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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FRANK SIVERO,

Plaintiff and Appellant,

v.

TWENTIETH CENTURY FOX
FILM CORPORATION,

Defendant and Respondent.

B266469

(Los Angeles County
Super. Ct. No. BC561200)

APPEAL from an order of the Superior Court of Los Angeles County, Rita Miller, Judge. Affirmed.

Hess, Hess & Herrera and Alejandro H. Herrera for Plaintiff and Appellant.

Mitchell Silberberg & Knupp, Robert H. Rotstein, Aaron M. Wais and Daniel A. Kohler for Defendant and Respondent.

Frank Sivero, a film actor, sued Twentieth Century Fox Film Corporation (Fox) for the misappropriation of his name and likeness in the promotion of the hit television show *The Simpsons*. Fox filed a special motion to strike under Code of Civil Procedure¹ section 425.16 contending Sivero's claims arose from protected activity and Sivero could not demonstrate a probability of prevailing. The trial court agreed and granted the motion to strike.

On appeal, Sivero argues the trial court erred (1) when it found his causes of action arose from protected activity, and (2) when it struck his first two causes of action based upon the application of the First Amendment's transformative use doctrine. We conclude Sivero has shown no error and affirm the trial court's order granting the special motion to strike.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Sivero is a professional actor who is best known for playing the roles of mafia figures in the films *The Godfather Part II* (Paramount Pictures 1974) and *Goodfellas* (Warner Bros. 1990).

Fox is a film studio that produces films and television shows, including *The Simpsons*. *The Simpsons* is an animated situation comedy starring the fictional Simpson family who resides in the fictional town of Springfield. In 1989, Sivero lived in an apartment building in a unit next door to two of the writers

¹ All undesignated statutory references are to the Code of Civil Procedure.

for *The Simpsons*. The writers were aware Sivero was developing a mafia character for *Goodfellas*.

An episode of *The Simpsons* first broadcasted in October 1991 included as a minor character a mafia henchman known as Louie who resembled Sivero's character in *Goodfellas*. Louie was one of two henchmen for a mafia boss known as Fat Tony. Louie later appeared in 15 additional episodes of the television show and in a movie and video games based on the show.

B. *Sivero's Complaint*

On October 21, 2014, Sivero filed a verified complaint alleging causes of action for (1) common law infringement of right of publicity; (2) misappropriation of name and likeness (Civ. Code, § 3344); (3) misappropriation of ideas; (4) interference with prospective economic advantage; and (5) unjust enrichment.²

Sivero alleges in his first two causes of action that Fox misappropriated his name and likeness "in the promotion of THE SIMPSONS franchise," without his authorization and without compensating him. Sivero alleges in his third cause of action that Fox misappropriated the idea of the *Goodfellas* character on whom Louie was based. In his fourth cause of action, Sivero alleges that by misappropriating his name and likeness Fox interfered with his ability to exploit his name and likeness. In his fifth cause of action, Sivero alleges that Fox has been unjustly enriched as a result of the misappropriation of his name and

² Sivero named Fox Television Studios, Inc. and 21st Century Fox America, Inc. as defendants. He later substituted Twentieth Century Fox Film Corporation for a fictitious defendant and dismissed the complaint against the two originally named defendants.

likeness. Sivero seeks compensatory and punitive damages and injunctive relief.

C. *Fox's Special Motion To Strike*

On April 20, 2015, Fox filed a special motion to strike the complaint. Fox argued the complaint arose from protected activity under the anti-SLAPP statute and Sivero could not show a probability of prevailing on any of his claims. Fox argued among other things that Sivero could not show a probability of prevailing on his first cause of action for common law infringement of right of publicity and second cause of action for misappropriation of name and likeness because any use of Sivero's likeness was transformative and therefore protected by the First Amendment. Fox filed numerous exhibits in support of its motion, including, but not limited to, a declaration by its counsel; video recordings of 16 episodes of *The Simpsons*; several movies including *Goodfellas*, *The Godfather Part II*, and *The Simpsons Movie*; and a video game entitled *The Simpsons: Hit and Run*.

Sivero opposed the special motion to strike and filed his own declaration and the declaration of an animation expert. Sivero also filed evidentiary objections. Sivero argued his causes of action did not arise from protected activity under the anti-SLAPP statute because Fox's use of his likeness was not transformative and therefore was not protected by the First Amendment. Regarding his probability of prevailing on the merits, Sivero argued the evidence supported each of his causes of action.

On August 6, 2015, after a hearing on the special motion to strike, the trial court entered an order granting the motion. The

court found the complaint arose from an act in furtherance of Fox's right of petition or free speech within the meaning of the anti-SLAPP statute. The court stated the facts alleged in this case were similar to those in *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133 and *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018 (*No Doubt*), which held that causes of action involving the alleged unauthorized use of the plaintiffs' names or likenesses in a television show or a video game arose from protected activity under the anti-SLAPP statute.

The trial court concluded that Sivero had failed to establish a probability of prevailing on any of his causes of action. Regarding his first and second causes of action, the court stated Sivero had submitted sufficient evidence to show Louie was based at least in part on Sivero, and Fox had failed to show as a matter of law that Louie was not based on Sivero.³ However, the court found that Fox's use of Sivero's likeness was transformative because Louie was only a minor character in the television series, and Sivero's likeness was distorted for purposes of lampoon, parody, and caricature. The court concluded this established a complete defense to the first and second causes of action, and, as for the remaining causes of action, Sivero failed to present sufficient facts to establish a probability of prevailing.

Sivero filed a timely notice of appeal from the order granting the special motion to strike.⁴

³ The court rejected Fox's argument that the Copyright Act preempted Sivero's claims.

⁴ An order granting or denying a special motion to strike is appealable. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).)

CONTENTIONS

Sivero contends (1) his first four causes of action (common law infringement of right of publicity, misappropriation of name and likeness, misappropriation of ideas, and interference with prospective economic advantage) do not arise from protected activity under the anti-SLAPP statute; and (2) his first and second causes of action are not precluded by the transformative use doctrine.⁵

DISCUSSION

A. *Special Motion To Strike*

A special motion to strike is a procedural remedy to dispose of meritless lawsuits brought to chill the valid exercise of the constitutional right of petition or free speech. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1165.) A cause of action arising from an act in furtherance of the defendant's

⁵ Sivero does not challenge the trial court's ruling that his fifth cause of action for unjust enrichment arises from protected activity or the ruling that he failed to establish a probability of prevailing on his third, fourth, and fifth causes of action for misappropriation of ideas, interference with prospective business advantage, and unjust enrichment. He therefore forfeits any claim of error regarding these rulings. (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 108 & fn. 9 [issues not raised in the appellant's opening brief are deemed waived]; *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41 [appellant forfeits any claim of error by failing to raise the issue on appeal].)

constitutional right of petition or free speech in connection with a public issue is subject to a special motion to strike unless the plaintiff demonstrates a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321.) The defendant bears the initial burden of showing that the cause of action arises from protected activity (i.e., an “act in furtherance”). If the defendant satisfies this burden, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Barry*, at p. 321.)

“Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

In the first step, an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection

with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

A cause of action “aris[es] from” protected activity within the meaning of the anti-SLAPP statute only if the defendant’s act on which the cause of action is based was an act in furtherance of the defendant’s right of petition or free speech in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) “[T]he focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.’ [Citation.] ‘The only means specified in section 425.16 by which a moving defendant can satisfy the [“arising from”] requirement is to demonstrate that the defendant’s conduct by which [the] plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)’ [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063.)

In the second step, a plaintiff establishes a probability of prevailing on the claim by showing that the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff’s favor. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) The court does not weigh the evidence, but determines as a matter of law whether the evidence is sufficient to support a judgment in the plaintiff’s favor. (*Baral v. Schnitt, supra*, 1 Cal.5th at pp. 384-385; *Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) The defendant can defeat the plaintiff’s showing only by

presenting evidence that establishes as a matter of law that the plaintiff cannot prevail. (*Baral*, at pp. 384-385 [trial court “accepts the plaintiff’s evidence as true, and evaluates the defendant’s showing only to determine if it defeats the plaintiff’s claim as a matter of law”]; *Oasis*, at p. 820.)

“Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) On appeal, we independently review the trial court’s determinations on both prongs. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1345-1346.)

B. *Step One: Sivero’s Causes of Action Arise from Protected Activity*

1. *The First and Second Causes of Action*

Before the trial court, Sivero argued his first two causes of action did not arise from protected activity because Fox’s use of his likeness was not transformative and therefore was not protected by the First Amendment. Sivero confused the threshold question whether the causes of action arose from protected activity with the question whether Sivero established a probability of prevailing on the merits. (See *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94 [“Plaintiff’s argument ‘confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits’”]; *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1522 [the plaintiff’s argument confused the threshold question whether the defendant’s conduct arose from protected activity with the

purported unlawful motive for the defendant's conduct, which was a second prong issue concerning the merits].)

On appeal, Sivero raises two new arguments. First, he contends that because Fox could have commented on any public issues addressed in *The Simpsons* without using his likeness, his causes of action did not arise from protected activity. Explaining this argument, Sivero posits that because his likeness was not necessary for Fox's public commentary, the use of his likeness was not in furtherance of Fox's right of free speech "in connection with a public issue" (§ 425.16, subd. (e)). Next, Sivero argues the use of his likeness in video games and other merchandise "[does] not exhibit the expressive elements protected by the First Amendment," and therefore his claims do not arise from protected activity.⁶

A reviewing court generally will not consider arguments made for the first time on appeal that could have been but were not asserted in the trial court. (*Hunter v. CBS Broadcasting Inc.*, *supra*, 221 Cal.App.4th at p. 1526 [refused to consider an argument under the first prong of the anti-SLAPP statute because the plaintiff did not present the argument to the trial court].) Doing so would be unfair to both the trial court and the opposing litigant. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 [rejected the plaintiff's new theory on appeal in opposition to defendant's summary judgment motion].) Sivero has provided no persuasive argument why we should depart from this rule. His new arguments are therefore forfeited. (*Hunter*, at p. 1526.) Without

⁶ Sivero fails to cite any authority in support of either argument.

any further challenge to the trial court's ruling, the first and second causes of action move on to the second step of the analysis.

2. *Sivero Has Shown No Error in the Ruling That His Third and Fourth Causes of Action Arise from Protected Activity*

Sivero argues his third cause of action for misappropriation of ideas and fourth cause of action for interference with prospective economic advantage do not arise from protected activity because these causes of action are based on tortious conduct and are not based on any constitutionally protected speech. According to Sivero, "the defendant should be required to prove the validity of its purported 'protected activity' in evaluating an anti-SLAPP motion." Sivero argues his third cause of action does not arise from "speech," but instead arises from "the act of stealing [Sivero's] idea and using it to [Fox's] own commercial advantage." Sivero argues his fourth cause of action does not arise from "the creation of Louie," but instead arises from Fox's "use of Louie," which "contributed to [Sivero's] loss of employment as well as the dilution of his 'typecast' mobster persona." Thus, Sivero argues tortious conduct cannot be protected activity and characterizes his third and fourth causes of action as arising from tortious conduct. Sivero misconstrues the first prong requirement.

A defendant satisfies its threshold burden of showing that a cause of action arises from protected activity by showing that the act on which the cause of action is based fits one or more of the four categories set forth in section 425.16, subdivision (e). (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 88.) Subdivision (e)

of section 425.16 does not distinguish between tortious and nontortious conduct and does not exclude tortious conduct. A plaintiff cannot avoid the application of the anti-SLAPP statute simply by alleging a tort. Sivero cites no authority for such a proposition, and the argument is contrary to the law. Torts arise from protected activity when the basis for the claim is an act described in section 425.16, subdivision (e). (See, e.g., *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 196, 199-205 [claims for negligent misrepresentation, negligent interference with economic relations, breach of Civ. Code, § 3344, violation of common law right of publicity, and unfair competition]; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1255 [claims for invasion of privacy, defamation, and intentional and negligent infliction of emotional distress].)

Courts may not “read a separate proof-of-validity requirement into the operative sections of the statute. [Citations.] Rather, any ‘claimed illegitimacy of the defendant’s acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff’s [secondary] burden to provide a prima facie showing of the merits of the plaintiff’s case.’ [Citation.]” (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 94.) Contrary to Sivero’s argument, the defendant need not establish the validity of its conduct in order to show the cause of action arises from protected activity, and the plaintiff cannot show that a cause of action does not arise from protected activity simply by characterizing the defendant’s alleged conduct as tortious.

Moreover, the trial court properly found Sivero’s third and fourth causes of action arise from protected activity. An act in furtherance of the defendant’s constitutional right of petition or free speech includes “any . . . conduct in furtherance of the

exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e)(4).) We must construe this provision broadly in favor of protecting the defendant’s continued participation in matters of public significance. (*Id.*, subd. (a); *Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 674 [the term “public interest” in the anti-SLAPP statute must be construed broadly].)

The basis for Sivero’s third cause of action for misappropriation of ideas is Fox’s commercial exploitation of the persona Sivero developed. The basis for Sivero’s fourth cause of action for intentional interference with prospective economic advantage is the same. These causes of action arise from protected activity under the anti-SLAPP statute if Fox’s use of Sivero’s likeness involved protected activity.

A television show is an expressive work protected by the First Amendment right of free speech, so creating and broadcasting a television show are acts in furtherance of the constitutional right of free speech. (*Hunter v. CBS Broadcasting Inc.*, *supra*, 221 Cal.App.4th 1510, 1521 [the defendant’s selection of television weather anchors was an act in furtherance of the right of free speech]; *Tamkin v. CBS Broadcasting, Inc.*, *supra*, 193 Cal.App.4th at p. 143 [the defendant’s use of the plaintiffs’ names in a popular television show was an act in furtherance of the right of free speech].) The same is true of movies and video games. (*Brown v. Entertainment Merchants Assn.* (2011) 564 U.S. 786, 790 [131 S.Ct. 2729, 180 L.Ed.2d 708] [video games are protected by the First Amendment because they “communicate ideas—and even social messages”]; *No Doubt*, *supra*, 192 Cal.App.4th at p. 1027 [“Video games generally are considered

‘expressive works’ subject to First Amendment protections”]; *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 323-324 “[f]ilm . . . whether exhibited in theaters or on television, is protected by constitutional guarantees of free expression”).)

Creating and broadcasting a popular television show, movie, or video game constitutes conduct “in connection with an issue of public interest” because ““an issue of public interest” . . . is *any issue in which the public is interested*. In other words, the issue need not be “significant” to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.” (*Tamkin v. CBS Broadcasting, Inc.*, *supra*, 193 Cal.App.4th at p. 143; accord, *Brodeur v. Atlas Entertainment, Inc.*, *supra*, 248 Cal.App.4th at p. 675; see also *No Doubt*, *supra*, 192 Cal.App.4th at p. 1027 [the defendant’s use of a band’s likeness in a video game was a matter of public interest because the band had achieved widespread fame]; *Kronemyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 949 [“the motion picture *My Big Fat Greek Wedding* was a topic of widespread public interest”).) In light of the widespread popularity of *The Simpsons*, Sivero’s third and fourth causes of action arise from conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest.⁷

⁷ As discussed, Sivero does not challenge the trial court’s finding that his fifth cause of action for unjust enrichment arises from protected activity.

C. *Step Two: Sivero Cannot Establish a Probability of Prevailing on His First and Second Causes of Action*

If the defendant shows the challenged causes of action arise from protected activity, the burden shifts to the plaintiff to establish a probability of prevailing on the claims. (*Baral v. Schnitt, supra*, 1 Cal.5th at p. 384.) Sivero contends he established a probability of prevailing on his first cause of action for common law infringement of right of publicity and second cause of action for misappropriation of name and likeness.⁸

1. *The Right of Publicity*

“The right of publicity protects an individual’s right to profit from the commercial value of his or her identity. [Citations.] California recognizes both a common law and statutory right of publicity. [Citation.]” (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684.)

The elements of a common law cause of action for infringement of the right of publicity are ““(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. [Citations.]” [Citation.]’ [Citation.]” (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 97.)

Civil Code section 3344 establishes a statutory right of publicity. (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 885 (*Winter*)). The statute states, in relevant part, “Any person who

⁸ As discussed, Sivero does not challenge the trial court’s ruling that he failed to establish a probability of prevailing on his third, fourth, and fifth causes of action.

knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. . . ." (Civ. Code, § 3344, subd. (a).) The elements of a statutory cause of action for misappropriation of right of publicity include all of the common law elements plus two additional elements: the defendant's knowing use and a direct connection between the defendant's use and the commercial purpose. (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 13.)

2. *The Transformative Use Defense*

A tension exists between the right of publicity and the First Amendment right of free speech and expression. (*Winter, supra*, 30 Cal.4th at p. 885; *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 396 (*Comedy III*)). "Because celebrities take on public meaning, the appropriation of their likenesses may have important uses in uninhibited debate on public issues, particularly debates about culture and values. And because celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression." (*Comedy III*, at p. 397; accord, *Winter*, at p. 887.) "[T]he very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the

celebrity’s meaning.” (*Comedy III*, at p. 397; accord, *Winter*, at p. 887.)

The California Supreme Court has developed a balancing test between the First Amendment and the right of publicity to determine whether the challenged work merely appropriates a celebrity’s likeness and economic value, and therefore is not entitled to First Amendment protection, or adds significant creative elements so as to transform the work into the defendant’s own expression. (*Winter, supra*, 30 Cal.4th at p. 888; *Comedy III, supra*, 25 Cal.4th at p. 391.) “When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.” (*Comedy III*, at p. 405, fn. omitted.) On the other hand, when “a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness,” it is protected by the First Amendment.⁹ (*Comedy III*, at p. 406.) As the California Supreme Court stated in *Comedy III*, “This inquiry into whether a work is

⁹ *Comedy III, supra*, 25 Cal.4th at page 406, stated: “Another way of stating the inquiry is whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness. And when we use the word ‘expression,’ we mean expression of something other than the likeness of the celebrity.”

‘transformative’ appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment.” (*Id.* at p. 404.)

Thus, the First Amendment is an affirmative defense to a cause of action based on the right of publicity to the extent that the challenged work “contains significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame.” (*Comedy III, supra*, 25 Cal.4th at p. 407.) This is known as the “transformative use” defense. (*No Doubt, supra*, 192 Cal.App.4th at pp. 1031-1032.) “[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable.” [Citations.] As in *Comedy III . . .*, courts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer.” (*Winter, supra*, 30 Cal.4th at pp. 891-892 [resolved the issue of transformative use in reviewing an appeal from a summary judgment]; see *No Doubt*, at pp. 1033-1035 [resolved the issue of transformative use on appeal from the denial of an anti-SLAPP motion].)

Since the California Supreme Court announced the transformative use test in 2001, case law has developed along a continuum with those cases finding the facts establish a transformative use on one end and those finding a nontransformative, literal depiction on the other. An

examination of several cases demonstrates the relevant distinctions and factors that differentiate the two ends.

Comedy III, supra, 25 Cal.4th 387, *No Doubt, supra*, 192 Cal.App.4th 1018, and *In re NCAA Student-Athlete Name & Likeness* (9th Cir. 2013) 724 F.3d 1268 (*NCAA*) are three cases finding the use of the celebrity's likeness to be literal and not transformative.

The California Supreme Court in *Comedy III* concluded as a matter of law that lithographs and silkscreened T-shirts bearing portraits of The Three Stooges were not transformative, stating that the artist's "undeniable skill [was] manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame." (*Comedy III, supra*, 25 Cal.4th at p. 409.) The court stated, "we can discern no significant transformative or creative contribution." (*Ibid.*) The court stated further, "Moreover, the marketability and economic value of [the artist's] work derives primarily from the fame of the celebrities depicted. While that fact alone does not necessarily mean the work receives no First Amendment protection, we can perceive no transformative elements in [the artist's] works that would require such protection." (*Ibid.*)

Comedy III stated that not all reproductions of celebrity portraits were unprotected by the First Amendment, noting that Andy Warhol's silkscreens of celebrities involving "distortion and the careful manipulation of context" conveyed "a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself." (*Comedy III, supra*, 25 Cal.4th at pp. 408-409.) Such expressions may be protected by the First Amendment, and

“the distinction between protected and unprotected expression will sometimes be subtle.” (*Id.* at p. 409.) In contrast, the court found the defendant’s literal depictions of The Three Stooges contained no transformative elements. (*Ibid.*)

No Doubt involved a video game in which players simulated performing popular songs as members of a rock band. Players could choose to perform as images of fictional characters or real-life rock stars. (*No Doubt, supra*, 192 Cal.App.4th at p. 1023.) The court held the defendant’s use of likenesses of members of the real-life rock band No Doubt was not transformative because the images were “literal recreations of the band members” doing “the same activity by which the band achieved and maintains its fame.” (*Id.* at p. 1034.) The video game images were “computer-generated recreations of the real band members, painstakingly designed to mimic their likenesses.” (*Id.* at p. 1033.) The court stated that none of the variables afforded to the game player, such as changing the venue of the performances, “transform[ed] the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.” (*Id.* at p. 1034.)

NCAA involved a video game in which players simulated playing football by controlling avatars representing actual college football players. The college teams in the game included all of the players from the real-life college teams with their actual jersey numbers and virtually identical physical characteristics, but without the players’ names on their jerseys. (*NCAA, supra*, 724 F.3d at p. 1271.) The plaintiff was one of the college football players depicted in the video game. (*Id.* at p. 1272.) The Ninth Circuit held the defendant’s use of the plaintiff’s likeness was not transformative because the avatar was a literal depiction closely

matching the plaintiff's physical characteristics, and the video game depicted the plaintiff performing the same activity for which he was known in real life, that is, playing football. (*Id.* at p. 1276.) The context in which the activity occurred was similarly realistic because the video game depicted the plaintiff playing football in realistic reproductions of actual football stadiums. (*Ibid.*)

On the other end of the continuum are *Winter, supra*, 30 Cal.4th 881 and *Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47, 58 (*Kirby*), in which the courts held the transformative use defense applied and provided a complete defense. In *Winter*, the California Supreme Court concluded as a matter of law that comic books containing characters evoking two well-known musicians were sufficiently transformative that they were protected by the First Amendment, and therefore held that the defendant was entitled to summary judgment. (*Winter*, at p. 892.)

Winter, supra, 30 Cal.4th at page 890, stated: “We can readily ascertain that [the comic books] are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs’ mere likenesses. Although the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the raw materials from which the comic books were synthesized. To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature. And the Autumn brothers are but cartoon characters—half-human and half-worm—in a larger story, which is itself quite expressive. The characters and their portrayals do

not greatly threaten plaintiffs' right of publicity. Plaintiffs' fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions."

In *Kirby, supra*, 144 Cal.App.4th 47, a video game featured a news reporter in outer space in the 25th century. The reporter, named Ulala, investigated an invasion of earth by aliens who shot people with ray guns causing them to dance uncontrollably. Players advanced in the game by causing Ulala to match the dance moves of other characters. (*Id.* at p. 52.) The plaintiff, Kierin Kirby, the lead singer of a band that was popular in the early 1990's, alleged the defendant had misappropriated her name and likeness.¹⁰ (*Id.* at p. 53.) The court concluded there was a triable issue of fact whether the defendant had misappropriated the plaintiff's likeness, but held the transformative use doctrine, nonetheless, provided a complete defense. (*Id.* at pp. 56-57, 59.)

Despite the similarities between Ulala and Kirby, there were notable differences, including "Ulala's extremely tall, slender computer-generated physique," based in part on the Japanese "anime" style; Ulala's hairstyle and costume; the game's setting in outer space in the 25th century; and Ulala's distinctive dance moves. (*Kirby, supra*, 144 Cal.App.4th at p. 59.) Those differences were creative elements making Ulala a new

¹⁰ The court recognized a resemblance between the visual images of Kirby and Ulala, and noted that "Ulala's name is a phonetic variant of 'ooh la la,' a phrase often used by Kirby and associated with Kirby." (*Kirby, supra*, 144 Cal.App.4th at p. 56.) "[B]oth Kirby and Ulala used the phrases 'groove,' 'meow,' 'delish,' and 'I won't give up.'" (*Ibid.*)

expression rather than a mere imitation of Kirby. (*Ibid.*) The court concluded the transformative use defense applied and affirmed a summary judgment in favor of the defendant. (*Id.* at p. 61.)

3. *Louie Is More Than a Mere Likeness or Literal Depiction of Sivero; the Transformative Use Defense Applies*

In the present case, we agree with the trial court's conclusion that Fox's use of Sivero's likeness in the television shows, movie, and a video game is transformative and therefore is protected by the First Amendment.¹¹ Even if Louie resembles Sivero, the Louie character contains significant transformative content other than Sivero's likeness. (*Comedy III, supra*, 25 Cal.4th at p. 407.) Louie is not a literal likeness of Sivero as were the images of The Three Stooges in *Comedy III* and the depictions of rock band members in *No Doubt*, and college football players in *NCAA*. Instead, Louie is a cartoon character with yellow skin, a large overbite, no chin, and no eyebrows. Louie has a distinctive high-pitched voice which, as the trial court pointed out, has "no points of resemblance to [Sivero]."

¹¹ Sivero argues the Louie character also appears in merchandise offered for sale. Although Sivero alleges in his complaint that *The Simpsons* "has created a market for various products, including memorabilia, apparel, music, . . . toys, games, and a variety of Simpsons related items . . .," Sivero presented no evidence of any merchandise featuring the Louie character apart from a video game and therefore has not shown a probability of prevailing on any cause of action based on the use of his likeness in any other merchandise.

Sivero acknowledges his likeness has been “Simpsonized.” To be “Simpsonized” is to be transformed by the creative and artistic expressions distinctive to *The Simpsons*. This is precisely what the California Supreme Court meant in *Comedy III* when it said: “an artist depicting a celebrity must contribute something more than a ““merely trivial”” variation, [but must create] something recognizably “his own”” [citation], in order to qualify for legal protection.” (*Comedy III, supra*, 25 Cal.4th at p. 408.) Contrary to Sivero’s argument, the fact other cartoon characters in *The Simpsons* share some of the same physical characteristics does not detract from the point these physical characteristics are transformative. Indeed, Sivero’s observation highlights the very point that the “creative elements predominate in the work.” (*Id.* at p. 407.)

The humorous depiction of Louie and other mafia characters in *The Simpsons* is a parody of mafia mobsters depicted in Hollywood films. Louie appears as one of two henchmen to the fictional mob boss Fat Tony. Louie dresses and acts in the style and manner associated with stereotypical mobsters portrayed in Hollywood movies. Louie interacts with other cartoon mobsters as a humorous lampoon of the style, speech, and mannerisms of such movie characters. Because of the cartoon distortions as well as the comedic portrayal of such mafia characters, Louie is not a satisfactory substitute for a conventional depiction of Sivero. And as a result, Louie does not greatly threaten Sivero’s right of publicity. As the Supreme Court observed in *Comedy III*, “works of parody or other distortions of the celebrity figure are not, from the celebrity fan’s viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for

celebrity memorabilia that the right of publicity is designed to protect. [Citation.] Accordingly, First Amendment protection of such works outweighs whatever interest the state may have in enforcing the right of publicity.” (*Comedy III, supra*, 25 Cal.4th at p. 405.)

While Sivero spends a substantial amount of time discussing the financial success of *The Simpsons*, he misses the point that if “the marketability and economic value of the challenged work” do not derive primarily from the celebrity’s fame, “there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection.” (*Comedy III, supra*, 25 Cal.4th at p. 407.) Without question *The Simpsons*’s success “comes principally from some source other than” Sivero’s fame. Louie is a minor character in the overall constellation of Simpsons characters. Because no credible argument can be made that the success of *The Simpsons* derives primarily from Sivero’s fame, the presumption applies that sufficient transformative elements warrant First Amendment protection.

Considering the continuum of transformative use cases, with *Comedy III*, *No Doubt*, and *NCAA* on one end finding nontransformative, literal depictions, and *Winter* and *Kirby* on the other end finding transformative uses, the present case is far closer to *Winter* and *Kirby*. We conclude that, unlike the likenesses of The Three Stooges on lithographs and T-shirts in *Comedy III*, the literal depictions of band members in *No Doubt*, and the literal depictions of college football players in *NCAA*,

Louie is not a “literal, conventional depiction[]” of Sivero designed to “exploit [his] fame.” (*Comedy III, supra*, 25 Cal.4th at p. 409.) Instead, like the “Autumn brothers” comic book characters in *Winter* and the futuristic news reporter Ulala in *Kirby*, Louie is the product of significant creative elements that “transform [him] into something more than [a] mere celebrity likeness[]” of Sivero. (*Winter, supra*, 30 Cal.4th at p. 885.) The transformative use defense is a complete defense to Sivero’s first cause of action for infringement of the right of publicity and second cause of action for misappropriation of name and likeness. The trial court properly granted the special motion to strike.¹²

DISPOSITION

The order is affirmed. Fox is entitled to recover its costs on appeal.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

¹² In light of our conclusion that the transformative use defense applies, we need not decide whether the Copyright Act preempts Sivero’s claims.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.