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The notion that the Federal Communications Commission can restrict speech on broadcast radio and broadcast television more strictly than on other media, such as the Internet, is so familiar today that its constitutionality is often taken for granted.

In a landmark 1978 decision, *Federal Communications Commission v. Pacifica Foundation*, the Supreme Court of the United States stated that broadcast media receive less First Amendment protection than other media. The Supreme Court has given two rationales for its distinction between media (referred to in this article as the "media distinction doctrine"). First, broadcast radio and television are unique because the frequencies that they use could become flooded if not regulated, and thus nobody would be able to transmit content over broadcast radio and television without the government's intervention. Second, broadcast radio and television are uniquely pervasive into the home, and thereby risk transmitting unwanted vulgarities to listeners and their children.

In this article, I argue that, given the technological development since *Pacifica* was decided, it is no longer sound to afford less First Amendment protection to broadcast media. After exploring the effects of technological development, I argue that neither of the above rationales remains sound. I also argue that other factors, such as consumer demand, would prevent broadcast media from transmitting offensive content even without the media distinction doctrine in place.

People who are deaf or hard of hearing need captions to understand spoken words in movies and television shows. By the 1990s, after decades of struggles, advocates for the deaf community were largely successful in utilizing legislative, regulatory, and litigation remedies to get producers to caption their movies and television shows.

However, some time in the late 1990s and early 2000s, many producers inexplicably stopped captioning song lyrics in their movies and television shows. This decision

seems to be a reaction to court cases holding that producers needed separate copyrights to produce song lyrics on "sing-along" videocassettes and karaoke machines. Producers apparently believed that separate copyrights are necessary to caption song lyrics for the deaf and hard of hearing consumers.

This article contends that the producers are mistaken in using a "copyright defense" as an excuse not to caption song lyrics, and are potentially leaving themselves vulnerable to a class action lawsuit by deaf consumers if they continue the practice. Recent court decisions have respectively established that 1) providing full accessibility and enjoyment for deaf customers means captioning song lyrics and 2) copying otherwise protected material for the purpose of making it accessible to customers with disabilities comes within the "fair use" exception of the Copyright Act.

If history is any guide, it is only a matter of time before the deaf community turns to the courts to force producers to caption the lyrics to songs that are featured in their movies and television shows. While producers could very well have valid defenses against a lawsuit for not captioning song lyrics in movies or shows, the "copyright defense" should not be one of them.

The Best Of Two Tests: A Hybrid Test For Balancing Right Of Publicity And First Amendment Interests Tailored To The Complexities Of Video Games
Nicholas E. Frontera. *193*

Over the past six decades, the right of publicity has been developed almost as quickly as the world around it. As major advances in film and computer technology have allowed content producers to depict real people in their works in a plethora of new ways, the people depicted have used the right of publicity to challenge many of these uses. As a result, courts have been faced with constantly remolding the right of publicity to account for these technological advances. As a creature of state law, the development of the right of publicity has varied across the country, with little guidance from the Supreme Court or Congress. However, courts across the circuits have consistently recognized that the property right granted by the right of publicity must be balanced against the First Amendment rights of the creators of expressive works.

Ultimately, courts have developed a number of tests to balance the right of publicity against the First Amendment. One such test, the "transformative test," was developed by the California Supreme Court and has been used in a number of circuits. This Comment argues that though the transformative test may have been appropriate when used in the context it was created, traditional still artistic depictions, it has been overextended and is ill-suited for the analysis of interactive media such as video games. Specifically, this Comment takes issue with a standard announced by the California Supreme Court, in No Doubt v. Activision Publishing Inc., and then followed by the Ninth Circuit in Keller v. Electronic Arts. This standard, now used by courts when applying the transformative test to video games, states that literal

depictions of celebrities within works will not be protected under the First Amendment if the celebrity is depicted doing what they became famous for. This Comment demonstrates that this standard is in direct conflict with case precedent in a variety of contexts including: art, film, and literature. Ultimately, this Comment contends that a new test must be crafted to balance the right of publicity with the First Amendment. Such a test must possess the flexibility to analyze both simple artistic depictions and depictions within more complex interactive media. This Comment offers one such test, which borrows and adapts language from the transformative test and the Rogers Test, to create a method of analysis that is better suited for application to both simple and complex media of expression.

In recent years, the major television studios have increasingly insisted that their new contracts with talent, including executive producers, directors and actors, include a mandatory arbitration provision and that one particular arbitration provider, JAMS, be the forum to arbitrate all disputes. The studios defend their inclusion of mandatory arbitration provisions with JAMS as the provider, arguing that the arbitration process has safeguards to protect fairness, JAMS arbitrators are particularly well qualified and that juries tend to favor talent, not large corporations. Given the studios' near universal designation of a sole provider in their contracts, the studios' size and influence on the Los Angeles economy, the realities of arbitration and private judging as a for-profit business and anecdotal stories of arbitrators favoring the repeat player studios over talent, the talent community is increasingly concerned about the danger of "repeat player/provider bias" in major studio versus talent arbitrations. The article examines the historical trends and the reasons for them, the lack of transparency and risk of repeat player/provider bias in talent versus studio arbitrations, the legal possibilities in challenging such a mandatory arbitration provision, the potential impact of the California consumer arbitration disclosure statute and steps that can and should be made by the arbitration providers to alleviate the perception, if not the reality, of repeat player/provider bias in this arena.