSICGAMING, <http://classicgaming.gamespy.com/View.php?view=ConsoleMuseum.Detail&id=26&game=5> (last visited Mar. 9, 2011). Following the economic crash of 1984, the NES was

ized the industry through mascots, television shows, commercials, magazines, and even a feature-length movie.⁵²

More importantly for the purposes of this Note, the NES also rejuvenated a video game industry beaten down after the economic collapse in 1984.⁵³ Whereas earlier arcade games focused, almost exclusively, on short gaming experiences and earning points, the NES and other subsequent home consoles were capable of storing larger games, producing more complicated music, and saving users' progress.⁵⁴ As such, many of the most popular NES games focused on stories forcing the user to pursue goals to trigger plot elements and events.⁵⁵ This is not to say that games without plotlines no longer existed; in fact, point-driven, arcade-style games continued to thrive.⁵⁶ Rather, the new technologies allowed game developers to diversify games beyond the traditional arcade style into genres such as role-playing,⁵⁷ sports, and platforming.⁵⁸ Not all of

released in the United States in 1985. *Id.* The console went on to outsell its competitors by a ten-to-one ratio. *Id.*

⁵¹ See *Nintendo Company History*, *supra* note 37.

⁵² See *ClassicGaming Museum: Nintendo Entertainment System (NES); 1985–1995*, *supra* note 50. During the late 1980s and early 1990s, Nintendo marketed its brand and mascots through almost every medium. *Id.* It published its own magazine, *Nintendo Power*, licensed its characters out for television shows including *The Super Mario Bros. Super Show!*, and made a film featuring its games, *The Wizard*. *Id.*

⁵³ See *id.* During 1983 and 1984, the video game industry experienced an economic decline that forced many publishers and developers to struggle. See Alexander L. Taylor III et al., *Pac-Man Finally Meets His Match*, *TIME*, Dec. 20, 1982, at 62; *ClassicGaming Museum: Nintendo Entertainment System (NES); 1985–1995*, *supra* note 50.

⁵⁴ See *The Videogame Hall of Fame: The Legend of Zelda (Inducted 2007)*, IGN ENT., <http://games.ign.com/halloffame/the-legend-of-zelda.html> (last visited Mar. 9, 2011). There are several examples of NES games that represent innovations in size, technology, and music, but the best example would be *The Legend of Zelda* (Nintendo 1987). See *id.* Released in 1987, the game was designed as an expansive world without a linear direction, featured multiple scores of music, and was the first NES game to feature a battery pack enabling users to save their progress and return to the game at a later time. See *id.*

⁵⁵ See *id.*

⁵⁶ See Lucas M. Thomas, *Bubble Bobble Review: Now It Is the Beginning of a Fantastic Story! Let Us Make a Journey to the Cave of Monsters!*, IGN RETRO (Jan. 8, 2008), <http://retro.ign.com/articles/848/848223p1.html>. *Bubble Bobble*, a popular game originally released in 1988, features two dragons that blow bubbles to capture enemies. *Id.* The game is entirely points-driven. See *id.*

⁵⁷ See *The Videogame Hall of Fame: Final Fantasy (Inducted 2007)*, IGN ENT., <http://games.ign.com/halloffame/final-fantasy.html> (last visited Mar. 9, 2011). Role-playing games rely heavily on story for appeal as opposed to fast-paced game play, and one of the first successful games of this type is *Final Fantasy* (Square 1990). See *id.* The genre uses storytelling, character development, music, and long pieces of dialogue. See, e.g., *FINAL FANTASY* (Square 1990).

⁵⁸ See, e.g., *SUPER MARIO BROS.* (Nintendo 1985). Platform games are named after their core game mechanics, which involve jumping from one surface to another, and the most well-known game of this type is *Super Mario Bros.* (Nintendo 1985). See *The Video Game Hall of*

the genres were inherently focused on storylines, but for some, such as role-playing games, it was the genre's defining feature.⁵⁹

As the technology advanced throughout the 1990s to present day, this trend of diversification and increased capabilities dramatically improved.⁶⁰ The integration of compact discs (CDs) into home consoles in the mid-1990s, and the later integration of digital video discs (DVDs), exponentially increased the potential size of games and allowed for the use of live-action video, CD quality music, and computer graphic animations.⁶¹ Some games even spanned several CDs or DVDs in order to accommodate the use of these innovations.⁶² In addition, home consoles steadily progressed in visual capabilities, moving from the two-dimensional images of the NES to present day consoles capable of three-dimensional characters with expressive facial features.⁶³

Despite modern home video consoles being capable of nearly photo-realistic images, not all games take advantage of these capabilities.⁶⁴ In

Fame: Super Mario Bros. (Inducted 2007), IGN ENT., <http://games.ign.com/halloffame/super-mario-bros.html> (last visited Mar. 9, 2011).

⁵⁹ Compare *The Videogame Hall of Fame: Final Fantasy (Inducted 2007)*, *supra* note 57, with *The Video Game Hall of Fame: Super Mario Bros. (Inducted 2007)*, *supra* note 58.

⁶⁰ Compare *THE LEGEND OF ZELDA* (Nintendo 1987), with *THE LEGEND OF ZELDA: THE OCARINA OF TIME* (Nintendo 1998). A good example of this progression is *The Legend of Zelda* series. See *The Videogame Hall of Fame: The Legend of Zelda (Inducted 2007)*, *supra* note 54. The original game, released in 1987, offered only two dimensions and limited dialogue to move the story forward. See *id.* In 1998, however, the technology of home consoles had progressed so that a game in the same series dealing with many of the same themes and characters, *The Legend of Zelda: The Ocarina of Time*, was three-dimensional, and utilized fully orchestrated music and in-depth dialogue. See *id.*

⁶¹ See *Business Development/Japan*, SONY COMPUTER ENT. INC., http://www.scei.co.jp/corporate/data/bizdatajpn_e.html (last visited Mar. 9, 2011). One of first successful home consoles using CD technology was the Sony PlayStation. *Id.* Originally planned as a partnership between Sony and Nintendo to develop a CD-based Nintendo console, the partnership unraveled and several developers moved their software to the new Sony console that was capable of higher storage capacities. See *History of the PlayStation: The Greatest Story Ever Told*, IGN ENT. (Aug. 27, 1998), <http://psx.ign.com/articles/060/060188p1.html>.

⁶² See, e.g., *FINAL FANTASY VII* (Square 1997). *Final Fantasy VII* for the Sony PlayStation used four CDs in order to contain all of the sound and animation used in the game. See *id.*; see also *The Making Of: Final Fantasy VII*, EDGE MAG., June 9, 2009, <http://www.edge-online.com/magazine/the-making-of-final-fantasy-vii>. As a more modern example, *Final Fantasy XIII*, released in March 2010, required the use of three DVDs. *FINAL FANTASY XIII* (Square-Enix 2010).

⁶³ See, e.g., *HEAVY RAIN* (Sony Computer Entertainment 2010). An example of a game featuring near photo-realistic visuals and expressive facial features is *Heavy Rain*. See *id.* The game functions in many ways as an interactive movie, using character motivations and plot to create the entertainment. See *id.*

⁶⁴ See Emma Boyes, *GDC '08: Are Casual Games the Future?*, GAME SPOT UK (Feb. 18, 2008), <http://uk.gamespot.com/news/6186207.html?tag=result;title;0>; see, e.g., *BEJEWELED* (PopCap Games 2001). Puzzle games, such as the very popular *Bejeweled*, use basic visuals but have a

fact, the popularity of the Nintendo Wii, iPhone, and Facebook demonstrate the continued diversification of video games.⁶⁵ Some games, often called “casual games,” focus on lightweight gaming experiences where the objective is often setting records or accumulating points.⁶⁶ The genre of casual games is very similar to the arcade games of the late 1970s and early 1980s, highlighting the fact that more primitive games continue to be produced regardless of advances in technology.⁶⁷

II. THE FIRST AMENDMENT AND PROTECTION OF FREE SPEECH IN VIDEO GAMES

A. *The Evolution of Free Speech Jurisprudence Concerning New Forms of Media*

Luckily for today’s society, the protections afforded to speech under the First Amendment of the U.S. Constitution are not limited to the forms of expression in existence in 1789.⁶⁸ Specifically, the First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”⁶⁹ This provision, more than any other, embodies the national commitment to the free exchange of ideas.⁷⁰ “As a general matter, ‘the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or

large market share. See Mark Ward, *Casual Games Make a Serious Impact*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/7301374.stm> (last updated Mar. 18, 2008).

⁶⁵ See Bryon Acohido, *Wii Wins Big Among Casual Gamers*, USA TODAY, May 24, 2007, at 2B; Anita Hamilton, *Can the iPhone Rule Gaming?*, TIME.COM, Aug. 4, 2008, <http://www.time.com/time/business/article/0,8599,1829037,00.html>; Alexander Sliwinski, *EA Signs 5 Year Deal with Facebook*, JOYSTIQ (Nov. 3, 2010), <http://www.joystiq.com/2010/11/03/ea-signs-5-year-deal-with-facebook/>. To date, *Angry Birds*, one of the most popular games on the iPhone, has sold over ten million copies. Richard Meads, *Angry Birds Hits 10 Million Paid App Store Downloads*, POCKET GAMER (Oct. 28, 2010), <http://www.pocketgamer.co.uk/news.asp?c=9301957701&pk=89593147>. Perhaps even more impressive, however, is the nearly fifty million monthly active users of *FarmVille*, a popular game on Facebook. See *FarmVille*, FACEBOOK, <http://www.facebook.com/FarmVille> (last visited Mar. 9, 2011).

⁶⁶ See Hamilton, *supra* note 65; see, e.g., WII SPORTS (Nintendo 2006).

⁶⁷ See Acohido, *supra* note 65. It is also important to note that not only do new arcade-style games continue to be produced, but remakes and re-releases of games from the 1980s continue to be published, perhaps the most popular example being *Tetris* (1989). *Product Showcase*, TETRIS, <http://www.tetris.com/products/index.aspx> (last visited Mar. 9, 2011).

⁶⁸ See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); *Schacht v. United States*, 398 U.S. 58, 63 (1970); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

⁶⁹ U.S. CONST. amend. I.

⁷⁰ See *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989)).

its content.’”⁷¹ In addition to the federal government, the various states are also subject to this prohibition through the Due Process Clause of the Fourteenth Amendment.⁷² There are, however, limits to First Amendment protection.⁷³

Over time, and as new forms of media developed, the U.S. Supreme Court held that First Amendment protections extend beyond the printed and spoken word.⁷⁴ For example, in 1952, the Court held that motion pictures are afforded free speech protection despite claims that the industry is a “large-scale business conducted for private profit.”⁷⁵ Additionally, live music,⁷⁶ theatre,⁷⁷ and even nude dancing are protected by the First Amendment.⁷⁸ Today, the Court recognizes websites as possible sources of expression that may be protected.⁷⁹

The Supreme Court has thus recognized that certain forms of entertainment, as well as political speech, constitute expression deserving of protection under the First Amendment.⁸⁰ To enjoy constitutional protection, however, entertainment must be designed to communicate or express some idea or information.⁸¹ Importantly, the Court does not require expression to have any “particularized message” in order to be constitutionally protected.⁸² This is because the line between informing and entertaining is frequently too elusive to act as the determining factor for First Amendment protections.⁸³

⁷¹ See *id.* (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983)).

⁷² See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁷³ See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (obscenity); *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (commercial speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (clear and present danger).

⁷⁴ See *Schad*, 452 U.S. at 65–66; *Southeastern Promotions*, 420 U.S. at 557–58; *Jenkins*, 418 U.S. at 161; *Schacht*, 398 U.S. at 63; *Wilson*, 343 U.S. at 502.

⁷⁵ See *Wilson*, 343 U.S. at 501; accord *Jenkins*, 418 U.S. at 161.

⁷⁶ See *Southeastern Promotions*, 420 U.S. at 557–58.

⁷⁷ See *Schacht*, 398 U.S. at 63.

⁷⁸ See *Schad*, 452 U.S. at 65–66.

⁷⁹ See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (striking down regulation of indecent material on the Internet as an invalid content restriction of speech). *But cf.* *Gridiron.com, Inc. v. Nat’l Football League Player’s Ass’n*, 106 F. Supp. 2d 1309, 1315 (S.D. Fla. 2000) (holding that merchandise websites lack the expression necessary to qualify for protection).

⁸⁰ See *Wilson*, 343 U.S. at 501.

⁸¹ See *id.*; *Winters v. New York*, 333 U.S. 507, 510 (1948).

⁸² See *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

⁸³ See *Winters*, 333 U.S. at 510.

Nevertheless, courts sometimes feel comfortable drawing such a line and denying constitutional protection.⁸⁴ Courts have held that activities solely for personal pleasure and devoid of communication, such as bingo or blackjack, are not expressive entertainment and therefore do not qualify for protection.⁸⁵

B. *History of Free Speech in Video Games*

The federal and state court decisions on whether video games are able to express ideas and information such that they should be protected under the First Amendment were all decided without any direct Supreme Court precedent on the matter.⁸⁶ Hence, lower courts were forced to rely on a principle articulated by the Supreme Court in the 1975 case of *Southeastern Promotions, Ltd. v. Conrad* that “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it.”⁸⁷ The result has been a shifting division in the jurisprudence.⁸⁸

1. Initial Rejection: A Denial of First Amendment Protection

A series of cases from the 1980s confronted the question of video games as protected speech when municipalities attempted to regulate them by ordinance like other forms of entertainment.⁸⁹ These cases reviewed early iterations of video games and unanimously held that the format was incapable of expression and not protected.⁹⁰

In 1982, in *America’s Best Family Showplace Corp. v. City of New York*, the U.S. District Court for the Eastern District of New York first estab-

⁸⁴ See *There to Care, Inc. v. Comm’r of the Indiana Dep’t of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994); *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1454 (D.R.I. 1985).

⁸⁵ See *There to Care*, 19 F.3d at 1167; *Allendale Leasing*, 614 F. Supp. at 1454.

⁸⁶ See *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 n.11 (9th Cir. 2009) (commenting on the lack of a Supreme Court stance), *cert. granted sub nom.* *Schwarzenegger v. Entm’t Merchants Ass’n*, 130 S. Ct. 2398 (2010); see also *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 179 (D. Conn. 2002). The issue is currently being considered by the Court. See *Schwarzenegger*, 130 S. Ct. at 2398.

⁸⁷ See 420 U.S. at 557.

⁸⁸ Compare *Am. Amusement Mach. Ass’n v. Kendrick (Kendrick II)*, 244 F.3d 572, 577–78 (7th Cir. 2001), with *Am.’s Best Family Showplace Corp. v. City of New York, Dep’t of Bldgs.*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982). For a related view, see *Ventry*, *supra* note 25, at 1133–43.

⁸⁹ See *Malden Amusement Co. v. City of Malden*, 382 F. Supp. 297, 299 (D. Mass. 1983); *Am.’s Best Family Showplace*, 536 F. Supp. at 174; *City of Warren v. Walker*, 354 N.W.2d 312, 317 (Mich. Ct. App. 1984); *City of St. Louis v. Kiely*, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983).

⁹⁰ See *Malden Amusement*, 382 F. Supp. at 299; *Am.’s Best Family Showplace*, 536 F. Supp. at 174; *Walker*, 354 N.W.2d at 316–17; *Kiely*, 652 S.W.2d at 697.

lished this interpretation, holding that video games communicate no element of information or idea.⁹¹ In *Showplace*, a restaurant owner in Queens wanted to install forty coin-operated video games in his establishment, but the city borough stopped the installation under a city ordinance that restricted video games in restaurants to no more than four.⁹² The restaurant owner sued claiming a violation of his First Amendment rights, and the district court examined whether video games constitute expression and are protected under the First Amendment.⁹³ The plaintiff argued that a video game is a fantasy experience similar to motion pictures and should enjoy similar First Amendment protection, and he used a Supreme Court case protecting coin-operated nude dancing for support.⁹⁴ The district court distinguished the Supreme Court case by pointing out that the Court required some element of information or some idea to be communicated before entertainment would be afforded First Amendment protection.⁹⁵ In so doing, the district court found that communicating information or an idea is a necessary element for video games to be protected as free speech, and without it, video games would fail the medium-specific test from *Southeastern Promotions*.⁹⁶ Specifically, the court stated:

In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games “talk” to the participant, play music, or have written instructions does not provide the missing element of “information.”⁹⁷

Subsequent courts also used the reasoning from *Showplace* to deny video games protections under the First Amendment.⁹⁸ In 1983, in *Caswell v. Licensing Commission*, the Massachusetts Supreme Judicial Court confronted a similar issue when a video game arcade was denied

⁹¹ See 536 F. Supp. at 173.

⁹² See *id.* at 171.

⁹³ See *id.* at 173.

⁹⁴ See *id.* (citing *Schad*, 452 U.S. at 62).

⁹⁵ See *id.* (citing *Winters*, 333 U.S. at 510).

⁹⁶ See *id.* at 173–74.

⁹⁷ See *Am. ’s Best Family Showplace*, 536 F. Supp. at 174.

⁹⁸ See *Malden Amusement Co.*, 382 F. Supp. at 299 (explicitly agreeing with the court in *Showplace* that video games are not protected by the First Amendment); *Caswell v. Licensing Comm’n*, 444 N.E.2d 922, 927 (Mass. 1983) (no First Amendment protection for video games where license denied by city for automatic amusement devices); *Walker*, 354 N.W.2d at 316–17 (holding that ordinance restricting children under seventeen from playing video games did not violate the First Amendment).

a municipal license.⁹⁹ Again, the court noted that First Amendment protections only attach to entertainment that is communicative of some idea or information.¹⁰⁰ The court then compared video games to roller skating or recreational dancing insofar as they are activities not meant as expression but are rather for personal pleasure.¹⁰¹

Later that same year, the Massachusetts Supreme Judicial Court also heard *Marshfield Family Skateland, Inc. v. Town of Marshfield*.¹⁰² The town of Marshfield enacted a complete ban on coin-operated amusement machines, including video games.¹⁰³ The plaintiffs, seemingly aware of the decisions in *Showplace* and *Caswell*, argued that the games in question¹⁰⁴ were sufficiently communicative as to merit protection as expression.¹⁰⁵ The court rejected the argument and held that the games in question were, in essence, only technologically advanced pinball machines and not protected by the First Amendment; this court was, however, the first to note the potential of video games as an expressive format.¹⁰⁶

It was not until the early 1990s that a court, despite denying First Amendment constitutional protection, seriously considered the possibility of expression in video games.¹⁰⁷ In 1991, in *Rothner v. City of Chicago*, the U.S. Court of Appeals for the Seventh Circuit upheld a city ordinance prohibiting minors from playing video games during school hours.¹⁰⁸ The court, however, refused to hold that video games as a medium are incapable of expression.¹⁰⁹ The court stated in dicta that it was unclear if video games are “simply modern day pinball machines or whether they are more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message protected by the First Amendment.”¹¹⁰ The court ultimately upheld the ordi-

⁹⁹ 444 N.E.2d at 923–24.

¹⁰⁰ *See id.* at 925.

¹⁰¹ *Id.* at 925–26.

¹⁰² 450 N.E.2d 605, 606 (Mass. 1983).

¹⁰³ *Id.* at 606–07.

¹⁰⁴ The games included several mainstays of the early 1980s including: *Ms. Pac-Man* (Midway/Namco 1981), *Tron* (Midway 1982), *Donkey Kong* (Nintendo 1981), *Zaxxon* (Sega 1982), and *Kangaroo* (Atari 1982). *Id.* at 609 n.5.

¹⁰⁵ *See id.* at 609.

¹⁰⁶ *See id.* at 609–10 (holding that the games on record lack protected expression but that “in the future video games which contain sufficient communicative and expressive elements may be created”).

¹⁰⁷ *See Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991).

¹⁰⁸ *See id.* at 298, 304.

¹⁰⁹ *See id.* at 303.

¹¹⁰ *See id.*

nance on the grounds that, even assuming First Amendment protection for the video games, the city ordinance was a reasonable restriction on the time, place or manner of protected speech.¹¹¹ Nonetheless, the decision represented one of the first indications that at least some video games may qualify for protection.¹¹²

2. Judge Posner's Qualified Protection: The World of Kids' Popular Culture "Is Not Lightly to Be Suppressed"

The shifting attitude towards video games as a form of expression began with *Rothner*, but it would be another decade before the answer to the question of their constitutional protection under the First Amendment was better articulated.¹¹³ In 2001, in *American Amusement Machine Ass'n v. Kendrick*, first the U.S. District Court for the Southern District of Indiana,¹¹⁴ and later the U.S. Court of Appeals for the Seventh Circuit, held that at least some video games now qualify as constitutional speech.¹¹⁵

In *Kendrick*, the manufacturers of video games and their trade association sought to enjoin the enforcement of an Indianapolis ordinance that limited minors' access to video games that depicted violence.¹¹⁶ The district court considered the development process of video games at length, and concluded that video games are expression entitled to First Amendment protection if they include sufficient communicative, expressive, or informative elements to fall at least within the outer limits of constitutionally protected speech.¹¹⁷ The district court, however, denied the preliminary injunction on the grounds of obscenity.¹¹⁸

The Seventh Circuit, in an opinion written by Judge Posner, reversed the district court opinion and granted the preliminary injunction.¹¹⁹ In so doing, Judge Posner explored the idea of whether video games qualify as protected speech and held that the games at issue should be protected.¹²⁰ To support its decision, the Seventh Circuit

¹¹¹ See *id.* at 304.

¹¹² See *id.* at 303; see also *Marshfield*, 450 N.E.2d at 609–10.

¹¹³ See *Kendrick II*, 244 F.3d at 577–78.

¹¹⁴ See *Am. Amusement Mach. Ass'n v. Kendrick (Kendrick I)*, 115 F. Supp. 2d 943, 951–52 (S.D. Ind. 2000), *rev'd and remanded*, *Kendrick II*, 244 F.3d 572.

¹¹⁵ See *Kendrick II*, 244 F.3d at 577–78.

¹¹⁶ *Id.* at 573.

¹¹⁷ See *Kendrick I*, 115 F. Supp. 2d at 951–52.

¹¹⁸ See *id.* at 981.

¹¹⁹ *Kendrick II*, 244 F.3d at 579–80.

¹²⁰ See *id.* at 577–78, 579–80.

drew parallels between the themes communicated by the violent video games and themes communicated by violent literature such as the *Odyssey* and *The Divine Comedy*.¹²¹ Judge Posner wrote:

Self-defense, protection of others, dread of the “undead,” fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young. “The House of the Dead” is not distinguished literature. Neither, perhaps, is “The Night of the Living Dead,” George A. Romero’s famous zombie movie that was doubtless the inspiration for “The House of the Dead.” Some games, such as “Dungeons and Dragons,” have achieved cult status; although it seems unlikely, some of these games, perhaps including some that are as violent as those in the record, will become cultural icons. We are in the world of kids’ popular culture. But it is not lightly to be suppressed.¹²²

Given the “literary character of the games in the record,” the Seventh Circuit held that these games were protected by the First Amendment; the court was careful to narrow its holding to the games on record, however, stating that “if the games lacked any story line and were merely animated shooting galleries, . . . a more narrowly drawn ordinance might survive a constitutional challenge.”¹²³ Hence, the court implied that video games must be evaluated on a case-by-case basis, consistent with the principle articulated by the U.S. Supreme Court in *Southeastern Promotions* that each medium must be assessed for First Amendment purposes by standards suited to it.¹²⁴

3. Extending Protections, Interpreting *Kendrick*, and the Continuing Question of Which Video Games Are Protected

Following *Kendrick*, several other courts extended First Amendment protections to video games.¹²⁵ There is, however, an open-ended question as to whether the protection is controlled on a case-by-case

¹²¹ See *id.* at 577. The Seventh Circuit also compared the expression in the games to *Ulysses* and *Great Expectations*. *Id.*

¹²² *Id.* at 577–78.

¹²³ See *id.* at 579–80.

¹²⁴ See *id.*

¹²⁵ See *Schwarzenegger*, 556 F.3d at 958 n.11; *Interactive Digital Software Ass’n v. St. Louis County (Interactive Digital II)*, 329 F.3d 954, 957 (8th Cir. 2003); *Midway Games*, 198 F. Supp. 2d at 181; *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002).

analysis of the games' content or a bright-line standard for the medium as a whole.¹²⁶

In 2002, in *Wilson v. Midway Games*, the U.S. District Court for the District of Connecticut agreed with the Seventh Circuit that some, but not all, video games warrant protection.¹²⁷ In *Midway Games*, the mother of a murder victim alleged that a video game influenced her son's murderer.¹²⁸ The court, accepting the *Kendrick* case-by-case analysis, stated that "[video games] that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment."¹²⁹ After considering the qualities of the specific game in question, the court held that the game, as the plaintiff described it, was protected First Amendment speech.¹³⁰

Likewise, in 2002, in *James v. Meow Media, Inc.*, the U.S. Court of Appeals for the Sixth Circuit cited both *Kendrick* and *Midway Games* in holding that the communicative aspects of video games are protected by the First Amendment.¹³¹ In *Meow Media*, similar to *Midway Games*, the parents of a murdered child claimed violent video games, movies, and websites desensitized the attacker.¹³² The Sixth Circuit implicitly adopted a case-by-case analysis of video games in holding that only the communicative portions of the specific video games presented by the defendants were protected by the First Amendment.¹³³ Interestingly, the Sixth Circuit's approach was more restrictive than the Seventh Circuit's and the Connecticut federal district court's, because it not only limited its consideration to the specific games in question but also only reviewed the portions of those games that communicated ideas.¹³⁴ In fact, the Sixth Circuit went so far as to say that its decision "should not

¹²⁶ See Ventry, *supra* note 25, at 1141. Compare *Schwarzenegger*, 556 F.3d at 958 n.11, *Interactive Digital II*, 329 F.3d at 957, and *Midway Games*, 198 F. Supp. 2d at 181, with *Interactive Digital Software Ass'n v. St. Louis County (Interactive Digital I)*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002) (rejecting a case-by-case analysis of any category of media, including video games), *rev'd*, *Interactive Digital II*, 329 F.3d 954 (8th Cir. 2003), and *Sanders*, 188 F. Supp. 2d at 1279 (implying that video games are categorically protected).

¹²⁷ See 198 F. Supp. 2d at 180–81.

¹²⁸ *Id.* at 169.

¹²⁹ *Id.* at 181. (citing *Universal City Studios, Inc., v. Corley*, 273 F.3d 429 (2d Cir. 2001) (involving First Amendment protections for computer software)).

¹³⁰ *Id.* at 181.

¹³¹ 300 F.3d 683, 696 (6th Cir. 2002) (citing *Kendrick*, 244 F.3d 572; *Midway Games*, 198 F. Supp. 2d 167).

¹³² *Id.* at 688.

¹³³ See *id.* at 696.

¹³⁴ See *id.*

be interpreted as a broad holding on the protected status of video games”¹³⁵

More recently, in 2009, in *Video Software Dealers Ass’n v. Schwarzenegger*, the U.S. Court of Appeals for the Ninth Circuit assumed in its analysis that at least some video games are protected under the First Amendment.¹³⁶ In *Schwarzenegger*, a professional video game association filed suit for declaratory judgment that a California state law restricting the sale or rental of violent video games to minors was invalid.¹³⁷ The Ninth Circuit reviewed the law under the strict scrutiny standard required by the Supreme Court’s 1968 decision in *Ginsberg v. New York* for content-based restrictions on speech.¹³⁸ In so doing, the court noted that the defense did not even contest that video games are a form of expression protected by the First Amendment.¹³⁹ The court went on to comment that “story-laden video games of the type potentially covered under the Act are similar to movies, which the [Supreme Court] has long held are protected expression notwithstanding their ability to entertain as well as inform.”¹⁴⁰ The court implicitly followed the case-by-case approach from *Kendrick* by identifying story-laden games as potentially protected speech, thereby implying that other games, presumably non-story-laden ones, may not be covered.¹⁴¹

Conversely, some courts have used a categorical approach.¹⁴² For example, in 2002, in *Sanders v. Acclaim Entertainment, Inc.*, the U.S. District Court for the District of Colorado supported the Seventh Circuit’s conclusion in *Kendrick*, but seemingly held video games as a whole may be protected.¹⁴³ In *Sanders*, the plaintiffs were the families of victims of the tragic school shootings at Columbine High School in Jefferson County, Colorado.¹⁴⁴ Asserting multiple claims against, among others, members of the video game industry, the plaintiffs relied on the *Showplace* line of cases as precedent to argue that video games were not protected speech.¹⁴⁵ The court rejected that argument on grounds that subsequent cases, including *Rothner* and *Kendrick*, superseded *Show-*

¹³⁵ *Id.*

¹³⁶ See *Schwarzenegger*, 556 F.3d at 958 n.11.

¹³⁷ *Id.* at 952–53.

¹³⁸ *Id.* at 960–61 (citing *Ginsberg v. New York*, 390 U.S. 629, 636–37 (1968)).

¹³⁹ *Id.* at 958.

¹⁴⁰ *Id.* (citing *Wilson*, 343 U.S. at 501–02).

¹⁴¹ See *id.*

¹⁴² See *Interactive Digital I*, 200 F. Supp. 2d at 1134; *Sanders*, 188 F. Supp. 2d at 1279.

¹⁴³ See *Sanders*, 188 F. Supp. 2d at 1279.

¹⁴⁴ *Id.* at 1268.

¹⁴⁵ *Id.* at 1279.

place.¹⁴⁶ In so holding, the court extended First Amendment protection to video games stating that the plaintiffs “failed to show that *video games* deserve anything less than full First Amendment protection.”¹⁴⁷ As opposed to *Kendrick*, it appears that the court did not limit this protection to the games involved in the case, but rather was making a statement about the medium in general.¹⁴⁸

Perhaps no case epitomizes the case-by-case versus categorical debate more than *Interactive Digital Software Ass’n v. St. Louis County*.¹⁴⁹ In *Interactive Digital Software*, a professional video game association challenged a local ordinance that made it illegal for a person to knowingly sell, rent, or make available graphically violent video games to minors.¹⁵⁰ In 2002, the U.S. District Court for the Eastern District of Missouri upheld the ordinance on the grounds that the video games were not protected by the First Amendment because video games categorically are not speech.¹⁵¹ In so finding, the district court expressly denied that some video games contain expression while others do not, stating that the First Amendment does not allow courts to review the content of books, magazines, motion pictures, or music to decide that some are speech and some are not.¹⁵²

In 2003, the U.S. Court of Appeals for the Eighth Circuit reversed, holding that the games in question were protected speech.¹⁵³ The Eighth Circuit did little to resolve the larger constitutional issue, however, as it used conflicting language regarding whether video games should be considered categorically, as the lower court insisted, or on a case-by-case basis.¹⁵⁴ At one point the court seemingly supported a categorical protection when it stated:

If the first amendment is versatile enough to “shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,” we see no reason why the pictures, graphic design, concept art, sounds, music, stories,

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* (emphasis added).

¹⁴⁸ *See id.*

¹⁴⁹ Compare *Interactive Digital II*, 329 F.3d at 957, with *Interactive Digital I*, 200 F. Supp. 2d at 1134.

¹⁵⁰ *Interactive Digital I*, 200 F. Supp. 2d at 1129–30.

¹⁵¹ *Id.* at 1141.

¹⁵² *Id.* at 1134.

¹⁵³ *Interactive Digital II*, 329 F.3d at 960.

¹⁵⁴ *See id.* at 957.

and narrative *present in video games* are not entitled to a similar protection.¹⁵⁵

A mere two sentences later, however, the court used language implying a case-by-case analysis when it stated “that *these* ‘violent’ video games contain stories, imagery, ‘age-old themes of literature,’ and messages, ‘even an ‘ideology,’ just as books and movies do.”¹⁵⁶ Therefore, though the court overturned the lower court decision and extended First Amendment protections to at least some video games, its inconsistent articulation of its holding left its methodology unclear.¹⁵⁷

C. *What Constitutes Expression?*

To understand arguments for protecting video games categorically or on a fact-specific basis, it is first necessary to consider what factors might render video games “expressive.” The Supreme Court’s basic approach has been to ask (1) whether the speaker intends to communicate a message; and (2) whether the speaker’s audience would understand that he or she is communicating a message.¹⁵⁸ Beyond this basic test, this Section discusses other factors that courts have employed in video game cases.

At least one court has considered the stage of production of the medium.¹⁵⁹ In particular, the court stated that the conceptualization and work in the production of an item or activity, no matter how imaginative, does not alone qualify it as speech.¹⁶⁰ The fact of the matter is that most, if not all, man-made things in the world are the result of some level of creative input, but not all are recognized as being able to communicate ideas qualifying them as constitutionally protected ex-

¹⁵⁵ See *id.* (alteration in original) (emphasis added) (quoting *Hurley*, 515 U.S. at 569 (1995)).

¹⁵⁶ See *id.* (emphasis added) (citing *Kendrick II*, 244 F.3d at 577–78).

¹⁵⁷ See *id.*

¹⁵⁸ See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (“An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”).

¹⁵⁹ See *Interactive Digital I*, 200 F. Supp. 2d at 1135 (stating that “background” expression does not make every automobile, gadget, or machine created a form of expression); *cf. Spence*, 418 U.S. at 410 (holding that the context in which a symbol is used for purposes of expression is important because the context may give meaning to the symbol).

¹⁶⁰ See *Interactive Digital I*, 200 F. Supp. 2d at 1135. “[I]t is ‘possible to find some kernel of expression in almost every activity . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.’” *Id.* (second alteration in original) (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

pression.¹⁶¹ For example, the production of an automobile involves teams of individuals, including artists, engineers, and graphic designers that make aesthetic decisions, but a car itself probably would not be considered a form of constitutionally protected speech.¹⁶² Similarly, the involvement of publishing companies, art departments, and programmers and their respective creative decisions during the production of a video game does not automatically render the game expressive.¹⁶³

In addition, courts have stated that technological advancements in video games, while possibly important, do not, in themselves, qualify the medium as expression.¹⁶⁴ For example, the activity of walking down the street is not considered expression;¹⁶⁵ similarly, a video game simulating the same experience, no matter how complicated the programming or how hyper-realistic the visuals may be, is not likely to be considered any more expressive.¹⁶⁶ It is possible, however, for technology to advance, and in so doing to make a medium capable of expression.¹⁶⁷ This fact is clearly recognized in the progression of precedent concerning expression in video games.¹⁶⁸

Finally, courts have noted that the fact that a medium is interactive, rather than created by one speaker, does not necessarily remove it from the realm of expression.¹⁶⁹ The most well-crafted literature and artwork are generally considered immersive and interactive insofar as they draw the viewer or reader into the experience.¹⁷⁰ These works, however, are accepted as capable of expression.¹⁷¹ Courts have found it only logical to apply the same line of thought to other media, including video games.¹⁷²

¹⁶¹ See *id.* (quoting *Stanglin*, 490 U.S. at 25).

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *Marshfield*, 450 N.E.2d at 609–10.

¹⁶⁵ See *Stanglin*, 490 U.S. at 25.

¹⁶⁶ See *Interactive Digital I*, 200 F. Supp. 2d at 1134; *Marshfield*, 450 N.E.2d at 609.

¹⁶⁷ See *Rothner*, 929 F.2d at 303.

¹⁶⁸ See *Kendrick II*, 244 F.3d at 577–78; *Rothner*, 929 F.2d at 303.

¹⁶⁹ See *Interactive Digital II*, 329 F.3d at 957.

¹⁷⁰ See *id.*

¹⁷¹ See *Kendrick II*, 244 F.3d at 577–78.

¹⁷² See *Interactive Digital II*, 329 F.3d at 957–58.

III. THE RIGHT OF PUBLICITY: DEVELOPMENT AND FIRST AMENDMENT BALANCING CONSIDERATIONS

A. *Development of the Right of Publicity*

The right of publicity is a person's right to control his or her own name, likeness, or identity, and to prevent others from using the same for commercial use without consent.¹⁷³ Although originally understood as an aspect of one's right of privacy,¹⁷⁴ the right of publicity was recognized as a distinct right by the U.S. Court of Appeals for the Second Circuit in 1953 in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁷⁵ In *Haelan*, the Second Circuit stated that "in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph . . ."¹⁷⁶ It would, however, be another quarter-century before the issue of publicity came before the Supreme Court.¹⁷⁷

B. *The Right of Publicity and the First Amendment*

In 1977, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the U.S. Supreme Court formally acknowledged the existence of a right of publicity.¹⁷⁸ The Court acknowledged that the right was seemingly at odds with protections of free speech because likenesses are often used in works of expression, but it held that the plaintiff's claim for violation of his right of publicity under Ohio law was not barred by the First Amendment.¹⁷⁹

In *Zacchini*, the plaintiff was a performer of a "human cannonball" act.¹⁸⁰ A local reporter, despite having been denied permission, recorded the plaintiff's fifteen-second performance, and this video clip was later broadcast, in its entirety, on the defendant's television news program.¹⁸¹ The Court distinguished the right of publicity from the

¹⁷³ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

¹⁷⁴ See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 68-69 (Ga. 1905) (recognizing that the "form and features of the plaintiff are his own").

¹⁷⁵ See 202 F.2d 866, 868 (2d Cir. 1953). In *Haelan*, the plaintiff, a chewing gum manufacturer, contracted with a baseball player for the exclusive right to use his picture, and the defendant, a rival chewing gum manufacturer, used a photograph of the baseball player without his consent. *Id.* at 867.

¹⁷⁶ *Id.* at 868.

¹⁷⁷ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 565-66 (1977).

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 578-79.

¹⁸⁰ See *id.* at 563.

¹⁸¹ See *id.* at 563-64.

right of privacy and recognized it as a separate cause of action.¹⁸² The Court accordingly refused to use the actual malice test associated with right of privacy cases under *Time, Inc. v. Hill*.¹⁸³ In its place, the Court used a balancing test to weigh the First Amendment's free speech protections against a person's right of publicity.¹⁸⁴ The Court, however, provided no guidance as to how the balancing test should be applied and instead limited its analysis to the clear-cut example before it, stating that "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."¹⁸⁵

Left with a clear indication of a balancing test but no guidance as to what it consists of, lower courts have devised several varying tests over time.¹⁸⁶ To date there are at least three common versions of the balancing test to weigh free speech against a person's right of publicity: (1) the *Restatement* approach;¹⁸⁷ (2) the transformative use test;¹⁸⁸ (3) the predominant use test.¹⁸⁹

1. The *Restatement* Approach

The *Third Restatement of Unfair Competition* articulates an approach that divides confrontations between the right of publicity and expression into categories.¹⁹⁰ For example, on the one hand, the use of a per-

¹⁸² See *id.* at 573.

¹⁸³ See *Zacchini*, 433 U.S. at 571–72. The actual malice test is required to establish libel/false light cases against public figures; it requires knowledge that the information was false or that it was published with reckless disregard of whether it was false or not. See *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967).

¹⁸⁴ See *Zacchini*, 433 U.S. at 574–75.

¹⁸⁵ See *id.*

¹⁸⁶ See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003). For an in-depth discussion of the various balancing tests concerning the right of publicity, see Kwall, *supra* note 20, at 1355–64. For additional background information about the right of publicity, see generally Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT & INS. L. J. 635 (1995); F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1 (2003); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART. & ENT. L. 35 (1998).

¹⁸⁷ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

¹⁸⁸ See *Comedy III Prods.*, 21 P.3d at 808. See generally Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

¹⁸⁹ See *TCI Cablevision*, 110 S.W.3d at 374.

¹⁹⁰ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

son's name or identity for advertising or on merchandise is considered "for the purposes of trade" and unprotected, leaving it open to publicity liability.¹⁹¹ For uses in news, entertainment, and creative works, on the other hand, the *Restatement* asserts that the use of a person's identity primarily for the purpose of communicating information or expressing ideas is not a violation of the right of publicity.¹⁹² The scope of the activities allowed is broadly construed:

[T]he use of a person's name or likeness in news reporting, whether in newspapers, magazines, or broadcast news . . . use in entertainment and other creative works, including both fiction and non-fiction . . . use as part of an article published in a fan magazine or in a feature story broadcast on an entertainment program . . . dissemination of an unauthorized print or broadcast biography, [and use] of another's identity in a novel, play, or motion picture is also not ordinarily an infringement."¹⁹³

Use of a person's name or likeness, however, is not permissible if it is used solely to attract attention to a work that is not related to the identified person.¹⁹⁴

2. The Transformative Use Test

The transformative use test weighs First Amendment protections for expression against a person's right of publicity by determining "whether the [person's] likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the [person] is the very sum and substance of the work in question."¹⁹⁵ If the former is true, the work is most likely protected expression; if the latter is true, the work is less likely to be protected speech and is more likely to be subject to liability under a publicity claim.¹⁹⁶

In 2001, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the Supreme Court of California first articulated what would come to be known as the transformative use test.¹⁹⁷ The plaintiff was the owner of

¹⁹¹ See *id.* § 47 cmts. a, b.

¹⁹² See *id.* cmt. c.

¹⁹³ See *id.*

¹⁹⁴ See *id.*; Kwall, *supra* note 20, at 1360–61.

¹⁹⁵ See *Comedy III Prods.*, 21 P.3d at 809.

¹⁹⁶ See *id.* at 809, 811; Kwall *supra* note 20, at 1357–58.

¹⁹⁷ See 21 P.3d at 808.

all rights associated with the comedy act known as “The Three Stooges,” and was seeking damages and injunctive relief for the reproduction and sale of charcoal drawings and lithographs using a likeness of The Three Stooges.¹⁹⁸ In an effort to affect the balancing test required in *Zacchini*, the court imported a piece of the fair use doctrine from copyright law to determine whether the drawings and lithographs were protected by the First Amendment.¹⁹⁹ As such, the court inquired into whether a work is “transformative” by asking “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.”²⁰⁰

Through its test, the court recognized that on the one hand “when artistic expression takes the form of a literal depiction . . . for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”²⁰¹ On the other hand, “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.”²⁰²

3. The Predominant Use Test

The predominant use test, rather than focusing on expression, looks at the product being sold and whether it predominantly exploits the commercial value of an individual’s identity.²⁰³ In such circumstances, under this test, the product is held to violate the right of publicity and is not protected by the First Amendment, even if there is some expressive content.²⁰⁴ As opposed to the other tests, the predominant use test gives greater weight to the fact that “many uses of a person’s name and identity have both expressive and commercial components.”²⁰⁵

¹⁹⁸ *See id.* at 800.

¹⁹⁹ *See id.* at 807–08. The court, however, specifically avoided a “wholesale importation of the fair use doctrine,” because it stated at least two of the factors employed in the fair use test did not seem especially useful for determining whether the depiction of a person’s likeness is protected by the First Amendment. *Id.* at 808.

²⁰⁰ *See id.* (alteration in original).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See TCI Cablevision*, 110 S.W.3d at 374; Kwall, *supra* note 20, at 1359.

²⁰⁴ *See TCI Cablevision*, 110 S.W.3d at 374.

²⁰⁵ *See id.*

In 2003, in *Doe v. TCI Cablevision*, the Supreme Court of Missouri developed the predominant use test.²⁰⁶ In *TCI Cablevision*, Anthony “Tony” Twist, a former professional hockey player, sued Todd McFarlane, the creator of the *Spawn* comic series, for the improper use of his name and likeness for a character in the comic named “Tony Twist.”²⁰⁷ The real Tony Twist was renowned during his career for his aggressive, violent play, becoming the league’s preeminent “enforcer”—a player whose chief responsibility was to protect teammates from physical assaults by opponents.²⁰⁸ Todd McFarlane, an avowed hockey fan, named a mafia don in his comic series “Anthony ‘Tony Twist’ Twisteli.”²⁰⁹ The court recognized that the real and fictional Tony Twists bear no physical resemblance to each other and aside from the common nickname, are similar only in that each can be characterized as having an “enforcer” or tough-guy persona.²¹⁰

Despite this, the court held in favor of the plaintiff stating that “the use and identity of Twist’s name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.”²¹¹ On remand, the jury awarded Twist \$15 million in damages, and the Missouri Court of Appeals affirmed.²¹²

C. *The Intersection: The First Amendment and the Right of Publicity
Concerning Video Games*

In the spring of 2009, Samuel Keller, an ex-college athlete, filed a complaint in the U.S. District Court for the Northern District of California.²¹³ In his complaint, Keller alleged, among other things, a violation of his right of publicity for the use of his name and likeness in the Electronic Arts (EA) video game series, *NCAA Football*.²¹⁴ In addition, the complaint sought class action status alleging common violations to

²⁰⁶ See *id.*

²⁰⁷ See *id.* at 365.

²⁰⁸ See *id.* at 366.

²⁰⁹ See *id.*

²¹⁰ See *TCI Cablevision*, 110 S.W.3d at 366.

²¹¹ See *id.* at 374.

²¹² See *Doe v. McFarland*, 207 S.W.3d 52, 56, 76 (Mo. Ct. App. 2006).

²¹³ See *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2010 WL 5644656, at *1 (N.D. Cal. Dec. 17, 2010).

²¹⁴ See Class Action Complaint at 10, *Keller v. Elec. Arts, Inc.*, No. 09-1967, 2010 WL 530108 (N.D. Cal. May 5, 2009). For an in-depth analysis of the publicity claim in *Keller*, see Anastasios Kaburakis et al., *NCAA Student-Athletes’ Rights of Publicity, EA Sports, and the Video Game Industry*, ENT. & SPORTS LAW., Summer 2009, at 1, 20–30.

the rights of publicity for all NCAA football and basketball players listed on the official opening day roster of a school whose team was included in any interactive software produced by EA.²¹⁵ This case represents an intersection between the freedom of speech and the right of publicity insofar as it will require a determination of the status of video games as protected speech, whether this game in particular is protected,²¹⁶ and whether the alleged use of the plaintiff's likeness constitutes a violation of the right of publicity.²¹⁷

To that extent, Samuel Keller's case is similar to a 2007 case, *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball*.²¹⁸ In *C.B.C. Distribution*, the U.S. Court of Appeals for the Eighth Circuit held that the use of baseball statistics and player names for the purpose of fantasy baseball products was protected speech similar to *Interactive Digital*, mandating a balancing test under *Zacchini*.²¹⁹ The court, using an ad hoc balancing test, determined that publicity rights of the professional baseball players were outweighed by free speech protections because, among other things, the state's interest in protecting publicity rights is diminished by the fact that professional athletes are already handsomely compensated.²²⁰ This factor, however, is distinctively absent from *Keller* because NCAA athletes are prohibited from using their likenesses for profit.²²¹

IV. THE RISKS AND IMPLICATIONS OF CATEGORICALLY PROTECTING "VIDEO GAMES" WITHOUT SPECIFICALLY DEFINING THE MEDIUM

The U.S. Supreme Court recognizes certain forms of entertainment may qualify as protected expression under the First Amendment.²²² Specifically, to enjoy constitutional protection, an entertainment medium must be designed to communicate or express some idea or information,²²³ even if there is no "particularized

²¹⁵ See *id.* at 15.

²¹⁶ See generally *Interactive Digital Software Ass'n v. St. Louis County (Interactive Digital II)*, 329 F.3d 954 (8th Cir. 2003).

²¹⁷ See *Dennie*, *supra* note 33, at 657–76. See generally *C.B.C. Distribution*, 505 F.3d 818; *Comedy III Prods.*, 21 P.3d 797; *TCI Cablevision*, 110 S.W.3d 363.

²¹⁸ See *C.B.C. Distribution*, 505 F.3d at 823–24.

²¹⁹ See *id.* at 823.

²²⁰ See *id.* at 824.

²²¹ See *Class Action Complaint*, *supra* note 214, at 4.

²²² See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

²²³ See *Winters v. New York*, 333 U.S. 507, 510 (1948); see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205,

message.”²²⁴ Hence, video games must be capable of expression to be protected by the First Amendment, but courts have wrestled with whether to consider the medium categorically or on a case-by-case basis.²²⁵ If video games follow other forms of media in eventually finding categorical protection, how the category is defined is paramount: this Part argues that a broad definition of “video games” risks encapsulating both expressive and non-expressive forms of entertainment, cloaking both in constitutional protections to the potential detriment of other individual liberties, like the right of publicity.²²⁶

A. *Why Kendrick Is Consistent with Showplace: An Argument Against a Broad Category of “Video Games”*

Recent case law provides no clear indication of whether video games are considered to be categorically protected under the First Amendment or only individually eligible for protection on a case-by-case basis.²²⁷ Contrary to the way other media are evaluated,²²⁸ most jurisdictions appear to pass judgment on only the video games involved in a particular case rather than consider the medium as a whole.

In fact, the main argument against a fact-specific application of First Amendment protections for video games is that other forms of protected media are not dissected based on content.²²⁹ For example, motion pictures,²³⁰ live music,²³¹ and theatre²³² all are considered categorically protected expression, subject to narrow exceptions.²³³ Again, even adult entertainment benefits from the presumption of expres-

210–12 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975); *Schacht v. United States*, 398 U.S. 58, 63 (1970).

²²⁴ See *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

²²⁵ See *supra* notes 68–172 and accompanying text.

²²⁶ See *infra* notes 227–271 and accompanying text.

²²⁷ See *Ventry*, *supra* note 25, at 1148.

²²⁸ See *Interactive Digital Software Ass’n v. St. Louis County (Interactive Digital I)*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002) (rejecting a case-by-case analysis of any category of media, including video games), *rev’d*, *Interactive Digital II*, 329 F.3d 954 (8th Cir. 2003).

²²⁹ See *Interactive Digital I*, 200 F. Supp. 2d at 1134.

²³⁰ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952); see also *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

²³¹ See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975).

²³² See *Schacht*, 398 U.S. at 63.

²³³ See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (obscenity); *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) (commercial speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (fighting words); *Schenck v. U.S.*, 249 U.S. 47, 52 (1919) (clear and present danger); *supra* note 73 and accompanying text.

sion.²³⁴ This is likely because courts are uncomfortable becoming the interpreters of what content warrants constitutional protection, and are instead more comfortable evaluating whether a delivery mechanism is capable of conveying ideas.²³⁵ Given this tradition, it would seem only natural for courts to consider video games as a whole and to determine the medium's fate categorically.²³⁶

To evaluate video games as one broad category, however, would be a misguided attempt to lump apples with oranges.²³⁷ The diverse array of video games available today simply does not comprise a comprehensive category.²³⁸ This is not to say, however, that the categorical approach must be abandoned altogether.²³⁹ Rather, the categorical approach simply needs to be modified, as the previously conceived category has been drawn too broadly.²⁴⁰ What has collectively been understood as "video games" is actually a collection of several different media built with similar tools but with different applications and capabilities; these media must be assessed for First Amendment purposes by standards suited to each of them.²⁴¹ To make an obvious point, consider for a moment the difference between a marble curb on the side of a street and Michelangelo's *David*. From a disinterested standpoint, both the curb and *David* are made of the same material and were conceptualized by individuals who made aesthetic choices; it is clear, however, that

²³⁴ See *Schad*, 452 U.S. at 72.

²³⁵ See *Winters*, 333 U.S. at 510; *Interactive Digital I*, 200 F. Supp. 2d at 1134.

²³⁶ See *Interactive Digital I*, 200 F. Supp. 2d at 1134; *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002).

²³⁷ See *supra* notes 86–156 and accompanying text; see, e.g., *Am. Amusement Mach. Ass'n v. Kendrick (Kendrick II)*, 244 F.3d 572, 577–78 (7th Cir. 2001); *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991); *Am.'s Best Family Showplace Corp. v. City of New York, Dep't of Bldgs.*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

²³⁸ See *infra* notes 241–248 and accompanying text; see also *supra* notes 35–67 and accompanying text.

²³⁹ Cf. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002). The difficulty courts seem to have in grouping together the various different forms of video games is particularly evident in the decisions advocating a case-by-case approach. See *id.* In *Midway Games*, the federal district court in Connecticut perfectly articulated this point when it said: "[W]hile video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media . . . are protected under the First Amendment." See *id.*

²⁴⁰ See *id.* Justice Kagan noted the possibility of such an approach during the Supreme Court oral arguments for *Schwarzenegger v. Entertainment Merchants Ass'n* when she asked, "are we going to separate video games into narrative video games and non-narrative video games?" See Transcript of Oral Argument at 39, *Schwarzenegger v. Entm't Merchants Ass'n*, No. 08-1448 (U.S. argued Nov. 2, 2010).

²⁴¹ See *Southeastern Promotions*, 420 U.S. at 557; *supra* notes 35–67 and accompanying text.

one is expressive in that it conveys ideas and the other is utilitarian. A similar mistaken categorization is apparent when one looks at the case law summarized in this Note as concerning a single medium.²⁴² Simply put, some games are made to be expressive, such as story-laden games, while others, such as arcade games, are utilitarian products meant as simple leisure activities.²⁴³ To carry the metaphor forward, the mistake being made by courts and scholars when they argue for or against categorical protection of all video games is that they are grouping the curb and *David* together and trying to evaluate the capabilities of marble.²⁴⁴

This becomes apparent when, instead of viewing the case law as evolving toward a new interpretation of video games as a whole, one views the cases as evaluations of different categories.²⁴⁵ Understood in this way, the decisions dating from the early 1980s are not unenlightened just because modern courts are beginning to reach different conclusions; instead, the early courts were evaluating fundamentally different products, namely arcade-style video games similar to pinball or chess, neither of which are considered protected forms of speech.²⁴⁶ On the other hand, the more recent cases have evaluated a more intricate, distinct category of games that involve themes, characters, and storylines.²⁴⁷ Hence, the modern courts found these works more similar to literature and movies than to games like chess, and therefore more deserving of constitutional protection.²⁴⁸

These analyses are therefore not mutually exclusive because the courts were evaluating entirely different categories of video games.²⁴⁹ Importantly, once one arrives at this understanding, one sees that the case law does not run contrary to either the Supreme Court's 1975 deci-

²⁴² See, e.g., *Kendrick II*, 244 F.3d at 577–78; *Am.'s Best Family Showplace*, 536 F. Supp. at 174; *Rothner*, 929 F.2d at 303; *supra* notes 86–156 and accompanying text.

²⁴³ See *Midway Games*, 198 F. Supp. 2d at 181.

²⁴⁴ Cf. *Interactive Digital I*, 200 F. Supp. 2d at 1134; Ventry, *supra* note 25, at 1150–53.

²⁴⁵ Compare *Rothner*, 929 F.2d at 303, and *Am.'s Best Family Showplace*, 536 F. Supp. at 174, with *Kendrick II*, 244 F.3d at 577–78.

²⁴⁶ *Malden Amusement Co. v. City of Malden*, 382 F. Supp. 297, 299 (D. Mass. 1983); *Am.'s Best Family Showplace*, 536 F. Supp. at 174; *Caswell v. Licensing Comm'n*, 444 N.E.2d 922, 927 (Mass. 1983).

²⁴⁷ See *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958 n.11 (9th Cir. 2009), *cert. granted sub nom. Schwarzenegger v. Entm't Merchants Ass'n*, 130 S. Ct. 2398 (2010); *Interactive Digital II*, 329 F.3d at 957; *Kendrick II*, 244 F.3d at 577–78; *Midway Games*, 198 F. Supp. 2d at 181; *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002).

²⁴⁸ See *Schwarzenegger*, 556 F.3d at 958; *Interactive Digital II*, 329 F.3d at 957; *Kendrick II*, 244 F.3d at 577–78.

²⁴⁹ Compare *Kendrick II*, 244 F.3d at 577–78, with *Am.'s Best Family Showplace*, 536 F. Supp. at 174.

sion in *Southeastern Promotions, Ltd. v. Conrad* or the traditional approach of assigning constitutional protections for expression categorically by medium; instead the arcade games and story-laden games are not in the same category or medium, and need to be evaluated by methods suited to them.²⁵⁰ This distinction has continued relevance because, despite the advancements in video games that make them capable of expression and deserving of constitutional protection, there are games made today that are still just digital iterations of real life or activities devoid of expression similar to those evaluated by the courts in the 1980s.²⁵¹ As such, it would be inappropriate to designate all video games as expression when some games simply do not convey ideas or information.²⁵²

B. *Implications for the Right of Publicity: Protecting Non-Expressive Work with an Overly Broad Categorization*

An overly broad categorical protection for “video games” under the First Amendment not only runs counter to Supreme Court precedent but would also have significant implications for other rights, including one’s right of publicity.²⁵³ The balancing test required by the Court in the 1977 case of *Zacchini v. Scripps-Howard Broadcasting Co.* is meant to evaluate free speech protections against the rights of an individual to protect his own image.²⁵⁴ As such, it would be inappropriate to require such a high hurdle if the video game in question is just an arcade-style game not capable of expression but nonetheless protected because of an overly broad categorical determination; such a situation would result in an over-inclusive constitutional protection that would intrude on the rights of individuals, including their right of publicity.²⁵⁵

The importance of this implication becomes even more evident when the various balancing tests developed after *Zacchini* are considered.²⁵⁶ Given the fact that video games, by their nature, are a complicated, interactive media, it is highly unlikely that the use of an individual’s likeness in a video game would fail to be protected as speech by

²⁵⁰ See *Southeastern Promotions*, 420 U.S. at 557.

²⁵¹ See *supra* notes 64–67 and accompanying text.

²⁵² See *id.*

²⁵³ Cf. *Zacchini*, 433 U.S. at 565–66; *Southeastern Promotions*, 420 U.S. at 557.

²⁵⁴ See *Zacchini*, 433 U.S. at 574–75.

²⁵⁵ Cf. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

²⁵⁶ See *Comedy III Prods.*, 21 P.3d at 808; *TCI Cablevision*, 110 S.W.3d at 374; RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 15, § 47 cmt. c. See generally Volokh, *supra* note 188.

any of the three tests discussed above, the most lenient being the predominant use test.²⁵⁷

For example, consider *Keller v. Electronic Arts, Inc.*, where a college quarterback's likeness is used in the video game *NCAA Football*.²⁵⁸ Under the *Restatement* approach, the use of an individual's identity is not a violation of the right of publicity if it is used in news, entertainment, or creative works for the purpose of communicating information or expressing ideas.²⁵⁹ If an overly broad definition of video games is categorically protected as expression regardless of whether the game is an arcade-style or a story-laden game, there would be a built-in assumption of communication of information.²⁶⁰ Therefore, use of the person's identity would likely be protected.²⁶¹

A similar result is likely under the transformative use test.²⁶² The transformative use test weighs constitutionally protected expression against a person's right of publicity by determining if an individual's identity is one of the 'raw materials' from which an original work is synthesized, or if the depiction is the very sum and substance of the work in question.²⁶³ Again, it is unlikely that a court would hold that the use of an individual's identity, or even the identity of the sought class in *Keller*, amounts to the entire sum and substance of the work in question.²⁶⁴ Video games, as opposed to the artwork in *Comedy III*, are complicated syntheses of programming and art design that make any one element less likely to be the entire sum of the work, let alone the use of a single identity.²⁶⁵

The predominant use test may be the only avenue to overcome an over-inclusive, categorical protection.²⁶⁶ This test looks at the product being sold and whether it predominantly exploits the commercial value of an individual's identity; if it does the product is held to violate the right of publicity even if there is some expressive content.²⁶⁷ In a situation like *Keller*, a court may be able to overcome a categorical presump-

²⁵⁷ See *TCI Cablevision*, 110 S.W.3d at 374.

²⁵⁸ See No. C 09-1967 CW, 2010 WL 530108, at *1 (N.D. Cal. Feb. 8, 2010).

²⁵⁹ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995); *supra* notes 190–194 and accompanying text.

²⁶⁰ See *Wilson*, 343 U.S. at 501; *Winters*, 333 U.S. at 510.

²⁶¹ Cf. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

²⁶² See *Comedy III Prods.*, 21 P.3d at 809.

²⁶³ See *id.*; *supra* notes 195–202 and accompanying text.

²⁶⁴ Cf. *id.*

²⁶⁵ See *id.*; see also *supra* notes 36–67 and accompanying text.

²⁶⁶ See *TCI Cablevision*, 110 S.W.3d at 374.

²⁶⁷ See *id.*

tion that all video games constitute expression because, as opposed to the other tests, it gives greater weight to the fact that many uses of a person's identity have both expressive and commercial components.²⁶⁸ Hence, it may be possible, if unlikely, to view the use of a single identity as inappropriately contributing to a work despite the expressive nature of the product.²⁶⁹

Prescribing categorical protection to an overly broad definition of video games inappropriately forces right of publicity claims involving all games into the balancing test meant to weigh constitutionally protected expression against an individual's ability to control his own identity.²⁷⁰ To do so, despite the fact that it is clear that at least some video games are incapable of conveying ideas and are not expression, extends the constitutional protection too far.²⁷¹

CONCLUSION

The recent extension of constitutional protection to video games is recognition that the medium is capable of expression, and it is a necessary extension as the industry continues to grow into one of the largest elements of entertainment media.²⁷² Nevertheless, it is necessary not to overextend such protections and risk potentially infringing on other rights. Video games are no longer all mindless entertainment activities aimed at accruing points. Many of today's video games have in-depth storylines and themes. These cinematic experiences are capable of expression and are certainly worthy of constitutional protection. At the same time, it is necessary to not overextend such protections to include games that are neither meant as expression, nor capable of it. Despite the advent of complicated games that convey themes, character development, and emotion, there will always be games that are modern-day equivalents of *Pong* and *Asteroids*—leisure activities undeserving of constitutional protection. The recent popularity in casual and online games, such as *Bejeweled*, *Angry Birds*, and *FarmVille*, demonstrates that these games are very much still in demand. Thus, a medium like video games, if too broadly defined, can encompass massively different works, and can create the potential for infringement upon personal liberties.

²⁶⁸ See *id.*

²⁶⁹ See *Doc v. McFarland*, 207 S.W.3d 52, 56, 76 (Mo. Ct. App. 2006).

²⁷⁰ See *Zacchini*, 433 U.S. at 574–75.

²⁷¹ See *Midway Games*, 198 F. Supp. 2d at 181.

²⁷² See *supra* note 4 and accompanying text.

In the end, though it is important to protect new media capable of expression, game publishers should not be able to hide behind the guise of expression to secure constitutional First Amendment protection if their particular work is not capable of expression.

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