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**THE THREE STOOGES LATEST ACT:
ATTEMPTING TO DEFINE THE SCOPE OF
PROTECTION THE FIRST AMENDMENT
PROVIDES TO WORKS OF ART DEPICTING
CELEBRITIES, *COMEDY III PRODUCTIONS, INC. V.
SADERUP, INC.*, 21 P.3D 797 (CAL. 2001)**

*Pete Singer**

I. INTRODUCTION

Supreme Court Justice Oliver Wendell Holmes once said:

It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.¹

Commentators that expressed trepidation regarding the California Supreme Court's decision denying First Amendment protection to Gary Saderup's portraiture of the comedy trio, The Three Stooges, in *Comedy III Productions, Inc. v. Saderup, Inc.*, reiterated Justice Holmes's admonition.² Specifically, critics of the *Comedy III* court's decision focused on the highly subjective "transformative use" test the court adopted. The test seemingly requires judges to ignore Holmes's admonition and assume the role of art critics.³

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¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

² See Lewis R. Clayton, *Judges as Critics*, The Natl. L.J. A23 (July 16, 2001); Michael S. Overing, *Not-So-Public Figures* <<http://ojr.usc.edu/content/story.cfm?request=590>> (accessed Nov. 11, 2001).

³ See Michael I. Rudell, *Reconciling Right of Publicity With the First Amendment*, N.Y. L.J. 3 (June 22, 2001); Harriet Chiang, *Famous Retain Wealth of Images Their Likenesses Belong to Them and Their Heir, State High Court Rules*, The S.F. Chron. A4 (May 1, 2001); Maura Dolan, *What is Art? 3 Stooges Case to Help Decide; Courts: Heirs Battle an Artist Saying They Control Images of the Slapstick Trio. He Cites the 1st Amendment*, L.A. Times A1 (April 23, 2001); Clayton, *supra* n. 2, at A23; Overing, *supra* n. 2. It should be noted, however, that Justice Holmes qualified his admonition by allowing judges to determine the worth of a pictorial illustration within the "narrowest and most obvious limits." *Bleistein*, 188 U.S. at 251. Although the California Supreme Court does not appear to be operating within this qualification, it has been claimed that some courts do so by "characterizing perceived qualitative deficiencies as quantitative deficiencies and denying protection on that ground." Paul Goldstein, *Copyright* vol. 1, §2.2.1, 2:18 (2d ed., Aspen 2002).

In its decision, the *Comedy III* court addressed two issues. First, the court examined Gary Saderup's charcoal drawing of the likeness of The Three Stooges that Saderup reproduced on T-shirts and lithographs and the court found the work fell within California's right of publicity statute.⁴ Second, the emphasis of the court's opinion and the focus of this Note, the court found that enforcement of California's right of publicity statute did not abridge Saderup's First Amendment rights.⁵ The court concluded that Saderup's work did not warrant First Amendment protection because it failed to add significant transformative elements or creative contributions to The Three Stooges' likeness and the work derived its value primarily from the fame of the depicted celebrities.⁶ This holding required Saderup to obtain the consent of Comedy III Productions, Inc. if he wished to continue to depict The Three Stooges as he had done.⁷

The *Comedy III* court correctly found that Saderup's work fell outside the scope of First Amendment protection. The court, however, supported its conclusion on a weak foundation: a "transformative use" test⁸ and a "subsidiary inquiry."⁹ Rather than offering a new, workable standard in the right of publicity and First Amendment jurisprudence, the "transformative use" test and "subsidiary inquiry" introduced confusing new elements into the legal analysis. Nonetheless, the court's conclusion that Saderup's work lacked the necessary transformative elements for First Amendment protection was correct if analyzed under the "Cultural Niche Theory of Art."¹⁰

Section II of this Note outlines the background of this case, including a brief overview of California's right of publicity statute¹¹ and the development and framework of the transformative use test the *Comedy III* court applied to Saderup's depiction of The Three Stooges.¹² Section III questions the court's decision to adopt the transformative use test¹³ and

⁴ *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (Cal. 2001), cert. denied, 2002 U.S. LEXIS 212 (Jan. 7, 2002).

⁵ *Id.* at 811.

⁶ *Id.*

⁷ *Id.*

⁸ *Infra* nn. 52-63 and accompanying text.

⁹ *Infra* nn. 64-69 and accompanying text.

¹⁰ In order to provide insight from the artistic vantage point and enable the law to better deal with the potential problems engendered in decisions that mix art and law, the *Comedy III* court's analysis and decision regarding Saderup's portrait of The Three Stooges will be analyzed under a theory from the art world entitled the Cultural Niche Theory of Art. The Cultural Niche Theory of Art will be explored in section III(B).

¹¹ *Infra* nn. 18-34 and accompanying text.

¹² *Infra* nn. 35-63 and accompanying text.

¹³ *Infra* nn. 73-85 and accompanying text.

contends that the court, in its application of the transformative use test and subsidiary inquiry, issued a conclusory holding that undermines the opinion's value as precedent for future right of publicity cases.¹⁴ Next, Section III distinguishes between Popular Art and Fine Art,¹⁵ concluding that the court correctly decided to deny Saderup's work First Amendment protection according to the Cultural Niche Theory of Art.¹⁶ Finally, this section defines a workable standard for future right of publicity cases involving celebrity depictions.¹⁷

II. BACKGROUND

This Section details the facts of *Comedy III Productions, Inc. v. Saderup, Inc.* and briefly introduces California's right of publicity law. The *Comedy III* court's adoption, explanation and application of the transformative use test and subsidiary inquiry are examined in detail.

A. The Facts

Comedy III Productions, Inc. was the registered owner of all rights to the deceased personalities of the former comedy act known as The Three Stooges.¹⁸ Gary Saderup was an artist with over twenty-five years of experience in making charcoal drawings of celebrities.¹⁹ Saderup's original drawings were used to create lithographic and silk-screen masters, which in turn were used to produce multiple reproductions in the forms of lithographic prints and silk-screened images on T-shirts.²⁰ Saderup was actively involved in the ensuing lithographic and silk-screening processes.²¹

¹⁴ *Infra* nn. 86-105 and accompanying text.

¹⁵ *Infra* nn. 116-27 and accompanying text.

¹⁶ *Infra* nn. 128-53 and accompanying text.

¹⁷ *Infra* nn. 154-56 and accompanying text.

¹⁸ *Comedy III*, 21 P.3d at 800.

¹⁹ *Id.* Saderup attended Pasadena's Art Center College of Design and his work was sold in kiosks at shopping centers and at art shows. Dolan, *supra* n. 3, at A1. Throughout his career, Saderup has drawn more than 100 famous people or celebrities, including portraits of Albert Einstein and John F. Kennedy. Dolan, *supra* n. 3, at A1.

²⁰ *Comedy III*, 21 P.3d at 800.

²¹ *Id.* For a brief discussion on screen print and lithographic techniques, see Wendy L. Lowengrub, Student Author, *Unique or Ubiquitous: Art Prints and the Uniform Commercial Code*, 72 Ind. L.J. 595, 602-03 (1997).

Although Saderup agreed to pay royalties on other celebrity portraits,²² Saderup made a charcoal drawing bearing the likeness of The Three Stooges, reproduced the likeness on T-shirts and lithographs and sold the lithographs and T-shirts for a considerable profit without securing Comedy III's consent.²³ Comedy III discovered Saderup's use of The Three Stooges' likeness and brought an action against him and Gary Saderup, Inc., seeking damages and injunctive relief for violating California's right of publicity statute and related business torts.²⁴ In response, Saderup raised a First Amendment defense claiming that enforcement of a judgment against him violated his rights of free speech and expression.²⁵

B. California's Right of Publicity Statute

The right of publicity is a right to profit from one's name, likeness, voice, signature or photograph.²⁶ The right of publicity holder possesses "a right to prevent others from misappropriating the economic value generated by the celebrity's fame."²⁷ It is not, however, a right of censorship.²⁸ Additionally, California's right of publicity is descendible²⁹ and consent to use the deceased personality's name, likeness, voice, signature or

²² Dolan, *supra* n. 3, at A1.

²³ *Comedy III*, 21 P.3d at 800. Saderup's profit for the sale of unlicensed lithographs and T-shirts bearing a likeness of The Three Stooges was determined to be \$75,000. *Id.* Saderup's lithographs of The Three Stooges sold for twenty dollars (\$20.00) unsigned and two hundred and fifty dollars (\$250.00) signed. Dolan, *supra* n. 3, at A1. Saderup's T-shirts bearing the likeness of The Three Stooges sold from eighteen (\$18.00) to twenty dollars (\$20.00). Dolan, *supra* n. 3, at A1. Saderup's profits derived mainly through Internet sales. Dan Bischoff, *There's a Fine Line Between Art and Commerce*, Newhouse News Serv. (May 7, 2001) (available in LEXIS, News Database).

²⁴ *Comedy III*, 21 P.3d at 800. After the California Supreme Court granted review, the Legislature renumbered California's right of publicity statute, Civil Code section 990, as section 3344.1 and amended its wording in several respects. *Id.* at 799 n. 1. In its analysis, however, the court interpreted the former statute and referred to § 990 in the present tense. *Id.*

²⁵ *Id.* at 802.

²⁶ *Id.* at 807.

²⁷ *Id.*

²⁸ *See id.* ("[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals. Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope.")

²⁹ *Comedy III*, 21 P.3d at 807. California Civil Code § 3344, California's right of publicity statute, was enacted in 1971. Steven Andreacola, *History: California Civil Code §3344.1*, 12 J. Contemp. Leg. Issues 592, 592 (2001). Thirteen years later, California Civil Code §990, "a companion statute to section 3344," codified the descendibility of the right of publicity by creating rights in deceased personalities. *Id.*

photograph must be obtained from the holder of the right.³⁰ “[T]he statute makes liable any person who, without consent, uses a deceased personality’s name, voice, photograph, etc., ‘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.*’”³¹ Therefore, Comedy III, as the registered owner of all rights to The Three Stooges,³² had standing to bring a cause of action against Saderup, the non-consensual user of The Three Stooges’ likeness³³ on T-shirt and lithograph products.³⁴

C. Adopting the Transformative Use Test and Creating the Subsidiary Inquiry

An artist, like Saderup, confronted with a right of publicity challenge has two avenues of defense, consent and invocation of the First Amendment. Although the consent defense was unavailable to Saderup because he used the likeness of The Three Stooges without securing Comedy III’s consent,³⁵ the First Amendment was a viable affirmative defense. Therefore, in deciding on a standard to apply to Saderup’s work, the *Comedy III* court began by analyzing a line of cases that endeavored to reconcile the right of publicity and the First Amendment.³⁶

Based on its analysis, the *Comedy III* court adopted two right of publicity principles.³⁷ First, “state law may validly safeguard forms of intellectual property not covered under federal copyright and patent law as a means of protecting the fruits of a performing artist’s labor.”³⁸ Second, “the state’s interest in preventing the outright misappropriation of such intellectual property by others is not automatically trumped by the interest in free expression or dissemination of information.”³⁹ From these

³⁰ *Id.*

³¹ *Comedy III*, 21 P.3d at 801.

³² *Id.* at 800.

³³ *Id.*

³⁴ *Id.* at 802 (finding that “[b]y producing and selling such lithographs and T-shirts, Saderup thus used the likeness of The Three Stooges ‘on . . . products, merchandise, or goods’ within the meaning of the statute”).

³⁵ *Id.* at 800.

³⁶ *Id.* at 806-07.

³⁷ *Id.* at 806 (adopting two principles enunciated in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977)).

³⁸ *Id.*

³⁹ *Id.*

principles, and the analysis of other right of publicity case precedent,⁴⁰ the court perceived a need to balance the state law interests in the right of publicity and the First Amendment interest in the freedom of expression.⁴¹ The court recognized that certain forms of commercial celebrity exploitation that violated the right of publicity did not deserve First Amendment protection. For example,

[w]hen artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right to 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.⁴²

Accordingly, the court formulated a test to distinguish between works of art depicting celebrities protected by the First Amendment and works of art not deserving of protection.⁴³

In constructing its test, the *Comedy III* court imported one factor of the fair use defense from copyright law.⁴⁴ Rather than a complete importation of all of the fair use factors into right of publicity law, the court elected to adopt only the first fair use factor, "the purpose and character of the use."⁴⁵ In particular, the court adopted Justice David Souter's interpretation of "the purpose and character of the use," which begs the question "whether and to

⁴⁰ *Id.* at 806-07. "[A]n action for infringement of the right of publicity can be maintained only if the proprietary interests at issue clearly outweigh the value of free expression." *Id.* at 806.

⁴¹ *Id.* at 806-07.

⁴² *Id.* at 808.

⁴³ *Id.* at 807.

⁴⁴ *Id.* at 808. "Fair use is most commonly defined as 'a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright.'" Goldstein, *supra* n. 3 at vol. II, § 10.1, 10:1. Section 107 of the 1976 Copyright Act lists four factors for courts to weigh in determining whether a use is fair

(1) the purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107(1)-(4) (1994). The *Comedy III* court rejected the use of the second and third factors because of their general lack of usefulness in determining whether the First Amendment protects a celebrity depiction. *Comedy III*, 21 P.3d at 807-08. The court rejected the fourth factor because of its potential for circularity when applied. *Id.* at 808 n. 10.

⁴⁵ 17 U.S.C. § 107(1).

what extent [Saderup's] work is 'transformative.'"⁴⁶ Addressing the potential for the transformative standard in right of publicity jurisprudence, the court stated, "[t]his inquiry into whether a work is 'transformative' appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment."⁴⁷

Although the *Comedy III* court considered that the inquiry into whether a work is transformative is the key to a First Amendment defense analysis in right of publicity jurisprudence, the court also perceived a need to supplement the transformative inquiry, "particularly in close cases."⁴⁸ The *Comedy III* court thus fashioned what it denoted as a subsidiary inquiry: "does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?"⁴⁹ This inquiry seems to be a judicially created standard because the court cites no authority after announcing it.⁵⁰

In summary, the *Comedy III* court held the First Amendment protected an artistic work containing a celebrity depiction when either (1) the work contained significant transformative elements or (2) the value of the work did not derive primarily from the celebrity's fame.⁵¹ The first prong of this test is the transformative use test. The second or alternate prong of this test is the subsidiary inquiry.

D. The Transformative Use Test in the Right of Publicity Jurisprudence

When a celebrity depiction contains significant transformative elements or creative contributions, it is especially worthy of First Amendment protection.⁵² Transformative elements or creative contributions can take many forms, such as parody, factual reporting, fictionalized portrayal, heavy-handed lampooning or subtle social criticism.⁵³ To determine whether a celebrity portraiture contains significant transformative elements

⁴⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994).

⁴⁷ *Comedy III*, 21 P.3d at 808. The court further justified its importation of the transformative standard into right of publicity jurisprudence by stating, "[t]he 'transformative' test elaborated in [*Comedy III*] will, we conclude, protect the right-of-publicity holder's core interest in monopolizing the merchandising of celebrity images without unnecessarily impinging on the artists' right of free expression." *Id.* at 808 n. 10.

⁴⁸ *Id.* at 810.

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Comedy III*, 21 P.3d at 810.

⁵² *Id.* at 808.

⁵³ *Id.* at 809.

or creative contributions, the court in *Comedy III* asked three transformative use queries and conducted a subsidiary inquiry. First, the court asked whether the creative elements predominated the work over the literal and imitative elements.⁵⁴ If the creative elements dominate, then the work is likely to be protected.⁵⁵ If literal and imitative elements dominate, the work may be protected under a second transformative use query, which asks whether a work is so transformed that it has become primarily the artist's personal expression rather than the celebrity's likeness.⁵⁶ In other words, it is a question of whether the artist's depiction of the celebrity contributes something more than a merely trivial variation, that is, something recognizably the artist's own.⁵⁷ If there is a contribution, then the work of art is likely to be protected.⁵⁸ If there is only a trivial variation, however, the work may still be protected under a third transformative use query.⁵⁹ The court summarily analyzed Saderup's work and concluded that it failed the first two "transformative use" queries with the following statement: "[t]urning to Saderup's work, we can discern no significant transformative or creative contribution."⁶⁰

Even though Saderup's work failed the first two transformative use queries, there was still hope for First Amendment protection under a third transformative use query, which asks whether the artist's skill and talent is manifestly subordinate to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame.⁶¹ If the answer is that the skills and talent are not subordinated, the work will likely be protected.⁶² The *Comedy III* court summarily analyzed Saderup's work and concluded that it failed this third transformative use query in the following statement: "[Saderup's] undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame."⁶³ Even though Saderup's skills were subordinated, nevertheless, the work may still receive protection under a fourth query, the subsidiary inquiry.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* The word "expression" in this sentence signifies an expression of something other than the celebrity likeness. *Id.*

⁵⁷ *Id.* at 811.

⁵⁸ *Id.*

⁵⁹ *See id.* at 810-11.

⁶⁰ *Comedy III*, 21 P.3d at 811.

⁶¹ *Id.* at 810.

⁶² *Id.*

⁶³ *Id.* at 811.

The subsidiary inquiry is a separate question from that of the previous three transformative use queries.⁶⁴ Satisfaction of the subsidiary inquiry alone can provide an artistic work with First Amendment protection.⁶⁵ Thus, one could apply the subsidiary inquiry before proceeding to the transformative use queries. Under the subsidiary query, the court sought to determine whether the marketability and economic value of the challenged work derived primarily from the fame of the celebrity depicted.⁶⁶ If the marketability and economic values do not come from the celebrity's fame, then the work is likely to be protected by the First Amendment.⁶⁷ If the value of the work derives primarily from the depicted celebrity's fame, the work will not be protected unless it satisfies the transformative use test.⁶⁸ The *Comedy III* court summarily analyzed Saderup's work and concluded that it failed the subsidiary inquiry in the following statement: "the marketability and economic value of Saderup's work derives primarily from the fame of the celebrities depicted."⁶⁹

Based on the *Comedy III* court's finding that Saderup's work failed all three of the transformative use test queries and the subsidiary inquiry, the court denied Saderup's work any First Amendment protection.⁷⁰ Accordingly, the court awarded Comedy III \$75,000 in damages⁷¹ and issued a caveat to Saderup that if he wished to continue to use his depiction of The Three Stooges, he could only do so with Comedy III's consent.⁷²

III. ANALYSIS

This Note argues that the *Comedy III* court's decision to deny Saderup's work protection was correct if analyzed under the Cultural Niche Theory of Art's categorization of works of art, however, in arriving at its conclusion, the court set poor precedent. This Note addresses the court's decision to adopt the transformative use test and argues that the court, in applying its adopted test, issued a conclusory holding that will not serve as useful

⁶⁴ *Id.* at 810.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 811.

⁷⁰ *Id.*

⁷¹ This amount reflected Saderup's profits from the sale of unlicensed lithographs and T-shirt bearing the likeness of The Three Stooges. *Id.* at 801. In affirming the Court of Appeals decision, Comedy III was also awarded attorney fees of \$150,000 plus costs. *Id.*

⁷² *Id.* at 811.

precedent in future right of publicity cases. Next, this Note distinguishes between Popular Art and Fine Art as separate art niches in contemporary culture and places Saderup's depiction of The Three Stooges into the Popular Art niche. This Note analyzes the need to protect The Three Stooges' images as original works of Popular Art. Finally, this Note proposes a more workable standard, the Cultural Niche Solution, for analyzing the use of celebrity images in works of art.

A. The Comedy III Court Failed to Create a Clear Standard

This Section critiques the transformative use test and the subsidiary inquiry the *Comedy III* court adopted, altered and applied to Saderup's work. It explains the difficulties with the transformative use test in copyright jurisprudence and how those difficulties can migrate into the test in right of publicity jurisprudence. Next, this Section explores the conclusory nature of the court's opinion along with the opinion's viability for future right of publicity cases concerning artistic works containing celebrity images. Finally, this Section explicates the ramifications of an unclear standard on future artistic expression.

1. Transformative Use: The Court Adopted an Already Confused Standard

Judge Pierre Leval coined the transformative use standard in a fair use opinion, written in response to a U.S. Supreme Court decision that Judge Leval believed left copyright lawyers, judges and publishers in a state of chaos.⁷³ By adopting the transformative analysis, Judge Leval and the courts that have utilized his transformative use standard, attempted to instill a sense of order in the wake of the fair use defense doctrine.⁷⁴ This objective has gone largely unmet, however, when courts applied the transformative use standard in copyright jurisprudence.⁷⁵

⁷³ Jeremy Kudon, Student Author, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. Rev. 579, 582 (2000). Judge Leval referred to the U.S. Supreme Court decision *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). *Id.*

⁷⁴ Diane L. Zimmerman, *The More Things Change the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. Copy. Socy. 251, 260 (Winter 1998).

⁷⁵ *Id.* at 262 (noting that "[r]ather than adding certainty to the fair use analysis, [the transformative use test] seems to have merely . . . pumped more silt into already muddy waters"). See also Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 Comm. L. & Policy 1, 6 (Winter 2002) (noting that "lower court decisions exhibit little consistency in determining what sort of use is or is not transformative").

In the copyright cases following Judge Leval's promulgation of the transformative use standard, no uniform standard was defined or applied.⁷⁶ The application of this standard in copyright jurisprudence resulted in a test that is both over and under inclusive,⁷⁷ allowing pure copying to constitute transformative use in some contexts⁷⁸ and over-protecting copyrighted works from seemingly transformative uses in others.⁷⁹ For example, an analysis of court decisions demonstrates judges using the transformative use test to protect only secondary works that add original expression to and provide explicit commentary, scholarship, criticism or parody on the original work.⁸⁰ Any type of secondary work falling outside these categories generally fails to be protected as transformative.⁸¹

The Supreme Court of California's decision in *Comedy III* parallels this trend, providing categorical transformative use protection to secondary works that fall within factual reporting, fictionalized portrayal, heavy-handed lampooning and subtle social criticism.⁸² This parallel path will result in creating the same problems of over-and under-protectiveness in

⁷⁶ Zimmerman, *supra* n. 74, at 260. In the six years following the Supreme Court's introduction of the transformative use test, lower courts have published approximately thirty-eight fair use opinions. Kudon, *supra* n. 73, at 583.

⁷⁷ Zimmerman, *supra* n. 74, at 262.

⁷⁸ Zimmerman, *supra* n. 74, at 261. In the hallmark case that introduced the transformative use standard to copyright jurisprudence, *Campbell*, 510 U.S. at 579, Justice Souter recognized that the preamble of the fair use section of the 1976 Copyright Act, 17 U.S.C. §107, provided that pure reproductions could in some cases qualify as fair use. Zimmerman, *supra* n. 74, at 260. Judge Leval acknowledged this issue and explained that pure copying could even be transformative in some circumstances. Zimmerman, *supra* n. 74, at 261. For example, a defendant that simply copied a work into a different size or shape would not be creating a substitute for the original work, but would be creating a transformative work if the copying was "done 'for a different purpose from the original.'" Zimmerman, *supra* n. 74, at 261.

⁷⁹ For example, in *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, the court held that a spoof of the O.J. Simpson trial entitled *The Cat NOT in the Hat!* was not transformative. 109 F.3d 1394 (9th Cir. 1997). Although the court found that none of the lines in the O.J. book literally reproduced the Seuss original and the story line was original, the author's borrowing of the Dr. Seuss style was sufficient to render it non-transformative. *Id.* at 1401. Examples of lines from the O.J. book are: "One knife?/ Two Knife?/ Red knife./ Dead Wife" or "A happy town/ Inside L.A./ Where rich folks play/ The day away./ But under the moon/ The 12th of June/ Two victims flail/ Assault! Assail!" *Id.* at 1401. The court's overprotective treatment of the copyrighted Dr. Seuss works, in *Dr. Seuss Enter.*, has provoked criticism among commentators. See Zimmerman, *supra* n. 74, at 258 (observing that the meaning of "transformative" would be more lucid if cases, such as *Dr. Seuss Enter.*, were ignored); Bunker, *supra* n. 75, at 10 ("Needless to say, this holding strains the bounds of any reasonable definition of the word 'transformative.'").

⁸⁰ Kudon, *supra* n. 73, at 583.

⁸¹ Kudon, *supra* n. 73, at 583. The following type of works tend not to be protected: "secondary works that add no original expression" and "secondary works that add original expression, but not in the form of criticism, commentary, or scholarship." Kudon, *supra* n. 73, at 583.

⁸² *Comedy III*, 21 P.3d at 809.

the right of publicity jurisprudence that has already occurred in copyright jurisprudence. For example, works that amount to a straight reproduction of a celebrity image will be protected in some instances, as the court has shown with its preference for the work of Andy Warhol,⁸³ while protection will be denied to works that might add creative elements, yet fail to portray a discernible message or simply convey a reverential message.⁸⁴ Admittedly, one could argue the *Comedy III* court's particular definition of transformative use is the standard to be applied in right of publicity cases involving celebrity depictions. One could further argue this difference in the transformative use definition could prevent problems of confusion, lack of uniformity and over-and under-protectiveness from infecting right of publicity jurisprudence. However, when a court, like the *Comedy III* court, adopts definitions of transformative use already causing confusion in copyright cases⁸⁵ to define transformative use in right of publicity cases,

⁸³ *Id.* at 811. Andy Warhol, a leading Popular artist and a former commercial artist, appropriated elements of mass media images, such as Marilyn Monroe, and reproduced the images using mechanical processes of modern technology, such as silk-screening. The results were images that were familiar, but seemed to be "remote and dehumanized, devoid of depth or intensity." Louis Torres & Michelle Marder Kamhi, *What Art is: The Esthetic Theory of Ayn Rand* 269 (Open Ct. 2000). Some critics and scholars have read great significance into the remoteness and detachment of Warhol's Popular Art, "seeing it variously as an ironic comment on contemporary life or, ludicrously, as an investigation into the nature of art itself." *Id.* The court acknowledged this view stating, "Warhol was able to convey 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*, 21 P.3d at 811. However, other critics argue that Warhol's own words suggest an opposite interpretation of his work with celebrity images. Torres & Kamhi, at 269.

Warhol's own words . . . reveal that the . . . mechanical character of his work stems not from philosophic profundity but, rather, from psychological dysfunction—from an almost total anomie and emotional deadness. . . . Remarkably, his work as a commercial artist was often more inventive and stylistically distinctive than his independent 'artwork'—because the other imposed a 'feeling' upon him.

Id. at 269-70. In reference to his past work as a commercial artist Warhol stated, "I'd do anything they told me to do, correct it and do it right. I'd have to invent and now I don't . . ." John Russell & Suzi Galik, *Pop Art Redefined*, 117 (Frederick A. Praeger, Inc. 1969). Warhol also declared "[t]here is nothing behind" the surface of his work. Robert Hughes, *The Rise of Andy Warhol*, N.Y. Rev. of Books 7 (Feb. 18, 1982).

⁸⁴ In articulating its favoritism for and the possible necessity to afford protection to Andy Warhol's mechanical reproductions of celebrity images, the court notes that Warhol was able to convey "a message" in his work. *Comedy III*, 21 P.3d at 811. The court's focus on a message conveyed in a work, however, seems to be in contradiction with its earlier statement that "a work of art is protected by the First Amendment even if it conveys no discernable message." *Id.* at 804. Turning to Saderup's work, the court, nonetheless, fails to give clout to Saderup's argument that his work conveyed a wholesome and reverential message rather than distortional. *Id.* at 811.

⁸⁵ The second transformative use question the court used in its transformative use test analysis seems to be a derivative of Judge Leval's definition of transformative use. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). Further, the alternative formulation of the

the court invites continued confusion and leaves legal boundaries uncertain.

2. The *Comedy III* Court's Analysis Under the Transformative Use Test Leaves Too Many Questions Unanswered

Aside from the second question the court posited in its transformative use test, the remaining questions the court asked in its transformative use analysis and subsidiary inquiry seemed to be the court's own creation because it cited no authority.⁸⁶ In analyzing the questions, the court failed to apply any of the facts regarding Saderup's depiction of The Three Stooges to the inquiries. In other words, after announcing its new standards, the court failed to engage in a careful exploration of specific facts or factors that led it to find Saderup's work fell outside the scope of First Amendment protection. The court simply concluded its inquiries. In doing so, the court left many relevant questions unanswered.

Concerning the first query—does Saderup's depiction of The Three Stooges contribute something more than a merely trivial variation of The Three Stooges or something recognizably his own—the court failed to find Saderup's personal expression or "touch" in the work.⁸⁷ The court rejected Saderup's position that because he drew The Three Stooges portraits by hand, he necessarily incorporated his view and his creative decisions into the final depiction of The Three Stooges.⁸⁸ If drawing a work by hand is not enough to convert the work into the artist's personal expression, then how does something become recognizably the artist's own work? Further, when does a work become more than a mere trivial variation? Does the fact that Saderup chose to portray only The Three Stooges' heads and uppermost torso, in a particular size, in a certain order, in black and white, in a specific posture, with a certain emphasis on light and shadow, with certain facial expression or on a certain medium, have any influence on the transformative use analysis?⁸⁹ By not applying any facts to its ultimate determination, the *Comedy III* court failed to provide an answer to any of these questions. Thus, the reader is left only to infer from the opinion that

court's second transformative use question, "an artist depicting a celebrity must contribute something more than a merely trivial variation, but must create something recognizably his own in order to qualify for legal protection," was derived from a copyright case. *Comedy III*, 21 P.3d at 810-11.

⁸⁶ *Comedy III*, 21 P.3d at 809-10.

⁸⁷ *Id.* at 811.

⁸⁸ *Id.* at 810.

⁸⁹ *Id.* at Appendix.

a hand drawing of a celebrity image will add little to furthering an artistic work's crusade to achieve transformative use status.⁹⁰

With regard to the second query—do the creative elements of Saderup's depiction predominate the work over the literal and imitative elements—the court found no creative contributions in Saderup's work.⁹¹ Other than citing to the work of Andy Warhol,⁹² the court failed to define or provide examples of what a creative or imitative work entails. The court provided no indication as to why Saderup's work is devoid of any significant creative contribution. The court, in failing to apply the facts of Saderup's case, left the reader wondering what a creative work of celebrity portraiture is versus a work that is simply imitative. Further, the reader is left with other questions. When does a creative contribution or a significant creative contribution occur? Even if a work is deemed creative, at what point do the creative elements of a celebrity portraiture dominate the literal and imitative elements of the work?

Under the third query—is Saderup's skill and talent manifestly subordinate to the overall goal of creating a conventional portrait of The Three Stooges so as to commercially exploit their fame—the *Comedy III* court acknowledged Saderup's "undeniable skill."⁹³ The court, however, failed to point out the relevant facts that led it to its determination that Saderup's goal was to commercially exploit The Three Stooges' fame. All the reader can glean from the court's opinion is that creating a celebrity depiction for the purposes of celebrating or revering a celebrity is an insufficient goal when creating a celebrity portrait.⁹⁴

Finally, under the *Comedy III* court's subsidiary inquiry—does the marketability and economic value of Saderup's work derive primarily from the fame of The Three Stooges—the court provided a more lucid standard by which to weigh a celebrity depiction, but it once again failed to substantiate any facts that supported its conclusion to the inquiry. The court posited three factors to determine if a celebrity depiction derived its economic value from either the artist's rendition or fame of the celebrity depiction.⁹⁵ These factors include the creativity, the skill and the reputation

⁹⁰ *Id.* at 810.

⁹¹ *Id.* at 811.

⁹² *Id.* Warhol utilized a similar silk-screening process Saderup employed to reproduce the images of celebrities. Torres & Kamhi, *supra* n. 83, at 269. Warhol, however, used mechanical means to obtain the original celebrity images that he ultimately reproduced. Torres & Kamhi, *supra* n. 83, at 269. Conversely, Saderup hand drew the image of The Three Stooges and reproduced the hand drawing. *Comedy III*, 21 P.3d at 801.

⁹³ *Id.* at 811.

⁹⁴ *Id.* (rejecting Saderup's argument that it would be incongruous and unjust to protect parodies and other distortion of celebrity figures but not wholesome, reverential portraits of such celebrities).

⁹⁵ *Id.* at 810.

of the artist who created the work.⁹⁶ If the value of the work derived principally from the creativity, skill and reputation of the artist, "it may be presumed that sufficient transformative elements are present to warrant First Amendment protection."⁹⁷ The court, however, failed to define the creativity, skill or reputation that one should look for in conducting this analysis. Saderup, who sold his work in kiosks at shopping centers and at art shows,⁹⁸ was an artist for over twenty-five years.⁹⁹ During his career Saderup drew more than one hundred famous people and/or celebrities, including portraits of Albert Einstein and John F. Kennedy.¹⁰⁰ What if evidence had shown that the buyers of his Three Stooges' depiction were repeat customers, purchasing the image because they enjoyed Saderup's work? What if evidence had shown the majority of Saderup's profits derived from the signed lithograph (\$250) versus the unsigned lithographs (\$18-20),¹⁰¹ thereby indicating consumers perceived value in the work other than simply the likeness of The Three Stooges, for example, the value of Saderup's signature.

The court's analysis neither provided answers to these questions nor any insight as to what evidence would be necessary for future artists to answer these questions favorably. Even if an artist could answer some of the questions favorably, what if an artist failed to favorably answer the others? Are some inquires entitled to more weight than others? For example, what results if a work's value derives from the fame of the celebrity depicted and the work predominates in imitative elements yet contains elements recognizably the artist's own?

Although the court's opinion was factually too abstract to convey much useful information, the court provided a policy or theory for its decision with the following statement: "were we to decide that Saderup's depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements."¹⁰² When a court decides a case based on theory or policy alone, however, it runs the risk of leaving no set of clear rules upon which to build.¹⁰³ In essence, it is like trying to build a set of rules from the

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Dolan, *supra* n. 3, at A1.

⁹⁹ *Comedy III*, 21 P.3d at 800

¹⁰⁰ *Id.* at 810.

¹⁰¹ *Id.*

¹⁰² *Id.* at 811.

¹⁰³ Zimmerman, *supra* n. 74, at 267-68.

top down rather than bottom up.¹⁰⁴ As stated by Professor Zimmerman, “[w]hen we start from theory, the structures we build are all too often no match for the messy reality they need to contain.”¹⁰⁵

3. The Chilling Effect on Future Artistic Works

Right of publicity cases have been relatively rare. Thus, artists have been awaiting a case that would decide just how free they are to use images of celebrities in their artwork, especially because a growing number of artists have turned to techniques based on appropriated images.¹⁰⁶ The absence of a clear legal standard for artists, such as Saderup, that appropriate visual images, creates a possible chilling of freedom of expression interests.¹⁰⁷ “Artists will hesitate to experiment with creative modes [and limit development and progress of innovative forms of celebrity art] if such experimentation [and development] may result in

¹⁰⁴ Zimmerman, *supra* n. 74, at 267-68.

¹⁰⁵ Zimmerman, *supra* n. 74, at 266-67.

¹⁰⁶ Bischoff, *supra* n. 23.

Appropriation is the practice of creating a new work by taking a pre-existing image from another context—art history, advertising, the media—and combining the appropriated image with new ones. Or, a well-known artwork by someone else may be represented as the appropriator’s own. . . . [A]ppropriation is simply a technique or a method of working. As such, it is the vehicle for a variety of viewpoints about contemporary society, both celebratory and critical.

Robert Atkins, *Art Speak* 42 (Abbeville Press 1990). Further, the appropriation artist

simultaneously appropriates a sign’s already laden popular significance and reinvests new meaning in the object as testament to the vices or virtues of modern society. Shifting the context of the image in this way transforms the meaning of the original image by forcing the viewer to reevaluate his or her former, most often unconscious, understanding of the image.

Roxana Badin, Student Author, *An Appropriate(d) Place in Transformative Value: Appropriation Art’s Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 Brook. L. Rev. 1653, 1660 (1995). “[A]ppropriation should not be mistaken for plagiarism.” *Id.*

¹⁰⁷ See E. Kenly Ames, Student Author, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 Colum. L. Rev. 1473, 1485 (1993); Michelle Brownlee, Student Author, *Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 Colum. L. Rev. 1157, 1180 (1993); Elton Fukumoto, Student Author, *The Author Effect After the “Death of the Author”: Copyright in a Postmodern Age*, 72 Wash. L. Rev. 903, 922-23 (1997); Patricia Krieg, Student Author, *Copyright, Free Speech, and the Visual Arts*, 93 Yale L.J. 1565, 1568 (1984); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 7 (2001); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. Cal. L. Rev. 247, 248 (1998). The holding of this case also places celebrity photographers and unofficial fan web sites owners at risk for right of publicity claims. Overing, *supra* n. 2. Therefore, the swath of the chilling effect of the *Comedy III* court’s opinion will likely extend to both celebrity photographers and unofficial fan web site owners. See Overing, *supra* n. 2.

liability for [right of publicity] infringement."¹⁰⁸ Further, if judges use their artistic tastes, as the highly subjective standard the *Comedy III* court seems to require, to make the transformative use determinations, judges would most probably influence the kinds of arts created in the future.¹⁰⁹ Artists would prefer creating works that meet the preference of judges because other works would not get the benefits of First Amendment protection and thus risk being suppressed.¹¹⁰ Artists with tastes and visions conflicting with those of judges might have difficulty finding or creating art that they prefer.¹¹¹

In summary, the definition and application of the transformative use test has been widely divergent. Further, given the conclusory nature of the *Comedy III* court's transformative use test and subsidiary inquiry, future court decisions, relying on other opinions along with the *Comedy III* court's opinion to define and apply the transformative use test and the subsidiary inquiry, will likely produce little uniformity in the application. Moreover, without a careful exploration of the facts or factors that led the court to its conclusion, the court left many relevant questions unanswered as to what an artist depicting a celebrity can do to make his or her work worthy of First Amendment protection.¹¹² Although the court failed to create a clear standard for analyzing celebrity depictions, the court's finding that Saderup's work was not transformative, and thus, not deserving of protection, was correct if analyzed under the Cultural Niche Theory of Art.

B. The Court's Decision to Deny Saderup's Work First Amendment Protection Was Correct When Analyzed Under the Cultural Niche Theory of Art

Artists entering the legal battlefield have expressed concern over judges, uneducated in art, acting as decision makers because of the confusion over where the line is drawn between an artistic work that is transformative, and

¹⁰⁸ Krieg, *supra* n. 107, at 1568.

¹⁰⁹ Yen, *supra* n. 107, at 248.

¹¹⁰ Yen, *supra* n. 107, at 248. See Ames, *supra* n. 107, at 1485 ("The absence of a declared standard governing appropriation [of visual images] has had some chilling effect on artists' choice of subject matter.").

¹¹¹ Yen, *supra* n. 107, at 248-49.

¹¹² Although the *Comedy III* court failed to explore the facts and factors that would be determinative of First Amendment protection, a recent case relying on the *Comedy III* court's decision has commenced the exploration. See *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1184 n. 2 (9th Cir. 2001) (finding that a photograph containing the head of Dustin Hoffman, as Tootsie, imposed upon a differently clothed body of a male model was significantly transformative).

thus, protected by the First Amendment, and an artistic work that is not transformative.¹¹³ Some commentators believe that “[j]udges should either be better educated in art or more open to consulting experts.”¹¹⁴ One such expert, Susan G. Josephson, developer of the Cultural Niche Theory of Art, however, would likely have agreed with the *Comedy III* court’s finding that Saderup’s work was not transformative or that it contained no value beyond the celebrities depicted.¹¹⁵

1. Distinguishing Between Popular Art and Fine Art According to the Cultural Niche Theory of Art

The *Comedy III* court searched for several key artistic qualities¹¹⁶ to define or find a transformative celebrity portraiture. These qualities included the artist’s personal expression in the work,¹¹⁷ the creativity in the work,¹¹⁸ the uniqueness or originality of the work¹¹⁹ and something more than a mere imitation of its subject matter depicted in the work.¹²⁰

Generally, Fine Art embodies these qualities, whereas Popular Art does not. Works of Fine Art tend to include personal expression¹²¹ while

¹¹³ *Rogers v. Koons*, 960 F.2d 301, 308 (2nd Cir. 1992) (dismissing defendant artist’s concern that a trial judge uneducated in art is not an appropriate decision maker).

¹¹⁴ Fukumoto, *supra* n. 107, at 927. See Louise Harmon, *Law, Art, and the Killing Jar*, 79 Iowa L. Rev. 367, 405 (1994) (warning that “most of the inhabitants of the universe of law know little and care less about the spectral ideas that hover around these objects of art”).

¹¹⁵ The Cultural Niche Theory of Art explores the “shaping of art by cultural forces and their functional demand.” Susan G. Josephson, *From Idolatry to Advertising: Visual Art and Contemporary Culture* 11 (M.E. Sharpe, Inc. 1996). It defines art based on its cultural setting by exploring the arts function and context in society. *Id.* at 14-15. This theory differentiates particular types of art through an analysis of the distribution systems, economic pressures and the audiences that typically produce the various forms of visual art. *Id.* at 92. The main visual arts identified in contemporary culture are Popular Art, Fine Art, Design Art and Advertising. *Id.* at 8.

¹¹⁶ See *supra* section II(D) (discussing the transformative use test and the subsidiary inquiry).

¹¹⁷ *Comedy III*, 21 P.3d at 809 (“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.” (emphasis added)). “An artist depicting a celebrity must contribute something more than a merely trivial variation, but must create something recognizably his own.” *Id.* at 810 (emphasis added).

¹¹⁸ *Id.* at 809 (“The inquiry is . . . asking whether . . . the creative elements predominate in the work.” (emphasis added)).

¹¹⁹ *Id.* (“The inquiry is . . . asking whether the literal . . . elements predominate in the work.” (emphasis added)).

¹²⁰ *Id.* (The inquiry is . . . asking whether the . . . imitative . . . elements predominate in the work.” (emphasis added)).

¹²¹ See Josephson, *supra* n. 115, at 93-94 (“Sincerity for the Fine Art art world means that the artist expresses his or her own true ideas and emotions. . . . Fine Art tends to be made by individual artists expressing their personal orientation.”).

works of Popular Art lack personal expression.¹²² The success of the work of the Popular Artist is not measured by its creativity.¹²³ Therefore, the Popular Artist's work tends to be unoriginal.¹²⁴ Conversely, Fine Art is valued for and embraces creative uniqueness.¹²⁵ Turning away from a tradition of mere imitation, the "Fine Artist tends to have an inspiration, which he or she makes into art."¹²⁶ On the other hand, Popular Artists tend to be viewed more as art technicians with their influence based in the tradition of imitation rather than inspiration.¹²⁷ Hence, according to the

¹²² Josephson, *supra* n. 115, at 93 ("In general, Popular Art reflects the viewers' taste and values back to them. It does not express the personal taste or feeling of the artist. This means that often this sort of art is criticized by the Fine Art art world for being insincere since the artist is not projecting their own views but producing art that is calculated to affect the viewers in a certain way, and pander to the viewers' taste. For example, a horse is painted with big eyes to look cute; but the artist does not necessarily really feel the emotion projected; rather the cuteness is a constructed emotion calculated to be appealing. The Popular Artist is a technician skillfully manipulating the medium to make art that appeals to popular taste.").

¹²³ Josephson, *supra* n. 115, at 94.

Those with popular taste allow themselves to make fully formed images in response to art. They let their concepts construct a complete scene of whatever the artist depicted. The conventionality of these images plays a role for them. Since they have seen what is depicted in the art before, it is easy for them to imagine themselves relating to it as if it were a scene in real life. The art is conventionalized and stylized so that individuality is completely lacking. The fact that the art is not new or creative doesn't bother popular taste at all. In fact, people like the comfortable familiarity of the conventional image, and its complete conventionality facilitates their engagement with the subject matter so as to have a vicarious experience. Doing this with an unconventional image would be more difficult.

Josephson, *supra* n. 115, at 108.

¹²⁴ See Josephson, *supra* n. 115, at 94. "There is no value in originality for the Popular Artist, since originality as such has no mass appeal" and "[t]he mission of the Popular Artist is to make art that has mass appeal." Josephson, *supra* n. 115, at 94-95.

¹²⁵ See Josephson, *supra* n. 115, at 86 ("Fine Art objects are appreciated for their uniqueness and their artistic qualities in the context of the art world. It is these art world standards that made Popular Art seem to be bad art. . . . When compared to Fine Art objects using Fine Art standards of creative uniqueness, aesthetics, expressiveness, Popular Art comes up short.").

¹²⁶ Josephson, *supra* n. 115, at 88.

¹²⁷ Josephson, *supra* n. 115, at 88.

Generally, Popular Art is meant to entertain, to stimulate emotion, or project sentimentality. All these things are really antithetical to intellectual goals. . . . The Popular Artist wants to appeal to everyone, and so needs to make art that needs no education or intelligence to decipher. The mission of the Popular Artist is to make art that has mass appeal. Thus, the Popular Artist makes representational art because that art is most easily understood. Also, representational art is easier for an artist-technician to produce. It does not require inspiration or stylistic experimentation or excessive creativity.

Cultural Niche Theory of Art, Popular Art's inherent qualities of unoriginality, lack of creativity, lack of uniqueness and lack of personal expression, render it unlikely to be deemed a transformative use under the *Comedy III* court's transformative use test.

2. Defining Saderup's Work as Popular Art According to the Cultural Niche Theory of Art

According to the Popular/Fine Art distinctions outlined in the Cultural Niche Theory of Art, Saderup's depiction of The Three Stooges would most likely fall into the Popular Art cultural niche, thereby likely placing Saderup's work outside of the *Comedy III* court's transformative use status and the concomitant First Amendment protection. Saderup's depiction of The Three Stooges can be categorized as Popular Art for several reasons. Popular Art is very inexpensive compared to Fine Art and is marketed in venues where the greatest number of people have access to it.¹²⁸ Many copies of the same image can be distributed, all of relatively equal value because of its unoriginality or lack of uniqueness.¹²⁹ Popular Art tends to use images that are not new,¹³⁰ that have proven effective in the past,¹³¹ that are conventional and that are familiar to people.¹³² Popular Art tends to lack a message or expression and is generally "meant to entertain, to stimulate emotion, or project sentimentality."¹³³

Saderup's artwork was relatively inexpensive, with multiple copies of the same image being distributed, all of relatively equal value. For example, his lithographs of The Three Stooges sold for twenty dollars unsigned and Saderup's T-shirts bearing the likeness of The Three Stooges sold for eighteen to twenty dollars.¹³⁴ Saderup's art was marketed in venues where a large number of people had access to the work. Saderup marketed and sold most of his Three Stooges' T-shirts and lithographs over

Josephson, *supra* n. 115, at 95. Further, "[t]he Popular Artist makes money by being good at making art that pleases a large audience. This tends to mean that making clearly representational art which is entertaining, sentimental, or emotionally stimulating." Josephson, *supra* n. 115, at 96.

¹²⁸ Josephson, *supra* n. 115, at 90-91.

¹²⁹ See Josephson, *supra* n. 115, at 90 ("For popular taste, the distinction between an original and a copy is made differently than it is made for Fine Art. For the viewers an exact copy of a cute puppies picture is just one more cute puppies picture. It is not considered a forgery, fake, or mere reprint. It is the image in the art, the subject matter, not the uniqueness of the art object itself that is important. Because of this, many copies of the same image can be distributed all of equal value.").

¹³⁰ Josephson, *supra* n. 115, at 108.

¹³¹ Josephson, *supra* n. 115, at 94.

¹³² Josephson, *supra* n. 115, at 108.

¹³³ Josephson, *supra* n. 115, at 95.

¹³⁴ Dolan, *supra* n. 3, at A1.

the Internet.¹³⁵ An image of The Three Stooges is nothing new to the public. In fact, The Three Stooges are familiar to the public. For example, in some realms the public has gone so far as to label The Three Stooges "American Icons."¹³⁶ Saderup's depiction was arguably conventional.¹³⁷ Saderup neither contended nor demonstrated that his depiction of The Three Stooges "sought to convey or sell a message of any type in or on their T-shirts, or for that matter their prints."¹³⁸ In fact, Saderup averred that what he sold "was no more or less than The Three Stooges' likenesses."¹³⁹ Saderup's ultimate purpose in creating The Three Stooges seemed to be to entertain, to stimulate emotion or project sentimentality, rather than to exhibit a personal expression, originality, creativity or to move beyond a mere imitation of The Three Stooges. For example, in describing his own work, Saderup claimed that his drawing of The Three Stooges was meant to edify them and to capture their madcap spirit in a way that would make people smile.¹⁴⁰ Arguably the best way to convey this spirit and make people smile would be to portray The Three Stooges exactly how they appeared to the American public in films and on television, with little deviation from the established images.

Thus, according to the Cultural Niche Theory of Art, Saderup's depiction of The Three Stooges on T-shirts and lithographs would likely be deemed Popular Art. Based upon a finding that Saderup's work constitutes Popular Art, it likely lacks sufficient transformative elements according to the *Comedy III* court's standards, and thus, fails to warrant First Amendment protection. Although some forms of Popular Art work will fail the transformative use test, namely those works that incorporate other original Popular Art images into the final product, original works of Popular Art require protection from appropriation.¹⁴¹

¹³⁵ Bischoff, *supra* n. 23. The following are two web sites where Saderup's charcoal drawings of celebrities are sold: <<http://www.creativemix.com/saderup/>> and <<http://www.kadinsky.com/>>.

¹³⁶ Michael Fleming, *The Three Stooges: Amalgamated Morons to American Icons* (Doubleday & Co., Inc. 1999).

¹³⁷ See *Comedy III*, 21 P.3d at 811 (The court held "[Saderup's] undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges." (emphasis added)).

¹³⁸ *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 68 Cal. App. 4th 744, 752 (Cal. App. 2 Dist. 1998). Before the Supreme Court of California, however, Saderup argued his work was wholesome and reverential. See *Comedy III*, 21 P.3d at 811.

¹³⁹ *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 68 Cal. App. 4th 744, 753 (Cal. App. 2 Dist. 1998).

¹⁴⁰ Dolan, *supra* n. 3, at A1.

¹⁴¹ The Cultural Niche Theory of Art distinguishes between original works of Popular Art and secondary works of Popular Art, i.e. works of Popular Art based on images from original works of Popular Art. For example, an original work of Popular Art would be the cartoon character "Odie" or a

3. The Need to Protect the Owner of the Rights to Original Works of Popular Art

"With Fine Art, there tends to be an original, and then any copies are either sanctioned 'reprints' or they are considered forgeries."¹⁴² With Popular Art, however, there tends not to be an original in the sense that a Fine Art image has an original.¹⁴³ For instance, take the example of the Mona Lisa.¹⁴⁴ As a recognized work of Fine Art in the art world, the value of the Mona Lisa arguably lies in its aesthetic form, its expression, its creative uniqueness or its appeal to intellect and reason of the mind.¹⁴⁵ More importantly, the Mona Lisa is valued as an original, one-of-a-kind work of Fine Art.¹⁴⁶ The image of the Mona Lisa can be imitated or reproduced, however, the owner to the rights of the Mona Lisa will not likely be damaged economically, even if the imitative images were not sanctioned, because the subsequent images will not likely be considered as good as the original.¹⁴⁷ Even if the imitative images were considered artistically as good as the original, the imitative image will not likely be considered as valuable as the original work because people, perceiving value in the original, tend to desire the unique, one-of-a-kind item, not the reprint.¹⁴⁸

Conversely, for an example of an original work of Popular Art, one can turn to the film arts of The Three Stooges' movies and television performances.¹⁴⁹ The *Comedy III* court readily found that The Three Stooges' creative labor had economic value.¹⁵⁰

painting by Norman Rockwell and a secondary work of Popular Art would be a sculpture of Odie or a sculpture of the images within the Rockwell painting.

¹⁴² Josephson, *supra* n. 115, at 91.

¹⁴³ Josephson, *supra* n. 115, at 91.

¹⁴⁴ Josephson, *supra* n. 115, at 91.

¹⁴⁵ Josephson, *supra* n. 115, at 91.

¹⁴⁶ Josephson, *supra* n. 115, at 91.

¹⁴⁷ Josephson, *supra* n. 115, at 91.

¹⁴⁸ See Josephson, *supra* n. 115, at 91 (noting that "[p]eople tend not to collect reprints as they would originals.").

¹⁴⁹ Josephson, *supra* n. 115, at 92. ("For Fine Art to function as it does, institutions of art history and art critics must exist. They interpret the art in the context of the Fine Art historical traditions and the contemporary art world context. Popular Art needs no art history because it is not interpreted in terms of art traditions, or art world context. However, for some Popular Art, specifically the film arts of movies and television, there are people who function as art critics. The primary job of these people is to tell us whether we would enjoy seeing the art. The art is rated on its mass appeal. . . . Sometimes it is evaluated on the grounds of its message as well. Although there are comparisons made between movies, or between television shows, they are not rated by their art world qualities, but by their entertainment value for the consumer.").

¹⁵⁰ *Comedy III*, 21 P.3d at 805.

Their brand of physical humor—the nimble, comically stylized violence, the ‘nyuks-nyuks’ and ‘whoop-whoop-whoops,’ eye-pokes, slaps and head conks . . . created a distinct comedic trademark. Through their talent and labor, they joined the relatively small group of actors who constructed identifiable, recurrent comic personalities.¹⁵¹

As indicated by the *Comedy III* court and as Popular Art, The Three Stooges value lay in their ability to entertain and to stimulate emotion, specifically humor, in the minds of their viewers. Nonetheless, when The Three Stooges died, in a sense, the original, one-of-a-kind work died with them.

As Popular Art, however, the image of The Three Stooges has value after their deaths. Their image retains an economically viable ability to entertain, to stimulate emotion, to create narrative thought and sentiment and to enable vicarious experiences. As Saderup acknowledged, regardless of their passing, The Three Stooges can still make people smile.¹⁵² This intangible value can easily be appropriated in skillful renditions of The Three Stooges. Unlike the Mona Lisa, the owner of the rights to The Three Stooges no longer has a tangible, original work of art that will retain its economic value regardless of imitations. Thus, the owner of the rights to the original piece of Popular Art requires protection. The protection of original works of Popular Art is by no means an aberration in the judicial system. Other courts have recognized the need to protect original works of Popular Art images from appropriation while not extending the protection to Fine Art.¹⁵³

¹⁵¹ *Id.*

¹⁵² Dolan, *supra* n. 3, at A1.

¹⁵³ For an example of a court that held that Fine Art need not be protected from appropriation, see *Alva Studios, Inc. v. Winniger*, 177 F. Supp. 265, 267 (S.D.N.Y. 1959) (holding that great skill and originality were required to produce a exact scale reduction of Rodin's sculpture, *Hand of God*, thereby extending copyright protection to exact reproduction). Conversely, for examples of courts that protected original Popular Art images from appropriation, see *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) (holding Jeff Koons, a recognized Popular artist that creates works of “banality” by appropriating images from comics, post cards, and note cards, infringed upon United Feature Syndicate, Inc.’s copyright rights in the cartoon character Odie of the Garfield comic strip by creating a collage which included a sculpture that was based on picture of Odie), *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Mar. 30, 1993) (holding Jeff Koons’ sculpture of professional photographer Barbara Campbell’s *Boy’s with Pig* copyrighted note card, although altering the image in some regards and seemingly making a comment or criticism of Campbell’s work by including it in his “Ushering in Banality” show, nonetheless, constituted copyright infringement) and *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990) (holding Jeff Koon’s sculptural reproduction of professional photographer Art Rogers’ copyrighted postcard entitled *Puppies*, although making drastic changes in

In summary, because the inherent qualities of some forms of Popular Art, as defined by the Cultural Niche Theory, cause it to fall outside transformative use and because Saderup's depiction of The Three Stooges can be categorized as Popular Art, the *Comedy III* court correctly concluded that Saderup's work was not transformative according to the Cultural Niche Theory. Further, because original works of Popular Art, such as The Three Stooges, require protection from appropriation in order to maintain its economic value, the court correctly decided to protect Comedy III's rights to the image of The Three Stooges by denying Saderup's work First Amendment protection. Although the court may have reached the correct result when it applied the transformative use test, the Cultural Niche Theory offers a more straightforward solution to determining whether the use of a celebrity image in a work deserves protection.

C. The Cultural Niche Solution to Analyzing Celebrity Depictions

According to the Cultural Niche Theory, the standard for determining which images require consent to use them and which images would be protected by the First Amendment is relatively simple. For original works of Popular Art, such as cartoon character X, a drawing of X by another is still considered property of the original artist, therefore requiring consent to use it.¹⁵⁴ This result stems from the fact that a drawing of original Popular Art image, X, is classed as a primary image and not a derivative image.¹⁵⁵ In other words, if it looks like X, then it counts as X "no matter how it is produced and can only be used by someone if permitted by the owners" of X.¹⁵⁶ Thus, the Cultural Niche test to determine if an artist is required to

the size and color of work and exhibiting it in his "Banality Show," did not preclude a finding that Koons' work constituted copyright infringement).

¹⁵⁴ See Josephson, *supra* n. 115, at 91.

¹⁵⁵ Josephson, *supra* n. 115, at 91. Unlike drawings of Popular Art images like X, a drawing of an image of Fine Art tends to be considered derivative and thus not owned. Josephson, *supra* n. 115, at 91.

¹⁵⁶ Josephson, *supra* n. 115, at 91. Josephson illustrates her point in the following:

For example, the image of a telephone in the shape of Garfield is owned by Paws, Inc., a company that distributes merchandise with Garfield images. A drawing of a Garfield phone is not considered a derivative image, but is classed as another case of the primary image. If it looks like Garfield, then it counts as a Garfield no matter how it is produced and can only be used by someone if permitted by the owners of Garfield.

Josephson, *supra* n. 115, at 91.

get consent to use a celebrity image or face a right of publicity claim is as follows: the artist must get consent to use the image if (1) the image is classed as an original work of Popular Art, (2) an artist incorporates that image into a new work and (3) the image in the new work resembles that of the original work. Accordingly, the Cultural Niche Solution provides more lucid standards by which to analyze a celebrity depiction than the *Comedy III* court's transformative use test and subsidiary inquiry.

IV. CONCLUSION

Imagine you are an emerging visual artist and a recent graduate of the local art college. Through your studies you have grown to admire the work of successful Popular Artists, such as Andy Warhol, and hope to achieve the same level of success in the art world as he did. Nevertheless, instead of casting the celebrity image in a remote, detached and dehumanized fashion like some of your more successful predecessors in the Popular Art world, like Andy Warhol, you decide to cast the celebrity image in a wholesome and reverential light. Assuming that the First Amendment protects Warhol's work because it has been interpreted as an ironic comment on contemporary life, will the First Amendment protect the less known, wholesome, reverential celebrity depictions or will you be subject to a lawsuit through a right of publicity claim?

The *Comedy III* court made an attempt to answer this question through its adoption and application of the transformative use test and the subsidiary inquiry.¹⁵⁷ The court's application of the transformative use test and subsidiary inquiry, unfortunately, failed to create a clear standard to be applied to future works containing celebrity images.¹⁵⁸ By adopting the transformative use test for use in right of publicity jurisprudence, the court may have unwittingly infected right of publicity jurisprudence with an already confused standard.¹⁵⁹ Further, in applying the transformative use test and the subsidiary inquiry, the court failed to engage in a prudent examination of the facts or factors that led to its conclusion that Saderup's work fell outside the scope of First Amendment protection.¹⁶⁰ Thus, readers of the opinion are left with many unanswered questions as to what elements of an artistic work containing celebrity images satisfy the

¹⁵⁷ See *supra* nn. 35-72 and accompanying text.

¹⁵⁸ See *supra* section III(A) (discussing the lack of clear standards provided by the *Comedy III* court's application of the transformative use test and subsidiary inquiry).

¹⁵⁹ See *supra* nn. 73-85 and accompanying text.

¹⁶⁰ See *supra* nn. 86-105 and accompanying text.

transformative use test or the subsidiary inquiry, thereby warranting First Amendment protection.¹⁶¹ Accordingly, artists, like those in the hypothetical above, are left with little guidance as to the legal boundaries that apply when depicting a celebrity image.¹⁶²

Perhaps employing art experts when analyzing a work to determine if it is transformative may solve the uncertainties of artists. This method would aid in detaching judges from making qualitative and aesthetic determinations concerning art works. The Cultural Niche Theory of Art is a simple solution to the problem. If an image is classed as an original work of Popular Art, an artist incorporates that image into a new work and the image in the new work resembles that of the original work, the artist must get consent to use the image. On the other hand, perhaps the transformative use test and subsidiary inquiry could be a reasonable standard for analyzing a work containing a celebrity image. However, to effectuate this standard and prevent the confusion engendered in decisions, like the *Comedy III* court's decision, requires that lawyers and judges identify with the utmost specificity the precise facts in each case that cut for and against the transformative use test and subsidiary inquiry. Only then will we "be able to use these fact-specific discussions as the bricks from which to build up, one at a time, a set of intelligible rules about acceptable and unacceptable practices"¹⁶³ concerning celebrity depictions.

¹⁶¹ See *supra* nn. 86-105 and accompanying text.

¹⁶² See *supra* nn. 106-12 and accompanying text.

¹⁶³ Zimmerman, *supra* n. 74, at 267.