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8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **THE NORTHERN DISTRICT OF CALIFORNIA**  
11 **OAKLAND DIVISION**

12 MUHAMMAD ALI ENTERPRISES LLC,

13 Plaintiff,

14 v.

15 FOX BROADCASTING COMPANY,

16 Defendant.

Case No. **4:17-CV-06949-DMR**

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION FOR JUDGMENT ON  
THE PLEADINGS**

Hon. Donna M. Ryu  
Hearing Date: March 22, 2018  
Time: 11:00 am  
Courtroom: 4

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**TO PLAINTIFF MUHAMMAD ALI ENTERPRISES, INC:**

PLEASE TAKE NOTICE that on March 22, 2018 at 11:00 am, or as soon thereafter as counsel may be heard in Courtroom 4 of the Honorable Donna M. Ryu, located at 1301 Clay Street, Oakland, CA 94612, Defendant will and hereby does move this Court, pursuant to Federal Rule Civil Procedure 12(c), for an order granting judgment for Defendant on the pleadings. This Motion is supported by the following memorandum of points and authorities and the Request for Judicial Notice, with Exhibits A-K attached, filed concurrently herewith.

**STATEMENT OF ISSUES TO BE DECIDED**

1. Whether Count I fails to state a claim under the Lanham Act because the Complaint fails to plausibly allege that viewers would be confused that Plaintiff endorsed "Fox's services."
2. Whether Count I is also barred by the First Amendment.
3. Whether Count II must be dismissed, for the same reasons summarized in the Notice of Defendant's anti-SLAPP motion. See. Dkt. No. 50 at 1-2.

**MEMORANDUM OF POINTS AND AUTHORITIES**

The claims in this case violate the core public policies of Illinois, California, and the First Amendment. This lawsuit arises out of Fox's broadcast of the 2017 Super Bowl, one of the most significant events in contemporary American culture. Because the Super Bowl has become a rare occasion when most Americans, be they football fans or not, gather together each year for a shared cultural experience, television coverage of the event last most of the day and includes numerous segments that touch on a wide variety of cultural, political, historical, and sports-related topics.

One of the segments Fox broadcast in its coverage of the Super Bowl in 2017 paid tribute to Muhammad Ali, who passed away during the previous year. Regarded by many as one of the greatest champions ever, the segment highlighted his accomplishments over more than three decades as an athlete, activist and human being. It compared Ali's pursuit of greatness to NFL athletes who throughout the Super Bowl's history have also achieved, or now aspire to achieve, lasting fame by excelling in what is widely regarded as the ultimate championship game.

MAE, however, contends that it had the right to control everything that Fox could say or show about Muhammad Ali in the segment. Moreover, if MAE's view of the law was correct, the

1 same result would follow for the dozens of other people whose “identities” were shown in order to  
 2 survey the historical events presented in the segment – ranging from other champion boxers Ali  
 3 fought, to people involved in his protest against military induction, to legendary football figures  
 4 like Vince Lombardi, and dozens of others. Put another way, the premise of MAE’s lawsuit  
 5 necessarily is that Fox may not say anything about anyone in this segment unless that person (or  
 6 their heirs or assignees) individually approves of the message Fox wants to use to provide some  
 7 historical context for the Super Bowl, and Fox must also pay each of them for that privilege.  
 8 However, the law does not permit public figures to censor and control what broadcasters, or  
 9 anyone else, may say about them in order to cover an important event like the Super Bowl. As a  
 10 result, Fox is entitled to judgment on the pleadings, for multiple reasons.

11 First, the law of Illinois, which is what the Complaint invokes, expressly bars claims like  
 12 this one, which challenge sports broadcasts and programming related to public affairs in particular,  
 13 or television programs in general. California law, which would apply in the event of any conflict,  
 14 does the same. And while MAE’s theories so clearly violate state-law policies protecting free  
 15 speech that there is no need to reach any constitutional issues, the segment is also protected by the  
 16 First Amendment because it conveys information about matters of public interest. In addition, the  
 17 publicity rights claim is preempted by the federal Copyright Act.

18 Finally, MAE’s Lanham Act claim must be dismissed because there is no plausible basis to  
 19 contend that consumers would likely be confused that Ali or MAE endorsed “Fox’s services.”  
 20 And, even if that were not so, the segment is protected by the First Amendment under well-  
 21 established precedent barring the use of the Lanham Act to challenge expressive speech.

22 This motion seeks judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on all  
 23 counts. Because Fox maintains that the Complaint is also subject to California’s anti-SLAPP law,  
 24 it is also filing a special motion to strike Count II of the Complaint, the state-law right of publicity  
 25 claim, along with this Motion. However, if the Court were to conclude that California’s anti-  
 26 SLAPP law does not apply to this case, in the alternative Fox respectfully requests that it grant this  
 27 motion as to Count II as well, and dismiss it on the pleadings. Finally, because Count I asserts a  
 28 federal claim, it is not subject to the anti-SLAPP law and so only this motion addresses that claim.

## I. STATEMENT OF FACTS AND ALLEGATIONS

### A. Fox's Super Bowl Broadcast

On February 5, 2017, Fox broadcast more than a dozen hours of coverage of and about the Super Bowl ("Super Bowl LI"). Its coverage included multiple pre-game programs, the game itself, and post-game coverage. (Compl. ¶ 18; Exhibit A to Answer (Dkt. 21) ("Exh. A").). The segment at issue, entitled "The Greatest" ("The Greatest segment") was the opening segment of the fourth of five pre-game shows that Fox broadcast before the kickoff of the game itself. (Exh. A at 2:43:40-2:45:14.)<sup>1</sup> It aired many hours before the game began.

The segment begins by introducing its theme: what it means to achieve "greatness." The narrator says that "greatness isn't stumbled upon, it's approached, pursued," and invites the audience to "walk with me, I can show you what it means to be the greatest." The first portion of the segment then covers how Muhammad Ali, who passed away in 2016, became "The Greatest." It chronologically portrays, through a combination of dramatic re-enactment and archival news footage, five key points in Ali's life between 1964 and 1996. At each point, the narrator explains how each moment exemplifies a different way in which Ali achieved "greatness," be it as an athlete, a political activist, or a human being. Along the way, the segment also depicts the names, likenesses, images, and sometimes voices of others who were involved in each moment of history.

The first moment in Ali's (then as Cassius Clay) career the segment highlights is his upset victory in his 1964 title bout with Sonny Liston (Compl. ¶ 9). The narrator describes that achievement as an example of greatness being "birthed unexpectedly, sending shock waves across the world," while footage of the fight and Ali's post-bout interviews with journalists are depicted:<sup>2</sup>

<sup>1</sup> On a motion for judgment on the pleadings, a court may consider materials whose contents are referenced in, but not attached to, the complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Here, the Complaint references both the segment involving Ali and the rest of "Fox's broadcast of the 2017 Super Bowl," which the segment allegedly promoted. (Complaint ¶¶ 3, 19.) Fox attached as Exhibit A to its Answer (Dkt. No. 21) a disc containing all elements of its 2017 Super Bowl broadcast, which is therefore properly considered on this motion. *Knievel*, 393 F.3d at 1076 (district court properly considered a CD-ROM of all aspects of Defendants' website within which a single allegedly defamatory photo and caption appeared).

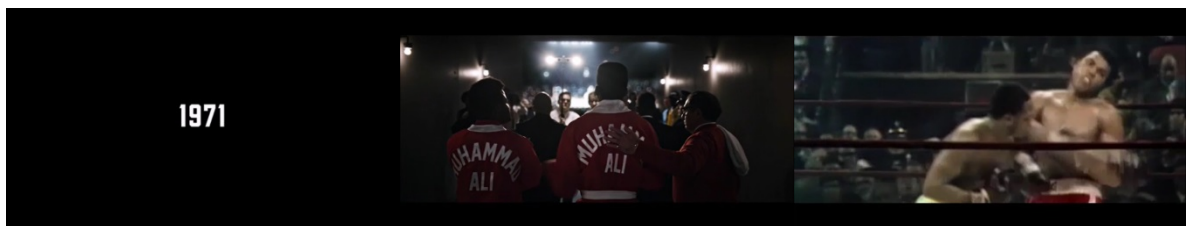
<sup>2</sup> The still pictures in this memorandum are screenshots taken from within The segment in Exhibit A, and are used to illustrate the various elements of the video segment.



The segment then turns to Ali's refusal to be inducted in the United States army in 1967 (Compl. ¶ 10), which it describes as an example of how "greatness is polarizing, but it is standing up for what you believe, no matter the cost." The segment depicts that controversy by showing contemporary news footage, including the army spokesperson who announced that "Muhammad Ali has just refused to be inducted in the United States armed forces":



Next, the segment moves to Ali's 1971 title loss to Joe Frazier. The narrator describes that setback as an example of "greatness being not afraid to fail, and showing that like the rest of us, you're human.":

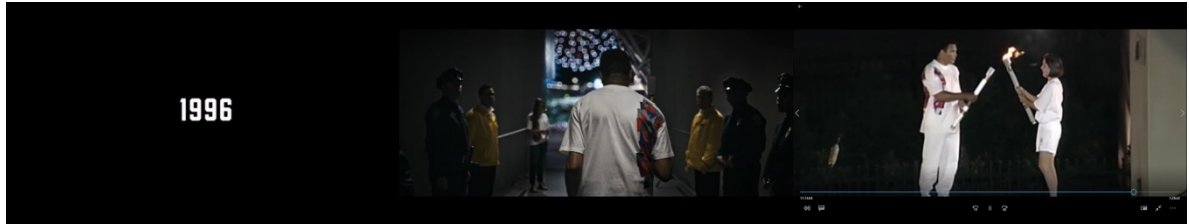


Ali's 1974 comeback to regain the heavyweight title by defeating George Foreman follows (Compl. ¶ 11), described as an example of "triumph in the face of unprecedented doubt.":

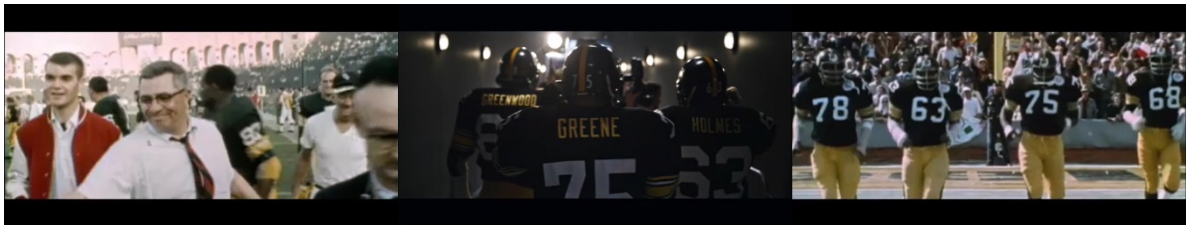


The first portion of the segment concludes with Ali's lighting the Olympic torch in 1996,

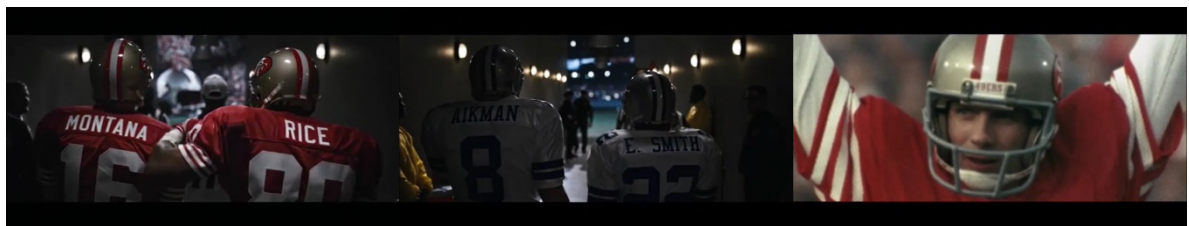
despite visibly suffering physically. The narrator salutes that very different form of achievement as an example of greatness persevering to “light[] the world on fire one last time.”:



The next portion of the segment relates Ali’s pursuit of greatness to the experience of legendary athletes from previous Super Bowls, who like Ali seized the opportunity to embrace an appointment with destiny on the largest stage. The narrator explains that “in the Super Bowl, many have marched towards this same confrontation with greatness.” Through the same technique of re-enactment and archival footage, the segment goes back again to the 1960s to survey, in chronological order, many of the most famous Super Bowl legends. It begins with coach Vince Lombardi and several of his Green Bay Packers players from the 1960s, then moves to members of the 1970s Pittsburgh Steelers like Mean Joe Greene:

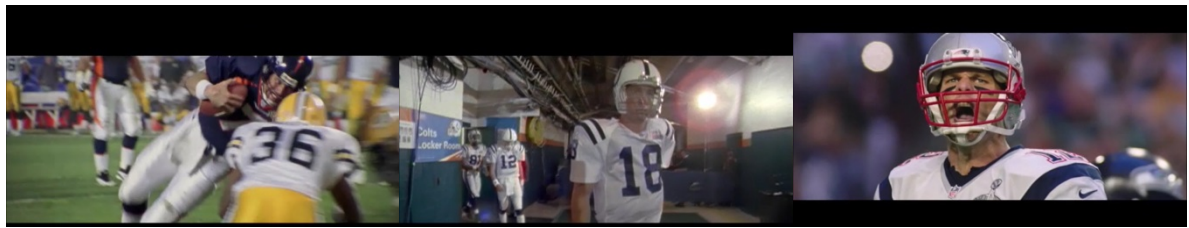


The narrator comments that “in the game, in those moments, those who dare to march into the unknown may emerge as something new, something singular, greatness can become the greatest.” More historical footage of Super Bowl legends is shown, including Joe Montana and Jerry Rice from the 1980s San Francisco 49ers and stars from the 1990s Dallas Cowboys:



and then other more recent Super Bowl champions including John Elway, Peyton Manning and finally Tom Brady, who played in Super Bowl LI:



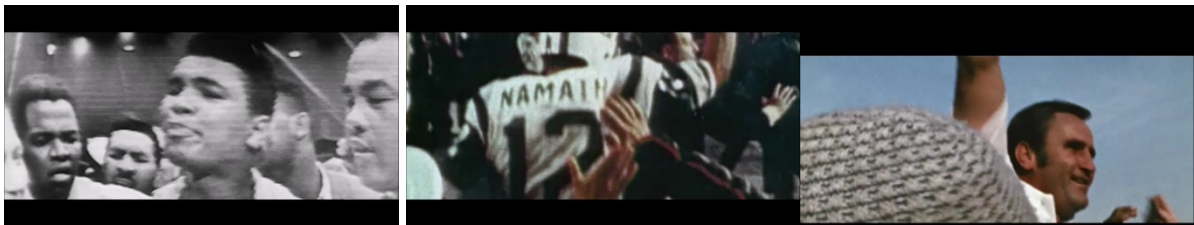


The segment concludes by alternating between footage of Ali and NFL athletes, as the narrator says “walk with me to that light at the end of the tunnel, fearlessly, it’s the only way to prove you are worthy of being called the greatest,” and ends with the words “Super Bowl LI.”



(*Id.* at 2:45:10.) The pre-game show then switched to commentator Curt Menefee, who reinforced the theme of the segment by introducing the audience to “[t]he South’s largest city, Houston, Texas, is home to America’s grandest sporting event, Super Bowl 51. And the New England Patriots meet the Atlanta Falcons for the right to be called, the greatest.” (*Id.* at 2:45:22-35.)

A slightly longer version of The Greatest segment was also telecast on Fox Sports 1, a cable television network, at the beginning of its post-game coverage, more than half an hour after the game ended. (Exhibit A at 11:11:44-11:14:23.)<sup>3</sup> The longer segment included more archival footage of Ali, his contemporaries, and other NFL athletes like Joe Namath from the 1969 New York Jets and Don Shula, the coach of the undefeated Miami Dolphins in the early 1970s:



The longer segment concluded with a final tribute to Ali with the same kind of graphic marking someone’s death often used in television obituaries:

<sup>3</sup> Fox Sports 1 is not operated by Defendant Fox Broadcasting Company; rather it is operated by another corporate affiliate. For purposes of this motion only, however, that makes no difference because either version of the video would require judgment on the pleadings, as a matter of law.



(*Id.* at 11:14:20.) The announcer then welcomed the audience to more post-game coverage of “the greatest comeback in Super Bowl history.” (*Id.* at 11:14:33.)

#### **B. Other Video Segments That Provided Historical Context to the Super Bowl**

The Greatest segment was one of dozens of video segments Fox presented throughout its Super Bowl broadcast that touched on a variety of themes related to the game. Some of them, like The Greatest segment, tried to put Super Bowl LI in historical or cultural context by featuring famous athletes and other public figures, both living and deceased. For example:

- Another segment paid tribute to another American icon who died in 2016, John Glenn. The segment highlighted Glenn’s accomplishments as an astronaut and his work preserving an NFL team in Cleveland as a U.S. Senator. The segment also ended with a similar obituary graphic. (Exhibit A at 3:59:49-4:01:14.):



- Four minutes after The Greatest segment, Fox broadcast a largely animated segment profiling “memorable moments” and the greatest athletes in the history of football in Houston, depicting the names and animated likenesses of athletes such as a star college player named Kenneth Hall (1950s), Warren McVey, the first African-American to play college football in Texas, and even Dr. Phil McGraw, who played in the 1960s. (*Id.* at 2:49:33-2:51:45.):



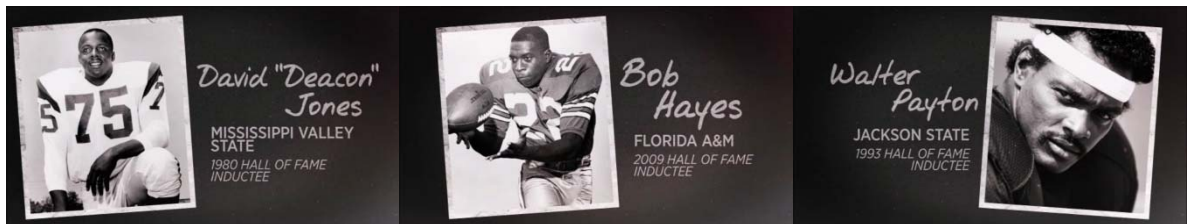
- Another addressed former NFL quarterback Colin Kaepernick’s decision to kneel for the national anthem. The segment compared that controversy to those sparked by actions taken by African-American activists in the past, including Ali, Bill Russell, Jim Brown, Jackie Robinson and Paul Robeson. (*Id.* at 4:24:24-4:27:58.):



- Revisiting the theme of greatness, another segment compared Patriots coach Bill Belichick with the late Vince Lombardi, posing the question: “[d]oes that make Bill Belichick the best ever, better than Vince Lombardi?” (*Id.* at 5:33:25-5:34:39.):



- On the field itself, tribute was paid to members of the NFL Hall of Fame who attended historically African-American universities, noting that many faced racial barriers. The ceremony began with Fox displaying commemorative pictures paying tribute to those athletes who are deceased, like Walter Payton and Bob Hayes to note just a few examples. (*Id.* at 6:28:56-6:31:26.):



### C. The Emmy Awards

Every year the National Academy of Television Arts & Sciences (“NATAS”) presents the Emmy Awards for outstanding television programs, including its Sports Emmy Awards.<sup>4</sup> The Greatest segment won two Emmys in 2017. One was the award for the “Outstanding Opening/Tease.” That is one of four awards presented for what the NATAS classifies as sports “Features.” The other “Features” awards are for Outstanding Sports Journalism, Outstanding Long Feature, and Outstanding Short Feature. RJN Ex. B at 35-36. NATAS rules specify that advertisements are ineligible to qualify for any of those awards. *Id.* at 35, 41. The Greatest segment also won another Emmy award for “Outstanding Production Design/Art Direction,”

<sup>4</sup> The existence of the Emmy Awards and the published criteria the NATAS uses to award them are properly subject to judicial notice. See Request for Judicial Notice (“RJN”) Exs. B, C. Nevertheless, this information is provided for background purposes only and is not essential to a determination of this motion.



which is one of the awards in the “Craft Achievement” category. The NATAS rules also specify that “[m]aterial from sports promotions are not eligible in Craft categories.” *Id.* at 41.<sup>5</sup>

### **D. The Complaint**

This case was originally filed in the United States District Court for the Northern District of Illinois, and transferred to this Court by an agreed order. (Dkt. No. 27.) The Complaint alleges two causes of action. Count I alleges a claim for violation of Section 43(a) of the Lanham Act by way of a theory of false endorsement, on the grounds that Fox’s “use of Ali’s identity” was a “false or misleading representation of fact that falsely implies Ali’s or MAE’s endorsement of Fox’s services.” (Compl. ¶ 31.) Though pled as a claim for “false endorsement,” Count I alleges claims under both the false endorsement prong of Section 43(a) (15 U.S.C. § 1125(a)(1)(A)) and the false advertising prong of the same statute (15 U.S.C. § 1125(a)(1)(B)). Count II alleges a claim for violation of the Illinois Right of Publicity Act, 765 ILCS 1765/1-60 (the “IRPA”), based on the allegedly “promotional video.” (Compl. ¶ 37.) Since the argument with respect to Count II is common to both this motion and the anti-SLAPP motion, it is addressed first below.

## **II. ARGUMENT**

### **A. Mae’s Right of Publicity Claim Must be Dismissed**

Count II of the Complaint pleads a claim pursuant to the Illinois Right of Publicity Act, even though Illinois has no connection to this case. Nonetheless, Count II may properly be dismissed under Illinois law because there is no material conflict between Illinois and California law, as both require dismissal. However, in the event that this Court were to find a conflict, then it should apply California law and dismiss the claim on that basis for the reasons discussed in the anti-SLAPP motion, which are incorporated herein by reference.<sup>6</sup>

<sup>5</sup> NATAS awards a separate Emmy for advertisements for sports programs, called “Outstanding Promotional Announcement.” RJN Ex. B at 50.

<sup>6</sup> “Rule 12(c) is ‘functionally identical’ to Rule 12(b)(6) and . . . ‘the same standard of review’ applies to motions brought under either rule.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n.5 (9th Cir. 2011). To survive a motion to dismiss, a plaintiff must allege “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court may consider the pleadings, matters incorporated by reference in the complaint, and matters properly subject to judicial notice. *In re NVIDIA Corp. Secs. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014).

1           **1. The Illinois Statute the Complaint Invokes Expressly Bars Count II**

2           The Illinois Right of Publicity Act protects “[t]he right to control and to choose whether  
3 and how to use an individual’s identity for commercial purposes.” 765 ILCS 1765/10. If a  
4 publication is subject to the statute, then it gives an individual absolute “control” over what the  
5 publisher may communicate about that person, if anything at all. Since the prospect raises obvious  
6 free speech concerns, Illinois courts emphasize that “[r]ecognizing the serious First Amendment  
7 implications inherent in regulating artistic and creative expression, the [Illinois Right of Publicity]  
8 Act specifically excludes such endeavors from its reach.” *Collier v. Murphy*, No. 02 C 2121, 2003  
9 WL 1606637, at \*2 (N.D. Ill. Mar. 26, 2003). Moreover, Illinois “[c]ourts construe the IRPA’s  
10 non-commercial use exemption to avoid First Amendment infirmity.” *Zglobicki v. Travel*  
11 *Channel, LLC*, No. 11 C 6346, 2012 WL 725570, at \*2 (N.D. Ill. Feb. 2, 2012).

12           As a result, Illinois courts routinely dismiss, on the pleadings, claims that artistic and  
13 creative works such as sports broadcasts and other television programs violate the IRPA, ranging  
14 from boxing matches to reality television programs. *See, e.g., Zglobicki*, 2012 WL 725570, at \*2  
15 (dismissing claim based on a reality television show); *Cummings v. ESPN Classic, Inc.*, No. 08-  
16 cv-0718, 2009 WL 650559, at \*2 (S.D. Ill. Mar. 9, 2009) (dismissing claim based on broadcast of  
17 a boxing match).<sup>7</sup> The reason dismissal is so common is that all a court need do is review the  
18 content at issue, and then determine whether the provisions of the IRPA exempt it. *See, e.g.,*  
19 *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) (“[t]he district court viewed the recording  
20 and weighed its content against the complaint’s allegations” to dismiss the claim under  
21 Wisconsin’s similar publicity rights law). Here, any one of three provisions of the statute  
22 independently bar MAE’s claim.

23  
24  
25 <sup>7</sup>*See also Thompson v. Getty Images (US), Inc.*, No. 13 C 1063, 2013 WL 3321612, at \*2-3 (N.D.  
26 Ill. July 1, 2013) (dismissing claim based on offering for sale of a photograph); *Vrdolyak v. Avvo,*  
27 *Inc.*, 206 F. Supp. 3d 1384 (N.D. Ill. 2016) (dismissing claim for use of plaintiff’s name in online  
28 lawyer directory as use was not commercial); *Collier v. Murphy*, No. 02 C 2121, 2003 WL  
1606637, at \*3 (N.D. Ill., Mar. 26, 2003) (television sitcom is protected as a matter of law);  
*Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 764 (2002) (dismissing claim based on use of  
plaintiff’s image in a commercial for a news report). *See also Best v. Berard*, 776 F. Supp. 2d  
752, 756 (N.D. Ill. 2012) (entertainment program featuring real-life traffic stops is not actionable).

a. **The Greatest Segment is a “News, Public Affairs, or Sports Broadcast”**

First, The Greatest segment is protected under 765 ILCS 1075-35(b)(2) as a “news, public affairs, or sports broadcast or account,” which are illustrative (but not exclusive) examples the statute provides of “non-commercial purposes.” This statutory exception protects both sports broadcasting, *Cummings*, 2009 WL 650559, at \*2 (protecting a boxing match), as well as the broadcast of “public affairs,” a term that is read broadly to cover all forms of entertainment – from reality television, *Best*, 776 F. Supp. 2d at 756-59, to situation comedies, *Collier*, 2003 WL 1606637, to a television show about a Chicago restaurant, *Zglobicki*, 2012 WL 725570, at \*2.

Certainly, “there can be little doubt that Ali is a figure of legitimate public concern and that [a] television biography [about him] is a subject of public interest.” *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996). Similarly, “there can be no question that . . . accounts of [past] Super Bowls . . . constituted publication of matters in the public interest.” *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 794 (1995).<sup>8</sup> The segment at issue here – part tribute, part history, and part editorial commentary on what makes an athlete truly “great” – is obviously protected by 765 ILCS 1075-35(b)(2). For the same reasons, courts in other jurisdictions have regularly dismissed right of publicity claims arising out of sports-related expressive works – including, ironically, claims by former Super Bowl athletes like Joe Montana and Joe Namath, whose images were also in The Greatest segment. *Montana*, 34 Cal. App. 4th at 794 (use of Joe Montana’s photograph from the Super Bowl on a poster to promote a newspapers was not actionable); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (1975), *aff’d*, 386 N.Y.S.2d 397 (1976) (use of Namath’s photograph from Super Bowl game to solicit subscriptions to a sports magazine not actionable).<sup>9</sup>

<sup>8</sup> See also *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154 (1967) (plurality opinion) (football coach a public figure in view of popular interest in the sport); *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997) (“[I]t is this court’s opinion that football, and specifically Notre Dame football[,] is a matter of public interest.”); *Chuy v. Phila. Eagles Football Club*, 431 F. Supp. 254, 267 (E.D. Pa. 1977) (“[I]nterest in professional football must be deemed an important incident among many incidents, of a society founded upon a high regard for free expression.”), *aff’d*, 595 F.2d 1265 (3d Cir. 1979) (en banc).

<sup>9</sup> See also *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (fantasy baseball games that used photos of players held to be protected speech, recognizing “the public value of information about the game of baseball and its players”);

**b. The IRPA Also Broadly Exempts Television Programs**

*Second*, the IRPA also exempts any use of an identity “to portray . . . that individual in . . . television,” as long as the portrayal “does not constitute in and of itself a commercial advertisement for a product, merchandise, goods, or services.” 765 ILCS 1075-35(b)(1). The Greatest segment is obviously not “in and of itself a commercial advertisement for a product,” or for anything else. Rather, the numerous commercials for beer, shoes, Walmart, Pizza Hut, etc. that regularly interrupt Fox’s coverage are “in and of” themselves commercial advertisements.

The Complaint alleges that the segment is a “promotional video for [Fox’s] broadcast of Super Bowl LI.” (Compl. ¶ 19.) However, the statutory test is not whether content might have some “promotional” value for the media entity that publishes or airs it. Most media content tries to attract readers and viewers, and if that were the test the statutory exceptions would be largely meaningless. As an Illinois court held in protecting the use of an individual’s identity in a television sitcom, “The Illinois Right of Publicity Act clearly and unambiguously exempts artistic works, including television productions . . . from its coverage, thus avoiding the serious First Amendment problems[.]” *Collier*, 2003 WL 1606637, at \*3. This is true although “all, or practically all, plays, books, musical works, films, radio productions, or television productions are commercial.” *Id.* at \*2.

Here, all of the many hours of pre-game coverage could be alleged to “promote” the Super

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*ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) (sketch entitled “Masters of Augusta” showing Tiger Woods surrounded by famous golfers was protected as “A piece of art that portrays a historic sporting event communicates and celebrates the value our culture attaches to such events”); *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815 (M.D. Tenn.), *aff’d*, 668 Fed. App’x. 155 (6th Cir. 2016) (dismissing claim based on broadcast of college football and basketball games); *Daniels v. FanDuel, Inc.*, No. 1:16-cv-01230, 2017 WL 4340329, at \*3 (S.D. Ind. Sept. 29, 2017) (dismissing claim based on player images used on fantasy gambling sites); *Dryer v. Nat’l Football League*, 55 F. Supp. 3d 1181 (D. Minn. 2014), *aff’d*, 814 F.3d 948 (8th Cir. 2016) (NFL Films documentaries protected from right of publicity claim); *Cardtoons, L.C. v. MLBPA*, 95 F.3d 959 (10th Cir. 1996) (trading cards commenting on baseball players not actionable); *Nat’l Football League v. Alley, Inc.*, 624 F. Supp. 6 (S.D. Fla. 1983) (broadcasts of NFL games not actionable); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Cal. App. 1st Dist. 2001) (clips of baseball highlights on Major League Baseball’s website protected as “[t]he public has an enduring fascination in the records set by former players and in memorable moments from previous games”); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 795 (Cal. App. 2d Dist. 1993) (documentary about a famous surfer is protected as related to “public affairs”).

Bowl, which was in turn broadcast by Fox, because it may enhance people's interest in watching the game. The same applies to most media coverage of public events. For example, when a television network airs coverage of a campaign debate or presidential speech, the pre-event programming likewise "promotes" interest in watching the event. Even the opening sketch of a program like *Saturday Night Live* helps promote interest in the rest of the program ("live, from New York, it's Saturday Night"). See e.g., *Frank v. Nat'l Broad. Co.*, 506 N.Y.S.2d 869, 872 (N.Y. App. Div. 2d Dept. 1986) (dismissing claim for misappropriation of name and likeness because sketches on Saturday Night Live are not "trade" or "advertising" uses). See also *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003) (the opening announcements on a variety show, promising that "tonight, for the first time on television," certain material would be aired, was not actionable under the Lanham Act because the opening number "was part of the show itself," not an advertisement for the rest of it).

Indeed, the Ninth Circuit has repeatedly recognized that many aspects of expressive works, including their titles, may partly serve a promotional function. *Twentieth Century Fox Television v. Empire Distrib., Inc.*, No. 16-55577, 2017 WL 5490820, at \*2 (9th Cir. Nov. 16, 2017). But that does not make them actionable. *Id.* Just as campaign debate pre-coverage and *SNL* opening sketches are not "in and of themselves commercial advertisements" for television networks, neither The Greatest segment, nor any of the other feature segments Fox aired that day in connection with the Super Bowl, are "in and of [themselves] commercial advertisements" for "Fox's broadcast of Super Bowl LI." See also *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) ("A printed article meant to draw attention to the for-profit magazine in which it appears, however, does not fall outside of the protection of the First Amendment because it may help to sell copies."); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1197-98 (9th Cir. 1989) (although defendant may have published feature solely or primarily to increase circulation and therefore profits, article is not thereby purely commercial or for purposes of advertising). If the law were otherwise, then John Glenn, Jackie Robinson, Paul Robeson, and each of the hundreds of other people whose "identities" were discussed or displayed in the course of Fox's Super Bowl pre-game or post-game coverage would all have the right to control how Fox may

cover the Super Bowl. But “[t]his is not a reasonable interpretation of the [IRPA], as it would extend liability too far and chill speech protected by the First Amendment.” *Thompson v. Getty Images (US), Inc.*, No. 13 C 1063, 2013 WL 3321612, at \*3 (N.D. Ill. July 1, 2013).

Indeed, other courts in Illinois, California and around the country have also rejected “promotion” theories like MAE’s, precisely because MAE’s logic would swallow an enormous amount of protected speech. For example, in *Gionfriddo v. Major League Baseball*, baseball players argued that historical “video depictions of their play” on the league’s website violated their publicity rights because they “promote the product of baseball” and “help baseball owners make a profit.” 114 Cal. Rptr. 2d at 311, 315. Even assuming that was so, the court deemed it irrelevant because there was an obvious difference between game highlights and actual commercial advertisements for products like automobiles. *Id.* at 316.

Similarly, in *Dryer v. Nat’l Football League*, 55 F. Supp. 3d 1181 (D. Minn. 2014), *aff’d*, 814 F.3d 938 (8th Cir. 2016), NFL players argued that NFL Films’ documentaries violated their publicity and Lanham Act rights because they “serve to promote the NFL and enhance the NFL’s brand.” 55 F. Supp. 3d at 1194. The Court held even assuming that was true, that did not convert documentaries into commercial advertisements. *Id.* at 1197-98. As *Dryer* noted – and as both common sense and the rules of NATAS reflect – there is an obvious difference between the printed advertisements entities like grocery stores and brewers of beer take out in a magazine like *Sports Illustrated*, see *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014) and *Newcombe v. Adolph Coors Co.*, 157 F.3d 686 (9th Cir. 1998), or the car ads that a company like General Motors airs during the broadcast of sports games, see *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996), and the sports features concerning those athletes written by *Sports Illustrated* journalists or created by a television network itself. *Dryer*, 55 F. Supp. 3d at 1191-92. See also *Hoffman*, 255 F.3d at 1185-86 (“[T]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties (citation omitted), and common sense tells us this is not a simple advertisement.”).

### c. The IRPA Also Exempts Program Advertisements

Finally, even if The Greatest segment could be somehow deemed an advertisement, which



it plainly is not, it would still be protected under yet another exemption, ILCS 1075-35(b)(4). That is because the “Fox service” it allegedly advertises is the Super Bowl broadcast, which is itself a protected sports broadcast under (b)(2) above. As one Illinois court explained, (“[S]ubsection (4) of § 35 makes clear the legislature’s intention of excluding from the exemption even commercials or promotional materials advertising the artistic endeavors identified in subsection (1).” *Collier*, 2003 WL 1606637, at \*3. *See also Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 764 (2002) (use of plaintiff’s image in a commercial for a news report is protected as the “promotional announcement” “was broadcast, not for commercial purposes, but for the noncommercial purpose of promoting ... news reports on WBBM channel 2”). Thus, the IRPA flatly bars MAE’s claim under Count II on the basis of any or all of three statutory exemptions.

## 2. The First Amendment Also Bars Plaintiff’s Right of Publicity Claim

In *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016), the Ninth Circuit held that the First Amendment barred a right of publicity claim asserted by the subject of *The Hurt Locker*, a movie docudrama about an American soldier in Iraq. That holding applies with even greater force to The Greatest segment, which combines elements of both docudramas (scenes with actors) and documentaries (newsreel footage and editorial narration) to convey its message.

*Sarver* emphasized that the starting point for any First Amendment analysis must be the recognition that the right of publicity “clearly restricts speech based upon its content.” *Sarver*, 813 F.3d at 903. Moreover, “[c]ontent-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.*, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). *Sarver* then summarized the circumstances in which the Circuit has found that a celebrity’s publicity rights may outweigh First Amendment interests. Those are where the defendant (1) has broadcast a celebrity’s “entire act,” *see Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); or (2) used the celebrity’s image on merchandise, such as a greeting card, *e.g., Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010); or (3) merely simulated the celebrity’s likeness and performance in a video game, *e.g., In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013), or

(4) used a celebrity's image in commercials advertisements for products like beer and VCRs, *e.g.*, *Newcombe v. Adolph Coors Co.*, 157 F.3d 686 (9th Cir. 1998); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

By contrast, the Court found that a docudrama like *The Hurt Locker* did not resemble any of those categories. Rather, "*The Hurt Locker* is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies, or plays." *Sarver*, 813 F.3d at 905. *See also Hoffman.*, 255 F.3d 1180 (First Amendment bars right of publicity and Lanham Act claims by Dustin Hoffman based on a magazine article, even though a Ralph Lauren dress was photo-shopped onto his image).

The same rationale precludes MAE's right of publicity claim as well, even if somehow state law were to recognize such a claim. Like *The Hurt Locker* and the magazine article in *Hoffman*, The Greatest segment is plainly not a product advertisement that is "pure commercial speech" which "does no more than propose a commercial transaction." *Hoffman*, 255 F.3d at 1185-86; *see also Sarver*, 813 F.3d at 905. As a result, it is "entitled to full First Amendment protection." *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more than propose a commercial transaction – then it is entitled to full First Amendment protection."). Likewise, the segment does not replicate Ali's "entire act," simulate it in a video game, nor is the segment an item of merchandise.

Rather, the segment is quintessentially an example of speech that uses "the stories of real individuals" to creatively depict the themes of personal and athletic accomplishment that are at the heart of championship games. It is therefore constitutionally protected. Indeed, courts in this Circuit have long held that the First Amendment protects "the publication of matters in the public interest," and thus "permits film producers to depict matters in the public arena without fear of liability." *Heller v. NBCUniversal, Inc.*, No. CV-15-09631, 2016 WL 6573985, at \*5-6 (C.D. Cal. Mar. 30, 2016) (granting motion to dismiss misappropriation claim arising out of docudrama). *See also Monge v. Maya Magazines, Inc.*, No. CV09-05077, 2009 WL 10656424, at \*2 (C.D. Cal. Oct. 26, 2009) (granting motion to dismiss claim based on a wedding photo of celebrities in a



magazine); *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (dismissing claims arising out of a reality television series because “a defense under the First Amendment is provided where the publication or dissemination of matters is ‘in the public interest’”). Multiple courts around the country have likewise held that sports and entertainment programming relating to matters of public interest is protected from right of publicity claims by the First Amendment.<sup>10</sup>

### 3. MAE’S Publicity Rights Claim is Also Preempted By Federal Copyright Law

Finally, because the segment is neither an advertisement nor an item of merchandise, Count II is also preempted by federal copyright law. The Copyright Act preempts state law claims that (i) fall within the general subject matter of copyright; and (ii) involve state law rights that are “equivalent” to any of the exclusive rights within the scope of federal copyright protection. *See* 17 U.S.C. § 301; *Maloney v. T3Media, Inc.*, 853 F.3d 1004 (9th Cir. 2017).

In *Maloney*, the Ninth Circuit recently clarified the scope of preemption as it applies to the right of publicity. The plaintiffs in *Maloney* were a putative class of athletes who alleged that their publicity rights were violated by the defendant photo licensing agency, which offered for sale to the public digital copies of photographs of the athletes. The Court affirmed the granting of the defendant’s anti-SLAPP motion, and its reasoning requires dismissal of MAE’s claim as well.

First, *Maloney* held that when the plaintiff’s claim is targeted entirely at the defendant’s copyrighted work – whether that work is a “film,” a “sound recording,” a “photograph,” or all other “different types of copyrighted works” – then the publicity claim falls within the subject matter of copyright and so the first prong of the preemption test is satisfied. *Id.* at 1011-18. Here, MAE is clearly seeking to challenge “control of the artistic work itself” – indeed, the Complaint

<sup>10</sup>*See, e.g., C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d at 824 (First Amendment protects fantasy baseball games); *Cardtoons, L.C.*, 95 F.3d at 972 (First Amendment protects trading cards commenting on baseball players); *Dryer*, 55 F. Supp. 3d at 1195 (“Plaintiffs’ publicity rights and the constitutional protection due the uses involved here [in NFL Films] tips decidedly in favor of the NFL”); *CBS Interactive Inc. v. Nat’l Football League Players Ass’n, Inc.*, 259 F.R.D. 398, 417-19 (D. Minn. 2009) (use of players’ identities in fantasy football games protected); *Best*, 776 F. Supp. 2d at 756 (use of plaintiff’s image on reality television show protected by First Amendment); *Nichols v. Moore*, 334 F. Supp. 2d 944, 956 (E.D. Mich. 2004) (a documentary by filmmaker Michael Moore constitutionally protected as it relates to matter of public concern); *Gionfriddo*, 114 Cal. Rptr. 2d at 316 (“significant public interest” in clips of baseball highlights on Major League Baseball’s website); *Dora*, 15 Cal. App. 4th at 546-57 (use of plaintiff’s image in surfing documentary protected as related to public affairs).

demands that the Court enjoin the segment entirely, *see* Compl. at 8. *Maloney*, 853 F.3d at 1011.

*Maloney* specifically addressed photographs that were being sold for the “personal use” of consumers, *id.*, but the Court made clear that its ruling also encompassed activities such as the broadcast of films and television programs to the public. It cited as “persuasive authority” two recent Eighth Circuit decisions finding that right of publicity claims arising out of the television broadcasts of a wrestling match, *see Ray v. ESPN, Inc.*, 783 F.3d 1140 (8th Cir. 2015), and documentaries about NFL football, *see Dryer v. National Football League*, 814 F.3d 938 (8th Cir. 2016) were preempted.<sup>11</sup> *See also Somerson v. McMahon*, 956 F. Supp. 2d 1345, 1355 (N.D. Ga. 2012) (distribution of videos of wrestling matches preempted).

More broadly, *Maloney* made clear that the key test for copyright preemption “is not between categories of copyrightable works.” Rather, it is “how those copyrighted works are used.” 853 F.3d at 1018. The Court held that “a publicity-right claim is not preempted when it targets non-consensual *use* of one’s name or likeness on merchandise or in advertising.” *Id.* at 1011. However, “when a likeness has been captured in a copyrighted artistic visual work,” and the crux of the plaintiff’s claim challenges the mere dissemination of an expressive work to the public – as MAE does here – then the claim is preempted. *Id.*

A recent decision by Judge Seeborg addressing the application of *Maloney* to right of publicity claims by athletes challenging *Madden NFL* video games illustrates why the segment at issue here is preempted. *Davis v. Electronic Arts, Inc.*, Case No. 10-cv-03328-RS, Dkt. No. 317 (N.D. Cal. Dec. 11, 2017); *see* RJN Ex. K. Judge Seeborg held that the athletes’ claims are not preempted, because the avatars in those video games may be constantly moved and altered by the consumers who play the game. Thus, because “game play in the Madden games is dynamic, interactive, variable, and in the hands of the consumer,” Judge Seeborg concluded the athletes’ likenesses are not “fixed in a tangible medium of expression” for purposes of copyright protection. *Id.* at 4. Regardless of whether Judge Seeborg was correct that *Maloney* may be distinguished on

<sup>11</sup>*Maloney* also distinguished the Third Circuit’s decision in *Facenda v. NFL Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008), which held that a purported NFL Films documentary called *The Making of Madden 06* was really just an infomercial for the *Madden NFL* video game. *Id.* at 1016-17. As discussed *infra*, The Greatest segment is neither a simulation video game itself, nor is it an advertisement for either video games or anything else.

that basis, his reasoning reinforces that all the images in The Greatest segment are clearly fixed, and so any right of publicity claim here is preempted under any construction of *Maloney*.

Turning to the second prong of the preemption analysis, here “the rights plaintiff[] assert[s] under state law are equivalent to rights within the general scope of copyright as specified by section 106 of the Copyright Act.” *Maloney*, 853 F.3d at 1019 (citations omitted). MAE’s Complaint, like the one in *Maloney*, does not “identify any use of [Ali’s] likeness[] independent of the display, reproduction, and distribution of the copyrighted material in which they are depicted.” The Greatest segment is a copyrighted, audiovisual work, and the essence of MAE’s claim is that Fox violated Ali’s publicity rights merely by broadcasting it. As a result, Count II is not “qualitatively different from a copyright claim,” and is therefore preempted. *Id.*

Finally, *Maloney* explained that:

We believe that our holding strikes the right balance by permitting athletes to control the use of their names or likenesses on merchandise or in advertising, while permitting photographers, the visual content licensing industry, art print services, the media, and the public, to use these culturally important images for expressive purposes. Plaintiffs’ position, by contrast, would give the subject of every photograph a de facto veto over the artist’s rights under the Copyright Act, and destroy the *exclusivity* of rights that Congress sought to protect by enacting the Copyright Act.

*Id.*

The Court’s reasoning in *Maloney* speaks not just to the issue of copyright preemption, but more broadly to why there is no sensible legal doctrine – be it the laws of Illinois, California, any other state or the First Amendment – that would recognize the legal theories MAE asserts here. That is because if, as MAE alleges, Fox’s “use” of Ali’s “identity” in the segment violates his right of publicity, then MAE would have the “right to control and to choose whether and how” Ali’s identity may be “used.” 765 ILCS 1765/10. Translated into plain English, MAE is claiming the right to absolute control over Fox’s speech, *i.e.*, what it may communicate about Ali in the segment. Thus, under MAE’s alleged construction of the law, MAE could condition its consent to allow Fox to “use” Ali’s name and likeness not just on monetary compensation, but also on MAE’s maintaining editorial “control” over Fox’s message.

The implications of that theory for sports programming would be staggering. For example,

1 the segment shows Joe Frazier defeating Ali in 1971. But it is well known that Ali and Frazier  
 2 detested each other, so MAE could condition its consent on Fox deleting that scene and instead  
 3 communicating something negative about Frazier. But the stranglehold MAE wishes to place on  
 4 Fox's speech, not to mention any other broadcaster of sports features, would not end there.

5 That is because for purposes of the IRPA, it is irrelevant whether Ali was, as MAE alleges,  
 6 the "centerpiece" of the segment. (Compl. ¶ 19.) Rather, the IRPA would extend to any person  
 7 whose "identity" was used "in connection with" the segment, defined broadly by the statute as  
 8 "any attribute of an individual that serves to identify that individual to an ordinary, reasonable  
 9 viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image,  
 10 (v) likeness, or (vi) voice." 765 ILCS/1075/5. Thus, under MAE's view of the law, all of the  
 11 other scores of people whom an "ordinary, reasonable viewer" could identify in the segment could  
 12 exercise the same power over Fox's speech as MAE. For example, John Elway could insist that  
 13 Fox only show highlights of his Super Bowl victory but not his losses, Vince Lombardi's estate  
 14 could demand that Fox proclaim him to be a better coach than Bill Belichick, Tom Brady's rivals  
 15 could demand that he be disparaged for the Deflategate controversy, and so on.

16 This is not to suggest that any of those people would do that, but the point is that MAE's  
 17 legal theory necessarily asserts that every person recognizably depicted or mentioned in The  
 18 Greatest segment has plenary control over what Fox may say – because that is the essence of what  
 19 the right of publicity protects. That would effectively eliminate the free speech rights of sports  
 20 broadcasters to provide informative, thematic pre-game coverage of public events.

21 In addition, if credited, MAE's theories would be extraordinarily disruptive to the viability  
 22 of broadcasting multi-participant sports and other events, for practical reasons as well. That is  
 23 because to comply with the law going forward, the next broadcaster who wants to open its pre-  
 24 game coverage of a Super Bowl, World Series, NBA Championship, or any ordinary game with a  
 25 similar type of historically-grounded segment, would need to first identify and locate each of the  
 26 scores of people whose identities were "used" in the segment – or, if deceased, their heirs – and  
 27 then negotiate the conflicting monetary and message demands of each of them individually. If  
 28 even one person or estate whose image appeared in a particular clip refused to agree to a license,

or just could not be located, then the broadcaster would have to choose between losing that moment in history forever, or risking an expensive lawsuit with likely legal exposure.

The extraordinarily speech-restrictive theories that MAE asks this Court to accept resemble those recently advanced by college athletes who claimed that the broadcasts of the actual football and basketball games in which they compete, and/or promotions for those games, infringed their publicity rights and violated the Lanham Act. The Sixth Circuit affirmed the dismissal of those claims on the pleadings, noting among other reasons the absurdity of the endless numbers of potential claimants the broadcast of a single game would provoke if that was the law – since logically “referees, assistant coaches, and perhaps even spectators [would] have the same rights as putative licensors.” *Marshall v. ESPN, Inc.*, 668 Fed. App’x. 155, 156 (6th Cir. 2016). MAE’s Complaint fares no better, and it should be dismissed as well.

**B. The Complaint Fails to State a Claim for False Endorsement Under the Lanham Act**

MAE’s false endorsement claim under Section 43(a) of the Lanham Act likewise must be dismissed, for either of two reasons. First, it fails to plausibly plead that consumers viewing the segment would likely be confused that “Ali and MAE” endorses “Fox’s services.” (Compl. ¶¶ 27, 29, 31.) Second, even if that were not so, because The Greatest segment is alleged to imply Ali’s endorsement of a larger expressive work (the “Super Bowl broadcast”), the First Amendment imposes a much higher standard for stating a false endorsement claim. *See Twentieth Century Fox Television v. Empire Dist., Inc.*, No. 16-55577, 2017 WL 5490820, at \*2 (9th Cir. Nov. 16, 2017). The segment here does not remotely satisfy that standard.

**1. The Complaint Fails to Plausibly Plead a Likelihood of Confusion**

“[B]ecause the names and likenesses of celebrities are commonly, and properly, used in a wide variety of publications, Lanham Act jurisprudence places great importance on the likelihood of consumer confusion as the ‘determinative issue’ in false endorsement claims.” *Kournikova v. Gen. Media Commc’ns, Inc.*, 278 F. Supp. 2d 1111, 1120 (C.D. Cal. 2003).<sup>12</sup> “The confusion”

<sup>12</sup> This standard applies regardless of whether a claim is styled as one for false endorsement or false advertising, because where – as here – a plaintiff does not allege that the defendant has made a “literally false” statement, plaintiff must also show that the “advertisement has misled, confused, or deceived the consuming public.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir. 1997).

over whether the plaintiff endorsed the defendant’s good or services “must ‘be probable, not simply a possibility.’” *Spearmint Rhino Cos. Worldwide, Inc. v. Chiappa Firearms, Ltd.*, No. CV 11-05682, 2012 WL 8962882, at \*1 (C.D. Cal. Jan. 20, 2012) (citing *Murray v. Cable Nat’l. Broad. Co.*, 86 F.3d 858, 861 (9th Cir. 1996). Courts in the Ninth Circuit routinely dismiss Lanham Act claims where plaintiffs fail to plausibly allege a likelihood of consumer confusion. *See, e.g., id.* (dismissing claim because there is no likelihood of confusion as a matter of law); *Toho Co. v. Sears, Roebuck & Co.*, 645 F.2d 788, 791 (9th Cir. 1981) (Plaintiff “has not alleged facts that would permit a conclusion that consumers are likely to be confused as to source or sponsorship of the” goods); *Murray*, 86 F.3d at 861 (no likelihood of consumer confusion as a matter of law). Moreover, merely reciting the elements of a claim cannot suffice to withstand a motion to dismiss. *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

Count I merely recites the legal conclusion that The Greatest segment “falsely implies Ali’s or MAE’s endorsement of Fox’s services.” (Compl. ¶ 31.) Not only does it fail to plead *any* facts that could support that conclusion, the Court need do no more than review the segment to conclude that theory is not plausible. Muhammad Ali is deceased, so viewers were not plausibly confused about whether he endorsed anything. Otherwise, the segment itself does not even mention MAE or Fox’s “services.”

Rather, the Complaint seems to allege that because Fox broadcast the words “Super Bowl LI” at the end of the segment, consumers would likely be confused that Ali or MAE endorsed “Fox’s services.” Given that all of Fox’s coverage that day repeatedly referred to Super Bowl LI – since the upcoming game was in fact Super Bowl LI – that is not a plausible basis to claim a likelihood of confusion concerning MAE. In fact, the second time the segment appeared it ended with the graphic “Muhammad Ali 1942-2016” – exactly as a segment paying tribute to John Glenn ended. Fox was obviously paying tribute to Ali and Glenn – not the other way around.

As the Sixth Circuit aptly observed in affirming the dismissal on the pleadings of an analogous Lanham Act claim brought by college athletes:

The theory here is that if, say, ESPN shows a banner for “Tostitos” at the bottom of the screen during a football game, then consumers might become confused as to whether all the players on the screen endorse Tostitos. Suffice it to say that ordinary consumers have more sense than the theory itself does.



*Marshall v. ESPN, Inc.*, 668 Fed. App'x. 155, 157 (6th Cir. 2016). *See also* *Dryer*, 814 F.3d at 944-45 (consumers would not likely be confused that footage of players in NFL documentaries implies an endorsement of the league).

## 2. The First Amendment Also Bars MAE's Lanham Act Claim

Even if the Complaint could be construed to plausibly plead a likelihood of confusion, MAE's Lanham Act claim would be barred by the First Amendment. That is because courts have consistently held that "where the defendant has articulated a colorable claim that the use of a celebrity's identity is protected by the First Amendment, the likelihood of confusion test is not appropriate because it fails to adequately consider the interests protected by the First Amendment." *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 926 (6th Cir. 2003); *see also* *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1242 (9th Cir. 2013) (noting that Ninth Circuit "rejected the 'likelihood of confusion' test as 'fail[ing] to account for the full weight of the public's interest in free expression' when expressive works are involved").

MAE's Lanham Act claim alleges that consumers would likely be confused as to whether "Ali or MAE" endorsed Fox's "broadcast" of the Super Bowl. (Compl. ¶¶ 29-32.) To address a claim that a celebrity was included in an expressive work in a manner that implies endorsement of the rest of the work, this Circuit has long adopted the test first articulated by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 998 (2d Cir. 1989). *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002). Under that test, the Lanham Act is inapplicable to expressive works unless the defendant's mark has (1) "no artistic relevance to the underlying work whatsoever," or (2) "explicitly misleads as to the source or the content of the work." *Id.*, quoting *Rogers*, 875 F.2d at 999. Since the test merely requires a court to assess the work(s) at issue, it may be applied on a motion to dismiss. *Brown*, 724 F.3d at 1245 (dismissing football player's Lanham Act claim that video game implied his endorsement); *E.S.S. Entm't 2000, Inc.*, 547 F.3d 1095.<sup>13</sup> The *Rogers* test

<sup>13</sup> *See also* *VIRAG, S.R.L. v. Sony Computer Entm't America LLC*, No. 16-15137, 2017 WL 4712436, at \*1 (9th Cir. Oct. 20, 2017); *Chaquico v. Freiberg*, No. 17-cv-02423, 2017 WL 3453370, at \*5-9 (N.D. Cal. Aug. 11, 2017); *Metrano v. Twentieth Century Fox Film Corp.*, No. CV 08-6314, 2009 WL 10672576, at \*5 (C.D. Cal. July 16, 2009); *Fortres Grand Corp. v. Warner Bros. Entm't Inc.*, 947 F. Supp. 2d 922, 924 (N.D. Ind. 2013), *aff'd*, 763 F.3d 696 (7th Cir. 2014).

clearly requires dismissal of Count I here.

**a. Paying Tribute to Muhammad Ali Had “Artistic Relevance” Both to the Theme of the Segment and to Fox’s Coverage of the Super Bowl**

This case presents a Lanham Act claim that is even farther afield than most, because MAE’s theory is that one expressive work (The Greatest segment) falsely implied the endorsement of another related expressive work – Fox’s broadcast of the Super Bowl. The notion that the pre-game coverage, the game itself, and the post-game coverage are even discrete “works” makes little sense, since they are all part of day-long event coverage. But however its claim may be analyzed, Muhammad Ali’s legacy was plainly “artistically relevant” to Fox’s “broadcast” of the Super Bowl. The threshold inquiry under *Rogers* “is set low: ‘the level of relevance merely must be above zero.’” *Twentieth Century Fox Television*, 2017 WL 5490820, at \*4. Thus, “only the use of a trademark with *no* artistic relevance to the underlying work *whatsoever* does not merit First Amendment protection.” *E.S.S. Entm’t 2000, Inc.*, 547 F.3d at 1100 (citation omitted). For example, *Rogers* held that even though the film at issue had nothing to do with Ginger Rogers and Fred Astaire, the title “Ginger and Fred” still had artistic relevance because the film was about two fictional dancers with those first names. *Rogers*, 875 F.2d at 1001. And in *E.S.S.*, the Court held that the name of a strip club was protected because although it had nothing to do with the video game *Grand Theft Auto*, it helped “mimic the look and feel of actual Los Angeles neighborhoods” in which the game was artistically set. *E.S.S.*, 547 F.3d at 1097.

Here the Complaint itself articulates why the segment has obvious artistic relevance both to the theme of the segment itself, as well as to coverage of the Super Bowl, in that it “uses Ali to define greatness and ultimately to compare the NFL legends to Ali and thus to define them and the Super Bowl as ‘greatness’ too.” (Compl. ¶ 23.) Opening pre and post-game coverage by focusing on what made a champion athlete “great” is obviously relevant to covering what is perhaps the most significant championship game. Moreover, more than just a game, the Super Bowl has become one of the only annual rituals in which virtually the entire nation is collectively watching the same event. As Fox’s coverage illustrates, it has therefore become a time to explore all manner of issues affecting the nation both within the world of sports and beyond, including remembering deceased public figures like Ali, John Glenn, Walter Payton and many others who



were honored during the course of Fox's coverage. Because both Ali and Glenn had passed away in 2016, it was especially "artistically relevant" to use the next Super Bowl broadcast as an occasion to reflect on their lives and legacy.

**b. The Greatest Segment Did Not "Explicitly Mislead" Consumers About its Source or Content**

The second prong of the test asks whether a defendant's use of the plaintiff's trademark "explicitly misleads as to the source or the content of the work." *Rogers*, 875 F.2d at 999. To be "explicitly mislead[ing]," the defendant's work must make some affirmative statement of the plaintiff's sponsorship or endorsement. *See id.* at 1001; *E.S.S.*, 547 F.3d at 1101. The relevant inquiry is "whether there was an 'explicit indication,' 'overt claim,' or 'explicit misstatement' that caused such consumer confusion." *Twentieth Century Fox Television*, 2017 WL 5490820, at \*5.

Here, the segment contains no explicit statement that Ali or MAE endorses "Fox's services." Indeed, the Complaint itself merely pleads that it "implies" some endorsement (Compl. ¶¶ 25, 31), which as a matter of law fails to satisfy *Rogers* since "the slight risk that . . . use of a celebrity's name might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression, and the Lanham Act is not applicable." *Rogers*, 875 F.2d at 999-1000 (movie title "Ginger and Fred" was not explicitly misleading). *See also Mattel*, 296 F.3d at 902 (title of song "Barbie Girl" was not explicitly misleading); *see also ETW Corp.*, 332 F.3d at 920, 937 (depiction of Tiger Woods in a painting surrounded by golfing legends did not explicitly mislead). Thus, Count I is also barred by the First Amendment.

**III. CONCLUSION**

For the reasons stated herein, Fox respectfully requests that this Court enter judgment for it on the pleadings, and dismiss the Complaint with prejudice.

DATED this 16<sup>th</sup> day of January, 2018

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **THE NORTHERN DISTRICT OF CALIFORNIA**  
15 **OAKLAND DIVISION**

16 MUHAMMAD ALI ENTERPRISES LLC,

17 Plaintiff,

18 v.

19 FOX BROADCASTING COMPANY,

20 Defendant.

Case No. **4:17-cv-06949-DMR**

**[PROPOSED] ORDER GRANTING  
DEFENDANT FOX BROADCASTING  
COMPANY'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

Hon. Donna M. Ryu  
Date: March 22, 2018  
Time: 11:00 am  
Courtroom: 4

**[PROPOSED] ORDER**

Having considered Defendant Fox Broadcasting Company's Motion for Judgment on the Pleadings, the Court finds that Plaintiff's Complaint fails to state a claim and that Defendant is entitled to judgment on the pleadings as a matter of law. Accordingly, Defendant's Motion is **GRANTED** and Plaintiff's complaint is **DISMISSED WITH PREJUDICE**.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

Hon. Donna M. Ryu

DAVIS WRIGHT TREMAINE LLP

## General Information

<b>Court</b>	United States District Court for the Northern District of California; United States District Court for the Northern District of California
<b>Federal Nature of Suit</b>	Property Rights - Trademark[840]
<b>Docket Number</b>	4:17-cv-06949