THE COLUMBIA JOURNAL OF
LAW & the ARTS

A QUARTERLY JOURNAL OF LAW AND THE ARTS,
ENTERTAINMENT, COMMUNICATIONS, AND INTELLECTUAL PROPERTY

Vol. 48, No. 1

COLUMBIA LAW SCHOOL

THE COLUMBIA JOURNAL OF LAW & the ARTS

CONTENTS

Copyright and the Training of Human Authors and Generative Machines

Robert Brauneis[*]

TABLE OF CONTENTS

INTRODUCTION

Since November 2022, authors and copyright owners have filed about twenty lawsuits against generative AI developers, many of them aspiring class actions. At the center of almost all of those lawsuits are claims of direct copyright infringement for the unauthorized use of copyrighted works in training generative AI models. The decisive issue in the U.S. cases will almost certainly be whether that copying is justified as fair use when the models are producing output that is being distributed publicly or used for private gain, but that output is not substantially similar to the training works.

In this Article, I explore that issue by considering how various copyright doctrines apply to constrain or free human authors when they learn from copyrighted works, and then asking whether there are grounds for treating the training of generative AI models differently. There are many limitations on copyright of which human authors can and do take advantage as they are learning. However, there is no blanket immunity for use of copyrighted works to train human authors, even though those authors typically do not end up creating substantially similar works. Human authors typically end up paying, directly or indirectly, for most of the copyrighted works from which they learn.

If no copyright doctrine frees human authors from all copyright constraints when they use works to learn, why should the training of generative AI models be treated as fair use? I will focus principally on two arguments in favor of treating generative AI training as fair use. (As I will note below, these arguments have also been made in foreign jurisdictions that do not have fair use exceptions, by tying them to other copyright doctrines.) The first is that the training of generative models involves a "non-expressive use" of the training works, and that "non-expressive uses" should be treated as fair uses, or indeed as uses that do not implicate any of the exclusive rights of copyright. Among the scholars who have made versions of such an argument are Matthew Sag, Oren Bracha, Michael Murray, Abraham Drassinower, Carys Craig, Alain Strowel, and Cheryl Foong.[1]

---

1.   *See* Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295, 304, 307 (2023); Matthew Sag, *Fairness and Fair Use in Generative AI*, 92 FORDHAM L. REV. 1887 (2024); Oren Bracha, *The Work of Copyright in the Age of Machine Production*, U. OF TEX. L. LEGAL STUD.RSCH. PAPER SERIES., 25 (2023); Michael D. Murray, *Generative AI Art: Copyright Infringement and Fair Use*, 26 SMU SCI. & TECH. L. REV. 259, 275–80 (2023); ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 88 (2015); Alain Strowel, *Reconstructing the Reproduction and Communication To the Public Rights: How To Align Copyright with Its Fundamentals, in*COPYRIGHT RECONSTRUCTED: RETHINKING COPYRIGHT'S ECONOMIC RIGHTS IN A TIME OF HIGHLY DYNAMIC TECHNOLOGICAL AND ECONOMIC CHANGE 203 (P. BerntHugenholtz, ed., 2018); Carys J. Craig, *The AI-Copyright Challenge: Tech-Neutrality, Authorship, and the Public Interest, in*RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND ARTIFICIAL INTELLIGENCE 134, 153–54 (2022); Cheryl Foong,

It turns out that "expression," and therefore "non-expressive use," has been defined in three different ways. Under the only definition that distinguishes generative AI training from human learning, a "non-expressive use" is one that does not result in an aesthetic or hedonic reaction on the part of a being that can feel such reactions. Because computers cannot have aesthetic reactions while human authors cannot avoid them, computers can in that sense make "non-expressive use" of works that humans cannot. However, I argue that recognition of this "non-expressive use" as a fair use would be bad copyright policy. Copyright should be and usually has been considered to protect not only the entertainment value of works for passive and unchanging human beings, but also the educational value of works for human beings who want to learn and change, both individually and collectively. Moreover, because all works both generate aesthetic responses in human beings, and educate and enculturate us, both entertainment and educational purposes have to be imputed to their creation. That means that their use to train generative AI models is not a wholly different, "transformative" use.

The second argument is that generative AI training is functionally equivalent to a human activity that copyright doctrine other than fair use would shield from liability, and fair use should be employed to legally recognize that functional equivalence. The leading candidates for such an activity are reading, listening, and watching. I conclude that there are reasons to doubt whether generative AI training is for copyright purposes equivalent to human reading, listening, and watching. Generative model training likely transcends the human limitations that underlie the structure of copyright's exclusive rights, and it therefore should not be able to take advantage of that structure. Moreover, the very inability of computers to have any hedonic or aesthetic reactions to the works they are processing, and their inability to remember and act on those reactions, makes computer processing fundamentally different than human experience of works.

Part I of the Article frames the question. It provides reasons why it is likely that the central issue in the many lawsuits pending in the U.S. against generative AI developers will be whether the use of copyrighted works to train generative AI models is fair use. Part II considers the variety of doctrines that make the use of copyrighted works to educate human authors subject to more or less legal constraint. These include not only fair use, but also the first sale doctrine, internal limitations on the exclusive rights, the enablement of public licensing and advertising-based revenue

---

Immaterial Copying in the Age of Access, 44 EUROPEAN INTELL. PROP. REV. 513 (2022). Mark Lemley and Brian Casey also mention non-expressive use. *See* Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 750 (2020). However, those two authors write as much about predictive AI as about generative AI, and therefore speak of non-expressive use in somewhat narrower terms, leaving some of the generative AI questions open. *See id.* ("When learning is done to copy expression, for example, by training an ML system to make a song in the style of Ariana Grande, the question of fair use can—and should—become much tougher.").

models, and the fixation and authorship requirements. It will conclude that while many doctrines ease copyright constraints on human learning, learning by human authors is not categorically free from those constraints. Authors typically end up paying some amount, directly or indirectly, for many of the copyrighted works from which they learn.

Part III considers copyright and fair use in the context of generative AI training. Part III.A. considers the argument that generative AI training is different from human learning because it is a "non-expressive use" that is recognized under existing precedent as fair use, at least as long as the model does not produce output that is substantially similar to any training work. I contend that the term "expression," and therefore also the term "non-expressive use," has actually been used in three different ways. Under the first definition, which I call "constitutive expression," generative AI training use is expressive use, not non-expressive use. Under the second, "actionable expression," generative AI training is non-expressive, but so is use by human authors to learn, and so to cover generative AI training, fair use doctrine would have to be radically expanded to immunize all learning. Under the third definition, "felt expression," generative AI training is indeed non-expressive in a way that human learning is not and likely cannot be, but I will argue that copyright law should not make that factual distinction legally significant.

Part III.B. considers the argument that the use of copyrighted works to train generative models is functionally equivalent to human reading, viewing, and listening—activities that are outside of the scope of the exclusive rights granted to copyright owners—and that fair use should be employed to legally recognize that functional equivalence. It will conclude that generative model training is likely not functionally equivalent to those activities. That is the case both because training algorithms surpass the human limitations that ground the structure of copyright's exclusive rights, and because those algorithms do not have and cannot act on hedonic reactions to the works they process. Part III.C. considers the issue of remedies if generative AI training is not a fair use. Part VI concludes.

I.   FRAMING THE QUESTION

It is by now common knowledge that most prominent generative AI base models were trained on works of authorship that are under copyright, without the authorization of the owners of copyright in those works.[2] Many copyright owners have filed individual or proposed class action lawsuits against generative AI

---

2.   *See, e.g.*, Peter Henderson et al., *Foundation Models and Fair Use* 1–2 (Stanf. L. and Econ. Olin Working Paper No. 584, 2023), https://arxiv.org/abs/2303.15715 (detailing how popular generative models such as GPT 3 and 4, Stable Diffusion, Codex, and BERT have been trained on collections containing copyrighted material, such as BookCorpus, Books3, and webcrawls such as C4 and OpenWebText).

developers.[3] Complaints in some of these lawsuits include a wide variety of federal and state causes of action—not just direct copyright infringement, but also vicarious and contributory copyright infringement, removal of copyright management information, unjust enrichment, unfair competition, negligence, right of publicity, and others. However, early motions to dismiss in some of those broad lawsuits have been narrowing them to claims of direct copyright infringement for unauthorized copying of works to train generative AI models.[4] Thus, it seems certain that that direct infringement claim will be central in many of these lawsuits.

Some of the complaints in those lawsuits relate dramatic instances in which the defendant's generative AI service, when prompted to produce the lyrics to a well-known song or the text of a newspaper article, generated a near-verbatim copy of a copyrighted work on which it was trained.[5] Those instances of generative AI models "regurgitating" verbatim copies are cut-and-dry cases of copyright infringement.[6] However, they are probably already relatively rare.[7] And "regurgitation" is likely to become rarer. The developers of generative AI models really do not want them to produce verbatim copies of existing works. That reduces generative AI to a search engine that only delivers cached copies, which is no more than a degraded version of an old technology. It is already clear that generative AI models can do far more than that—they can produce text, images, music and videos that are not substantially similar to any of the works on which they were trained. It is very likely that generative AI developers will figure out how to prevent the models from producing near-verbatim copies of training works in all but very rare cases, probably both by making changes to how the models are trained, and, if they are deploying the models

---

3. For an updated list of lawsuits against generative AI developers, see DAIL—the Database of AI Litigation, available at https://blogs.gwu.edu/law-eti/ai-litigation-database/ (search for the "Generative AI" in Application Area).

4. *See* Order on Motions to Dismiss and Strike, Andersen v. Stability AI, Ltd., No. 23-cv-00201 (N.D. Cal. Oct. 30, 2023); Order Granting Motion to Dismiss, Kadrey v. Meta Platforms, No. 23-cv-03417 (N.D. Cal. Nov. 20, 2023); Order Granting in Part and Denying in Part the Motions to Dismiss, Tremblay v. OpenAI, Inc., No. 23-cv-03223 (N.D. Cal. Feb. 12, 2024).

5. *See, e.g.*, Complaint at 5, Concord Music Grp., Inc. v. Anthropic PBC, No. 23-cv-01092 (M.D. Tenn. Oct. 18, 2023) ("When a user prompts Anthropic's Claude AI chatbot to provide the lyrics to songs such as 'A Change Is Gonna Come,' "God Only Knows," "What a Wonderful World," "Gimme Shelter,' . . . or any other number of Publishers' musical compositions, the chatbot will provide responses that contain all or significant portions of those lyrics."); Complaint at Exhibit J, N.Y. Times Co. v. Microsoft Co., No. 23-cv-11195 (S.D.N.Y. Dec. 27, 2023) (containing "One Hundred Examples of GPT-4 [Allegedly] Memorizing Content from The New York Times").

6. For one good attempt to separately define "extraction" (verbatim copies produced through intentional prompting of a generative model), "regurgitation" (verbatim copies produced through intentional or unintentional prompting), and "memorization" (verbatim copies produced through any means), *see* A. Feder Cooper & James Grimmelmann, *The Files Are in the Computer: Copyright, Memorization, and Generative AI*, CHI.-KENT L. REV. (forthcoming 2024).

7. *See* Nicolas Carlini et al., *Extracting Training Data from Diffusion Models, in* 32ND USENIX SEC. SYMP. 5253 (2023) (managing to produce 94 outputs that were near-identical to training works, out of 175 million targeted attempts); *see also* Peter Henderson et al., *supra* note 2, at 7–8, 11 (2023) (citing other extraction efforts, and reporting on extraction experiments).

only as closed services, by filtering or supplementing prompts, or filtering outputs, or both.[8]

That leads us to the question that I want to address in this Article. Let us define the term "generation," taken as a noun, as an output of a generative AI system that would fall into one of the categories of "works of authorship" enumerated in the U.S. Copyright Act had it been created by a human being.[9] Given the most popular generative AI tools available today, generations would be most likely to qualify as literary works; pictorial or graphic works; motion pictures; or combined musical works and sound recordings.[10] Taking "substantial similarity" as standing for one of the two principal elements of copyright infringement, suppose that a generative AI model does not produce generations that are substantially similar to any of the copyrighted works on which it was trained.[11] Suppose also that the generative AI model is not merely part of a research project to test the capabilities of certain machine learning technologies, but will be deployed commercially.[12] In that case, can the developer use any work of authorship it wants to train the model, even if that

---

8. *See, e.g.*, Peter Henderson et al., *supra* note 2, at 20–25 (2023) (detailing various types of technical mitigation tools, including data and output filtering, instance attribution, differentially private training, and fair use learning from human feedback); Microsoft Corporation, Comments on U.S. Copyright Office's Notice of Inquiry and Request for Comment Re Artificial Intelligence and Copyright [Docket No. 2023-06], at 4 (Oct. 30, 2023) [hereinafter, Microsoft Comments] https://www.regulations.gov/comment/COLC-2023-0006-8750 [https://perma.cc/G67A-A3V9] [https://web.archive.org/web/20241004155553/https://www.regulations.gov/comment/COLC-2023-0006-8750] (detailing measures to prevent memorization or repetition).

9. *Cf.* A. Feder Cooper et al., *Report of the 1st Workshop on Generative AI and Law* 28 (Yale Law & Econ. Research Paper, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4634513 (defining "generation[s]" as "complex, human-interpretable outputs, such as full sentences or natural-looking images").

10. *See* 17 U.S.C. § 102(a) (enumerating eight categories of works of authorship, including "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works").

11. For further discussion of substantial similarity, see *infra* text accompanying note 26, notes 94–101.

12. I have some sympathy for the unauthorized use of copyrighted works to see whether certain machine learning technologies would work at all. It is probably impossible to convince investors to invest money to attempt to license millions of works if you cannot provide evidence that your machine learning technology will, if trained on enough works, produce something very valuable. In its motion to dismiss the complaint of the group of plaintiffs led by Mike Huckabee, Bloomberg has argued that its unauthorized use of copyrighted works to train its large language model was a fair use in part because the project was for internal research purposes only. *See* Memorandum of Law in Support of Bloomberg L.P. and Bloomberg Finance L.P.'s Motion to Dismiss First Amended Class Action Complaint at 10–12, Huckabee et al. v. Bloomberg L.P., No. 23-cv-09152 (S.D.N.Y Mar. 22, 2024). If that is true—if Bloomberg did not use any generations produced by the model in the conduct of its business, but was just testing to see what is possible—I think that would weigh heavily in favor of fair use. On the difference between academic and commercial research more broadly, see Deven R. Desai & Mark Riedl, *Between Copyright and Computer Science: The Law and Ethics of Generative AI* 21–26 (Georgia Tech Scheller Coll. of Bus. Research Paper No. 4735776, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4735776.

work is under copyright and the owner of copyright does not want it to be used in that way?

The owners of copyright in the works can make a pretty strong case for prima facie copyright infringement. The developers of generative AI tools that are defendants in these cases use computer programs that find files of the type that are useful to their training project—text, image, music, or video, for example—that are available at internet URLs; download copies of those files; and store them on a server under the developers' control. They keep those copies for some time and process them with a machine learning algorithm to create a generative model. Yes, there is at least one academic, Oren Bracha, who has argued that those copies are not really "copies" within the meaning of the Copyright Act, because they generally are never seen by any human being.[13] However, it seems likely that the courts in which this litigation is proceeding will hold that the copies that the generative AI developers have made are in fact "material objects . . . in which a work is fixed . . . from which the work *can be* perceived, reproduced, or otherwise communicated . . . with the aid of a machine or device."[14] That language seems to require only that the copies are potentially perceivable by human beings, not that they actually were ever so perceived. If you could gain access to the servers on which those copies were stored, you would definitely be able to read, view, or listen to them with the aid of your computer. Thus, if the works were under copyright, and the developers had no authorization from the owners of copyright, what they did almost certainly amounts to prima facie infringement of the reproduction right.[15]

What is left? Fair use. Section 106 of the Copyright Act, which enumerates the exclusive rights granted to copyright owners, states that those rights are "[s]ubject to sections 107 through 122."[16] Those sixteen sections contain many exceptions to the exclusive rights, but the only one that potentially applies to what the AI developers have done and are doing is the fair use exception codified in § 107. It alone is broad and vague enough that it might apply to the making of copies of millions or billions of files containing copyrighted works for the purpose of building a generative model. And generative AI developers are already invoking it. OpenAI, for example, has repeatedly asserted that "[t]raining AI models using publicly available internet materials is fair use, as supported by long-standing and widely accepted precedents."[17]

---

13. *See* Bracha, *supra* note 1. Others have made this argument more generally, without tying it specifically to the language of the U.S. Copyright Act. *See* DRASSINOWER, *supra* note 1, at 101; Strowel, *supra* note 1 (citing DRASSINOWER); Foong, *supra* note 1.

14. 17 U.S.C. § 101 ("Copies") (emphasis added).

15. *See* 17 U.S.C. § 106(1).

16. *See* 17 U.S.C. § 106.

17. *Open AI and Journalism*, OPENAI (Jan. 8, 2024), https://openai.com/blog/openai-and-journalism [https://web.archive.org/web/20241004161638/https://openai.com/web/20241004161638/https://openai.com/index/openai-and-journalism/]; *see* OpenAI LP, Comment on U.S. Patent and Trademark Office's Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation, Docket No.   PTO-C-2019-0038   (2019)   [hereinafter, OpenAI   Comments   2019], https://www.uspto.gov/sites/default/files/documents/OpenAI_RFC-84-FR-58141.pdf [https://perma.cc/M7UP-J482]

More directly, Bloomberg L.P. has invoked fair use in a motion to dismiss the claim of direct copyright infringement in litigation brought by a group headed by former Arkansas governor Mike Huckabee.[18] That focuses us on the question I want to explore in this Article: Is using copyrighted works to train generative AI models which produce no output that is substantially similar to those works a fair use?

A note about the international implications of the issues I will explore. There are a relatively small number of countries whose copyright laws have an open-ended fair use provision like that of the United States.[19] For those countries, a wide-ranging policy discussion, with consideration of all of the traditional fair use factors, will be directly applicable. For other countries, that will not be the case. However, some of the more specific concepts discussed in detail below will still have legal relevance through other doctrinal routes. First, those concepts may arguably be implicit in other general provisions. Thus, for example, Abraham Drassinower, Alain Strowel, Cheryl Foong, Oren Bracha and Carys Craig all argue that a non-expressive or non-communicative use of work does not infringe any exclusive right in that work.[20] If that is so, then what "expression" means is important to determine whether a use implicates any of the exclusive rights, even in a country that has no fair use provision. Second, some narrower exceptions in particular countries may explicitly reference concepts like non-expressive use. For example, Article 30-4 of the Japanese Copyright Act provides that a work may be used if it is not a person's purpose to personally enjoy or cause another person to enjoy the thoughts or sentiments expressed in that work"[21]—a category that is arguably identical to one use of the term "non-expressive." Thus, although the principal focus of this Article is U.S. law, some of the discussion will refer to non-U.S. sources and will have application outside of the U.S.

II. COPYRIGHT AND THE TRAINING OF HUMAN AUTHORS

When considering whether and under what circumstances unauthorized use of copyrighted works to train generative AI models is or should be "fair use," one starting point is to ask how fair use and other copyright doctrines feature in the training, or education, of all of the human creators who copyright law groups under

---

[https://web.archive.org/save/https://www.uspto.gov/sites/default/files/documents/OpenAI_RFC-84-FR-58141.pdf]; Memorandum of Law in Support of OpenAI Defendants' Motion to Dismiss, N.Y. Times Co. v. Microsoft, No. 23-cv-11195 (S.D.N.Y. Feb. 26, 2024) [hereinafter, OpenAI's MTD].

18. *See* Memorandum of Law in Support of Bloomberg L.P. and Bloomberg Finance L.P.'s Motion to Dismiss First Amended Class Action Complaint at 9–21, Huckabee et al. v. Bloomberg L.P., No. 23-cv-09152 (S.D.N.Y. Mar. 22, 2024).

19. *See, e.g.,* Niva Elkin-Koren& Neil Weinstock Netanel, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of US Opposition*, 72 HASTINGS L.J. 1121, 1125–26 (2020) (listing eleven countries that have adopted, "with some variation," a fair use model).

20. *See* sources cited *supra* note 1.

21. Copyright Law of Japan, Art. 30-4 (English translation provided by the Copyright Rsch. and Info. Ctr.), https://www.cric.or.jp/english/clj/cl2.html [https://web.archive.org/web/20240924155408/https://www.cric.or.jp/english/clj/cl2.html]; *see* Tatsuhiro Ueno, *The Flexible Copyright Exception for 'Non-Enjoyment' Purposes–Recent Amendment in Japan and Its Implication*, 70 GRUR INT. 145 (2021) (discussing this provision).

the term "author": writers, coders, visual artists, photographers, composers, recording artists, choreographers, dramatists, architects, and so on. While the generative AI question is new, the question of how copyright should and does treat the training of human authors has existed since copyright law itself emerged. Courts, legislatures, and agencies have had plenty of occasions to consider that question, and to shape copyright law in light of it.

Of course, human learning and generative model training are not exactly the same. Most fundamentally, computers do not *do* anything, in the sense that they are not moral agents to whom we can ascribe purposes. A generative AI project is still an activity of human beings, who are trying to program computers to build models for the purpose of accomplishing certain tasks. Thus, computers are not *learning* in any purposive sense. We are really still comparing humans to humans—humans learning without using computers, and humans learning how to automate certain processes.

If computers are not moral agents, they are also not moral subjects. Many of the positive connotations we attach to learning are directly tied to our human condition. Because each of us must make our way in the world, we recognize how important learning is to survival, to flourishing, and to the enjoyment of life. Because we also depend upon each other, we recognize how important learning is to society. By contrast, training a computer to fish is not going to help the computer. The computer needs no help and is not deserving of help. We again need to consider the consequences for human beings, and for other animals who we consider moral subjects, not for the computer. Thus, "machine learning" is not inevitably deserving of whatever support we think education should get. On the other hand, generative AI undoubtedly has many benefits for society. In the currently dominant model of responding to and elaborating on human prompts, it undoubtedly has many benefits for the human prompters.[22] Those can and should be taken into account when making generative AI policy.

It is also the case that the process of training a large language model is not the same as the process of teaching a human being. However, the outcome is similar: both human authors and generative models gain the ability to produce new works of authorship in part through exposure to copyrighted works. That is the similarity I want to highlight, and that I think is significant for copyright purposes. It follows in the tradition of taking an external view of artificial intelligence, and asking only whether machines can behave in ways that we would identify as intelligent if human beings so behaved.[23]

---

22.   *See, e.g.*, Katrina Geddes, *How Art Became Posthuman: Copyright, AI, and Synthetic Media*, 42–45 (2024), https://papers.ssrn.com/abstract=4865510 (arguing that generative AI will help users and promote semiotic democracy).

23.   *See, e.g.*, J. McCarthy, M.L. Minsky, N. Rochester & C.E. Shannon, *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence* (Aug. 31, 1955), https://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html   [https://perma.cc/L93R-ELA8] [https://web.archive.org/web/20240925220620/http://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html] ("[T]he artificial intelligence problem is taken to be that of making a machine behave in ways that would be called intelligent if a human were so

Given the current broad scope of copyright protection, almost every human being has been an author. Just about all of us have fixed an original work of authorship in some tangible medium of expression, from childhood crayon drawings to emails and cell phone photos.[24] For some purposes, we may want to concentrate on *remunerated* human authors—people who have received money for the works of authorship they have created. They, after all, are the people who are creating most of the works that have "potential market(s)" that we would want to consider in the fourth factor of fair use analysis.[25] Both remunerated and unremunerated human authors learn from works of authorship that are still under copyright. (Of course, they also learn from works that are in the public domain, and from other sources that are not works of authorship at all, as I will discuss below.) Those authors then go on to create their own works, and the vast majority of those works do not infringe the works from which the authors learned.

Copyright infringement requires at its core two elements—both "lack of independent creation" and "improper appropriation," the latter of which is sometimes known as "substantial similarity."[26] The works that a human author produces are not created independently of the works from which that author has learned. Suppose, for example, that a journalist learned to write "short, sharp sentences" by reading an Ernest Hemingway novel.[27] She then writes a news article full of sentences with grammatical structures that she had found in that novel. That article was not created independently of that novel. Thus, with respect to the works that demonstrably influenced an author—and are still under copyright—the first element of copyright infringement is satisfied.

However, outside of the myopic world of copyright litigation, it is rare that the works that a human author creates are substantially similar to any of the works that have influenced them. The journalist's article is almost certainly not substantially similar to the Hemingway novel or any portion of it. More generally, authors undoubtedly incorporate many of the expressive elements they found in works that inspired them into their own works. However, they usually have remixed them enough, and introduced enough new combinations and elements, that none of their works is substantially similar to any one of the works that they have read or seen or heard.

---

behaving."). I will consider some differences below, especially the difference that human authors have aesthetic or hedonic reactions to the works from which they learn, while machines do not have such reactions to the works to which they process during training.

24.   *See* 17 U.S.C. § 102(a) (providing that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.").

25.   *See* 17 U.S.C. § 107(4) (directing courts to consider "the effect of the use upon the potential market for or value of the copyrighted work" in determining whether a use is a fair use).

26.   *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946)(holding that two essential elements in an infringement case are "(a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation"); *cf.* WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9.16 (stating that the plaintiff must "prove that defendant copied from its work," and what the defendant copied must "constitute[] a material amount of expression").

27.   I discuss this example further below at text accompanying note 34.

In that respect, the situation of the generative models whose training with copyrighted works either is or is not fair use is similar to that of human authors. Generative models are shaped through encounters with many works of authorship, and many of those works are protected by copyright, and are still under copyright. Well-trained generative models produce text, images, video, and music that, for the most part, are not substantially similar to the works on which they were trained. So, it is fair to start by asking, what copyright strictures must human authors respect with regard to the works from which they learn? In what ways does revenue flow from those learning authors to the authors and copyright owners of the works from which they learn? Or considered from the opposite perspective, what freedoms do human authors enjoy with respect to their formative works? In what ways does revenue *not* flow to the authors and copyright owners of the formative works?

Providing a comprehensive answer to those questions would require a review of more than a hundred pages of the Copyright Act and many hundreds of judicial opinions, as well as consideration of all of the ways in which copyright owners have decided to license their works, implicitly and explicitly. Here, I will touch on some of the doctrine that I think is the most important. I will also provide examples of revenue flows, though there too I have no aspiration to be comprehensive. I will then briefly consider the issue of whether the balance struck is the right one.

A. HUMAN AUTHORS AND THE STRICTURES AND FREEDOMS OF COPYRIGHT

1. Fair Use

There is no blanket fair use defense to potential infringement liability for the use of works to educate human authors. Suppose that I want to keep handy a copy of, say, the novel *What We've Lost is Nothing* by Rachel Louise Snyder so that I can study it thoroughly and reread it from time to time for inspiration.[28] (Snyder happens to be a named plaintiff in one putative class action against OpenAI and Microsoft and another against Meta.)[29] There is no reasonable interpretation of current fair use doctrine under which I can claim that it is fair use for me to go to the library photocopier with the library's copy of the book, make a copy of the entire book, and take the copy home. It will not help me in the least to swear, and swear truthfully, that my own creative output will never include anything that copyright law would consider to be substantially similar to Snyder's novel. Fair use simply does not extend that far.[30] As Benjamin Sobel has said, "[n]o human can rebut an infringement claim

---

28.   *See* RACHEL LOUISE SNYDER, WHAT WE'VE LOST IS NOTHING (2014). In fact, I have a copy of the book that I purchased used. The action in the novel takes place in Oak Park, Illinois, where I lived for many years.

29.   *See* First Consolidated Amended Complaint at 4, In re ChatGPT Litigation, No. 23-cv-03223 (N.D. Ca., Mar. 13, 2024); First Consolidated Amended Complaint at 4, Kadrey et al. v. Meta Platforms, Inc., No. 23-cv-03417 (N.D. Cal., Dec. 22, 2023).

30.   In many other countries around the world, my "private copying" would not infringe upon the copyright in the book, because those countries have passed legislation which provides for a private copying

merely by showing that he has learned by consuming the works he copied, even if he puts this new knowledge to productive use later on."[31]

According to one 2019 study of 4083 households in the United States, each U.S. household owns an average of 114 books.[32] With 125.7 million households in the United States in 2018–2022,[33] that would amount to about 14.3 billion books held in private households. The vast majority of those books were undoubtedly lawfully purchased rather than copied without authorization. Thus, just taking that as one example of works used to educate human authors, we find that authors have not been able to claim that they should get access to those works free of copyright restrictions, and that they often pay for copies of works that have helped build their skills to create their own, non-infringing works.

In the course of arguing that use of copyrighted works to train generative models is fair use, Daniel Jeffries asserts that "[w]riters at the [New York Times] did not pay the Hemingway estate for learning to write short, sharp sentences as young people learning journalism."[34] As a factual statement, that is almost certainly literally false. It is a pretty good bet than more than one journalist who writes for the New York Times bought a copy of an Ernest Hemingway novel sometime in their life; that some of the purchase price went to pay royalties to the Hemingway estate; and that they learned something from that novel about writing style.

That does not mean that fair use has no role in supporting educational activities. Section 107 of the Copyright Act, the fair use provision, states that the use of a work for "nonprofit educational purposes" will weigh in favor of fair use. It also states that the purposes that support a claim of fair use include "teaching (including multiple copies for classroom use), scholarship, or research."[35] In practice, however, the support afforded by fair use to educational activities turns out to be a partial subsidy, not a blanket exemption from copyright. For example, at the end of the decade-plus-long saga of litigation between three academic publishers and the Georgia State University over the copying and distribution of forty-eight excerpts from books to

---

exception. However, that legislation also imposes levies on copying equipment and on blank media, the proceeds of which are distributed to copyright owners and authors. Thus, while my copying would be permitted by law, whoever bought the copying equipment and blank media is paying some amount for that privilege, and even if that was not me, I might be paying for it indirectly, through taxes to support libraries, copying fees, and so on. The private copying exception may seem like a big deal, but you would have to ask, how many people actually make a private copy of an entire book rather than paying for a copy or borrowing it from a library? My guess is that there are not many.

    31.   *See* Benjamin L.W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 73 (2017).

    32.   *See* Joanna Sikora, M. D. R. Evans & Jonathan Kelley, *Scholarly Culture: How Books in Adolescence Enhance Adult Literacy, Numeracy and Technology Skills in 31 Societies*, 77 SOC. SCI. RSCH. 1, 6 (Table 1) (2019).

    33.   U.S. Census Bureau, *QuickFacts: United States*, https://www.census.gov/quickfacts/fact/table/US# [https://web.archive.org/web/20241004163815/https://www.census.gov/quickfacts/fact/table/US].

    34.   Daniel Jeffries (@Dan_Jeffries1), X (Dec. 28, 2023, 4:27AM), https://twitter.com/Dan_Jeffries1/status/1740303405254377808 [https://perma.cc/4R5B-BLVZ] [https://web.archive.org/web/20241004165501/https://x.com/x/migrate].

    35.   17 U.S.C. § 107.

students, the U.S. District Court for the Northern District of Georgia held that the copying and distribution thirty-seven of those excerpts were fair uses, but that the copying and distribution of eleven of those excerpts were not fair uses.[36] For instance, the use of one chapter from *The Craft of Inquiry* by Robert R. Alford, which amounted to 6.25% of the entire book, was fair use, considering not only the percentage of the work used, but the market for the book as a whole and the market for excerpts from the book.[37] By contrast, the use of two chapters of *The Power Elite* by C. Wright Mills, which amounted to 12.5% of the entire book, was not fair use,[38] nor was the use of 1.58% of *The SAGE Handbook of Qualitative Research*, due largely to the proven demand for licensing of excerpts from that work.[39] Georgia State never even tried to argue that the copying and distribution of an entire book would amount to fair use.

In some limited circumstances, of course, copying an entire work for educational purposes could be fair use. For example, the 1976 "Classroom Guidelines," which were intended to construct a "safe harbor" for copying in connection with educational instruction, provided that entire poems and articles could be sometimes be copied and distributed to students.[40] However, they needed to meet both tests for "brevity"—up to a 250-word poem or 2500-word article—and for "spontaneity"—teachers had to individually decide to use the works shortly before the class session in question.[41] While the Classroom Guidelines were not meant to go the limit of fair use, it remains quite clear that fair use was never meant to cover any general distribution of educational materials in their entirety. The upshot is that most students buy or rent textbooks, and most schools buy or license the copyrighted materials that they provide for students.

2. First Sale and Cost Sharing

The first sale doctrine, codified in § 109 of the Copyright Act,[42] supports a lot of sharing of the cost of obtaining physical copies of books and images and video and recorded music. Many authors borrow books and videos and music from libraries. There were about 1.77 billion items in U.S. public libraries in 2019, and undoubtedly virtually all of those items were authorized copies purchased by the libraries.[43] In that

---

36.   *See* Cambridge Univ. Press v. Becker, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).

37.   *See id.* at 1162–65.

38.   *See id.* at 1264–66.

39.   *See id.* at 1266–69.

40.   *See* Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, H.R. REP. NO. 1476, at 67–70 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681–83.

41.   *See id.*

42.   *See* 17 U.S.C. § 109 (allowing any owner of a lawfully made copy of a work to dispose of it without the permission of the copyright owner, with limitations for computer programs and sound recordings).

43.   *See* Nicholas Rizzo, *State of US Public Libraries—More Popular &Digital Than Ever* (Feb. 17, 2022), https://wordsrated.com/state-of-us-public-libraries/   [https://perma.cc/VC8R-KBPX] [https://web.archive.org/web/20241004164221/https://wordsrated.com/state-of-us-public-libraries/].

same year, there were about 2.98 billion instances of borrowing items from those libraries.[44] Thus, each item in a public library's collection served on average the needs of just under two borrowers. The most popular items were undoubtedly shared by many more. The first sale doctrine also facilitates the sale of used books. Many of the estimated 14.3 billion books in U.S. households were undoubtedly purchased in used condition, allowing the cost of those books to be shared by two or more households over time. In the digital network era, when "borrowing" occurs over the internet on devices, licensing and technical measures continue to simulate the experience of temporary possession and access, and facilitate the sharing of costs.[45]

3. Limitations on the Exclusive Rights and Human Experiences

Copyright law also facilitates learning by human authors through the limitations of the exclusive rights themselves. The only exclusive rights afforded to copyright owners are those that concern the making and distribution of copies—identical or substantially similar—and the presentation of public performances and displays.[46] People do not infringe any exclusive right by *experiencing* works of authorship— by seeing, reading, hearing, or touching them.[47] That leaves more leeway for people, including remunerated authors, to learn from works. When we read a copy of a book, or listen to a song on the radio, we do not have to worry about whether the copy or the performance is infringing, because our activity of reading or watching carries no liability with it. However, it would be a mistake to say that those limitations of copyright's exclusive rights leave human learning free from the constraints of copyright. Rather, those limitations implement two policy decisions: (1) a decision about *who* is liable if and when a work is copied, distributed, performed or displayed without authorization; and (2) a decision about how *fine-grained* the control is that copyright owners have over their works.

If a person is reading an unauthorized copy of a book, or watching an unauthorized public performance of a video, then *someone* is liable for copyright infringement—it just is not the reader or the viewer. That situation therefore poses only a practical question of enforcement: Can the copyright owner find and sue the person who made or distributed the copy, or who performed the work publicly? As long as copyright enforcement is reasonably good, and authorized copies, displays or performances are available on reasonable terms, most people will end up reading and watching and listening to authorized copies and performances and displays.

---

44. *See id.*

45. For a description of how authorized ebook lending works, see Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 374–75 (S.D.N.Y. 2023). In that same opinion, the court holds that the Internet Archive's unauthorized ebook lending is not a fair use. *See id.* at 379–91.

46. *See* 17 U.S.C. § 106(1)–(6).

47. *See, e.g.*, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 398–99 (1968) (members of theater audiences do not perform, and neither do television viewers). As Jessica Litman has put it, "[f]or most of the history of copyright, the law left reading, listening, and viewing unconstrained." Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1882 (2006).

Thus, for example, in February 2024, 99% of American households subscribed to at least one streaming service, and on average, Americans pay for 2.9 streaming services each month.[48] Because of enforcement efforts,[49] most of that content is not easily available as unauthorized public performances that would lead to no viewer liability.[50] Some of it may be available for unauthorized download, using peer-to-peer protocols like BitTorrent and index sites like The Pirate Bay,[51] but then the recipient is creating a new unauthorized copy, and could be liable for copyright infringement. Thus, although it is hard to track, it is very likely that the vast majority of experiences of works of authorship under copyright are of authorized copies, performances, or displays, for which compensation is flowing, directly or indirectly, back to the copyright owner. The decision to exclude experiences of works of authorship from the reach of exclusive rights protects important liberty and privacy interests. However, it does not result in any blanket freedom for people in general, or remunerated authors in particular, to learn from copyrighted works of authorship without permission from the copyright owner.

The limitation of the exclusive rights to reproduction, distribution, and public performance and display also means that the copyright owner's control is coarse-grained. A copyright owner can charge for a copy of a book, but cannot control the reading of the book, or any private performances of the text. It is no secret that the transition from physical copy to digital network distribution has resulted in a lot of controversy about whether that copyright owner control would and should become finer grained.[52] The answer so far is that it has, but not nearly as much as skeptics feared, in part because of their opposition, and in part because of market forces.

---

48. *See* Ana Durrani, *Top Streaming Statistics in 2024*, FORBES HOME (Aug. 15, 2024), https://www.forbes.com/home-improvement/internet/streaming-stats/ [https://perma.cc/C3M7-KF2B] [https://web.archive.org/web/20241004164507/https://www.forbes.com/home-improvement/internet/streaming-stats/].

49. *See, e.g.*, Press Release, Office of Public Affairs, U.S. Department of Justice, Five Men Convicted for Operating Major Illegal Streaming Service (June 20, 2024) (announcing criminal convictions for operating an illegal streaming service branded "Jetflicks"), https://www.justice.gov/opa/pr/five-men-convicted-operating-major-illegal-streaming-service [https://perma.cc/V34T-49PR] [https://web.archive.org/web/20241004164842/https://www.justice.gov/opa/pr/five-men-convicted-operating-major-illegal-streaming-service].

50. To be sure, there are illegal streaming sites. For one list, see Top Illegal Streaming Sites in Canada and Their Risks, STREAMSAFELY, https://streamsafely.ca/where-to-watch/dangerous-illegal-streaming/ [https://perma.cc/TA9A-KUJE] [https://web.archive.org/web/20240920155025/https://streamsafely.ca/where-to-watch/dangerous-illegal-streaming-in-canada/] (last visited Sept. 20, 2024).

51. *See* BITTORRENT, https://www.bittorrent.com [https://perma.cc/LB5T-B4TT] [https://web.archive.org/web/20240918221952/https://www.bittorrent.com/] (last visited Sept. 20, 2024); PIRATE BAY, https://thepiratebay.org/index.html [https://perma.cc/6WDP-HRM6] [https://web.archive.org/web/20240919132141/https://thepiratebay.org/index.html] (last visited Sept. 20, 2024).

52. *See, e.g.*, AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY (2016).

4. Public Licensing and Advertisement-Based Revenue Models

The owners of many works of authorship decide to distribute them under public licenses that allow anyone to use their works under whatever terms and conditions the owners decide to impose. They may make their works more or less freely available out of charitable impulses, or to build their reputation. It is also true that many owners of copyright decide to publicly perform or display their works accompanied by advertisements, and to seek revenue not from fees paid by audience members, but from fees paid by advertisers. As a result both of public licensing and of advertising-based revenue models, many people experience many works without paying fees. That, of course, does not stem from any limitations or exceptions to copyright law, but rather from the copyright owners' use of their exclusive rights to further what they see as being their interests.

5. Lack of Fixation or Authorship

Human authors also learn a lot from sources that are not protected by copyright because they are not "fixed in a tangible medium of expression,"[53] or because they are not created by authors. As children, we all learn from our parents and others speaking with us, and we continue to learn from conversations throughout our lives. Those oral communications are not fixed and they therefore are not protected by copyright. We also learn a lot from natural sources. A visual artist may learn from the shape of a leaf, from the texture of a stone, or from the color of the sky at sunrise. Those sources are not protected by copyright because they have no human author.

6. Remedies

This is the last one, but an important one. Let us return to Daniel Jeffries' assertion that "[w]riters at the [New York Times] did not pay the Hemingway estate for learning to write short, sharp sentences as young people learning journalism."[54] As I suggested above,[55] this is almost certainly false. Suppose, however, that a young writer admitted that they had made an infringing copy of *For Whom the Bell Tolls* ("*Bell*"); that they had read that copy; and that they had been inspired by that reading to write their novel *For Whom the Ringtone Rings* ("*Ringtone*"), which became acclaimed for, among other things, its short, sharp sentences. Suppose further that *Ringtone* had generated a million dollars in profits, and that many schools had decided assign *Ringtone* to their students in place of *Bell*, causing sales of the latter to drop by $500,000. Assuming that *Ringtone* was not substantially similar to *Bell*, what actual damages and profits could the owner of copyright in *Bell* get for the writer's infringement? The answer is that it could get no more than the profits from the sale

---

53. 17 U.S.C. § 102(a).

54. Jeffries, *supra* note 34.

55*. See supra* text accompanying note 34.

of one copy of *Bell*.[56] It would not be entitled to any of *Ringtone*'s profits, not even some tiny apportioned amount. Nor would it be entitled to any actual damages, even though *Ringtone* demonstrably substituted for *Bell*. Those measures of damages are limited to the circumstance in which *Ringtone* itself infringed *Bell*. Pam Samuelson, drawing on earlier work of Mark Lemley, calls this limitation the rejection of the "fruit of the poisonous tree" doctrine, and cites a number of cases in support of that rejection.[57]

Statutory damages and equitable relief should be limited similarly. Statutory damages may sometimes seem altogether inappropriate when a defendant has made a single copy for personal use.[58] In any event, however, in determining where an award of statutory damages should fall within the wide range that the Copyright Act provides, a court should not take into account the value of skills learned from reading an infringing copy. As for equitable relief, *Bell*'s owner would not be entitled to any injunctive relief regarding *Ringtone*. In theory, *Bell*'s owner might be able to have the court order the destruction of the infringing copy of *Bell*, but maybe not even that, since the Copyright Act leaves the court a lot of discretion with regard to injunctive relief.[59]

Stated more generally, remedies for infringement should not extend to the products of the things learned or abilities gained from that infringement, so long as those products are not substantially similar to the infringed works. In tort law terms, the infringing copy of *For Whom the Bell Tolls* may have been a but-for cause of *For Whom the Ringtone Rings*, but it is not a proximate cause. That is an important freedom for human authors. If they learn from infringing, nothing of what they learn can be reached by non-punitive remedies for that infringement, so long as they don't create works that are substantially similar to the infringed work.[60]

I have undoubtedly not described all the ways in which fair use, first sale, the basic structure of the exclusive rights, fixation, authorship, or other copyright doctrines could possibly come to the aid of human authors. They are important limitations, and we will have occasion to consider them below in relation to generative AI

---

56.   This assumes that the young writer had made the infringing copy of "Bell" within the last three years. *See* 17 U.S.C. § 507(b) (providing that civil copyright infringement actions must be brought within three years of the accrual of the claim). The statute of limitations is also an important limit on liability; the legal consequences of our infringements do not hang over our heads forever.

57.   *See* Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. (forthcoming) (manuscript at n.375) (2023) (citing several cases and Mark A. Lemley, *The Fruit of the Poisonous Tree in IP Law*, 103 IOWA L. REV. 245 (2017)).

58.   On the problems of statutory damages, see generally Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009). Canadian copyright law provides a lower range for statutory damages in cases of infringement for non-commercial purposes ($100–$5000) than in cases of commercial infringement ($500–$20,000). *See* Canadian Copyright Act § 38.1. U.S. copyright law makes no such distinction. *See* 17 U.S.C. § 504(c).

59.   *See* 17 U.S.C. § 503(b) (providing that "as part of a final judgment or decree, the court *may* order the destruction *or other reasonable disposition* of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights") (emphasis added).

60.   One can imagine a Copyright Act providing for punitive measures to deter certain kinds of infringement, but in the United States, at least, copyright has never had civil punitive damages.

development. What I think remains incontestable is that neither fair use nor any other copyright law doctrine provides a blanket exception to copyright liability for human authors in their learning encounters with copyrighted works of authorship. Human authors end up paying for many of the learning experiences they have with those copyrighted works, even though the works that those authors produce are not substantially similar to the works from which they have learned.

B.   THE IDEAL COPYRIGHT REGIME FOR AUTHORS?

For as long as copyright has existed, policymakers, scholars, authors, and others have debated what the ideal set of copyright law provisions would look like, and what theory would justify those provisions. The debate will undoubtedly continue. Here, I only want to make a point about the edges of that debate. Very few people would argue that human authors should be able to access all previous works for learning purposes without any copyright restrictions at all. That seems unlikely to be the right answer from any number of theoretical perspectives, whether the issue is viewed as one of providing incentives, or rewarding labor, or protecting personality or human rights. One of the most revealing perspectives may be a relatively rare one: considering the relationship between generations of authors as a matter of Rawlsian justice, as Professor Dawn Nunziato did in a 2002 article.[61]

John Rawls himself formulated a principal of intergenerational savings as part of his theory of justice.[62] Suppose that you did not know in which generation you were going to live along the timeline of history. In that state of ignorance, you had to settle on a general principle of how much each generation would save for the next. You would not decide that each generation should save nothing for the next, and consume it all. That would benefit you if you happened to live in the first generation, but it would be devastating if you lived in any other generation. On the other hand, you also would not decide that each generation should save everything for the next. That would only benefit you if you lived in the last generation, and would otherwise impoverish you. You would formulate a principle that would lie somewhere in between those extremes.

Nunziato applied that Rawlsian reasoning to authors and copyright. Suppose that you were an author who did not know to which generation of authors you would belong along the timeline of civilization. In that state of ignorance, you needed to formulate a set of copyright rules that would apply to all generations of authors. Nunziato was principally concerned with justifying limitations on copyright, including many of the limitations I describe above, and those are important. They would likely include limitations, not only on scope, but also on duration, since extending the duration of copyright much more than a few decades beyond an author's life produces little added incentive or benefit for that author, while it subjects

---

61.   *See* Dawn C. Nunziato, *Justice Between Authors*, 9 J. INTELL. PROP. L. 219 (2002).
62.   *See* JOHN RAWLS, A THEORY OF JUSTICE 251–59 (Harvard Univ. Press rev. ed. 1999).

future generations to additional constraints.[63] Here, I want to emphasize the other side. You probably would not formulate a rule that allowed authors to access all works by means of unauthorized copying so long as they were learning something from those works. That would benefit you if you happened to end up living in the last generation of authors on earth. In any other generation, however, you would probably want to be paid something, for some limited term, for the works you created from which others are learning. In return, you would be willing to pay something for recently created works from which you learned.[64] That contributes to an intuitive understanding of why learning from works is not entirely free of copyright strictures, whether through fair use or otherwise, even though there is still a lot of debate about the details.

III. COPYRIGHT AND THE TRAINING OF GENERATIVE MACHINES

Human authors do not get the benefit of any categorical fair use exception from copyright liability for their encounters with copyrighted works from which they learn. Why should humans who create and use generative AI tools get such an exception?[65]There are two different principal arguments that I would like to address. The first is that the use of copyrighted works to train a generative AI tool is a "non-expressive use." I will argue that there are actually three senses in which the term "expression" is used, and three corresponding definitions of "non-expressive use." Under the first two senses of "expression," human and machine learning cannot be distinguished. Both make "constitutive" expressive use of the copyrighted works from which they learn, and neither usually make "actionable" expressive use. Under the third sense of "expression," what I will call "felt expression," human and machine learning can indeed be distinguished. Human authors necessarily have aesthetic or hedonic reactions to the works they learn from; computers do not. If the only thing copyright protected in a work were the aesthetic or hedonic reactions that it produced, or if works used to train generative AI were created for the sole purpose of producing such reactions, then that factual difference could make a legal difference. However, I will argue that copyright law protects both the enjoyment and the learning value of works, and that works have the effect, and therefore the imputed purpose, of both entertaining and enlightening us. Adopting a view that anhedonic

---

63. *See* Nunziato, *supra* note 61, at 249–53 (discussing how the principal of intergenerational savings might result in specific limitations on copyright, including duration); *cf.* Eldred v. Ashcroft, 537 U.S. 186, 254–55 (2003) (Breyer, J., dissenting) (noting that the extension of copyright term from life plus fifty years to life plus seventy years is exceedingly unlikely to create any additional motivating benefit to authors).

64. Of course, while under current copyright law everyone is an author of copyright-protected works of authorship, very few are remunerated authors. The knowledge of whether you were going to be one of those remunerated authors would probably greatly affect your judgment about what the best copyright rules would be. Thus, the Rawlsian veil of ignorance should probably hide from you the knowledge of whether you will be a remunerated author.

65. As James Grimmelmann put it, why should "a digital humanist [be able to] skim a million books with abandon while a humanist who reads a few books closely must pay full freight for hers"? James Grimmelmann, *Copyright for Literate Robots*, 101 IOWA L. REV. 657, 675 (2015).

learning, and only anhedonic learning, is a fair use would unfairly disadvantage human authors for whom aesthetic experience and learning are inextricably intertwined. Existing precedent does not mandate such an outcome, and it should not be extended in that direction.

The second argument is that what people are doing with computers when they train a generative AI model is functionally equivalent to some activity that for human authors is free of copyright restrictions. The most frequently mentioned of such activities are reading, viewing, or listening that fall outside of the scope of the exclusive rights. According to this line of argument, we should use fair use to achieve "perceptual parity" between machines and humans, compensating for the technical need for computers to make copies during generative model training. I will argue that the generative model training process is in relevant ways different than human reading, viewing or listening, and that we should therefore not ignore the copying of works that is part of that process.

A.   GENERATIVE AI TOOLS AND NON-EXPRESSIVE USES

Matthew Sag and Oren Bracha are leading academic proponents in the United States of the argument that the process of training and deploying a generative AI tool either does not infringe any of copyright's exclusive rights in any copyrighted training work (Bracha), or makes fair use of any such work (Sag), because it makes a "non-expressive use" of that work.[66] (Abraham Drassinower, Alain Strowel, Carys Craig, and Cheryl Foong have made similar arguments in other countries.)[67] That position has been repeated in Congressional testimony,[68] and in comments by OpenAI in a U.S. Patent and Trademark Office inquiry.[69] However, the meaning of "non-expressive use" is not entirely fixed or stable, because the term "expression" has been and is being used in more than one sense. Much of the rhetorical force of the "non-expressive use" argument is generated by switching back and forth between these different senses, lending an air of authority to statements about one meaning of "non-

---

66.   *See* Bracha, *supra* note 1, at 25; Sag, *Copyright Safety for Generative AI*, *supra* note 1, at 304 ("[T]he fair use cases dealing with copy-reliant technology reflect the view that non-expressive uses of copyrighted works should be treated as fair use."); *id.* at 307 ("There Is No Machine Learning Exception to the Principle of Non-expressive Use."). Matthew Sag coined the term and concept of "non-expressive use" in an earlier article. *See* Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U.L. REV. 1607, 1068 (2009). James Grimmelmann and Benjamin Sobel have investigated non-expressive use without making the argument that such use never requires the permission of copyright owners. *See* James Grimmelmann, *supra* note 65, at 661–65; Sobel, *supra* note 31, at 51–57. For other good criticism of "non-expressive use" as fair use, see David W. Opderbeck, *Copyright in AI Training Data: A Human-Centered Approach*, 76 OKLA. L. REV. 951, 975–85 (2024).

67.   *See* sources cited *supra* note 1.

68.   *See Understanding Generative Artificial Intelligence and Its Relationship To Copyright: Hearing on Artificial Intelligence and Intellectual Property: Part I—Interoperability of AI and Copyright Law Before Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 118th Cong., at 15 (2023) (statement of Christopher Callison-Burch, Ph.D.).

69.   *See* OpenAI Comments 2019, *supra* note 17, at 5–7.

expressive" that in truth should only be enjoyed by statements about a different meaning.

Here, I want to concentrate on three possible meanings of "expression," and therefore three meanings of "non-expressive use." The three meanings of "expression" are as follows, and to keep them distinct, I am going to introduce some qualifying adjectives:

(1) "constitutive expression" means the individual expressive choices that the author of a work makes, and that are not disqualified from protection because they are facts, historical or scientific theories, or functional elements.

(2) "actionable expression" means a group of expressive choices made by an author that are complex enough to be copyrightable as a work of authorship, and that if copied in another work, would render that other work substantially similar to the first work.

(3) "felt expression" means the aesthetic or hedonic reaction that someone who is capable of such reactions has when they experience a work of authorship.

Given those definitions of "expression," we can consider three definitions of "non-expressive use":

(1) "non (constitutive) expressive use" is a use of a copyrighted work that is indifferent to the expressive choices made by the author of the work.

(2) "non (actionable) expressive use" is a use of a copyrighted work that does not produce any other work that contains enough of the expressive choices of the first work to infringe it.

(3) "non (felt) expressive use" is a use of a copyrighted work that produces no aesthetic or hedonic reaction to the expressive choices of that work because it does not expose that work to anyone capable of having such a reaction.

I will first consider each of these meanings of "expression" and "non-expressive use" and how they relate to each other. I will then consider how each of them applies to human authors and generative AI tools.

1. The Three Meanings of Expression and "Non-Expressive Use"

a. Constitutive Expression

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Supreme Court stated that "[t]he copyright [in a work] is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."[70] In that sense, "expression" is any aspect or element of a work that is a protectable choice of the

---

70.   471 U.S. 539, 547 (1985).

author, and not an excluded element, such as a fact,[71] an historical hypothesis,[72] a scientific theory, or a functional element. Any choice exhibiting a "modicum of creativity" will do, although courts sometimes use the "scenes à faire" doctrine to heighten the creativity standard,[73] or the merger doctrine to deny protection when there is only one or a very few ways of expressing an unprotectable element.[74] Each of those qualifying choices is a constitutive part of what copyright protects in a work, hence the name "constitutive expression." Somewhat confusingly, in that context, unprotectable elements like historical hypotheses or scientific theories are sometimes called "ideas."[75]

The "stamp of author's originality" may not always be the result of the author's deliberate, conscious choice. Sometimes statements about constitutive expression assume that it is the result of an author's fixed personality, instead of a matter of choice. Thus, for example, in *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes writes that a work, which he calls a "copy," is the personal reaction of an individual upon nature," and then proceeds to comment that "[p]ersonality always contains something unique," and that it is that unique reaction of personality to the world that is copyrightable.[76] For present purposes, however, as long as the constitutive expression comes from the author, the degree of deliberate choice does not matter.

Take for example, the story *Fox 8*, by George Saunders (a named plaintiff in one of the putative class action lawsuits against OpenAI and Microsoft).[77] The text exhibits a lot of expressive choices, including misspellings and grammatical errors to remind the reader that the narrator is supposed to be a fox:

> We do not trik Chikens! We are very open and honest with Chikens! With Chikens, we have a Super Fare Deel, which is: they make the egs, we take the egs, they make more egs. And sometimes may even eat a live Chiken, shud that Chiken consent to be eaten by us, threw faling to run away upon are approche, after she has been looking for feed in a stump.[78]

All of those word and spelling and grammatical choices are expressive choices that Saunders makes. All of the expressive choices are constitutive expression, because each of them is a qualifying part of an aggregate that is protected by copyright—an

---

71. *See* Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991); 17 U.S.C. § 102(a) (providing that copyright subsists in "original works of authorship").

72. *See, e.g.*, Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 976 (2d Cir. 1980).

73. For the "modicum of creativity" standard, see *Feist*, 499 U.S. at 346; for "scenes à faire," see, e.g., *Hoehling*, 618 F.2d at 979.

74. *See, e.g.*, Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967).

75. *See, e.g.*, CCC Info. Serv. v. Maclean Hunter Mkt. Rep., 44 F.3d 61 (1994) (referring to "ideas that undertake to advance the understanding of phenomena or the solution of problems, such as the identification of the symptoms that are the most useful in identifying the presence of a particular disease").

76. 188 U.S. 239, 250 (1903).

77. *See* First Consolidated Complaint, Authors Guild v. Open AI, Inc., No. 23-cv-08292 (S.D.N.Y. Feb. 25, 2024).

78. GEORGE SAUNDERS, FOX 8: A STORY 6 (2018). I bought a copy of this book in a used bookstore, Powell's, in Chicago.

original work of authorship—and none of them is disqualified as a fact, historical hypothesis, scientific theory, or functional element. Expressive choices in literary works can be about particular words or phrases, or about structural matters like the use of a particular rhyming pattern in a poem. Similarly, in visual art expressive choices can be about particular colors or lines, or about structural matters like the use of symmetrical or asymmetrical composition.

Very confusingly, in standard copyright lingo each of the constitutive expressive choices can also be called, in isolation, an "idea," as can an insufficiently complex group of such choices. That is because copyright law does not protect creations that are the product of only a few creative choices, like a graphic composition of "evenly spaced white circles on a purple background,"[79] or a short phrase like "holy origin" or "to gain love."[80] In isolation, those creations are not complex enough to be recognized as original works of authorship.[81] It is also because a more complex work, which does qualify for copyright protection, is not infringed by another work that copies only one or a few of the first work's expressive choices. In such a case—as we will explore further below—the second work is said to copy only "ideas" from the first, particularly when the copying is "non-literal."[82] Obviously, that meaning of "idea" is different than "scientific theory" or "historical hypothesis."

When the term "idea" is used to refer to an insufficiently complex expressive choice, then the term "expression" refers to an aggregation of expressive choices that is sufficiently complex to qualify for copyright protection, and that, if copied from one work into another, makes that second work infringe the first (unless another exception applies, which could include fair use). I am going to call that kind of expression "actionable expression," to distinguish it from the "constitutive expression" of individual expressive choices. When constitutive expression gets aggregated into actionable expression, the constitutive expressive choices do get protection as part of the whole.

Ordinarily, when we human beings read a book like *Fox 8*, we care about those constitutive expressive choices, and about the way they are combined to create actionable expression in works of authorship. We are interested in the aesthetic experience they produce, and we are also interested in what we learn from them. Sometimes, however, we are indifferent to the expressive choices, because we want

---

      79.   *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.1 Common Geometric Shapes (2021) [hereinafter, COPYRIGHT COMPENDIUM] (a claim of copyright in "a picture with a purple background and evenly spaced white circles" will not be registered, because "the combination of the purple rectangle and the standard symmetrical arrangement of the white circles does not contain a sufficient amount of creative expression to warrant registration.").

      80.   *See* Arica Inst., Inc. v. Palmer, 770 F. Supp. 188, 191 (1991), *affirmed*, Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (1992); *cf.* COPYRIGHT COMPENDIUM, *supra* note 79, § 312.2 The Originality Requirement for Compilations (stating that the Copyright Office "generally will not register a compilation containing only two or three elements, because the selection is necessarily de minimis.").

      81.   On the formulation of a standard of minimum complexity, or size, separate from the "modicum of creativity" standard for originality, see Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005).

      82.   *See infra* text accompanying notes 95–99.

other information from the work. If we are using the work in a way that is indifferent to the expressive choices made in a work, then maybe our use should count as a fair use, because we are not making use of any of the elements that copyright protects in a work.

For example, it is standard black-letter copyright law to say that copyright does not protect functional elements in a work, or facts conveyed in a work.[83] Can we make copies of a work in order to access the functional elements contained in it? In some contexts, courts have said yes. Thus, for example, in *Sega Enterprises Ltd. v. Accolade, Inc.*,[84] the Ninth Circuit held that it was fair use for Accolade, an independent video game developer, to decompile the object code of three video games produced by Sega and produce source code copies, so that it could understand how the game cartridge communicated with Sega's game console and make a cartridge compatible with the Sega console.[85] The commands passed back and forth between the game cartridge and the console were functional code not protected by copyright, and the *Sega* court undoubtedly also had the sense that it was not within copyright law's purpose to enforce a "tying" arrangement, requiring all purchasers of Sega consoles to use only Sega game cartridges.[86] Significantly, the *Sega* court rejected Accolade's broader argument that "intermediate copying does not infringe the exclusive rights granted to copyright owners in § 106 of the Copyright Act unless the end product of the copying is substantially similar to the copyrighted work."[87] The narrower winning argument was that copying the game cartridge's code for the purpose of obtaining the technical specifications for communication with the game console was fair use. That can be seen as an instance of non (constitutive) expressive use.

The fair use record with unprotected elements is more mixed, however, in part because courts are sometimes sensitive to protecting an author's investment in labor, even when they profess to be protecting creativity. In *Author's Guild v. Google,* for example, Judge Leval suggests that the factual or fictional character of a work should not be given much weight in fair use analysis, because copyright does protect the "author's manner of expressing . . . facts."[88] He continues: "Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports."[89] Whether that is actually

---

83. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991); 17 U.S.C. § 102(b).

84. 977 F.2d 1510 (9th Cir. 1992).

85. *See id.* at 1520–28; *see also* Sony Computer Ent., Inc. v. Connectix Corp., 203 F.3d 596, 601 (9th Cir. 2000) (holding that it was fair use to copy a game console's software for purposes of understanding its noncopyrightable functional elements and then using them in emulation software that could enable compatible games to be run on a personal computer).

86. *Sega*, 977 F.2d at 1523–24 ("an attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression and cannot constitute a strong equitable basis for resisting the invocation of the fair use doctrine"); *cf.* Chamberlain Grp. v. Skylink Tech., Inc., 381 F.3d 1178 (2004) (holding that the anti-circumvention provisions of § 1201 cannot be used to prevent an independent remote control manufacturer from making a remote control compatible with a garage door opener made by the plaintiff).

87. *Sega,*977 F.2d at 1517.

88. 804 F.3d 202, 220 (2d Cir. 2015).

89. *Id.*

because copyright is protecting the creative expression of the facts, or to some degree protecting the labor in collecting the facts, it is clear that you cannot justify your copying and redistribution of a news article on the ground that you just want to provide access to the uncopyrightable facts.

Courts have developed the concept of "transformative use," rather than "non-expressive use," and in cases involving factual content, one can understand how transformative use might more flexibly respect the investment in the used work and the purposes of the author and the user. Take, for example, Mark Lemley and Brian Casey's example of the use of images that include stop signs to train a computer vision model to recognize stop signs.[90] Suppose that a company developing such a model scraped the internet for such images, and found 50,000 of them. Suppose further that those images were all travel photos posted on sites like Flickr or shared on social media services like Instagram, and that the stop signs appeared coincidentally in the background. Here there is a reasonably strong case for transformative use. The original purpose of the photographers had nothing to do with training a computer vision model, and that use has no effect on any market originally contemplated by the photographers.

Lemley and Casey make a case, not for transformative use, but for "non-expressive use." The computer vision company could argue that it "wants photos of stop signs so [that its computer vision system] can learn to recognize stop signs, not because of the artistic choices you made in lighting or composing your photo."[91] However, suppose that one company finds and uses a large set of photographs of stop signs taken by another company expressly for the purpose of training a computer vision model. Is that still a "non-expressive use"? I think not, and not a "transformative use" either. As Lemley and Casey acknowledge in a footnote, "[t]here is a sense in which the creative choices matter even here. The AI is likely to want to see photos of stop signs in a variety of lights, angles, and conditions to train better."[92] Courts will tend to broaden "expressive choices" towards what Canadian courts would call "skill and judgment,"[93] to protect the investment of one company against a competing company in the same market.

b. Actionable Expression

As I have suggested above, the term "expression" can mean an element or feature of a work that counts towards copyright protection, because it is the result of a

---

90.   *See* Lemley & Casey, *supra* note 1, at 749. The same could be true of any use of images to train a model to recognize objects, whether the goal would be to recognize a category of objects, such as stop signs, or specific objects, such as individual human beings through facial recognition. *See* Sobel, *supra* note 31, at 67–68 (stop signs); Enrico Bonadio, Plamen Dinev & Luke McDonagh, *Can Artificial Intelligence Infringe Copyright? Some Reflections*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND ARTIFICIAL INTELLIGENCE 245, 248 (Abbott ed., 2022) (facial recognition).

91.   Lemley & Casey, *supra* note 1, at 749.

92.   *Id.* n.34.

93.   *See* CCH Canadian Ltd. et al. v. Law Soc'y of Upper Canada, 2004 SCC 13 [2004] 317 N.R. 107 (Can.).

creative choice by the author, rather than, say, a fact or a functional element. That is what I have called "constitutive expression." Alternatively, it can mean an aggregation of such constitutive choices that is sufficiently complex to qualify for copyright protection, and that, if copied from one work into another, makes that second work infringe the first. I am going to call that this second kind of expression, the complex aggregation kind, "actionable expression," to distinguish it from the "constitutive expression" of individual expressive choices.

The use of "expression" to mean "actionable expression" dates back at least to Judge Learned Hand's exploration of "substantial similarity" in the context of non-literal copying. In *Nichols v. Universal Pictures Corporation*, for example, Hand considered whether the movie *The Cohens and the Kellys* infringed the play *Abie's Irish Rose*.[94] There was no question that the producers of *The Cohens and the Kellys* knew of and were inspired by *Abie's Irish Rose*. They had tried to obtain the rights to make the play into a movie.[95] When that attempt failed, they copied some of the expressive choices that Anne Nichols, the author of *Abie's Irish Rose*, had made. For example, they copied Nichols' choice to make the story about a boy and a girl, one Jewish and the other Irish Catholic, living in New York City, who fall in love. They also copied Nichols' choice to have the boy and the girl initially keep their romance secret, because each of their families was opposed to romance and marriage outside of their respective religions and ethnicities. And they copied Nichols' choice to have the boy and the girl get married, and to have their fathers quarrel but in the end make up with each other.

However, in the terms that Learned Hand chose to structure the analysis of substantial similarity, each of those choices counts only as an "idea," and "ideas" can be copied freely into a new work. It is only when a sufficient number of those ideas—or constitutive expressive choices—are copied that the appropriation becomes copying of "actionable expression" that gives rise to an infringement claim. Judge Hand held that the choices made by Anne Nichols in *Abie's Irish Rose* that were copied in *The Cohens and the Kellys* were not numerous and complex enough to amount to actionable expression.[96] That is to say, *The Cohens and the Kellys* makes a "non (actionable) expressive use" of *Abie's Irish Rose*. More generally, a non (actionable) expressive use is any use of the expressive choices in a work that does not make a new work, or a performance or display, substantially similar to the first work.[97] In the case of "literal" copying, courts typically use the standard of "de minimis use," rather than

---

94.   45 F.2d 119 (2d Cir. 1930).

95.   *See* Nichols v. Universal Pictures Corp., 34 F.2d 145, 150 (S.D.N.Y. 1929) ("The record discloses that in 1925 the defendant, the Universal Pictures Corporation, tried to purchase 'Abie's Irish Rose' motion picture rights, and that, when the scenario of 'The Cohens and Kellys' was being written, its authors 'studied' the synopsis of 'Abie's Irish Rose.'").

96.   *See id.* at 121–22.

97.   In the *Nichols* opinion, Hand also used the same idea of a sufficiently complex aggregate to furnish a test for copyrightability: A character could be subject to copyright protection, but only if it was sufficiently developed and distinct. *Id.* at 121–22.

the standard of "substantial similarity," to determine whether there is enough copying to constitute infringement.[98]

c. Felt Expression

Felt expression is the aesthetic or hedonic reaction that a human being has when they experience a work of authorship. This is territory that James Grimmelmann began exploring in his 2016 article "Copyright for Literate Robots,"[99] but I want to explore further here. For many readers, the easiest path to understanding the appearance of felt expression in copyright law may be through well-known formulations of the standard of "improper appropriation" or "substantial similarity." Jerome Frank's famous formulation in a case involving music asks "whether defendant took from plaintiff's works so much of *what is pleasing to the ears of lay listeners . . .* that defendant wrongfully appropriated something which belongs to the plaintiff."[100] Learned Hand's equally well-known framing in a fabric design case asks whether "the ordinary observer, unless he set out to detect the disparities [between two works], would be disposed to overlook them, and regard *their aesthetic appeal* as the same."[101] This could suggest that what is important in works of authorship is the kind of aesthetic or hedonic reactions they produce in the human beings who form their audiences. Thus, Oren Bracha speaks of expression as involving "human enjoyment of the expressive value of a work" and "expressive enjoyment by any ear or eye."[102] Correlatively, the important thing about those who experience works is that they can be pleased or displeased by a work, and be aesthetically attracted or repulsed.[103]

If the only thing that is important about a work of authorship, and that makes it valuable, is that it produces certain hedonic reactions, then any use of a work in which no such reaction is produced could count as a non (felt) expressive use. This could account, for example, for some of an intuitive sense that it is fair to make an archival or backup copy of a work of which you already have an authorized copy.[104]

---

98. *See, e.g.*, Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 74–77 (2d Cir. 1997).

99. *See* Grimmelmann, *supra* note 65; *cf.* Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1260–75 (2016) (arguing that authorship requires an intent to produce a mental effect in an audience).

100. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (emphasis added).

101. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (emphasis added).

102. Bracha, *supra* note 1, at 28.

103. Others use somewhat different language and concepts. Abraham Drassinower, followed by Alain Strowel and Carys Craig, speaks of "communicative" and "non-communicative" uses. *See* DRASSINOWER, *supra* note 1; Strowel, *supra* note 1; Craig, *supra* note 1. Cheryl Foong draws on both "non-expressive use" and "non-communicative use." *See* Foong, *supra* note 1. Somewhat further afield in philosophy, John Searle distinguishes between computer programs, which cannot have intentionality, and human brains and potentially other machines, which can. *See* John R. Searle, *Minds, Brains, and Programs*, 3 BEHAV. AND BRAIN SCIS. 417 (1980). The relationship between these concepts is worth investigating—in a different article.

104. *Compare* 17 U.S.C. § 108(b) (allowing a library or archive to make a copy of an unpublished work for preservation or security purposes), *and* § 108(c) (allowing a library or archive to make a copy of a

The archival or backup copy, locked in a drawer or on a cloud server somewhere, is not satisfying any current or additional demand for the hedonic reaction that it could produce. Rather, it is stored away for use only if the authorized copy is damaged or destroyed. Generalizing on that intuition, Oren Bracha states that "[m]aking a new physical copy when the expression embodied in it will be experienced by no one is not any more relevant for copyright than using an existing copy as a doorstop."[105]

2. Human Authors and Generative Machines: Distinguished Only By Felt Expression, and That Should Not Make a Legal Difference

Having provided definitions for three different types of expression and three different types of non-expressive use, let us turn to the comparison of human authors and generative AI tools. Do computers make some kind of non-expressive use of works that human authors do not, and that would therefore entitle generative AI systems to a fair use privilege that human authors do not enjoy?

First, it is important to note that Matthew Sag and others seem to mix the three different senses of "expression" that I have tried to distinguish.[106] For example, Sag states that "the rationale for allowing for-profit and academic researchers to derive valuable data from other people's copyrighted works is a necessary implication of the fundamental distinction between protectable original expression and unprotectable facts, ideas, abstractions, and functional elements."[107] The references to unprotectable "facts" and "functional elements" suggest that the statement is about constitutive expression. The reference to "ideas" is ambiguous, as it might be a reference a scientific theory like "$E = mc^2$,"[108] or to an expressive choice that is not complex enough to constitute actionable expression.[109] The reference to "abstractions" suggests that the statement may be about actionable expression.[110] Elsewhere in the same article, Sag asserts that "machine learning models . . . qualify as non-expressive use so long as the outputs are not substantially similar to any particular original expression in the training data."[111] Here, the reference to "substantial similarity" suggests that the statement is about actionable expression. In two other passages, Sag states that "technical acts of copying that do not communicate the original expression to a new audience do not interfere with the interest in original expression that copyright is

---

published work for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if a copy cannot be found at a reasonable price), *with* § 117(a)(2) (allowing an owner of an authorized copy of a computer program to make another copy or adaptation provided "that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful").

    105.   Bracha, *supra* note 1, at 23.

    106.   Of course, this may just mean that they would reject the distinctions I have drawn!

    107.   Sag, *Copyright Safety for Generative AI*, *supra* note 1, at 305.

    108*.*   *See supra* text accompanying note 72.

    109*.*   *See supra* text accompanying notes 79–84, 95–99.

    110*.*   *See supra* text accompanying notes 79–84,95–99.

    111.   Sag, *Copyright Safety for Generative AI*, *supra* note 1, at 309.

designed to protect,"[112] and "what matters is whether the original expression of the authors of works in the training data is communicated to a new public."[113] In another article, Sag defines "non-expressive use" as "any act of reproduction that is not intended to enable human enjoyment, appreciation, or comprehension of the copied expression as expression."[114] Those sound like statements about felt expression, which exists only in the minds of audience members who have aesthetic reactions.

If it makes sense to separate the three uses of "expression," how do human authors and generative machines compare with regard to each? It turns out that human authors and generative systems are both intensely interested in and make uses of constitutive expression, so that does not distinguish them. Neither human authors nor generative systems typically copy actionable expression, so that does not distinguish them either. However, human authors do make use of felt expression, while generative AI systems typically do not. I will argue that that should not make a legal difference.

a. Machines and Humans Both Use Constitutive Expression

In early motions to dismiss the copyright infringement lawsuits that have been filed against them, generative AI developers OpenAI and Bloomberg have argued that their generative models are only learning "facts" or "information" from the works on which they are trained, plus the most basic elements of language and linguistic structure: "grammar[] and syntax"[115] or"grammar[] [and] vocabulary."[116] That is not the case. Developers of generative AI tools are completely interested in creating tools and services that produce text and images that appeal to the aesthetic sensibilities of users, not just text and images that would recognizably but boringly or awkwardly portray some object or fact.[117] That is why they use training works in a wide variety of linguistic and visual styles. That is also why the latent spaces in their models contain clusters representing, not only objects depicted in images or facts stated in prose, but also a wide variety of stylistic characteristics derived from the expressive choices of the authors of the training works.

---

112.   *Id.* at 306.

113.   *Id.* at 309.

114.   Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. COPYRIGHT SOC'Y U.S.A. 291, 301 (2019).

115.   OpenAI's MTD, *supra* note 17, at 12.

116.   Memorandum of Law in Support of Bloomberg L.P. and Bloomberg Finance L.P.'s Motion to Dismiss First Amended Class Action Complaint at 8 (Jan. 24, 2024), Huckabee v. Meta Platforms, Inc., No. 23-cv-09152 (S.D.N.Y Jan. 24, 2024).

117.   *See* Sobel, *supra* note 31, at 57 (2017) ("[M]achine learning gives computers the ability to derive valuable information from the way authors express ideas. Instead of merely deriving facts about a work, they may be able to glean value from a work's expressive aspects."); *id.* at 69 (noting that generative AI developers "sought to make use of authors" varied and rich expression of ideas," which "is the essence of copyrightable subject matter.").

Take the case of text-to-image model training. In comments submitted to the U.S. Copyright Office's inquiry on Artificial Intelligence and Copyright, OpenAI states,

> When a model is exposed to a large array of images labeled with the word "cup", it learns what visual elements constitute the concept of "cup-ness[.]" It does this not by compiling an internal database of training images, but rather by abstracting the factual metadata that correlates to the idea of "cup." . . . The factual metadata and fundamental information that AI models learn from training data are not protected by copyright law.[118]

Matthew Sag uses the same example of cup images and suggests that what Generative AI models do is "encode fundamental relationships between pixels that are more likely in pictures with coffee cups than without."[119] He then provides an example of an image of a cup generated by Stable Diffusion next to some images of cups used to train Stable Diffusion. The cup in the generated image has "generic features"—it is "round . . . [a]ppears to be made of white ceramic, [and] has a small single handle . . . [but is otherwise] not substantially similar to any particular image from the training data."[120] The implicit suggestion is that the training set contains images labeled only with names of objects that appear in them; that the generative model just averages out all images labeled "cup" into a generic cup; and that a text-to-image service built on that model only produces images of generic cups. It would in theory be possible to construct such a training set, and to construct a model from that training set that contained only a representation of a generic cup, averaged from all cups portrayed in the training images. If that were what generative AI developers were doing, text-to-image generative models would have some claim to be learning only about real-world, uncopyrighted objects, thus making essentially non (constitutive) expressive use of the image-text pairs in the training set.

However, that is not what any text-image dataset collector or generative AI developer does, and that is not what they would want to do. Consider, first, the matter of training works—for example, the LAION image-text pair datasets on which

---

118. OpenAI, Comments of OpenAI on U.S. Copyright Office's Notice of Inquiry and Request for Comment [Docket No. 2023-06], at 11–12 (Oct. 30, 2023) [hereinafter, OpenAI Comments 2023], https://www.regulations.gov/comment/COLC-2023-0006-8906 [https://perma.cc/KY34-XQXA] [https://web.archive.org/web/20240914125018/https://www.regulations.gov/comment/COLC-2023-0006-8906]. Meta made similar statements in its comments in the Copyright Office inquiry. *See* Meta Platforms, Inc., Comments of Meta on U.S. Copyright Office's Notice of Inquiry on Artificial Intelligence & Copyright [Docket No. 2023–06], at 7 (Oct. 30, 2023)[hereinafter, Meta Comments] https://www.regulations.gov/comment/COLC-2023-0006-9027 [https://perma.cc/7K69-PTD9] [https://web.archive.org/web/20240914125134/https://www.regulations.gov/comment/COLC-2023-0006-9027]("The goal of such models is to simply extract non-expressive facts and statistics from training data (e.g., what characteristics typify a cat) and use them to generate new content (e.g., an entirely new picture of a cat).").

119. Sag, *Copyright Safety for Generative AI, supra* note 1, at 319; *see* Sag, *Fairness and Fair Use in Generative AI, supra* note 1, at 1908–09 (discussing the same example of cups).

120. Sag, Copyright Safety for Generative AI, supra note 1, at 319.

Stability AI trained Stable Diffusion. The datasets consist of the URL where each image can be found, and the accompanying alt-text tag.[121]

Stability AI downloaded each of the images, and trained Stable Diffusion on each image and its corresponding text.[122] The text tags in the LAION datasets include terms describing every conceivable stylistic element in images—everything you would ever want to describe the expressive choices of image creators. Think of names of colors, and terms like "vivid" and "muted". Shape terms, like "organic" and "geometric." Texture terms, from "smooth" to "rich" to "rough.""Movement,""balance,""imbalance,""harmony,""contrast"—they are all there. So are genres, and schools of art are also all there, from "baroque" and "rococo" to "impressionist,""expressionist,""Fauve,""cubist,""Dada,""photorealist," and so on. If that were not enough, there are thousands of names of the artists who created the images, and not just long-dead artists whose works are no longer under copyright, but artists who are still very much living and working.[123] It is also telling that the single most frequent word in the LAION 400M dataset (excluding prepositions and articles) is "Stock"—text-to-image tools are being trained on the stock images that their outputs are most likely to replace.[124]

Those tags are not left in the training dataset out of laziness. They are essential to the goal of the generative AI developers, which is to learn what visual patterns are associated with those terms. Some of those will be pretty simple: The term "purple" will likely come be associated with a range of corresponding hues. Others will be much more complex: The name of a particular artist may be associated with a whole series of visual patterns that cover texture, composition, color palette, subject matter, and so on. Thus, if we define "non-expressive use" as "a use of a copyrighted work that is indifferent to the expressive choices made by the author of the work," generative AI training uses are anything but indifferent to the author's expressive choices. Developers want text-image models to understand the visual patterns associated with every term that could be used to describe an artist's work, so that the models can respond to user requests to create images embodying those choices.[125]

---

121.   *See* Romain Beaumont, LAION-5B: A New Era of Open Large-Scale Multi-Modal Datasets, Laion (Mar. 31, 2022), https://laion.ai/blog/laion-5b/ [https://perma.cc/ZF4T-4F7P] [https://web.archive.org/web/20240914125219/https://laion.ai/blog/laion-5b/].

122.   *See* Stable Diffusion v1 Model Card, GITHUB, https://github.com/CompVis/stable-diffusion/blob/main/Stable_Diffusion_v1_Model_Card.md#training [https://perma.cc/S83T-KM6K] [https://web.archive.org/web/20240919022150/https://github.com/CompVis/stable-diffusion/blob/main/Stable_Diffusion_v1_Model_Card.md#training] (stating that Stable Diffusion was trained on "LAION 5B and subsets thereof") (last visited Sept. 18, 2024).

123.   *See* Robert Brauneis & Aneri Girishbhai Patel, LAION 400M Text Tag Word Frequency List, https://ln5.sync.com/dl/4b125ab10/f5kbcsb2-ibzyh2fg-iug9k55j-89ngixs7 [https://perma.cc/AQS3-XRQ7] [https://web.archive.org/web/20241004174530/https://ln5.sync.com/dl/4b125ab10/f5kbcsb2-ibzyh2fg-iug9k55j-89ngixs7/view/text/23874584460008] (last visited Oct. 4, 2024).

124.   *See id.*

125.   Importantly, state-of-the-art generative modeling techniques do not limit themselves to the terms found in the text tags of text-image pairs. Rather, they incorporate separately trained large language models, which can provide more context for terms that appear in the text tags of text-image pairs, and thus interpret prompts better. *See* Chitwan Saharia et al., *Photorealistic Text-to-Image Diffusion Models with Deep*

The same is true of the images in the LAION training sets. If what we wanted to do with such a set was to train a computer vision model, it would be important to limit the images in the set to those that were or looked like standard visible-spectrum photographs. When we deployed the model within a computer vision system, the system would be receiving images from a standard camera, and would have to identify objects in such images. However, the LAION training sets are in no way limited to such images. Generative AI developers keep all of the artistic, highly-stylized images when they use the sets to train their models, because they want their models to be able to produce images in a wide variety of styles, containing a wide variety of expressive choices.

Consider, for example, the seven image-text pairs from the LAION 5B dataset in Table 1 below. Notice that the text tags all include the word "cup," but they also all include other words. Go retrieve the images using the provided Perma links, and look at them. They do indeed portray cups, in a very wide variety of styles, sometimes barely visibly, as in the Diane Leonard painting, sometimes whimsically, as in the Stanley Morrison illustration, sometimes conceptually, as in the Jacek Yerka sketch in which no cup is present, just the water in a cutaway of a cup-shaped moat around a castle.

Image URL	Tag
https://i.pinimg.com/736x/23/20/ca/2320caf3176e52d46769bec1ace33e31.jpg [https://perma.cc/T4C3-CSEY]	A Cup of Tea. Oil on Board. Diane Leonard. Impressionist.
https://render.fineartamerica.com/images/rendered/search/print/images/artworkimages/medium/1/coffee-dragon-stanley-morrison.jpg [https://perma.cc/2ZFW-8ZEQ]	Cup Digital Art Coffee Dragon by Stanley Morrison
https://www.absolutearts.com/portfolio3/j/jimlively/A_Second_Cup_of_Coffee-1357674081st.jpg [https://perma.cc/24ZM-UEVM]	Jim Lively Artwork A Second Cup of Coffee
https://images.fineartamerica.com/images-medium-large-5/yellow-morning-cup-lutz-baar.jpg [https://perma.cc/2NZF-L5XA]	Yellow Morning Cup Painting by Lutz Baar
https://render.fineartamerica.com/images/rendered/search/print/images/artworkimages/medium/1/coffee-cup-painting-robert-joyner.jpg [https://perma.cc/CMG2-LFQA]	Painting – Coffee Cup Painting by Robert Joyner
https://mayhemandmuse.com/wp-content/uploads/2012/08/A-Jacek-Yerka-surrealism-sketch-of-a-castle-in-a-tea-cup.jpg [https://perma.cc/LP25-AAT8?type=image]	A Jacek Yerka surrealism sketch of a castle in a tea cup
https://mydekel.files.wordpress.com/2015/04/guitarcoffee.jpg?w=1250&h=600&crop=1 [https://perma.cc/2PEC-BVXX]	Guitar and Coffee Cup digital art from photographs (c)2015 Michael Dickel

Table 1: Seven Image-Text Pairs from LAION 5B[126]

---

126.   I found these images by doing a search for "cup" on *"Have I Been Trained?,"* an online tool that allows searchable access to the LAION-5B dataset, available at https://spawning.ai/have-i-been-trained [https://perma.cc/V94M-72G7] [https://web.archive.org/web/20241004174736/https://spawning.ai/have-i-been-trained] (last visited Mar. 4, 2024). I generated Perma links for the pages on which the images were found, so that they could continue to be viewed in their original context, even if they become no longer available at the URLs provided in the LAION 5B dataset.

Nonetheless, those images, and thousands of others like them, are all included in the LAION 5B dataset, and were all used to train Stable Diffusion.[127] What patterns is the Stable Diffusion machine learning algorithm finding in those images? It is, among other things, finding patterns associated with how particular artists choose to portray cups, including named artists like Diane Leonard, Stanley Morrison, Lutz Baar, Jim Lively, Robert Joyner, and Jacek Yerka (all of whom, by the way, are as of this writing still alive and creating images). Those patterns are the expressive choices that those artists have made.

The images are encoded and stored in a "latent space" that is impossible for us to interpret and experience directly. However, experiments in exploring small regions of latent space in the image models of generative AI systems demonstrate that the image embeddings are indeed storing style information—expressive choices made by image creators—as well as information about the objects represented in those images.[128] Take a look, for example, a couple of the animated gifs provided with a post titled "A walk through latent space with Stable Diffusion" on the Keras website.[129]One part of one gif shows the decoded images associated with similar image embeddings, most of which look like a panda depicted in a stained glass window. The panda seems to morph into a weasel or a skunk at some points, but the stained glass window context remains, exploring variations in how the panels of color are divided by black lines that look like lead came—until it veers off into another neighborhood of planes flying through an orange sky.[130] That area of latent space would not exist without one or more training works created by artists who were making expressive choices about how to design stained glass windows or images that looked like stained glass windows. The same is true for another gif of painterly Dutch landscapes with windmills and cows.[131] Again, it is not that any of those images is necessarily substantially similar to any one image in the training set. That would be actionable

---

127.   *See Stable Diffusion v1 Model Card, supra* note 123.

128.   For some brilliant experiments in making latent spaces interpretable, see B.J. Ard, *Copyright's Latent Space: Generative AI and the Limits of Fair Use*, CORNELL L. REV. (forthcoming 2025).

129.   *See* Ian Stenbit, fchollet, and lukewood, *A Walk Through Latent Space with Stable Diffusion*, KERAS (Sept. 28, 2022), https://keras.io/examples/generative/random_walks_with_stable_diffusion/ [https://perma.cc/DPB3-M2C2] [https://web.archive.org/web/20240919032516/https://keras.io/examples/generative/random_walks_with_stable_diffusion/].

130.   *See* Gif of a Panda, *in* KERAS, https://keras.io/img/examples/generative/random_walks_with_stable_diffusion/panda2plane.gif [https://perma.cc/CY9M-26M4] [https://web.archive.org/web/20240828175233/https://keras.io/img/examples/generative/random_walks_with_stable_diffusion/panda2plane.gif].

131.   *See* Gif of Cows, *in* KERAS, https://keras.io/img/examples/generative/random_walks_with_stable_diffusion/happycows.gif [https://perma.cc/ZL38-DRF7] [https://web.archive.org/web/20240828175230/https://keras.io/img/examples/generative/random_walks_with_stable_diffusion/happycows.gif].

expression, which I am not focusing on here. Rather, those images incorporate constitutive expression found in one or more training images.

Oren Bracha has argued that training generative AI models involves the process of extracting social "metainformation" from the training works. The information extracted, he says, is not "not the information (whether content or expressive form) contained in specific works."[132] Rather, it is "information about regularities and relations in the informational patterns of such works," and it is "social information because its value consists in aggregating patterns common to many individual expressive works."[133] Does this mean that training generative AI models is non-expressive in a way educating human authors is not? I do not think so.

First, consider Bracha's use of the term "metainformation." In what is likely its most common use, the term "metadata" refers to information that is included in a digital file, but that is not the main content of that file (which is often a work of authorship like an image) and that is not derived from that content. For example, under a standard called Exchangeable Image File Format, most digital cameras capture and store certain additional information about each photograph taken.[134] That information typically includes the make and model of the camera, the focal length of the lens, the shutter speed, the aperture setting, the ISO speed setting, and the date and time the photo was taken. Another example is the "copyright management information" defined by § 1202(c) of the Copyright Act.[135] That includes certain information that is conveyed with copies of a work, such as the work's title, author, and copyright owner, and terms and conditions of using the work.[136] If a file contains a copy of a work, then information such as the make and model of the camera that was used to create that work, or the name of the author of that work, is not part of the work, and is not derived from the work.

That is not the kind of "metainformation" Bracha is talking about. He is talking about information that is derived from the work itself. Ideally, we would find a different term to describe that derived information, since the use of "metainformation" or "metadata" to refer to both non-derived and derived information can lead to confusion, and in particular can lead to the mistaken assumption that derived information should be as insulated from copyright claims as

---

132.   Bracha, *supra* note 1, at 42–43.

133*.   Id*. at 43; *see also* Sag, *Copyright Safety for Generative AI*, *supra* note 1, at 301 (mentioning the argument that "generative AI is exactly the same as the digitization process in HathiTrust: millions of copyrighted works were digitized so that researchers could extract uncopyrightable metadata . . . ."). Amanda Levendowski explicitly connects the difference between "works" and "data" to the inability of machines to have the aesthetic reactions that human beings cannot avoid. *See* Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579, 625 (2018). I will address this difference regarding what I call "felt expression" below.

134.   The Exchangeable Image File Format was originally released in 1996; version 3.0 was released in May 2023. *See "Exif 3.0 Released, Featuring UTF-8 Support"*, INT'L PRESS TELECOMMS. COUNCIL (June 1, 2023), https://iptc.org/news/exif-3-0-released-featuring-utf-8-support/   [https://perma.cc/X9U9-MSAU] [https://web.archive.org/web/20240919033556/https://iptc.org/news/exif-3-0-released-featuring-utf-8-support/].

135.   17 U.S.C. § 1202(c).

136*.   See id*.

non-derived information. In the case of derived information, the question must be, what kind of derived information?

At one end of the spectrum, we might agree that broad statistical summaries derived from a large number of works provide insights that are very different from what we learn when we experience a particular work. In *Author's Guild v. Google*, for example, the court notes that the full-text search of Google's Library Project enables "text mining" to provide "statistical information to Internet users about the frequency of word and phrase usage over centuries."[137] Researchers can uncover interesting patterns, such as "'the frequency of references to the United States as a single entity ("the United States is") versus references to the United States in the plural ("the United States are") and how that usage has changed over time.'"[138] The *Authors Guild* court concluded that such information was part of the "transformative use" that made the Library Project a fair use.

At the other extreme, we can imagine an argument that information about the value of each pixel in a digital image, and the location of that pixel in that image, is just information *about* a work rather than the work itself. Yet because the image—the pictorial or graphic work—could be reconstructed perfectly from that information, calling that information "metainformation" or "metadata" would render those terms meaningless.

On that spectrum, the information preserved in a generative AI model falls pretty close to where the learning of human authors falls. When we as human authors read a book or view an image, we typically do not remember the exact sequence of words in the book, or the exact composition of the image.[139] Rather, we remember techniques of writing or painting, styles, moods, patterns, broad outlines. And we remember certain patterns more when we have experienced them in many works, not just one. Some of those patterns are common in our social milieu, and they become part of our enculturation, as we come to understand norms common to our social context. They are rightly characterized, as Bracha characterizes generative AI models, as "social information," because we "aggregat[e] patterns common to many individual expressive works."[140] Thus, this kind of aggregation does not distinguish generative AI models from the human authors who cannot claim blanket fair use immunity from copyright liability.

It is true that some generative AI developers have started to implement voluntary filters or guardrails that seek to limit the ability of their services to mimic individual artistic styles. For example, OpenAI has stated that "DALL-E 3 is designed to decline

---

137.   804 F.3d 202, 209 (2d Cir. 2015).

138.   *Id.* (quoting Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013)).

139.   It is a little different with music. We often do remember the exact sequence of notes in a melody, which, combined with the greater simplicity of the average musical work, is why all significant unconscious copying cases are about music. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976); Fred Fisher, Inc. v. Dillingham, 298 F.145 (S.D.N.Y. 1924).

140.   Bracha, *supra* note 1, at 43.

requests that ask for an image in the style of a living artist."[141] Microsoft states that it "has offered the ability for living artists to request that their name not be used to generate prompts."[142] However, the mere existence of such filters is an acknowledgement that the model is, in fact, learning to mimic individual artists' styles. Because the model itself stores information on individual artistic styles, it may be possible to "trick" the model into imitating an individual style by using alternative prompts that substitute for an artist's name and are not blocked. In any event, these developers have decided to provide a filter only for "living artists," thus falling seventy years short of the current term of copyright.[143] Since the ability to provide a filter depends on limiting access to the model through a platform interface, developers that release "open source" models to the public cannot limit the performance of their models, and they will be able to imitate individual styles.

b. Machines and Humans Rarely Use Actionable Expression

This section can be as short as the previous section is long. Although generative AI systems have produced images, text, and other generations that contain actionable expression from training works,[144] I have assumed for purposes of this Article that that is an engineering problem that can largely be fixed.[145] If it continues to occur from time to time, there will be infringement suits when a sufficient amount of money is involved, just as there are when human authors use valuable actionable expression from copyrighted works without authorization.

Here, I only want to reiterate what I developed in some detail above in Part II. Human authors do not get the benefit of a blanket exception to infringement liability for unauthorized copying of copyrighted works, so long as they use those works for learning purposes and do not include actionable expression from those works in the new works that they create. True, Mark Lemley and Brian Casey argue in "Fair Learning" that human beings should be able to take advantage of a broader fair use doctrine, under which, for example, gaining access to uncopyrightable facts and theories might justify copying some actionable expression found in scientific articles, newspaper articles, and newsworthy video.[146] Even Lemley and Casey, however, do not argue that human authors should be able to claim a fair use privilege for any unauthorized copying that they do, as long as they don't author any works that infringe the works they've copied. Thus, a claim that human beings who use

---

141.   *DALL-E   3,*   OPENAI,   https://openai.com/dall-e-3 [https://web.archive.org/web/20241004112116/https://openai.com/index/dall-e-3/?__cf_chl_rt_tk=0GNo4xPobQkzhXnBkBSFCE_4_ty5Kv74GSYrn9E04Qc-1728040876-0.0.1.1-6186] (last visited Oct. 11, 2024); *see also* OpenAI Comments 2023, *supra* note 119, at 11.

142.   Microsoft Comments, *supra* note 8.

143.   *See* 17 U.S.C. § 302(a) (the general term of copyright for works created on or after January 1, 1978 is the life of the author plus seventy years).

144.   *See* sources cited *supra* note 5 (complaints in lawsuits that allege near-verbatim copying of text in training works by generative AI services).

145.   *See supra* text accompanying notes 7–8.

146.   *See* Lemley & Casey, *supra* note 1, at 779–82.

generative machines should get such a privilege is mysterious, and anything but self-evident. Put another way, if we use the term "expression" in the sense of "actionable expression," then Matthew Sag's statement that "machine learning models . . . qualify as non-expressive use so long as the outputs are not substantially similar to any particular original expression in the training data" is just a tautology.[147] Indeed, what it means to make a "non (actionable) expressive use" of a work is to create another work (or "generation" or "output") that is not substantially similar to that work. We need something more to understand why that might turn making copies of the first work into a fair use if machines are involved. For that, we proceed to the next section.

c. *Machines Do Not Use Felt Expression and Humans Do, But That Should Not Make a Legal Difference*

As I have noted above, when we human beings experience a work of authorship, we have an aesthetic or hedonic reaction. Any expression in that work becomes *felt* expression.[148]

As far as we know, no computer has an aesthetic reaction to a work that it processes in some way. Computers are anhedonic learners. Thus, the processing of a work by a computer, without any human involvement, would count as a non (felt) expressive use. It is not clear that all generative machine learning avoids human exposure to training works. There is an entire field of "human-in-the-loop" machine learning,[149] and some of the ways in which humans could be involved in the training and deployment of generative models could expose them to the training works.[150] For present purposes, however, let's assume that a generative AI training and deployment process involves no human exposure to the copyrighted works in the training set. What then? Does the factual difference between human learning and generative machine learning justify a difference in legal treatment of the two? In particular, does

---

147.   Sag, *Copyright Safety for Generative AI*, *supra* note 1, at 309.

148.   Of course, we have aesthetic and hedonic reactions to noncopyrightable elements, too, like theories, facts, and functional elements. Surely, many students of physics have experienced the beauty of $F = m*a$, Isaac Newton's second law of motion.

149.   *See, e.g.*, Eduardo Mosqueira-Rey et al., *Human-in-the-Loop Machine Learning: A State of the Art*, 56 Artif. Intell. Rev. 3005 (2023).

150.   For example, we know that Stable Diffusion is more intensively trained on some subsets of LAION 5B, namely, "LAION Aesthetics," which are "several collections of subsets from LAION 5B with high visual quality." Christoph Schuhmann, *LAION-Aesthetics*, LAION Blog (Aug. 16, 2022), https://laion.ai/blog/laion-aesthetics/   [https://perma.cc/TA64-CWGG] [https://web.archive.org/web/20240927013701/https://laion.ai/blog/laion-aesthetics/]. How did LAION figure out which images in LAION 5B had "high visual quality"? It trained an aesthetic assessment model on a dataset that consisted of images and the aesthetic quality score that human beings gave those images. In this case, however, it had people score images that were created by a generative AI system from user-submitted prompts, and the users all signed an agreement dedicating whatever copyright interest they might have in the images to the public domain. *See Simulacra Aesthetic Captions*, GitHub, https://github.com/JD-P/simulacra-aesthetic-captions   [https://perma.cc/TS2D-JY46] [https://web.archive.org/web/20240927014520/https://github.com/JD-P/simulacra-aesthetic-captions] (last visited Sept. 26, 2024).

it justify blanket fair use treatment of any copying that occurs in generative AI development, while human learning does not get that favorable treatment?

There are two reasons why I think it does not. First, the purpose of copyright law is not only to protect and incentivize the creation of aesthetic experiences—felt expression. It is also, and perhaps primarily, to protect and incentivize the creation of learning experiences. Second, the particular works that have been used to train generative AI models are unlikely to have been created solely for entertainment or hedonic purposes, such that the use of those works to train generative AI models is a "transformative" use. Rather, they are created with the understanding that people will learn from them as well as enjoy them, so that their use to train a generative model should not count as a transformative use.

i.   *Copyright Law's Purpose: Protecting Education as Well as Entertainment.*

It is true that courts sometimes seem to focus solely on the entertainment value of works. As mentioned above, for example, Judge Jerome Frank's famous formulation of substantial similarity asks whether "whether defendant took from plaintiff's works so much of *what is pleasing to the ears of lay listeners* . . . that defendant wrongfully appropriated something which belongs to the plaintiff."[151] However, even that formulation does not exclude the possibility that part of what listeners found valuable about the plaintiff's work—here, a musical work—is that they learned something new from the work about the rhythmic, melodic, or harmonic possibilities of music. More generally, the better view is that while we human beings have an aesthetic or hedonic reaction to every work that we experience, we also learn from, and are changed by, every work that we experience. We do not have fixed aesthetic desires from birth, and then create markets for works through passive consumption that leaves us unchanged. Rather, we are always "on," as both appreciators and learners. The works that we experience simultaneously delight or repulse us, and also edify, enlighten, enrich, and change us.

Does copyright law recognize the educational value of works, as well as their entertainment value? There is a good argument that it does, and has from the very beginning. After all, the constitutional proclamation of the purpose of copyright and patent law does not refer the promotion of pleasure. Rather, according to Article I, section 8, clause 8, the purpose of copyright and patent law is "[t]o promote the progress of science and useful arts"[152]—to advance human knowledge in both its theoretical and practical forms. Likewise, the first Copyright Act—the Copyright Act of 1790—is not entitled "An Act for the encouragement of entertainment," but "An Act for the encouragement of learning."[153] As Oren Bracha and others have noted,

---

151.   Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (emphasis added).

152.   U.S. CONST. art. I, § 8, cl. 8.

153.   Act of May 31, 1790, ch. 15, 1 Stat. 124. The Copyright Act of 1790 borrowed its title (and most of its substance) from England's Statute of Anne. *See* Statute of Anne 1710, 8 Ann. c. 19 (Eng.) (entitled "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned").

among early copyrighted works, "practical or useful works" were dominant.[154] "[W]orks of original literature or poetry constituted only a small fraction of registrations."[155] Thus, copyright was not intended to protect only the aesthetic reactions that would be produced by the works, but also their value in imparting knowledge and skill of various kinds to those who were exposed to them.

As the Supreme Court held in *Baker v. Selden*,[156] and as I acknowledged above,[157] "the copyright of [a] treatise [does not] give the exclusive right to the art or manufacture described therein."[158] Thus, when I say that copyright protects the learning value of a work, I am not saying that the owner of copyright in a work has the right to control any skill learned from the work. What I am saying is that no one can make an unauthorized copy of the book to learn the skill, and then claim that copying the book was fair use because the skill was not copyrightable. The *Baker v. Selden* Court would agree, because it made it perfectly clear that "a work on the subject of book-keeping . . . may be the subject of a copyright . . . and, considered as a book, as the work of an author, conveying information on the subject of book-keeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community."[159] What I am also saying is that the purpose of copyright cannot be just to protect the aesthetic or hedonic reactions that a treatise on book-keeping produces in readers. Surely for such a treatise, as for many works, the aesthetic or hedonic reaction that it produces is only a secondary consideration.

Suppose that an AI tool was designed to ingest the explanatory text in the book at issue in *Baker v. Selden*—"Selden's Condensed Ledger, or Book-keeping Simplified"—not to add to its ability to generate new text, as existing text-to-text generative AI tools do, but to enable it create a spreadsheet program that would implement the bookkeeping method described in that text. That would be an instance in which the AI really did just use the book to learn an uncopyrightable system, rather than making use of any (constitutive) expression in the book. I do not think it would be fair use to do even that with an unauthorized copy of the book, but obviously that gets closer to *Sega v. Accolade*.[160] Even if you disagree, however, note that that is not what text-to-text generative AI tools do. When they ingest the text of "Selden's Condensed Ledger," they not just learning an uncopyrightable system. They are also adding to their ability to create new verbal expression that would be a copyrightable work if it were created by a human being—they are using the constitutive expression in the book. That kind of use is neither a non (constitutive) expressive use, nor a transformative use.

---

154.   *See* Oren Bracha, *Commentary on the U.S. Copyright Act 1790, in* PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmereds.).

155.   *Id.*

156.   101 U.S. 99 (1880).

157.   *See supra* text accompanying notes 53–57 (explaining why infringement damages should not include the value of skills learned from infringing copies of works).

158.   *Baker*, 101 U.S. at 102; *see supra* text accompanying notes 54–60.

159.   *Baker*, 101 U.S. at 102.

160.   For discussion of *Sega*, *see supra* text accompanying notes 84–87.

ii. *The Imputed Purpose of Copyrighted Works: Both Entertainment and Education.*

A number of generative AI developers have argued that the copyrighted works they used to train their models were created only for entertainment purposes, so that their use of those works for training purposes is use for a "transformative" purpose within the fair use analysis. Thus, for example, OpenAI contends that "[w]orks in training corpora were meant primarily for human consumption for their standalone entertainment value. The 'object of the original creation,' in other words, is direct human consumption of the author's expression."[161] By contrast, OpenAI is using those works to "hel[p] computer programs learn the patterns inherent in human-generated media," which it asserts is a completely different purpose.[162] Similarly, Meta Platforms, Inc. asserts that "[t]he works that AI models are trained on . . . were created for expressive purposes," while "models use training data . . . to develop an entirely new and innovative service that . . . produces valuable new content."[163] This argument could be supported in part by a statement in *Baker v. Selden.*[164] The *Baker* Court suggests in dicta that there is a category of works—"ornamental designs, or pictorial illustrations addressed to the taste"—the "object" of which is "the production of pleasure in their contemplation," and it concludes that "[t]his is their final end."[165]

That piece of dicta in *Baker* is wrong, and so are the generative AI developers' assertions. As human beings we learn matters such as "the mode of drawing lines to produce the effect of perspective,"[166] not only from "book[s] on perspective"[167] —from instructional treatises—but also from "pictorial illustrations addressed to the taste"[168]—from seeing how artists use perspective in practice. Similarly, we learn how to write "short, sharp sentences," not just from style manuals, but also from works of fiction. Because we are always learning from works as well as enjoying them, we cannot say that the sole purpose of such works is to entertain. Even if the subjective intent of the author of a work was only to entertain, the imputed purpose of the work must be broader, since the effect of the work is to educate as well. Thus, it is a mistake

---

161.   OpenAI Comments 2019, *supra* note 17, at 5.

162.   *Id.*

163.   Meta Comments, *supra* note 119, at 14; *see* Stephen Wolfson, *Fair Use: Training Generative AI*, CREATIVE COMMONS (Feb. 17, 2023), https://creativecommons.org/2023/02/17/fair-use-training-generative-ai/   [https://perma.cc/4FBY-TTMR] [https://web.archive.org/web/20240927164524/https://creativecommons.org/2023/02/17/fair-use-training-generative-ai/] ("While these images were originally created for their aesthetic value, their purpose for the AI model is only as data.").

164.   I say "in part" because the training sets of the generative AI developers are hardly limited to "ornamental designs," *Baker v. Selden,* 101 U.S. 99, 103–04 (1880), or works created for their "standalone entertainment value," OpenAI Comments 2019, *supra* note 17, at 5. They include textbooks and other nonfiction and instructional works. Thus, even if there were a category of works the use of which for generative AI training would be "transformative," actual training sets for leading generative models are not limited to those works.

165.   *Baker v. Selden*, 101 U.S. 99, 103–04 (1880).

166.   *Id.* at 102.

167.   *Id.*

168.   *Id.* at 103.

to conclude that there are "ornamental" works that have only "standalone entertainment value," so that using such works for learning or training purposes would involve a "transformative purpose."[169]

As Benjamin Sobel has recognized,[170] Justice Stevens's reply to a broad interpretation of Justice Blackmun's dissenting stance in *Sony Corp. of America v. Universal City Studios, Inc.* undermines generative AI developers' claims that use of copyrighted works to train a model that could create new, dissimilar works is "productive."[171] Under that broad interpretation, Justice Blackmun draws a line between using works for "purely personal consumption," which will never produce any benefit to society, and using works in a productive way, which will produce societal benefits.[172] Justice Stevens responds that even uses that Justice Blackmun would presumably consider "consumptive" do in fact benefit individuals and will likely benefit society, so that the presence of societal benefit alone can't mean that a use is a fair use. "A teacher who copies to prepare lecture notes is clearly productive," states Justice Stevens, "[b]ut so is a teacher who copies for the sake of broadening his personal understanding of his specialty."[173] That is true. Human beings have always been learning how to create new, dissimilar works from existing copyrighted works. That has never been sufficient in itself to render that learning use a fair use, and it should not be sufficient to render generative AI training a fair use either.

There is a narrower interpretation of Blackmun's dissent that is further developed and reinforced in *Campbell v. Acuff-Rose Music, Inc.*, but the narrower interpretation does not help generative AI developers either.[174] A new work may make use of a particular older work in a way that justifies the use of some portion of *that particular work*. If you are "a researcher or scholar," for example, you may find that your "work depends on the ability to refer to and to quote the work of prior scholars"[175]—scholars who worked in the same field, and whose work you need to quote because you want to comment on or criticize that particular work. Similarly, if you want to parody Roy Orbison's song "Oh Pretty Woman," then you need to use some of the lyrics and music from that song, so that the audience understands what you are parodying.[176] That weighs in favor of fair use, and as long as your new work does not use so much

---

169.   David Opderbeck argues that "because some of the copyrighted works used to train an AI are *meant for training* human beings, the transformation in purpose is not so dramatic." *See* Opderbeck, *supra* note 66, at 979. I agree, but I want to make the point even stronger: Human beings use virtually all works to train themselves, and so there really is no transformation in purpose when human beings use works to train AI models to produce generative outputs that will satisfy human demands.

170.   *See* Sobel, *supra* note 31, at 73.

171.   464 U.S. 417 (1984).

172.   *See id.* at 495 (Blackmun, J. dissenting) ("There is no indication that the fair use doctrine has any application for purely personal consumption on the scale involved in this case . . . ."); *id.* at 478 (Blackmun, J., dissenting) (suggesting that a productive use is one that "result[s] in some added benefit to the public beyond that produced by the first author's work").

173.   *Id.* at 455 n.40.

174.   510 U.S. 569 (1994).

175.   *Sony*, 464 U.S. at 477 (Blackmun, J., dissenting).

176.   *See Campbell*, 510 U.S. at 586–89.

of the old work that it acts as a substitute for it, you are in pretty good shape.[177] It will be an exceedingly rare case, however, in which a generative AI output contains enough of a training work to be prima facie infringing, but turns out to be a fair use because it is parodying, criticizing, or otherwise commenting on the work it is using. To the extent that fair use jurisprudence distinguishes between "transformative use" and "transformative purpose," that would be a "transformative use."[178] The design of generative AI systems is not focused on such uses, in which the purpose and content of the output or generation justifies the use of one particular training work. Rather, generative AI systems are primarily designed to produce new output with constitutive expression that they learned from a variety of training works. That is not a transformative use, and it is not a transformative purpose either.

iii. Should Learning Without Enjoyment Be Discounted?

You may have a lingering sense that even if the learning value of works is protected by copyright, so is the enjoyment value, and therefore if humans delegate the development of literary and artistic skills to machines, and forego the enjoyment, they should get some sort of discount. You also may have a sense that human beings sometimes are not learning all that much from their TikTok videos or their sitcoms, and so they should pay a premium for the enjoyment value of works. Of course, we should not forget that licensing prices may take this into account. For example, Stability AI offers a generative music service called "Stable Audio" that is trained entirely on music licensed from a platform called Audiosparx. Creators on the Audiosparx platform are allowed to opt out of having their music used for training, and when Audiosparx first publicized the training use and the opt-out, about 10% of the creators opted out.[179] Those who do not opt out—initially, 90% of the creators— receive some payment for the training use.[180] Although the amounts of those payments are not publicly known, the payment a creator receives for training use is almost certainly far less than the payment they would receive if their music was licensed for a (felt) expressive use, such as use in a movie or as background music in a store.

---

177.   *See id.* at 591–94.

178.   For this distinction, *see* Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 869–70 (2015) (distinguishing between "content-transformativeness" and "purpose-transformativeness"); Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 169–70 (2019) (distinguishing between "physical transformation" and "purposive transformation").

179.   *See* Stuart Dredge, *Stable Diffusion Maker Launches Stable Audio Text-to-Music AI*, MUSIC ALLY (Sept. 13, 2023), http://musically.com/2023/09/13/stable-diffusion-maker-launches-stable-audio-text-to-music-ai/ [https://perma.cc/7UTZ-SW9Q] [https://web.archive.org/web/20240927173722/https://musically.com/2023/09/13/stable-diffusion-maker-launches-stable-audio-text-to-music-ai/].

180.   *Id*; *see also Introducing Stable Audio 2.0*, STABILITY AI (Apr. 3, 2024), https://stability.ai/news/stable-audio-2-0 [https://perma.cc/X7CR-T8J2] [https://web.archive.org/web/20240927175138/https://stability.ai/news/stable-audio-2-0].

Whether or not private bargaining sets the correct discount for generative AI training use, we should be wary of setting copyright policy that makes it less expensive to train machines than to educate human authors to perform similar tasks.[181] Even if generative AI developers have to license training works, generative AI will cause significant labor displacement. That is probably something that society as a whole should welcome, as it means that the creation of some kinds of content will become less expensive and more accessible, and some of those who would have become remunerated authors or artists will find some other productive role. However, to avoid even more drastic displacement, we should think twice about making the present generation of authors the one that helped finance its own replacement. Academics concerned about AI labor displacement more generally have suggested that we should change policies that make it more expensive for employers to hire human beings than to buy machines. For example, rather than forcing employers to pay for employees' health care and family leave benefits, maybe we should finance those benefits through general taxation.[182] Here, we should consider whether copyright policy, in the form of a fair use exemption for training generative machines, but not for educating human authors, will accelerate and deepen creative labor displacement in a way that we should avoid.

B.   THE REPRODUCTION RIGHT AND COMPUTER "READING"

In this section, we are going to keep discussing whether the copies made for generative AI training purpose should be treated as infringing the reproduction right, but the framework will be quite different, and it will sometimes seem like the polarities have been reversed. The previous section discussed the argument that generative AI training is making a "non-expressive use" of the copyrighted works in the training set, and that the act of making copies of those works for training purposes should therefore be treated as a fair use. In that context, the proponents of fair use argue that use by the computers creating the generative model is fair precisely because it is *different* than human use. Human use is "expressive" because we human beings have hedonic reactions to a work to which we are exposed. Computers do not have those reactions, and so their use is "non-expressive." By contrast, I argued that both humans without computers and humans building generative models can be said

---

181.   We can imagine some ghastly experiment in which human beings were rendered anhedonic—perhaps through a continuous flow of dopamine inhibitors—and then employed to read copyrighted works, and respond to requests for essays or images by other, more fortunate human beings. Under the principle that non (felt) expressive use is fair use, the employers of those anhedonic human beings could make copies of every work now under copyright, so long as they only let their anhedonic employees read or view or listen to them, thus avoiding the extra cost of licensing the works, and in that respect putting humans and computers on a level playing field. However, even if such an operation could overcome moral and legal objections, it likely would not work: Human beings almost certainly do not learn as well when deprived of their aesthetic reactions.

182.   *See* Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 305–19 (2018).

in a relevant sense to be learning—acquiring a facility—and in particular acquiring a facility with constitutive expressive choices, acquired from the training works.

Now we want to consider an argument that the creation of copies for computer use should be a fair use because computers are doing something that should be treated *the same* as one kind of human activity, namely, the activity of reading, listening to, or viewing works.[183] To process a work using a computer, one typically has to make a copy of the work. As Nicola Lucchi states, "AI systems cannot learn from art in the same way humans do, since they require an exact copy of the artwork in their training dataset."[184] Mark Lemley and Bryan Casey make a similar comment: "The problem [machine learning] systems face is the inability to capture the unprotectable parts [of copyrighted works of authorship] to use for training without making a rote copy of the protectable ones."[185]

However, according to this argument, it is merely a technicality that a copy must be made for a computer to use a work to train a generative model. During model training, the computer processes the copy once and is done with it, just like we human beings might read a book, listen to a song, or view a streamed movie. Therefore, computer "ingestion" of works for purposes of generative model training is functionally equivalent to human reading, viewing, or listening.[186] As we know, human beings do not incur infringement liability for those activities.[187] Therefore, computers should not either. Rather, they should enjoy a kind of "perceptual parity" with humans. Because there is no specific provision in the Copyright Act allowing adjustments for perceptual parity, fair use should step in.[188] Making a copy solely for purposes of one-time computer analysis and training should be a fair use. Thus, for

---

183.   One might consider a broader argument that people who use computers to learn things about works should be treated exactly the same as people who learn without computers. They should benefit from all of the same freedoms that unaided humans do, and be subject to all of the same strictures. For example, they should benefit from the first sale doctrine and the limitations on exclusive rights, but they should not be able to make unauthorized copies of entire works. The problem is that treating what the computer does as mere "experiencing," and treating as fair use any copies made to enable that experience, ends up bypassing all of the other remaining copyright strictures. Making an unauthorized copy of an entire book is perfectly fine, because that is treated as no more than reading that book, which is not an infringing act. Nor does it matter that the copy from which the electronic copy is made is itself pirated, because the computer is just "reading" the pirated copy, and reading pirated copies is not an infringing act either. All we need is a ruling that the computer is effectively doing no more than reading, listening or watching, and every copy made to enable that activity is immunized from infringement liability.

184.   Nicola Lucchi, *ChatGPT: A Case Study on Copyright Challenges for Generative AI Systems*, EUR. J. RISK REGUL. 1, 11 (2023).

185.   Lemley & Casey, *supra* note 1, at 775.

186.   *See, e.g.*, UTKU TAŞOVA, THE DICTIONARY OF ARTIFICIAL INTELLIGENCE 127 (2023) (defining "data ingestion" as "the process of collecting, importing, and processing data for storage and analysis").

187.   *See supra* text accompanying note 47.

188.   The idea of adjusting rules to achieve perceptual parity between unaided humans and humans using machines is one example of the broader idea of "technological neutrality." As Carys Craig has argued, it is unlikely that technological neutrality can be achieved by adjusting one rule in isolation; it is more likely that one has to step back and compare contexts in light of the broader aims of copyright law. *See* Carys J. Craig, *Technological Neutrality: Recalibrating Copyright in the Information Age*, 17 THEORETICAL INQUIRIES LAW 601, 606–15 (2016).

example, in its comments submitted to a U.S. Patent and Trademark Office inquiry on AI and intellectual property, the Consumer Technology Association contends: "To read is not to infringe . . . The case law on non-AI reading-for-learning teaches that AI reading does not infringe where fixed copies are produced but not distributed."[189]

That leads to the question whether computer processing is, for copyright purposes, functionally the same as human reading, listening or viewing. (Sometimes I will use "reading" to stand for all human experience of works.) This is not an easy question. However, I think there are two principal reasons why the computer processing that takes place during generative model building should probably be treated as *different from* the human experience of works. First, distinctions between the exclusive rights of copyright are very much based on human limitations of perception and memory, and are comprehensible only in light of those limitations. If generative AI development operates beyond those limitations, which I think in some respects it does, then it is hard to conclude that a computer involved in that development should be treated as merely being on the receiving end of a display or performance, rather than as possessing a copy, when copies of training works are in fact being made.

Second, human experience of works is the experience, not only of beings who can have emotional and aesthetic reactions to those works, but of beings who remember those reactions, and who are actors in social, cultural, and economic worlds. When copyright owners make works publicly available, they are doing so under the general assumption that the public who will be experiencing them is a human public, with emotions, memory, and agency. That enables the building of reputations, and it enables generation of revenue. Generative AI training bypasses all direct social, cultural, and economic involvement stemming from the experience of works. Cutting that link between experience and action in the social and economic world renders that use unlike the human experience of reading, viewing, or listening. Because it is unlike that experience, it should not count as "mere reading" for fair use purposes.

1. Reading and the Human Limitations Implicit in the Structure of the Exclusive Rights

The Copyright Act itself gives us an important framework within which we can assess whether what machine learning algorithms are doing are for copyright purposes similar to what human beings are doing when they read, view, or listen to works. As part of its core structure, copyright law assumes that human abilities are limited, particularly those abilities related to memory, analysis, and creation. The Copyright Act's division of exclusive rights in § 106 is only comprehensible against

---

189.   Consumer Tech. Ass'n, Comment on U.S. Patent and Trademark Office's Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation, Docket No. PTO–C–2019–003 (Jan.   10,   2020),   at   1,   3, https://www.uspto.gov/sites/default/files/documents/Consumer%20Technology%20Association_RFC-84-FR-58141.pdf   [https://perma.cc/ZG32-XRLX] [https://web.archive.org/web/20240921202957/https://www.uspto.gov/sites/default/files/documents/Consumer%20Technology%20Association_RFC-84-FR-58141.pdf].

the background of limited human abilities. Although § 106 creates six exclusive rights, they are of two basic types. The first are those that concern fixed copies, reproduction, distribution, and some if not all adaptations.[190] The second are those that concern only unfixed presentations of works—public display and public performance (including digital audio transmissions), and possibly unfixed adaptations. What I will call the "presentation rights"—display and performance—are much more limited and porous than what I will call the "fixation rights"—reproduction and distribution. Private presentations are not regulated at all. Public presentation rights are subject to far more exceptions and limitations than fixation rights. Those include the eleven enumerated exceptions in § 110 of the Copyright Act,[191] and the elaborate schemes for cable transmissions, digital audio transmissions, jukeboxes, public broadcasting, and satellite transmissions.[192] In addition, the enumeration of distinct § 106 rights facilitates private bargaining about licensing performances and displays on far more lenient terms than reproductions and distribution.

Why do we think of presentations differently than we think of fixation, and why does the Copyright Act regulate presentations with a far lighter touch? One important answer is this: As human beings, we face serious limitations in our ability to analyze, learn from, remember, or recreate the works that we experience in real-time presentations. These limitations are so natural to us—such a part of our ordinary experience of life—that it may require a thought experiment to make them apparent. Imagine that we all had near-perfect auditory and visual memory. Once we were exposed to a page of text or of musical notation, we could read it from memory at will. Once we saw a painting, we could conjure it up whenever we fancied, and could savor the vibrant colors or rich graytones just as if we were standing in front of it. If that were how we experienced the world, copyright law would be structured far differently. It is not clear that we would consider reproduction and distribution to be different enough from performance or display to formulate separate exclusive rights in that way. It is not clear that we would exempt private presentations, since a private presentation would have the same effect as the distribution of a personal copy. Paradoxically, one might prefer to acquire a copy rather than view a display if one did *not* want to experience a work immediately, but wanted to delay that experience.

---

190.   There is some question about whether the adaptation or derivative work right can be infringed without fixation. *See* H.R.REP. No. 94-1476, at 62 (1976)*, as reprinted in* 1976 U.S.C.C.A.N. 5675 ("The exclusive right to prepare derivative works . . . is broader than [the exclusive right of reproduction], in the sense that . . . the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form."); *but see* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992) (holding that the derivative work must "incorporate a protected work in some concrete or permanent form."). For my purposes, it does not really matter whether the adaptation right extends to some unfixed performances or not. If so, then it straddles the two basic types of exclusive rights. If not, then it can be grouped with the reproduction and distribution rights.

191.   *See* 17 U.S.C. § 110.

192.   *See* 17 U.S.C. § 111 (cable transmissions); 17 U.S.C. § 114(d) (digital audio transmissions); 17 U.S.C. § 117 (jukeboxes); 17 U.S.C. § 118 (public broadcasting); and 17 U.S.C. § 119 (satellite transmissions).

The human limitations assumed by the division of exclusive rights into fixation rights and unfixed presentation rights concern not only memory, but also analysis and creation. Suppose that we human beings want to thoroughly analyze a musical sound recording—a "song," in the modern definition—to understand it and perhaps to mimic its style. Very few if any of us can do that after having heard the song only once, particularly if it is not at a time of our own choosing. As human beings, we need access to a copy of that song, so that we can listen to it repeatedly, and pause and listen to small segments repeatedly. Of course, in a digital networked world, that copy need not be in our physical possession. A perfectly manipulable on-demand stream would do. But that is why Congress decided to treat on-demand streaming differently than programmed streaming, requiring individually negotiated licenses for the former, and also why Congress decided that owners of the rights to make copies of sound recordings of musical works—so called "mechanical rights"—would be compensated for on-demand streams.[193] An on-demand stream is too close to being a replacement for possession of a copy.

Now that we understand that the Copyright Act treats presentations differently than fixations in substantial part because of limitations on what we humans can do with our experiences of presentations, we can return to considering the status of generative AI training. Suppose we are willing to entertain the possibility that at least in some instances, making a copy of a work for purposes of computer processing should be treated as fair use, because the computer is doing no more than what a human being would do when experiencing a presentation of a work, something that does not implicate any of the exclusive rights of copyright. We now have to focus on what it means to do "no more than" what a human being would do. In a particular instance, is a computer doing what a human being could do without a copy, through mere exposure to a performance or display, or is it doing something more? If it is doing more, than immunizing copying for computer use is not creating perceptual parity. Rather, it is favoring people who use computers over those who do not, and creating a huge breach in the partition between fixation rights and presentation rights.

How do we tell whether computers, in building generative models, are doing more with the works they use to train the models than what human beings could do when experiencing those works through performance and display? It is not easy to decide what the relevant comparison should be. We could consider (1) the learning process—how learning takes place; (2) the resulting memory or model—how much and what is "known"; or (3) the resulting ability or capacity—how quickly and cheaply

---

193.   *See* 17 U.S.C. § 114(d)(2)(a)(1) (providing that digital audio transmissions of sound recordings that are part of an interactive service are not covered by a statutory license; licenses for those transmissions must be obtained directly from the owner of copyright in the sound recording); 17 U.S.C. § 115(e)(10) (defining "digital phonorecord delivery" as including an "interactive stream"); Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 161 (2d Cir. 2009), *cert. denied*, 559 U.S. 929 (2010) (considering the definition of "interactive service") ("If the user has sufficient control over the interactive service such that she can predict the songs she will hear, much as she would if she owned the music herself and could play each song at will, she would have no need to purchase the music she wishes to hear.").

can new works or generations be created. Probably some combination of all three is necessary, since it is not clear how the details of processing alone would matter if the resulting system created generations that were far worse and more expensive than works created by human authors.

As for the learning process, I think what turns out to be important is how consistently a machine learning algorithm can analyze a very large number of works—whether texts, images, videos, or songs—in a comparatively short period. For example, GPT4 was apparently trained in a three-month period using about 13 trillion tokens of text, which works out to about 10 trillion words.[194] The GPT learning algorithm is able to build a coherent model because it analyzes each piece of text in exactly the same way. Human beings can't do that. At a reading rate of 250 words per minute, a human being would take about 76,000 years to read 10 trillion words. Maybe we could figure out how to do something with many human beings working in parallel, with some redundancy built in to ensure consistency. However, that very redundancy would require persistent copies, to make sure that people were reading the same thing.

It is also the case that generative model building requires making many additional copies of training works—at least "copies" in the colloquial sense, if not the copyright sense. For example, the goal in training a generative image model, using state-of-the-art diffusion technology, is to enable it to find images within visual noise. You do that by starting with a model that has randomly initiated weights, feeding it an image with some noise introduced, seeing what it predicts the image would look like with the noise removed, and then adjusting the weights to make the model perform better. Existing theory suggests that this needs to be done in stages—the model has to be trained to make a noisy image a little less noisy, and then repeat that process many times, rather than predicting a perfect image from complete noise in one step. For every stage, the computer training the model has to make another copy of the image being used as training data—a copy that is slightly noisier. How many stages are there? At first, researchers needed hundreds of stages; a 2021 paper introduced an improved process that brought that number down to around fifty.[195] Typically, in more than half of those stages, the original image is still quite recognizable. That means that the training process is requiring, not just one copy of an image to be made, but twenty-five or more recognizable copies.[196]

---

194.   *See* Yam Peleg (@Yampeleg), TWITTER (July 10, 2022, 11:23 PM), archived Tweet, https://archive.is/2RQ8X[https://perma.cc/MM6S-P7LP].

195.   *See* Alex Nichol & Prafulla Dhariwal, *Improved Denoising Diffusion Probabilistic Models*, ARXIV (Feb. 18, 2021), http://arxiv.org/abs/2102.09672 [https://perma.cc/B9T3-87YT] [https://web.archive.org/web/20240921220503/https://arxiv.org/pdf/2102.09672] ("While DDPM . . . requires hundreds of forward passes to produce good samples, we can achieve good samples with as few as 50 forward passes . . . .") (last visited Sept. 21, 2024).

196.   Another advance in the field first compresses the images into a latent space, and then performs the training steps within that space. *See, e.g.*, Robin Rombach et al., *High-Resolution Image Synthesis with Latent Diffusion Models*, ARXIV(Apr. 13, 2022), http://arxiv.org/abs/2112.10752 [https://perma.cc/S3X9-PACB] [https://web.archive.org/web/20240922195159/https://arxiv.org/pdf/2112.10752]. Nonetheless, each of the progressively noisier versions of an image in latent space can be converted into a perceptible

That is not the end of copying. Many generative image models use convolutional layers to process the input images. The idea of a convolutional layer is to process an image with some number of filters (also called "kernels") that will highlight certain features in the image, such as vertical edges or horizontal edges. The output of a typical first convolutional layer is some number of filtered copies of the input images. For example, the first paper to suggest a U-Net architecture contains an example in which the first layer produces sixty-four filtered copies of the input image—all recognizable copies of the input image, with certain features highlighted.[197] Thus, in a training process, hundreds of copies of the input image are being made.

Of course, arguably, all these additional copies are not "copies" within the meaning for the Copyright Act. Although the Copyright Act leaves it to courts to determine what exactly counts as more than "transitory duration" under the definition of "fixed" in § 101,[198] it may be that none of these additional copies exists for more than what a court would find to be a transitory duration. However, they are still evidence of the consistency of how the machine learning algorithm processes each image. If similar consistency could be achieved by human beings only with the use of copies, then it is hard to argue that what the machine is doing is functionally equivalent to human reading.

That is the learning process. How about the resulting model? I argued above that the traces of the training works that are left in the generative model may in some sense be similar to what human beings remember. In both cases, what is remembered or modelled may be mostly patterns in the works that were experienced or processed, not the exact sequence of words in a particular textual work, or the exact graphic design of a particular image.[199] That suggests that human memory and the generative model may not be all that different. However, some have suggested that "memorization" of training works is inevitable in generative models, to a greater

---

image, and thus should count as a copy. *See* 17 U.S.C. § 101 ("copy") ("'Copies' are material objects . . . from which the work can be perceived . . . either directly *or with the aid of a machine or device*.") (emphasis added).

197.   *See* Olaf Ronneberger, Philipp Fischer & Thomas Brox, *U-Net: Convolutional Networks for Biomedical Image Segmentation 2*, ARXIV (May 18, 2015), http://arxiv.org/abs/1505.04597 [https://perma.cc/9U5W-XHYJ] [https://web.archive.org/web/20240922200846/https://arxiv.org/pdf/1505.04597] (depicting a diagram showing a U-Net with a 64-channel first convolutional layer). For good visualizations of the output of a first convolutional layer (and subsequent layers) see Jay Wang et. al., CNN EXPLAINER(Aug. 29, 2020), https://poloclub.github.io/cnn-explainer/ [https://perma.cc/4MUQ-LYPA] [https://web.archive.org/web/20240922202853/https://poloclub.github.io/cnn-explainer/] (last visited Sept. 22, 2024); Adam Harley, An Interactive Node-Link Visualization of Convolutional Neural Networks, ISVC 865, 867–77 (2015), https://adamharley.com/nn_vis/ [https://perma.cc/UP6L-TU2E] [https://web.archive.org/web/20240922203823/https://adamharley.com/nn_vis/] (last visited Sept. 22, 2024).

198.   17 U.S.C. § 101 ("fixed") ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.").

199.   *See supra* text accompanying notes 141–42.

degree than human beings would actually memorize verbatim text or images.[200] If that is the case, that is also evidence that models are doing something that human beings could not do without copies.[201]

Lastly, we consider ability or capacity: can a generative AI model accomplish more than a human author can? The answer has to be "no and yes." As of Fall 2024, there are still many things human authors can do that generative AI tools cannot. Human authors can write longer coherent literary works than generative AI tools can. Human authors can fact-check better. Human artists can create works in physical media that generative AI tools cannot.[202]

On the other hand, generative AI tools can produce short textual works and medium-resolution digital images much faster and much less expensively than human authors can. That, is, of course, why companies are investing many billions of dollars in the technology. If those companies thought that their potential customers would be able to obtain text and images better and faster by employing human beings to do the work, they would not be making that investment. Thus, within the area of competence of generative AI tools, they can out-compete human beings, and they do so through analysis and modeling that human beings would not be able to do without making copies. If generative AI developers are actually making copies of training works, and if they are using computers to perform analysis and build models that human beings would need copies to equal, then it is hard to argue that the computers are "merely reading" the training works.

To be sure, some cases hold that computer processing of copyrighted works is noninfringing, even though copies are made of those works, using the doctrine of fair use. However, they do not do so by concluding that the computers are "just reading" the works. In *Authors Guild v. Google, Inc.*, for example, the Second Circuit does not hold that the Google Library Project is fair use because the computers that are building a full-text search tool for millions of books are "just reading" those books.[203] Rather, it considers a variety of factors, including the transformativeness of the use, and the effect on the use on the potential market for the copyrighted work. Full-text

---

200.   *See, e.g.*, Henderson et al., *supra* note 2, at 27 (noting that technical examinations of generative models "have consistently found that generative models memorize or plagiarize content," and that "[t]he percentage of verbatim outputs varies depending on extraction strategy and the model.").

201.   Some will argue that "memorization" in a model is the making of a copy as that term is defined in copyright law, and therefore is a violation of the reproduction right in whatever work is memorized. That may be true, though there is the counterargument that if that copy is never perceived by anyone—either because it is unlikely to ever be generated given all of the possible generations that a model can produce, or because it will be filtered out by an effective closed-system filter—that it should not be counted as a copy. Here, I am interested, not in whether there is infringement of a particular training work, but what the presence of systematic memorization says about how generative models may exceed human limitations.

202.   Pindar Van Arman is among the artists who have been building generative AI systems that are connected to robots capable of painting on physical media. *See* CLOUDPAINTER, https://www.cloudpainter.com/   [https://perma.cc/YJ8C-NK3G] [https://web.archive.org/web/20240923060113/https://www.cloudpainter.com/] (last visited Sept. 23, 2024).

203.   804 F.3d 202 (2d Cir. 2015).

search indexing may be transformative, and may not impact the potential market for the copyrighted work. Generative AI training may not be transformative, in so far as the works in the training set are created at least in part to disseminate knowledge about expressive choices, and it may impact the potential market for the training work. In neither case is the analogy of human reading determinative.

2. Reading, Emotion, Memory, and Agency

Those who argue that generative AI training is fair use because it is a non-expressive use would readily agree that human experience of works—including human reading—is (felt) expressive. Human beings can be moved by what they read, while machine learning algorithms can't be. Here I want to add one more layer of distinction between human beings and generative AI training algorithms. Not only do we human beings have hedonic reactions to works that we experience, we also can remember those reactions, and we typically can and do take actions based on our remembered experience. That makes a big difference in the ecosystem of distribution and presentation of works, in a way that is relevant to the question of whether the algorithms can be said to be "reading" what they are processing.

When OpenAI argues that using copyrighted works to train AI models is fair use, it emphasizes that is it using "*publicly available* internet materials."[204] The exact legal point it is making is not quite clear,[205] but the general atmospheric suggestion is that these are works that the copyright owners are willing to have anyone experience. The owners have just put them out there in plain view of any visitor, and therefore training use is not interfering with any of their expectations. Recall, also, that free public display and performance is an important way in which we human beings get to experience works and learn from them without making any direct payment for them.[206] Consider, however, *why* the owners (who are often also the authors) have decided to make their works available to the general public. Here are some reasons, expressed in the first person:

I have an opinion on a particular public issue, and I would like to make that opinion known, in the hope of convincing others and influencing the outcome of the debate.

I want people to listen to my recording of a song, in the hope that they will like it and decide to pay to hear my other recordings, or to pay to attend one of my live concerts.

I want people to see what the item I am selling looks like, in the hope that they like it, and that they then buy it.

I want people to visit my webpage, because I display advertisements on that page, and I earn money from those advertisements.

---

204. *Open AI and Journalism*, *supra* note 17; *see* OpenAI's MTD, *supra* note 17, at 12.

205. The "public availability" of the works may eliminate other legal grounds for objection, such as trade secrecy or terms of service agreements, or may be a reference to publication as a factor in fair use analysis (although it is rarely the determining factor, particularly after a 1992 amendment to § 107).

206. *See supra* text accompanying note 52.

I want people to experience my work, in the hope that many people will like it, because I want to be liked and respected, apart from any potential economic gain.

I want my family and friends to know what I am doing, and I am making work available to the public mainly as a byproduct of reaching those friends and family.

Notice that all of these reasons require a human audience—human beings who can emotionally react, and remember those reactions, and act on them. Thus, our traditional concept of human experience of works—of reading, viewing, and listening—is a concept in which the possibility of emotion, memory, and action plays a central role. True, not every audience member will react the way an author hopes, but human audience members have the basic capacity to feel, to remember the feeling, to act.

Generative AI development all but destroys any connection between what is extracted from a work during training, on the one hand, and emotion, memory, and action, on the other. Indeed, that is the selling point of those who argue that training use is a "non-expressive use"—computer processing to train a model avoids producing any emotion in anyone, let alone an emotion that could be remembered and motivate action. Of course, the eventual products of the generative models are, and are meant to be, experienced by feeling and acting human beings. That means there is a small possibility that there could be some connection between the reasons people freely publish their works and the generative AI output. For example, someone might hope that their expression of opinion on a topic could influence the attitudes expressed in the output of a generative AI model. However, that influence is greatly attenuated, and most generative AI developers dismiss the effect of any one work on the model as infinitesimal.

That leads us to revisit the question whether generative model training can be justified, not as a non (felt) expressive use, but as an activity that is just like human reading. When answering that question, generative AI's putative strengths become serious weaknesses. The more complete the break between extracting constitutive expression from works and any possibility of emotional reaction and resulting action, the less that generative AI training is anything like human reading, viewing or listening. That should at least give us serious pause before we accept the argument that because there is no infringement liability for human reading, there should not be infringement liability for the processing that occurs during generative AI training either.

To be sure, there is some Ninth Circuit precedent which suggests that, in some contexts, the use of technical means to avoid the conditions under which the copyright owner made a work publicly available does not weigh against fair use or in favor of infringement. In the 2014 case of *Fox Broadcasting Co., Inc. v. Dish Network LLC*,[207] for example, Dish Network offered its customers a service it called "AutoHop." AutoHop enabled Dish Network customers to skip the commercials on some television shows, including some shows broadcast by Fox. The customers recorded the shows on DVRs provided by Dish Network. Simultaneously, Dish Network

---

207.   747 F.3d 1060 (9th Cir. 2014).

employees watched the shows and electronically marked where the commercials began and ended. Dish Network then sent the file with the electronic markings to its customers. The customers' DVRs could use the files with the markings to skip the ads on the shows they had recorded.

Is it fair use for a customer to copy a show while using technology to skip all of the ads? The Supreme Court precedent obviously looming over this question is *Sony Corp. of America v. Universal City Studios, Inc.*[208] The *Sony* Court famously held that private copying of broadcast television for purposes of time-shifting was a fair use. Yet it is hardly a foregone conclusion that it would also have held copying for purposes of commercial-skipping to be a fair use. After all, the *Sony* majority noted how hard it was to skip commercials given the videotape technology of the time, and it concluded that commercial skipping would not substantially affect the market value of the Universal's works, since a survey showed that "92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them."[209]

In *Fox Broadcasting*, however, the Ninth Circuit held that the Dish Network customers who used the AutoHop feature to skip commercials on shows that they had recorded were still engaged in fair use. According to its logic, no analysis of how commercial skipping might affect Fox's revenues was needed, because Fox did not own copyright in the ads: "If recording an entire copyrighted program is a fair use, the fact that viewers do not watch the ads not copyrighted by Fox cannot transform the recording into a copyright violation."[210]Although the court rests its reasoning on Fox's lack of ownership of copyright in the advertisements, it is hard to imagine that that fact makes any difference. Suppose that Fox did own copyright in the ads, or that customers used AutoHop to skip over parts of the show in which Fox did own copyright, like the introduction, or scenes that were too violent or too boring. Would the Ninth Circuit then hold that home copying was no longer fair use, because of what the home copiers decided *not* to watch?[211] That seems very unlikely. The opinion

---

208.   464 U.S. 417 (1984).

209.   464 U.S. at 453 n.36 (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 468 (C.D. Cal. 1979). The District Court noted that there were probably actually fewer commercials skipped than those statistics suggested. "[T]o omit commercials, [as 8% of recordings did,] Betamax owners must view the program, including the commercials, while recording." *Universal City Studios, Inc.,*, 480 F. Supp. at 468. "To avoid commercials during playback [as 25% of viewers did,] the viewer must fast-forward and, for the most part, guess as to when the commercial has passed"—and a wrong guess would result in viewing part of the commercial, or missing part of the show and then possibly rewinding and viewing part of the commercial. *Id.*

210.   *Fox Broadcasting Co.*, 747 F.3d at 1068–69.

211.   A parallel question is whether private performances of a work that omit some of it infringe the adaptation right of 17 U.S.C. § 106(2). Although some of the legislative history of the 1976 Act suggested that the adaptation right could be infringed without fixation, courts have tended to shy away from so holding. *See, e.g.*, Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992) (holding that "[a] derivative work must incorporate a protected work in some concrete or permanent 'form'"). The Copyright Office took the position that specially programmed DVD players which muted or skipped objectionable portions of movies did not violate the adaptation right. *See Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Cts, the Internet, and Intell. Prop. of the H. Comm.* on the Judiciary, 108th Cong. 12–13 (2004) (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the

is better interpreted as enlarging the power and the liberty of home copiers, and protecting the interests of the tech companies that assist them, at the expense of the copyright owners and program originators. Under that interpretation, once a copyright owner makes its work publicly available, it cannot prevent private persons using technical means to avoid the advertisements that finance the public availability of the work, at least when that use is incidental to the time-shifting purpose sanctioned in *Sony.*

In *Perfect 10, Inc. v. Amazon. com, Inc.,* an earlier Ninth Circuit panel articulates a similar limit on copyright owner control.[212] When an internet browser requests a web page from a server, the server, using traditional web page technology, first sends the text and code of the web page, but not whatever images might be included on the page. The images are stored on a server at separate URLs, which are included in the page's code. The browser uses those URLs to request each image from the server where it is stored, and it then incorporates them into the display of the requested web page. Because the images are stored separately, they are technically available for display on web pages that are completely different than the page intended by the person who placed the images on the server.

Suppose that I take beautiful photographs of national park scenery and display them on a web page on which I also display advertisements. I gain some income from those advertisements to support myself as a photographer. Along comes someone else—call them Opportunist—who decides to create a different web page that features my photographs. Opportunist incorporates my photographs by copying the image URLs contained in the code of my web page, so that the browser of a visitor to Opportunist's web page requests my photographs from the server on which I placed them, and that server responds to those requests. Opportunist also makes money by displaying advertisements and charging for them. The appearance of an image file on a new page has been called "framing," since the image has been provided with a new context.[213] Do I have any legal recourse in this situation, or is it the case that once I have made my photographs publicly available in this way, anyone can "frame" them, and I have no legal control?

This issue has been litigated, not as a matter of fair use, but as a matter of whether the person who "frames" or "embeds" an image is making a new public display of that image, thus implicating the public display right of § 106(4) of the Copyright Act.[214] The *Perfect 10* court held that framers do not publicly display images, because they did not place the copy of the image on the server from which it is communicated to the viewer of the framing web page.[215] According to *Perfect 10*, only the person who has placed the image on the server is publicly displaying it. That holding, like the holding in *Fox Broadcasting*, limits copyright owner control. Once the owner makes an image

---

United States, the Library of Congress). In spite of that position, Congress passed the Family Movie Act, codified at 17 U.S.C. § 110(11), which specifically immunizes such technology from copyright liability.

212.   487 F. 3d 701 (9th Cir. 2007).
213.   *See id.* at 712.
214.   17 U.S.C. § 106(4).
215.   *See Perfect 10 Inc.,*487 F.3d at 716–18.

publicly available, they cannot legally prevent the image from being placed in a new context that may undercut their original goals in displaying the image to the public.

In the case of framing and the public display right, the Ninth Circuit's holding has not gone unchallenged. Three judges in the Southern District of New York and one in the Northern District of Texas have come out the other way, holding that framing is public display, in spite of the Ninth Circuit precedent.[216] However, none of those cases made to an appellate court, and the Ninth Circuit recently reaffirmed and broadened its commitment to the "server test" in *Hunley v. Instagram*.[217] The *Fox Broadcasting* issue of ad-skipping has not produced a judgment in any other circuit.

The Ninth Circuit's precedent on ad-skipping and framing may or may not hold up in the long run. Even if it does, however, it does not support the position that machine extraction of constitutive expression from copyrighted works is equivalent to human reading, viewing or listening. When human beings view a TV show without advertisements, or view a photograph framed by a different web page than the one intended by the photographer, they still have an aesthetic reaction to those works, and can remember and act on that aesthetic reaction. In other words, the filmmaker and the photographer are still building reputations with viewers. Indeed, if a provider of ad-skipping technology also edited out TV show credits, or if a framer also obscured photograph credits, either visible or in metadata, they would be liable for removing copyright management information, and the Ninth Circuit decisions would not save them.[218] By contrast, the generative machine learning algorithm has no capacity for aesthetic reaction, memory, or ability to act. It is extracting constitutive expression without taking part in any of the social, cultural, or economic world within which works of authorship are produced and appreciated, and within which authors gain compensation, social recognition, or whatever else they desire. Thus, generative machine learning algorithms do not "read" in the sense in which humans do, and their processing of works should not count as immunized "reading" for copyright purposes.

C.   REMEDIES

Suppose that a court concludes that generative AI training is not a fair use of the copyrighted works that are in the training set, and that the generative AI developer has therefore infringed copyright in the works that it did not get permission to use. What remedies should be available to the plaintiffs? Here I will say something that won't be quite as favorable to them as the arguments I have made against fair use. I argued above that even if a person learns something very valuable from an infringing copy of a work, and incorporates what they learned into a new work, actual damages

---

216.   *See* McGucken v. Newsweek LLC, 2022 WL 836786 (S.D.N.Y. Mar. 21, 2022) (per Judge Failla); Nicklen v. Sinclair Broad. Grp., Inc., 551 F. Supp.3d 188 (S.D.N.Y. 2021) (per Judge Rakoff); Goldman v. Breitbart News Network, LLC, 302 F. Supp.3d 585 (S.D.N.Y. 2018) (per Judge Forrest); Leader's Institute, LLC v. Jackson, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017) (per Judge Boyle).

217.   73 F.4th 1060 (9th Cir. 2023).

218.   *See* 17 U.S.C. § 1202(b).

should not take into consideration profits earned from that new work, so long as that person does not incorporate what I have called "actionable expression" from the infringing copy into the new work.[219] I also argued that so long as the new work contains no actionable expression from the infringed work, a court is not justified in ordering the destruction of the new work.[220]

Those limitations on remedies should also apply in the generative AI training context, with some elaboration. The value of particular outputs or generations from generative AI models should not be taken into account in assessing actual damages, unless those outputs are substantially similar to one or more training works. However, the best measure of damages is not the price that a human being would pay for an authorized copy of an infringed work. A deployed generative AI model like OpenAI's ChatGPT may have 10 million or more paying subscribers.[221] That represents economic activity on a completely different scale than that of an individual human author. There is a licensing market developing for AI training use of works, and ideally damages should be keyed to a reasonable licensing fee. Although several of the plaintiffs in the generative AI training infringement lawsuits have asked the court to order destruction of the models,[222] that seems warranted, if at all, only if the models have "memorized" substantial numbers of training works. If not—if the models do not themselves contain infringing copies—and they should not be subject to destruction orders. That may give the plaintiffs' attorneys less leverage than they would like, but it avoids a dramatic expansion of remedies that would not be available if a human author had learned from infringing copies. To this extent, the limitations in copyright remedies should be respected. Of course, the attorneys who are representing plaintiffs who have registered their works before their use in generative training are salivating over statutory damages and attorneys fees, and those can be awarded under current copyright law, though there is room for legislative reform in that area.

IV. CONCLUSION

Copyright law does not grant human authors blanket fair use immunity from infringement liability when they are learning from copyrighted works. Should there be such immunity when people are using computers to train a generative AI model from copyrighted works? This Article concludes that there most likely should not be.

Generative AI model training does use the constitutive expressive choices embodied in the training works. While the computers processing the works do not have any hedonic reactions to those works, and they thus make non (felt)expressive

---

219.   *See supra* text accompanying notes 54–57.
220.   *See supra* text accompanying note 59.
221.   ChatGPT has an estimated 9.88 million paying subscribers. *See ChatGPT Has More Paid Subscribers than What Streaming Service?*, GOV'T TECH., (July 12, 2024), https://www.govtech.com/question-of-the-day/chatgpt-has-more-paid-subscribers-than-what-streaming-service [https://perma.cc/BB8T-YH2Q].
222.   *See, e.g.*, Complaint at 68, New York Times Co. v. Microsoft Corp., No. 23-cv-11195 (S.D.N.Y. Dec. 27, 2023) ("ask[ing] the court to "[o]rde[r] destruction under 17 U.S.C. § 503(b) of all GPT or other LLM models and training sets that incorporate Times Works").

use of those works, that should not make a legal difference. Copyright law protects the learning value of works as well as their hedonic value.

Neither should generative model training be treated as functionally equivalent to human reading, viewing, or listening that does not implicate any of the exclusive rights. Generative model training transcends the human limitations that underlie the structure of the exclusive rights, and it therefore cannot take advantage of that structure. Moreover, the very inability of computers to have any hedonic reactions to the works they are processing, and their inability to act on those reactions, makes computer processing fundamentally different than human experience of works.

There are serious policy concerns about the effect of copyright law on generative AI. Those include concerns about performance, concentration, bias, and international competitiveness. At this early point in the history of generative AI, however, none of those concerns are so clear that courts should step in and grant blanket immunity for generative AI training. The current case that generative AI training is a fair use is weak.

LITIGATING FAIR USE

*Dale M. Cendali**

This Article's topic is "Litigating Fair Use." What follows is a discussion of techniques a litigator can use to win a case and in so doing, help shape the development of fair use law.

Fair use is well-recognized as one of the "most troublesome" doctrines in all of copyright.[1] There are many famous cases where the district court wrote a compelling opinion holding that something was or was not fair use, and then was reversed by a court of appeals in an equally certain-sounding and compelling opinion holding the opposite.[2] Sometimes we have seen the Supreme Court take yet another view, or

---

* Dale M. Cendali, P.C. is a nationally recognized leader in the field of intellectual property litigation, having successfully litigated and tried numerous high-profile cases, and having argued and won before the U.S. Supreme Court. Dale heads the Copyright, Trademark, Internet and Advertising ("CTIA") Practice Group at Kirkland and Ellis, LLP and is an adjunct professor at Harvard Law School, teaching copyright and trademark litigation. She originally delivered this Article, in modified form, as the 36th Annual Horace S. Manges Lecture at Columbia University School of Law's Kernochan Center for Law, Media, and the Arts on March 25, 2024. She gives her sincere thanks to the amazing Kernochan Center, and in particular to Professor Jane Ginsburg and Executive Director Philippa Loengard, for selecting her to deliver the Manges Lecture. She also would like to thank Josh Berlowitz, Columbia Law School '23 and a former associate at Kirkland & Ellis LLP and current judicial law clerk at the United States Court of Appeals for the Second Circuit, for his help in preparing the lecture and this Article.

1. Monge v. Maya Mags., Inc., 688 F.3d 1164, 1170 (9th Cir. 2012) (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam)); *see also* Gary Myers, *Muddy Waters: Fair Use Implications of* Google LLC v. Oracle Am., Inc., 19 Nw. J. Tech. & Intell. Prop. 155, 179 (2022) ("The best evidence of how unpredictable fair use determinations can be *ex ante* is the deeply divided judiciary in each of the four modern fair use [Supreme Court] cases."); *cf.* Google LLC v. Oracle Am., Inc., 593 U.S. 1, 20 (2021) (fair use's judicial origins, "as well as modern courts' use of the doctrine, makes clear that the concept is flexible, that courts must apply it in light of the sometimes conflicting aims of copyright law, and that its application may well vary depending upon context.").

2. *E.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 331 (S.D.N.Y. 2019) (granting summary judgment on fair use), *rev'd*, 11 F.4th 26, 32 (2d Cir. 2021) (no fair use as a matter of law), *aff'd*, 598 U.S. 508, 551 (2023); Cariou v. Prince, 784 F. Supp. 2d 337, 354 (S.D.N.Y. 2011) (granting summary judgment that use of 35 images was not fair use), *rev'd in part and vacated in part*, 714 F.3d 694, 712 (2d. Cir. 2013) (fair use of 30 out of 35 images; material factual disputes as to other five precluding determination of fair use); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1106–07 n.9 & n.10 (1990) (collecting cases on "reversals and divided courts"). Judge Leval's observation, nearly

multiple views, where there is a dissent and perhaps a concurrence as well.[3] Court after court has noted that fair use requires "case-by-case analysis" that carefully balances the four statutory fair use factors[4]—plus sometimes other considerations as well[5]—rather than rigid application of "bright-line rules."[6] The overall intent is to help judges reach a result that furthers the bedrock constitutional principle that copyright laws "promote the progress of science and useful arts."[7] The flexible nature of fair use provides an opportunity—and perhaps a challenge—for a copyright litigator to not only figure out how best to apply *existing* precedent to create a persuasive argument, but also how to invite the creation of *new* precedent.

Copyright law, and fair use specifically, starts from Congress's statutory text, is informed by the Copyright Office's guidance, is interpreted by the courts, and is analyzed by law professors. But litigators are not passive in this process; rather, they play an important role as well. In fact, the modern litigator often is in a uniquely good position to affect the development of fair use. These days, litigators practice all around the country, with admissions in many courts and *pro hac vice* appearances before others. This cross-country practice creates the opportunity—and in fact the necessity—to keep abreast of trends and splits across the various circuits, to figure out what best to argue in a given case, and thereby to hope to advance the law and their clients' interests. Simply put, if the law of fair use is developed by case precedent, then the people whose arguments impact cases—that is, litigators—can help shape the law.

How do litigators do it? In this Article, I will discuss three of the primary tools in the litigator's proverbial tool kit: law, facts, and persuasion. At the end of the day, these three things determine every fair use outcome. The art of litigating fair use is found in the gaps between precedent, when a litigator's cutting-edge case is one about which reasonable minds may disagree. It is in those gaps where the litigator shines, because

---

thirty-five years ago, that "[j]udges do not share a consensus on the meaning of fair use" remains as valid today as it was then. *Id.* at 1106.

     3.   *E.g.*, Oracle Am., Inc. v. Google Inc., No. 10-cv-3561, 2016 WL 3181206 (N.D. Cal. June 8, 2016) (denying Rule 50 motions to overturn jury verdict on fair use), *rev'd*, 886 F.3d 1179, 1210 (Fed. Cir. 2018) (no fair use as a matter of law), *rev'd*, 593 U.S. 1, 40 (2021) (fair use as a matter of law).

     4.   *Warhol*, 598 U.S. at 527 (internal citation and quotation marks omitted) (quoting *Google*, 593 U.S. at 20) ("Fair use is a flexible concept, and its application may well vary depending on context."); *Google*, 593 U.S. at 23 ("fair use depends on the context"); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

     5.   *Google*, 593 U.S. at 19 ("[W]e, like other courts, have understood that the provision's list of factors is not exhaustive (note the words 'include' and 'including')."); *see also* Joshua Berlowitz, Note, *The Five-Factor Framework: A New Approach To Analyzing Public Benefits in Fair Use Cases*, 46 COLUM. J.L. & ARTS 61, 65 (2022) (pre-codification, courts historically weighed a "fluctuating host of other considerations, including the challenged use's public benefits" as part of the fair use analysis); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1152 (1990) ("[U]nless one disregards the plain language of the statute, the statutory factors are not exclusive."); *see generally* 4 NIMMER ON COPYRIGHT § 13F.09 (discussing "a range of alternative and supplementary frameworks to fill the analytical gap" left by the statutory factors).

     6.   *Campbell*, 510 U.S. at 577.

     7.   *See id.* at 599 (Kennedy, J., concurring) ("[U]nderprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create."); *see also* U.S. CONST., art. 1, § 8, cl. 8.

the law there is at its most malleable and the ability to persuade is most important. And with fair use, there are a *lot* of those gaps.

In this Article, I will explore the litigator's arsenal, moving from law to facts to persuasion, using some of my own cases to illustrate each part. Finally, I will conclude with what I see as some of the next big issues in fair use from my position in the trenches and some thoughts on how litigators may help resolve them.

Without further ado, I turn to the litigator's first weapon: understanding the law of fair use, and especially its malleability. I will discuss a small slice of legal history that I hope will show how litigators not only understand the law, but have an opportunity to affect its development.

I.   LITIGATING THE LAW OF FAIR USE.

To make sure we are all on the same page, let us start with the statute. Section 107 of the Copyright Act is the fair use provision.[8] It begins by describing the types of uses that may be fair use, and then lays out four non-exclusive factors that a court "shall" consider in addressing fair use.

I think it is fair to say, however, that perhaps the most significant development in fair use law over the past thirty years came not from Congress but from the courts, in the form of the transformative use doctrine. First proposed by Judge Leval in a seminal *Harvard Law Review* article,[9] transformative use was adopted by the Supreme Court in 1994 in *Campbell v. Acuff-Rose Music, Inc.*[10] There, the Court held that the first fair use factor—which considers the "purpose and character of the use"—asks whether a use is transformative.[11] As the Supreme Court explained, that means the first fair use factor looks for "whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[12]

Litigators and courts ever since have grappled with what this means in practice. Some courts took a broad view of transformativeness and essentially found that any

---

8.   17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors").

9.   Leval, *supra* note 2, at 1111.

10.   *Campbell*, 510 U.S. at 569.

11.   *Id.* at 579 (quoting Leval, *supra* note 2, at 1111).

12.   *Id.* (alterations, internal quotation, and citation omitted).

work that added any new expression was transformative.[13] In these cases, such a finding often had a domino effect on the other factors.[14] This "litmus test" approach to fair use led to an overall conclusion of fair use whenever transformative use was found.[15] Other courts, however, were less keen to find a use transformative,[16] or were less likely to let it alone dictate the other factors.[17]

The problem with the all-or-nothing approach, leaving aside the reduction of the importance of the other factors, is that it runs headlong into the question of where the derivative works right ends and where transformative use begins. Section 106 of the Copyright Act grants to the copyright owner the exclusive right to prepare derivative works[18]—that is, to prepare works "based on" the original in "any other form in which a work may be . . . *transformed* . . . ."[19] How *transformed* derivative works differ from *transformative* fair uses, *Campbell* doesn't say. Courts began noting this tension in various ways over the years, and it became increasingly a subject of discussion, especially after *Cariou*, which in finding Prince's fair use, rejected claims that it was

---

13.   *E.g.*, Cariou v. Prince, 714 F.3d 694, 707–08 (2d Cir. 2013) (finding transformativeness where Prince's works "have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."); Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) ("[A]n allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent.").

14.   *See* Dale Cendali & Abbey Quigley, *The Death of the Litmus Test*, 23 CHI.-KENT J. INTELL. PROP. 139, 141–42 (2023).

15.   *See id.* at 139; Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) ("The Second Circuit has . . . concluded that 'transformative use' is enough to bring a modified copy within the scope of § 107."); 4 NIMMER ON COPYRIGHT § 13.05[I][4][d] (discussing "stampeding" in *Google v. Oracle*); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 584 (2008) (fair use factors are correlated with one another); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 46, 84 (conducting an empirical analysis of the fair use doctrine and concluding "transformative use by the defendant is a robust predictor of a finding of fair use").

16.   *E.g.*, Gaylord v. United States, 595 U.S. F.3d 1364, 1373–74 (Fed. Cir. 2010) ("We conclude that the stamp does not transform the character of The Column. Although the stamp altered the appearance of The Column by adding snow and muting the color, these alterations do not impart a different character to the work."); Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 142 (2d Cir. 1998) ("Any transformative purpose possessed by *The SAT* is slight to non-existent."); Dr. Seuss Enters., LP v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (finding "there is no effort to create a transformative work with '"new expression, meaning, or message"'" where "the substance and content of" the original work was not "conjured up" by the alleged parodic use at issue).

17.   *E.g.*, Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 548–49 (S.D.N.Y. 2008) ("In this case, . . . the Lexicon's purpose is only slightly transformative of the companion books' original purpose. As a result, the amount and substantiality of the portion copied from the companion books weighs more heavily against a finding of fair use."); *see also* Cendali & Quigley, *supra* note 14, at 144–45 (discussing the court's decision not to apply a litmus test in *Warner Bros.*).

18.   17 U.S.C. § 106(2).

19.   17 U.S.C. § 101 (emphasis added).

derivative work.[20] But this tension was not noted just by judges. It was also written about in law reviews[21] and discussed by bar associations.[22]

Turning to the role of litigators specifically in this ongoing conversation, litigators contributed in several ways. Most directly, litigators contribute to the development of fair use law by making arguments in their own cases, whether in briefs or in oral argument, leading to the judicial opinions we all love to discuss. As I noted above, this involves closely keeping abreast of precedent and figuring how to tease out language and nuances that might be persuasive to win the case for their clients.

But the United States also provides an opportunity for even people not directly involved in a case to provide their views, and this is a particularly useful tool in fair use cases. Here I speak of amicus briefs.[23] Litigators must consider when to solicit amici in cases where their client is a party, when doing so would add something useful to the discussion. Moreover, as a practical matter, parties may not have space in their briefs to fully explore every helpful dimension. And while we perhaps think of amicus briefs most prominently at the Supreme Court, there can be a role for amici at all stages in a case, including district court proceedings, where they can assist the litigators in shaping the issues from early on.[24]

Note, however, that different procedures apply to amicus briefs at different levels. At the district court, for example, you need leave of court to submit one. For example, as I will discuss more later, *Fox News Network, LLC v. TVEyes, Inc.* was a single-plaintiff fair use case that we litigated on behalf of Fox.[25] It involved the reproduction of television news content that TVEyes argued assisted with media monitoring.[26] As the case raised important issues to other news organizations as well, we encouraged them to share their views with the court by seeking leave to file an amicus brief at the time of summary judgment briefing at the district court.[27] Judge Hellerstein granted leave, and the resulting briefing helped frame the effect on the market issues.[28]

In addition, when your client isn't a party to a case, they can still have their voice heard as an amicus. As an example of this, let us turn to *Cariou v. Prince* and how amicus briefs played a role. *Cariou* asked whether it was fair use for appropriation artist Richard

---

20.   *See* TCA Television Corp. v. McCollum, 839 F.3d 168, 181 (2d Cir. 2016); *Kienitz*, 766 F.3d at 758.

21.   *E.g.*, Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 16 VAND. J. ENT. & TECH. L. 785, 842–43 (2013) (criticizing approaches that "tend[] to conflate derivation and fair use."); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

22.   *E.g.*, Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use? The 1999 Donald C. Brace Memorial Lecture*, 46 J. COPYRIGHT SOC'Y U.S.A. 513, 515 (1999) ("[W]hen it comes to derivative works, fair-use doctrine is a red herring and we should just dump it.").

23.   *See* FED. R. APP. P. 29.

24.   *See, e.g.*, Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 287–88 (S.D.N.Y. 2013), *aff'd*, 804 F.3d 202 (2d Cir. 2015).

25.   43 F. Supp. 3d 379 (S.D.N.Y. 2014), *aff'd in part, rev'd in part*, 883 F.3d 169 (2d Cir. 2018).

26.   *Id.* at 383–84.

27.   *See* Brief of Amici Curiae Bright House Networks et al. in Support of Plaintiff's Renewed Motion for Summary Judgment, Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (No. 13-cv-5315).

28.   *TVEyes*, 43 F. Supp. 3d at 395–97.

Prince and the gallery that exhibited his works to use photographer Patrick Cariou's photographs of Rastafarians as part of a series of paintings and collages.[29] On behalf of our clients, the American Society of Media Photographers and the Picture Archive Council of America, we filed an amicus brief arguing that an overbroad conception of transformative use would destroy the original author's exclusive rights, including the right to prepare derivative works.[30] We wrote that:

> [I]t is clear as a matter of statutory construction that merely because a work is "transformed" in a second author's work does not make that second work a fair use. To hold otherwise would put Section 107 in conflict with, and potentially nullify, the Copyright Act's express grant to copyright owners of the exclusive right to prepare derivative works, which *by definition* involve transformation.[31]

But the role of an amicus is not just to point out problems; rather, it is better to offer *solutions*. Thus, we argued that the tension between derivative works and transformative use tension could be resolved by ensuring the use in some way *related back* to the original work. Specifically, we wrote: "It is th[e] necessary relationship between the original work and the new work that can justify the taking of the original without permission or compensation."[32]

Counsel for Prince and his co-defendants in their reply brief specifically cited both counsel for Cariou's argument on this score as well as our amicus brief to challenge this "relation-back" idea.[33] In finding that twenty-five of the thirty Prince works at issue were fair use as a matter of law, the Second Circuit agreed with the defendants, rejected this relation-back principle, and adopted a broad view of transformative use.[34]

Cariou, however, was not the end of the debate between the derivative works right and transformative use. Famously, just a year later in *Kienitz v. Sconnie Nation, LLC*, Judge Easterbrook, writing for the Seventh Circuit, expressly criticized *Cariou*, and in particular its overreliance on transformativeness at the expense of the statutory factors.[35] The court stated that, in the Seventh Circuit's view, "*Cariou* and its predecessors in the Second Circuit do no[t] explain how every 'transformative use' can be 'fair use' without extinguishing the author's [derivative works right]."[36]

By the time *Andy Warhol Found. for the Visual Arts v. Goldsmith* reached the Supreme Court last year on the meaning of transformativeness under factor one,[37] this issue had been debated in the bar, in law reviews, and before the courts. A deluge of amicus briefs

---

    29.   Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

    30.   Brief of Amici Curiae Am. Soc'y of Media Photographers, Inc. and Picture Archive Council of Am., Inc. in Support of Plaintiff-Appellee and Affirmance, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (No. 11-cv-1197).

    31.   *Id.* at 10–11 (discussing §§ 101, 106).

    32.   *Id.* at 12.

    33.   Joint Reply Brief for Defendants-Appellants at 7, n.5, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (No. 11-cv-1197).

    34.   *Cariou*, 714 F.3d at 706.

    35.   766 F.3d 756, 758 (7th Cir. 2014).

    36.   *Id.*

    37.   598 U.S. 508, 525 (2023).

from a wide assortment of stakeholders were submitted to the Supreme Court on the derivative works issue alone, including one that our team filed on behalf of the Association of American Publishers.[38]

At issue in *Warhol* was the Andy Warhol Foundation's commercial licensing of a silkscreen portrait that the acclaimed artist Andy Warhol had made based on a photograph by another acclaimed artist, photographer Lynn Goldsmith.[39] In a majority opinion by Justice Sotomayor, the Supreme Court held that transformativeness is a matter of *degree* that requires the proponent of fair use to *justify* the copying.[40]

Important to this discussion, the Court emphasized the need to protect the derivative works right, and that "an overbroad concept of transformative use . . . that includes any further purpose" would narrow the copyright owner's exclusive right to create derivative works.[41] Thus, the Court held that "the degree of transformation required to make 'transformative' use of an original must go beyond that required to qualify as a derivative"[42] and that simply "to convey a new meaning or message . . . does not suffice."[43] After finding the use at issue *not* transformative, the Court affirmed the Second Circuit's finding of no fair use.[44]

This little bit of legal history is just one example to show how litigators, as well as their clients, can shed light on issues, contribute to a larger debate, and incrementally shape the law, which in this case resulted in the Supreme Court addressing the very issue we—and many others—had highlighted so long ago. While sometimes the law can change instantly, very often it is more of a marathon than a sprint, with many constituencies helping to advance the debate, including litigators and their clients.

II.   LITIGATING THE FACTS OF FAIR USE.

Let us turn to the next tool of a litigator—marshalling the facts. I have been teaching a class on Copyright and Trademark Litigation at Harvard Law School for about fifteen years, and on the first day of every semester I tell the class, "*The facts are not a given.*" By that I mean that while facts in judicial opinions *look* comprehensive and compelling, they only get to the courts' attention if the lawyers find them and try to get them in the record.

---

38.   *See* Brief for Amicus Curiae Ass'n of Am. Publishers in Support of Respondents at 2, Andy Warhol Found. for the Visual Arts v. Goldsmith, 598 U.S. 508 (2023) (No. 21-cv-869).

39.   *Warhol*, 598 U.S. at 526 ("Here, the specific use of Goldsmith's photograph alleged to infringe her copyright is AWF's licensing of Orange Prince to Condé Nast.").

40.   *Id.* at 531–33 ("[T]he question of justification is one of degree." (citing Leval, *supra* note 2, at 1111)).

41.   *Id.* at 529; *see also* Andy Warhol Found. for the Visual Arts v. Goldsmith, 11 F.4th 26, 41 (2d Cir. 2021) ("A common thread running through these cases is that, where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a higher or different artistic use is insufficient to render a work transformative." (internal quotation omitted)).

42.   *Warhol*, 598 U.S. at 529.

43.   *Id.* at 547.

44.   *Id.* at 551.

Developing the factual record is a unique contribution of litigators to a case. Lawyers need to figure out which facts *might* be relevant to the case and then use appropriate discovery methods to ferret them out. Traditional tools such as requests for production of documents, requests for admission, interrogatories, and depositions[45] should of course be used, but a litigator sometimes has to be more creative, too, about how to find facts.

For example, when we were doing discovery on the copyright part of *Twentieth Century Fox Film Corp. v. Dastar Corp.*,[46] we needed to establish what Eisenhower's state of mind was in 1948 as to whether the book *Crusade in Europe* was written as a work for hire at the instance and expense of the publisher Doubleday.[47] It was challenging, as all the percipient witnesses were dead. We thus had to scour the archives of universities across the country, including those at Columbia, to collect the memoirs and related documents of everyone involved.[48] We pieced all this together to recreate what happened at the fateful meeting between Eisenhower and Doubleday, where they shook hands on a deal and Eisenhower agreed to write the book.[49] In fact, in my closing, I acted out the various roles using the dialogue contained in the various memoirs. We won summary judgment on ownership and infringement, a bench trial regarding remedies, a permanent injunction, and attorney's fees, and the Ninth Circuit affirmed.[50]

In creating your discovery plan, remember that *context* can be vital. Pretend for a minute that you are litigating a car accident case where your client ran a red light and crashed into a parked car. At first glance, the facts seem unfavorable to your client's case. But if you discovered that the only reason why your client ran the light was to avoid a kindergarten class that had darted into the street, it is easy to see that this might be helpful to your defense!

The importance of context is particularly true in fair use cases, where the facts can be so essential.[51] The first and fourth fair use factors are particularly fact-rich, as we

---

45.   *See* FED. R. CIV. P. 34 (production of documents); FED. R. CIV. P. 36 (admissions); FED. R. CIV. P. 33 (interrogatories); FED. R. CIV. P. 30 (depositions by oral examination); FED. R. CIV. P. 31 (depositions by written questions).

46.   *See* Twentieth Century Fox Film Corp. v. Dastar Corp., No. 98-cv-7189, 2000 WL 35503105 (C.D. Cal. Jan. 4, 2000) (summary judgment re: ownership and infringement) and 2000 WL 35503106 (C.D. Cal. Aug. 29, 2000) (bench trial re: remedies), *aff'd in part, rev'd in part, vacated in part sub nom.* Twentieth Century Fox Film Corp. v. Ent. Distrib., 34 F. App'x 312 (9th Cir. 2002), *rev'd sub nom.* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003), *on remand to* 2003 WL 22669587 (C.D. Cal. Oct. 14, 2003), *aff'd sub nom.* Twentieth Century Fox Film Corp v. Ent. Distrib., 429 F.3d 869 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2932 (2006).

47.   *See Dastar*, 2000 WL 35503015, at *9 ("The ownership of the copyright in this case turns on whether Eisenhower wrote the Book as a 'work for hire' for Doubleday.").

48.   Although in this case we did the factual research ourselves, a litigator may also want to employ private investigators in certain cases. *See* 2 NIMMER ON COPYRIGHT § 8.11[D][5][a] ("An anomaly of non-public infringement is that plaintiffs may know of its existence at the 'wholesale' level, but to gain sufficient evidence of a 'retail' violation in order to craft a viable complaint, plaintiff may need to send in an investigator to engage in a sample transaction.").

49.   *See Ent. Distrib.*, 429 F.3d at 873 (discussing handshake meeting).

50.   *Id.* at 882–83 (affirming findings of ownership and infringement and award of attorneys' fees).

51.   *See* Google LLC v. Oracle Am., Inc., 593 U.S. 1, 23 (2021) ("[O]ur case law instructs that fair use depends on the context.").

need to assess the claimed justification for the use,[52] consider whether and to what degree it is substitutive,[53] whether there is harm an existing or potential market for the use.[54] While the parties themselves may have much of this information and the relevant documents, a litigator must also think about *non-party* sources of information, which can be especially probative as to whether a market exists and whether there is harm to it. Narrowly tailored third-party subpoenas can help obtain that sort of data.[55]

In addition, fair use cases lend themselves to the creative use of experts, who can place the use in a broader context. For example, when we litigated the *TVEyes* case, we contended that TVEyes usurped a growing digital market for video clips of news segments.[56] Although our client had a lot of the information we needed to prove our point, we also retained a former TV producer who had become a journalism professor to position the use within a wider industry lens.[57] She wrote a detailed report about the economic pressures facing journalism and the need to protect the ability to monetize and support journalism in new ways, like through video clips that could be licensed to third-parties and/or shown with pre-roll ads on websites.[58] As I will discuss more later, we won this case on summary judgment, then won affirmance at the Second Circuit.[59]

Of course, in any given case, there may be one or more bad facts from your client's perspective. A creative lawyer, however, can sometimes change the facts *prospectively* (or at least shed light on their context) and not treat them as forever static. When I talk to my team about this, I cite the key precedent of Kobayashi Maru. No, this is not some Supreme Court case, but something from *Star Trek*.

First introduced in the movie *The Wrath of Khan*,[60] the Kobayashi Maru was a simulation test for Starfleet Academy cadets that was programmed to always result in failure: it was impossible for cadets to rescue the *Kobayashi Maru* without destroying their own ship.[61] Young Captain Kirk, however, rejected the idea of a no-win scenario He reprogrammed the simulation to provide an opportunity to win, and for the first time in Starfleet Academy history, the ship was saved. I think this is a helpful mindset for litigators, as although you cannot change the past—and I am certainly not advocating hacking into computer programs—you *can* possibly do things to improve

---

        52.   Andy Warhol Found. for the Visual Arts v. Goldsmith, 598 U.S. 508, 531 (2023) ("[T]he first factor also relates to the justification for the use.").

        53.   *Id.* at 528 ("[T]he first factor relates to the problem of substitution—copyright's *bête noire.*").

        54.   *Google*, 593 U.S. at 36 (discussing "harm" to "actual or potential markets").

        55.   *See* FED. R. CIV. P. 45 (subpoena).

        56.   Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 180 (2d Cir. 2018).

        57.   *See* Declaration of Beth Knobel, Ph.D., in Support of Plaintiff Fox News Network, LLC's Renewed Motion for Summary Judgment, Fox News Network, LLC v. TVEyes, Inc., No. 13-cv-5315, 2015 WL 11661842 (S.D.N.Y. May 21, 2015).

        58.   *See id.* ¶ 10.

        59.   Fox News Network, LLC v. TVEyes, Inc., 124 F. Supp. 3d 325 (S.D.N.Y. 2015), *aff'd in part, rev'd in part*, 883 F.3d 169 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 595 (2018).

        60.   STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982).

        61.   *See* Mark Donaldson, *Every Kobayashi Maru in Star Trek (& Who Beat It)*, SCREEN RANT (Oct. 26, 2022), https://screenrant.com/star-trek-every-kobayashi-maru-test [https://perma.cc/SJ6J-E44P] [https://web.archive.org/web/20240921132119/https://screenrant.com/star-trek-every-kobayashi-maru-test/].

your client's position going forward. This can involve many things depending on the case, including prospectively changing a website's terms of use, taking down allegedly infringing content and thereby potentially minimizing damages, adding a disclaimer, finding a new source for a product, and/or redesigning a product where feasible so that the case's impact is limited to the past, not the future.

Again, you can only change future conduct. Sadly, however, sometimes people try to change the past, and you need to be alert to that possibility. In other words, it is important to take a critical eye and not to accept everything produced in discovery at face value, especially in this digital age where fabrication is incredibly easy.

As an illustration of this concern, consider the Obama Hope poster fair use case. There, we represented the Associated Press news organization against artist Shepard Fairey and argued that Mr. Fairey had engaged in copyright infringement by using without a license an AP photograph made by its photographer, Mannie Garcia, as the basis for his Obama Hope poster.[62] The poster became a fixture of President Obama's first presidential campaign and various merchandise.[63] The AP sent a cease-and-desist letter protesting the use of the photograph without a license, and noted that if a license could not be negotiated, it would commence a lawsuit in the Southern District of New York the following week.[64] The day before that deadline, Mr. Fairey elected to file suit in that same court for a declaratory judgment of non-infringement.[65]

In his declaratory judgment complaint, Mr. Fairey alleged that contrary to the AP's claim that he had used a particular portrait photograph by Mr. Garcia of then-Senator Obama, he instead had used a *different* photograph from the same news conference on the crisis in Darfur, also made by Mr. Garcia, but which included both Senator Obama and actor George Clooney.[66]

---

62. *See generally* Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims [hereinafter, AP Amended Answer], Fairey v. Associated Press, No. 9-cv-1123 (S.D.N.Y. Nov. 12, 2009), ECF No. 54.

63. *See, e.g.*, *id.* ¶ 115.

64. *Id.* ¶ 156.

65. *Id.* ¶ 157.

66. Associated Press's Memorandum of Law in Opposition to the Motion for Substitution of Counsel [hereinafter, AP Mem. Opp. Substitution of Counsel] at 2, Fairey v. Associated Press, No. 9-cv-1123 (S.D.N.Y. Nov. 9, 2009), ECF No. 49.

Figure 1: Garcia Photo (left); Hope Poster (center); Clooney Photo (right)[67]

Discovery ensued, including about which photo was used.[68] Mr. Fairey produced in discovery a digitized image file allegedly showing how Mr. Fairey had modified the Clooney photograph to make the poster.[69]

All of this struck us as odd. It just did not seem credible that someone would have contorted a photograph to get the image that became the poster, when another photograph appeared to be a perfect match without any complicated digital editing. It also seemed a little bit convenient from a fair use perspective, because if the Clooney photograph had been the one used, perhaps Mr. Fairey would say he had transformed it more under factor one to make the poster and that he used less of it under factor three.[70]

One thing copyright litigators often do, especially in photography cases like this one, is to overlay images to show how they compare. This is exactly what we did here.[71] The Obama image in the Clooney photo did not line-up with the poster. By contrast, the Garcia portrait photo that the AP claimed had been used lined up perfectly.

We thus studied the digital metadata for the poster and the photograph and discovered that the metadata file paths did not support Mr. Fairey's story about how he had created the poster.[72] The metadata also indicated, for example, that there were more responsive documents on Mr. Fairey's computer than Mr. Fairey had produced.[73]

We confronted Mr. Fairey's lawyers with this evidence, and they admitted in a memorable Friday night letter that the correct photograph was indeed the Mannie

---

67. AP Amended Answer, *supra* note 62, ¶ 158.

68. *Id.* ("The AP sent Fairey an e-mail on October 1st identifying the specific file paths for these documents on Fairey's computers and asked Fairey's counsel whether those file paths had yet been searched.").

69. Associated Press's Rule 56.1 Statement of Undisputed Facts in Support of Its Motion for Summary Judgment Against Obey Clothing [hereinafter, AP SUF], ¶¶ 129–30, Fairey v. Associated Press, No. 9-cv-1123 (S.D.N.Y. Jan. 7, 2011), ECF No. 153.

70. AP Amended Answer, *supra* note 62, ¶ 160 ("Fairey's misidentification of the Clooney Photo as the source for the Infringing Works can only be understood as a deliberate attempt to obscure the Obama Photo as the true source material for the Infringing Works and to minimize the nature and extent of Fairey's unauthorized copying of the Obama Photo.").

71. *Id.* ¶ 159.

72. AP Mem. Opp. Substitution of Counsel, *supra* note 66, at 2.

73. AP Amended Answer, *supra* note 62, ¶ 168.

Garcia portrait photo that the AP asserted all along.[74] They also admitted that the image Mr. Fairey had provided in discovery had been fabricated, and that other evidence had been deleted by Mr. Fairey rather than produced.[75] Finally, they said that they were planning to withdraw from the case.[76] Ultimately, Mr. Fairey was indicted by the U.S. Attorney's Office on obstruction of justice, a charge to which he plead guilty, and he later settled the civil suit with the AP.[77] The civil suit against Mr. Fairey's apparel company and declaratory judgment co-plaintiff Obey Clothing, continued, however. The AP ultimately won summary judgment striking the fair use defense,[78] and then the case ultimately settled as well.[79]

I wish I could say that this case was the only one we have had where fabricated evidence was at issue, but unfortunately it was not. In fact, possible fabrication was on our minds in *Fairey* because we encountered a similar issue a few years earlier in *Scholastic, Inc. v. Stouffer*.[80]

There, we filed a suit for a declaratory judgment that J.K. Rowling's acclaimed *Harry Potter* books did not infringe Stouffer's alleged trademarks and copyrights, including in the term "muggles" and in the books *Larry Potter and His Best Friend Lilly* and *The Legend of Rah and the Muggles*.[81] Stouffer claimed the books had been printed in the 1980s.[82] They looked new to us, however, and trusting our instincts, we hired a typeface expert who conclusively determined that at least part of the text could not have been printed in the 1980s, as the typeface technology didn't exist until the 1990s.[83] This led to a wholesale review of other documents produced in discovery, including sending a paralegal to the archives of a magazine so we could compare ads as they had been produced in discovery to how they actually ran. We discovered some had been altered by adding the phrase "Muggle's TM."[84] We successfully moved for sanctions with respect to seven types of fabricated evidence[85] and summary judgment on the merits.[86] With today's AI tools, vigilance as to what's been produced is more important than ever.

---

74.   *Id.* ¶¶ 169–70.

75.   *Id.*

76.   *Id.* ¶ 177.

77.   *See* Mary Huber, *Shepard Fairey Sentenced for Destroying Documents*, ART NEWS (Sept. 7, 2012), https://www.artnews.com/art-in-america/features/shepard-fairey-fined-59021/   [https://perma.cc/QJJ6-ZQM4]   [https://web.archive.org/web/20240927172856/https://www.artnews.com/art-in-america/features/shepard-fairey-fined-59021/].

78.   *See* Summary Order, Fairey v. The Associated Press, No. 09-cv-01123 (S.D.N.Y. Feb. 17, 2011), ECF 199.

79.   *See* Summary Order, *Fairey*, No. 9-cv-01123 (Mar. 16, 2011), ECF 243.

80.   Scholastic, Inc. v. Stouffer, 221 F. Supp. 2d 425 (S.D.N.Y. 2002).

81.   *Id.* at 428–30.

82.   *Id.* at 429–30.

83.   *See id.* at 429, 431.

84.   *Id.* at 429.

85.   *See id.* at 439–45.

86.   *Id.* at 445.

In sum, it is the litigator's job to determine what facts are needed to tell the client's story of fair or unfair use, and then to develop the record using both fact and expert discovery.

III. LITIGATING IS PERSUADING.

We have discussed the litigator's role in helping to shape the law and in discovering the relevant facts in each case, so let's now discuss how a litigator brings law and facts together to persuade the court and jury. This is where the magic happens. Litigation is the art of persuasion, and as a former theatre person, I can tell you that litigating is a lot like putting on a show, especially at trial.

It is vital for a litigator to synthesize the facts and law to develop an easy-to-understand and convincing *theme*. Fair use may be a complex doctrine, but if you start your presentation with "this is complicated," you are likely to lose. Rather, you need to *simplify* and *persuade*, whether in a brief, at oral argument, or at trial.

Consider our *TVEyes* case. In its briefing and at oral argument, TVEyes relied heavily on the *Google Books* case,[87] in which the Second Circuit had held that it was fair use for Google to copy entire books and reproduce snippets of them in response to user queries.[88] Central to the holding in that case, however, was that Google Books was designed to reproduce only *snippets* of the copied books.[89] As Judge Chin wrote on summary judgment at the district court, "Google Books provides a new and efficient way for readers and researchers to *find* books."[90] On appeal at the Second Circuit, Judge Leval noted that even if someone set out to do multiple searches of a particular book, the resulting aggregation of snippets would be "incomplete," which made substitution unlikely.[91] The Second Circuit also noted that the Google Books service was designed to prevent someone from getting a complete book by "blacklisting" "one snippet on each page and one complete page out of every ten."[92] Key to the *Google Books* holding, therefore, was that you could not get the whole text of any of the copied works.

By contrast, we argued, TVEyes *was* substitutive because it made all television news content available to users, in as many ten-minute segments as they wished, without any of the blacklisting design elements of Google Books.[93] TVEyes even advertised that subscribers could further download and save the clips, and further distribute the clips

---

87.   *See, e.g.*, Redacted Page Proof Brief for Defendant-Appellant-Cross-Appellee at 24–26, Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018) (No. 15-cv-03885).

88.   Authors Guild v. Google, Inc. ("*Google Books*"), 804 F.3d 202, 229 (2d Cir. 2015).

89.   *Id.* at 207.

90.   Authors Guild v. Google Inc., 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013) (emphasis added).

91.   *Google Books*, 804 F.3d at 224–25.

92.   *Id.* at 209–10.

93.   *See* Final Brief for Plaintiff-Appellee-Cross Appellant Fox News Network, LLC [Redacted] [hereinafter, Final Pl. Brief] at 1–2, Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018) (No. 15-cv-03885).

by email and use them on social media.[94] All of this, we contended, posed an existential threat to the market for television journalism.

To make all this clear, I came up with a theme that distinguished *Google Books* head-on. We argued that whereas Google Books was a program designed to *find* content, TVEyes *delivered* content.[95] This "*finding versus delivering*" theme guided us through our discovery efforts, our briefing, and our oral arguments. For example, at oral argument before the Second Circuit, after appellant's counsel argued that TVEyes was simply Google Books for television, I argued that *TVEyes* "can be decided by recognizing the fundamental difference between services that *find* copyrighted works and those that *deliver* copies of such works. While this Court has held in other contexts that search can be a quintessential transformative use, well, so too should delivery of content be quintessential infringement."[96]

The Second Circuit agreed, recognizing that we were not challenging search but rather redistribution of the audiovisual content.[97] In an opinion by Judge Jacobs, the Second Circuit thus affirmed that TVEyes' service was *not* a fair use, and was more akin to *Infinity Broadcasting Corp. v. Kirkwood* and other retransmission cases than *Google Books*, because the content was redistributed.[98] Notably, a different Second Circuit panel in *Capitol Records LLC v. ReDigi, Inc.* later that same year discussed *TVEyes* expressly.[99] *ReDigi* asked whether a service to allow users to resell their digital music files was unauthorized distribution or a fair use.[100] In an opinion written by Judge Leval, the Second Circuit endorsed the fair use decision in *TVEyes*, writing that *TVEyes* was a "substantial precedent" for the Second Circuit's finding of no fair use in *ReDigi*, noting that the modest transformative purpose in TVEyes was "easily outweighed" by the harm to the rightsholder's market.[101]

Another point about oral argument in particular, is that part of the persuasion process is respectfully attempting to teach a court to see the case from your point of view. This epiphany was brought home to me by the foreword written by Justice Ruth

---

94. *TVEyes*, 883 F.3d at 175; *see also* Bill Donahue, *TVEyes Downloads Aren't Fair Use, Judge Says*, LAW360 (Aug. 25, 2015), https://www.law360.com/articles/695389/tveyes-downloads-aren-t-fair-use-judge-says [https://perma.cc/3ZY9-TSVU] [https://web.archive.org/web/20160123090142/http://www.law360.com/articles/695389/tveyes-downloads-aren-t-fair-use-judge-says].

95. *See* Final Pl. Brief, *supra* note 93, at 1 ("TVEyes' service is nothing like Google Books. It goes beyond **finding** authorized copies of television content, and instead **delivers** unlimited, unauthorized, lengthy, seriatim, high-definition video clips to its paying subscribers." (emphasis in original)).

96. Transcript of Oral Argument at 57:10–17, *TVEyes*, 883 F.3d 169 (No. 15-cv-03885) (emphasis added).

97. *TVEyes*, 883 F.3d at 174.

98. *See id.* at 177–78, 180 (citing Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998); *see also id.* at 186–188 (Kaplan, J., concurring) ("I regard *Infinity Broadcast Corp. v. Kirkwood* as having settled the question whether a use is transformative simply because it is more efficient or convenient than what preceded it.").

99. 910 F.3d 649 (2d Cir. 2018).

100. *Id.* at 657.

101. *Id.* at 663 (quoting *TVEyes*, 883 F.3d at 180).

Bader Ginsburg to a book on Supreme Court arguments,[102] which I eagerly read before I argued the *Dastar* case before the Court.[103] In addition to making a lot of helpful points about oral argument in general, Justice Ginsburg likened arguing in court to her experience as a teacher. As she reflected on her first Supreme Court argument, Justice Ginsburg wrote that "a teacher by trade, I relished the opportunity to persuade them that my cause was just, my legal argument sound."[104] She saw oral argument as an opportunity to *teach*, not an ordeal to "resent."[105] I found this idea of teaching and opportunity to be a helpful way of approaching oral argument.

To illustrate the point about using oral argument to teach and convey your theme, I think it is useful to consider briefly *Rentmeester v. Nike, Inc.*[106] There, a photographer alleged that Nike had infringed his copyright in a photograph of Michael Jordan leaping when Nike made its own iconic photograph of Mr. Jordan, which it used to create its "Jumpman" logo.[107]
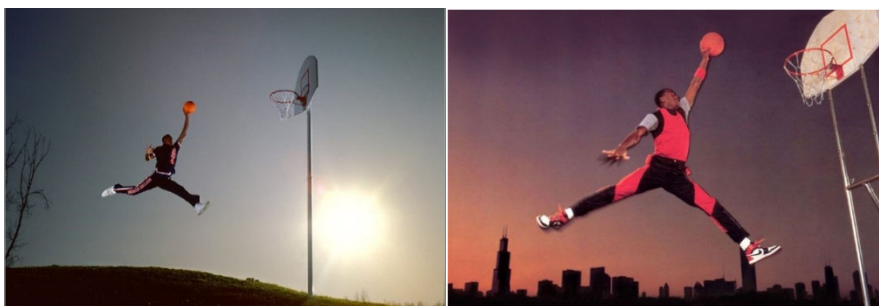
Figure 2: Rentmeester (left); Nike (right)[108]

When I teach this case in my law school class, I start by polling my students, many of whom have never taken a copyright class before, to see who thinks the two images are substantially similar.[109] At first, many hands go up. Then I teach the idea/expression dichotomy and ask again.[110] This time, fewer hands. Finally, I start pointing out all the

---

102. Ruth Bader Ginsburg, *Foreword* to DAVID C. FREDERICK, SUPREME COURT AND APPELLATE ADVOCACY, at v–vii (1st ed. 2002).

103. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

104. Ginsburg, *supra* note 102, at v.

105. *Id.* at vi.

106. No. 15-cv-00113, 2015 WL 3766546 (D. Or. June 15, 2015), *aff'd*, 883 F.3d 1111 (9th Cir. 2018).

107. Rentmeester v. Nike, Inc., 883 F.3d 1111, 1116 (9th Cir. 2018).

108. *Id.* app. at 1126.

109. *Cf. id.* at 1117 ("To prove unlawful appropriation . . . the similarities between the two works must be 'substantial' and they must involve protected elements of the plaintiff's work.").

110. *Cf.* Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1037 (9th Cir. 2015) ("Section 102(b) codifies the 'idea/expression dichotomy,' under which 'every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication'" (first citing 17 U.S.C. § 102(b), then quoting Golan v. Holder, 565 U.S. 302, 328 (2012))).

differences in expression—the color, the proximity to the hoop, the bend of the arms, and the difference between a more traditional *grand jeté*, scissor-style split and a straddle-style jump. When I ask again if the images are substantially similar, few hands go up. And then when I tell them that I represented Nike—no hands go up!

My actual oral argument in that case on our motion to dismiss for lack of substantial similarity used the same principles. *First*, I used the theme that no one can own the idea of Michael Jordan jumping in a pose inspired by a *grand jeté*. *Second*, I emphasized the various expressive differences. I even acted out as best I could the difference between the scissor-style horizontal split as in the Rentmeester photo and the vertical straddle-style jump in the Nike photo. The Ninth Circuit then affirmed the district court's grant of our motion to dismiss.[111] The lesson here is that persuasion is closely tied to teaching.

Let us now turn from oral argument to trials, which may be the ultimate theatre for a fair use litigator. Having a theme at trial is absolutely critical. Not only will the theme help you to persuade the court or jury, but it also provides a compass for you to keep your presentation of evidence on track and help the factfinder see how disparate pieces of evidence and testimony fit together.

I know that Professor Ginsburg has always appreciated the theme we used in the *Harry Potter Lexicon* case, so I think it makes sense for me to turn to it now. The *Harry Potter Lexicon* case concerned whether a so-called *Harry Potter* encyclopedia was fair use.[112] Well before the case was ever filed, there had been a free, fan-made website called the Harry Potter Lexicon that compiled and analyzed many aspects of the *Harry Potter* books for other fans.[113]

One part of that website contained an alphabetical list of the people, places, and things in the *Harry Potter* universe.[114] After Ms. Rowling announced her intention to write her own encyclopedia after she completed the last of the seven *Harry Potter* books,[115] publisher RDR Books contracted with the editor of the Lexicon website, Steven Vander Ark, to rush out a book of just the A-to-Z listings from the Lexicon website (that is, not the essays and other analyses) as an unofficial *Harry Potter* encyclopedia.[116]

After cease-and-desist efforts were unsuccessful, J.K. Rowling and the *Harry Potter* books' film studio, Warner Brothers, filed suit in the Southern District of New York and sought a TRO and preliminary injunction against the publication of the *Harry Potter Lexicon* book.[117] In our complaint and our subsequent motions, we contended that *unlike* a true encyclopedia, the *Lexicon* merely repackaged the *Harry Potter* series as well as the companion books to it, *Quidditch Through the Ages* and *Fantastic Beasts and Where*

---

111.   *Rentmeester*, 883 F.3d at 1125.

112.   Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 518 (S.D.N.Y. 2008).

113.   *Id.* at 520.

114.   *Id.*

115.   *Id.* at 519; *see also* Trial Tr. (Rowling) 51:16–25, Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (No. 7-cv-9667).

116.   *Warner Bros.*, 575 F. Supp. 2d at 522.

117.   *Id.* at 523–24.

to Find Them, with little or no analysis, research, or even quotation marks.[118] RDR's defense was fair use.[119]

Judge Patterson combined the preliminary injunction hearing with a bench trial on the merits,[120] and we were off to the races in a trial that created a media frenzy of cameras at the courthouse steps and so much public interest that after the courtroom filled up, the court staff set up an overflow courtroom for people to watch the trial unfold on closed-circuit television. It was clear that I needed to come up with a concise, convincing trial theme that would show how each of the fair use factors favored us. It needed to get to the heart of the argument that this was not a true encyclopedia and that the copying was overly extensive, in a way that would persuade the court. I did not think that merely saying, "the four fair use factors favor us" would be very persuasive or clear.

Rather, my theme was that the *Lexicon* "*takes too much and does too little*" to be fair use.[121] With that phrasing, I wanted to emphasize the wholesale copying and the little, if any, transformative value of the so-called encyclopedia. The point was that the *Lexicon* added little, if anything, beyond Ms. Rowling's own words—there was no commentary, no analysis.[122] It had only sporadic and sometimes inaccurate etymology, and none of the other things you would expect in an encyclopedia.[123] As the *Lexicon*'s first page even noted, "All the information in the Harry Potter Lexicon comes from J.K. Rowling. . . ."[124] This is exactly what we wanted to convey—that it was all Ms. Rowling's work.

But it is not enough to simply *have* a theme; you need to *use* it. The "takes too much and does too little" theme was therefore an important framework for presenting the evidence and bringing out key factual points. Starting from my opening argument and continuing to the summations, I returned again and again to the massive verbatim copying and lack of analysis or other creative additions,[125] as well as to the highly imaginative world of J.K. Rowling and the need to protect it.[126]

Part of the defendant's argument was that Ms. Rowling and Warner Brothers were engaging in copyright misuse, or the enforcement of copyright beyond the law's reasonable bounds.[127] In some ways, however, this gave us an opportunity to show that

---

118.   *See, e.g., id.* at 543.

119.   *Id.* at 539.

120.   *See id.* at 517–18 (citing FED. R. CIV. P. 65(a)(2)).

121.   Trial Tr. (Cendali), *supra* note 115, at 5:8–9 (emphasis added).

122.   *Id.* at 5:10–15 ("You will hear that the Lexicon takes much more of Ms. Rowling's fictional facts and copyrighted expression tha[n] is necessary to comment on and discuss the Harry Potter books, and you will hear the Lexicon provides virtually no analysis or commentary, as much as RDR strains to inflate the import of sporadic qualitatively meaningless phrases.").

123.   *See* Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 526 (S.D.N.Y. 2008) ("sporadic etymological references"), 544 (etymology "occasionally inaccurate").

124.   *Id.* at 525.

125.   *E.g.,* Trial Tr. (Cendali), *supra* note 115, at 5:8–9, 678:23–679:11, 679:17–19.

126.   *E.g., id.* at 6:2–16, 679:14–19.

127.   *Warner Bros.*, 575 F. Supp. 2d at 518; *see also id.* at 545 n.21 ("Nor does the Court find Defendant's allegations of Plaintiffs' copyright misuse and unclean hands to amount to more than aggressive protective

neither Ms. Rowling nor Warner Brothers objected to true reference works, that took less of Ms. Rowling's expansive universe and did more with it. We showed that many books fit this theme—and thereby showed what made the *Lexicon* different.[128]

We did this in part through a demonstrative series of slides that I used in my opening. I explained that the evidence would show that there are books about "Harry Potter and religion."
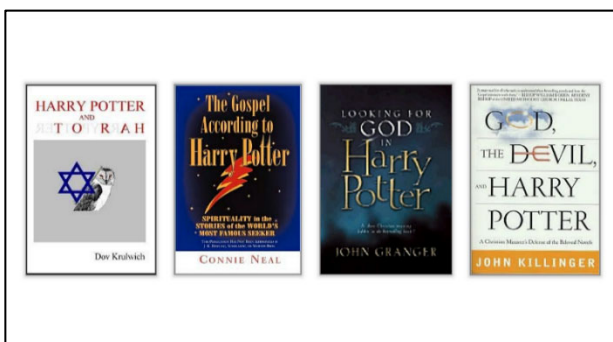
Figure 3: "Harry Potter and Religion."[129]

Figure 4: "Kids and Harry Potter."

---

actions permitted by copyright law. Defendant apparently agreed, as it abandoned these defenses by the end of trial.").

    128.   *See* Trial Tr. (Rowling), *supra* note 115, at 80:17–81:18.

    129.   These slides are recreations of those used at trial. *See* Trial Tr. (Cendali), *supra* note 115, at 24:4–13.

Figure 5: "Harry Potter and Literature."

Figure 6: "Science and Psychology and Harry Potter."
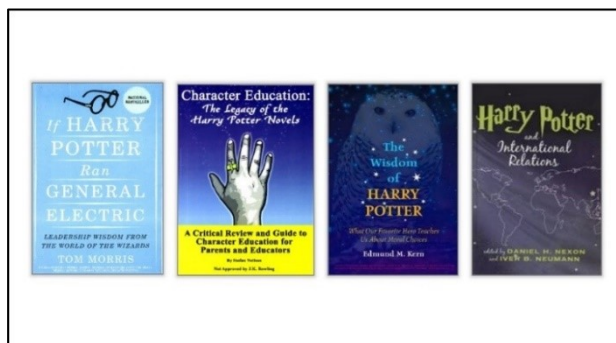
Figure 7: "What We Can Learn About Harry Potter."

Figure 8: "And Parodies of Harry Potter."

Figure 9: "Other Guidebooks to Harry Potter."
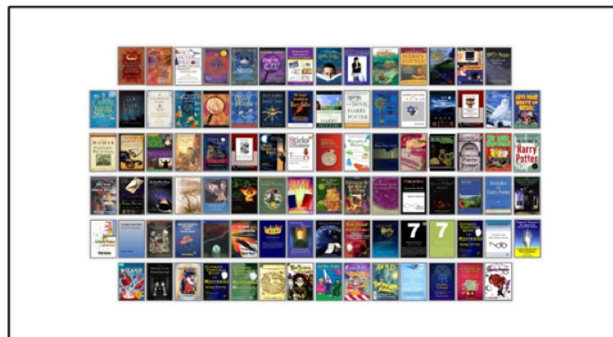
Figure 10: "Many Books About Harry Potter."

In fact, there were many books about Harry Potter. But as I told the court, these books took less and did more.[130]

Ms. Rowling also emphasized in her testimony how the Lexicon took too much. She testified that the *Lexicon* took "all the highlights of [her] work" or, as she analogized it, "all the plums in [her] cake."[131] She also explained how the *Lexicon* didn't add enough to justify the taking. Ms. Rowling testified that "if [Vander Ark] put quotation marks around everything he ha[d] lifted from [her] book, there would pretty much be quotation marks around the whole substance of the book, with a few little sides omitted."[132] That is to say, that the *Lexicon* took too much, and did too little. And she used the theme in explaining market harm, noting that if it became legally acceptable to take an extreme amount of an author's work and add little text to it, "the flood gates would open."[133] Finally, she described the "devastating" injury to her as an author in having her words taken and resold under a different author's name.[134]

Similarly, when I questioned Mr. Vander Ark, I tried to emphasize our "takes too much, does too little" theme. For example, I asked him what the Chudley Cannons were. As I expected, he gave a short answer, namely "This is a Quidditch team."[135] I then juxtaposed that short answer with an exhibit from the text of the *Lexicon* showing that he included far more than that short response in the *Lexicon*.[136] Rather, he put in an extensive description—which was virtually identical to the text Ms. Rowling herself had written about the Chudley Cannons.

I then got him to admit that these were "fictitious facts,"[137] harkening back to the *Seinfeld Aptitude Test* case,[138] and that they were Ms. Rowling's "creative output."[139] Finally, I got him to confirm that he took everything. As he admitted, *"it looks like we pretty much caught it all."*[140]

I will also add that when part of your point in arguing factor two is the creativity of your client's work, it is important to bring that out. For example, my opponent made a big show of introducing his client as "the man without whom none of us would be here, Roger Rappaport of RDR Books."[141] I felt that statement could not go unchallenged. Immediately after that, when I stood to begin my opening statement, I emphasized that "the person without whom none of us would be here is *J.K. Rowling*."[142] I wanted to set the right tone from the beginning.

---

130.   Trial Tr. (Cendali), *supra* note 115, at 24:4–13.
131.   Trial Tr. (Rowling), *supra* note 115, at 647:3–10.
132.   *Id.* at 59:9–12.
133.   *Id.* at 652:7–11.
134.   *Id.* at 93:20–94:10.
135.   Trial Tr. (Vander Ark), *supra* note 115, at 285:17–19.
136.   *Id.* at 285:23–286:1.
137.   *Id.* at 286:7–8.
138.   *See* Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 139 & n.5 (2d Cir. 1998) ("Whatever the line between historical fact and creative expression, however, *Seinfeld* is securely on the side of creative expression.").
139.   Trial Tr. (Vander Ark), *supra* note 115, at 286:9–11.
140.   *Id.* at 288:15–22 (emphasis added).
141.   Trial Tr. (Hammer), *supra* note 115, at 3:21–23.
142.   *Id.* at 3:24–25.

Similarly, at the end of my opening, at the risk of perhaps being a little theatrical, I dove into the copyrighted work and used it to reemphasize our theme. I said, "In closing, it seems right to go back to Ms. Rowling's words. At the end of *Harry Potter and the Goblet of Fire*, Professor Dumbledore, headmaster of Hogwarts, cautions the students that there may come a time when they must choose between what is right and what is easy. We submit, your Honor, that by *taking too much and doing too little*, RDR chose to do what was easy. But the evidence and controlling law of this circuit show that it was not right."[143]

Ultimately, the court held that the *Lexicon* was infringing and was not fair use.[144] The court found that while it was "slightly" transformative, this was not enough to justify the wholesale copying without even quotation marks.[145] In other words, the court held that the *Lexicon* took too much, and did too little. Note that the court found no fair use even though it found the *Lexicon* was slightly transformative. This was also the situation in our *TVEyes* case, where the Second Circuit said that the service's "modest" transformative character was not enough to justify its copying.[146]

It is interesting to me, reflecting back on these cases, that both the *Harry Potter Lexicon* and *TVEyes* courts found fair use despite findings that the uses were "slightly"[147] or "modest[ly]"[148] transformative. This seemed right to me, as I never understood why a finding of transformativeness should be an outcome-determinative litmus test, given the express direction in Section 107 that courts "shall" consider at least the four factors, none of which perfectly corresponds to transformativeness.[149] Thus, I appreciated that Justice Sotomayor's majority opinion in *Andy Warhol Found. for the Visual Arts v. Goldsmith* repeatedly emphasized that transformativeness is a matter of "*degree*," and that it must be considered along with the other factors.[150]

I was also heartened by *Warhol* in that in so many ways it seemed to be a validation of our Obama Hope poster case that had foreshadowed it, including by vindicating the idea that fair use cases often "involve[] not one, but two artists."[151] Both cases involved photographs used as artists' references to create new images.

---

143.   Trial Tr. (Cendali), *supra* note 115, at 28:6–17 (emphasis added).

144.   Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008).

145.   *Id.* at 542 (use is "slightly transformative").

146.   Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 181 (2d Cir. 2018) ("[I]ts transformative character is modest at best.").

147.   *Warner Bros.*, 575 F. Supp. 2d at 542.

148.   Fox News Network, LLC v. TVEyes, 883 F.3d 169, 181 (2d Cir. 2018); *see also* Monge v. Maya Mags., Inc., 688 F.3d 1164, 1183–84 (9th Cir. 2012) (finding no fair use "even if [the use were] credited as mildly transformative").

149.   17 U.S.C. § 107; *see generally* Cendali & Quigley, *supra* note 14.

150.   Andy Warhol Found. for the Visual Arts v. Goldsmith, 598 U.S. 508, 525, 528–29 (2023).

151.   *Id.* at 514.
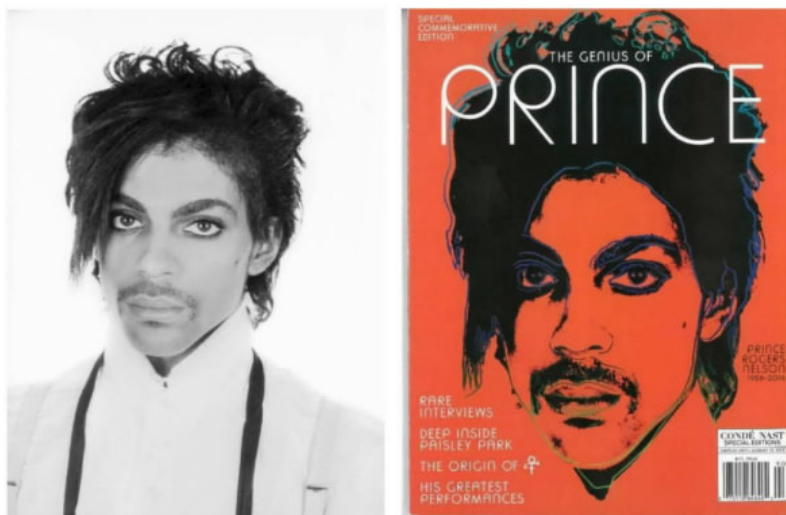
Figure 11: Goldsmith (left); Warhol Foundation (right)[152]

It also strikes me that in both cases, the side claiming fair use argued that the reference photo was not very original or entitled to much protection. In *Warhol*, the Foundation argued Goldsmith was attempting to "copyright Prince's face."[153] Opposing counsel made almost the identical argument in our case.[154]

But whereas the other side in the Hope Poster case tried to minimize Mr. Garcia's artistry, we tried to elevate it. For example, we adopted the language photographers use to describe their work. Photographers don't talk about "taking a picture;" they speak of "*making*" one, as that emphasizes their creative process as opposed to simply happening on an image and picking it up, as "taking" seems to denote. Part of our case, therefore, involved showing how Mr. Garcia *made* a patriotic portrait of the then junior senator from Illinois, Barack Obama.[155] For example, we included in our filings how Mr. Garcia

---

152.   *Id.* at 517 fig. 1, 519 fig. 3.
153.   Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 46 (2d Cir. 2021).
154.   *See* Memorandum of Law in Support of Counterclaim Defendant One 3 Two, Inc's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment at 18, Fairey v. The Associated Press (S.D.N.Y. Jan. 10, 2011) (No. 9-cv-1123) ("[T]he conventional pose depicted in the Garcia Photo, and the elements associated with that pose (*i.e.*, President Obama's thoughtful gaze out at the horizon and the angle of his body), all of which are part of the 'conventions and ideals' of political portraitures, are thus not protectible under the Copyright Act.").
155.   *See* Memorandum of Law in Support of the Associated Press' Motion for Summary Judgment Against Defendant One 3 Two, Inc. d/b/a Obey Clothing at 16, 53–54, Fairey v. The Associated Press (S.D.N.Y. Jan. 7, 2011) (No. 9-cv-1123) ECF No. 152 (relying on artist's deposition testimony to prove work's creativity).

had liked the patriotic flag image behind Senator Obama, how he chose the right filter and moment to make the photograph, and how he even got on his knees to get the angle just right for making the portrait photograph he wanted.[156]

Moreover, in thinking about persuasion, lawyers need to be careful to make sure their arguments are consistent with the facts. While as noted above, the Fairey side tried to argue that there wasn't anything special about the Garcia headshot he used, that was not what Shepard Fairey had said both in a newspaper interview he gave prior to the lawsuit and in his deposition, where he said he selected the photo because of its special qualities.[157] As Mr. Fairey testified in his deposition, for example, "There are a lot of different historic photos of people like John F. Kennedy, [and] the famous Korda Che Guevara photo that have this feeling of the subject knowing what lies in the future, having some sort of wisdom, and it's a specific angle of the gaze, and that was really what struck me about the photo."[158]

We further tried to persuade the court on this issue by using some of the images that Mr. Fairey had downloaded and rejected as references to make the poster.

Figure 12: Examples of Rejected Images[159]

---

156.   AP Amended Answer, *supra* note 62, ¶ 99 (quoting Fresh Air, *Mannie Garcia: The Photo That Sparked 'Hope'*, NAT'L PUB. RADIO (Feb. 26, 2009), https://www.npr.org/transcripts/101184444 [https://perma.cc/9JWN-LXM2] [https://web.archive.org/web/20241005043240/https://www.npr.org/2009/02/26/101184444/mannie-garcia-the-photo-that-sparked-hope]).

157.   *See* AP SUF, *supra* note 69, ¶ 94.

158.   *Id.* ¶ 95 (internal citations omitted).

159.   *Id.* ¶ 100.

As Fairey testified in his deposition, none of these were as good as the AP photo that was the subject of the lawsuit, as they made Senator Obama look "grumpy" or "unsure."[160] This evidence helped to highlight the creativity of the AP's photograph and to rebut the argument to the contrary.

The bottom line is that litigators are in a unique position. Sometimes incrementally, sometimes more dramatically, to impact the law and achieve results for their clients. Doing so effectively requires a suite of tools, starting with a command of the case law, the ability to identify and harness facts creatively, and ultimately the ability to persuade.

IV. LITIGATING THE FUTURE OF FAIR USE.

Let me now look to the future and ask, what does all this mean about the future of litigating fair use? I have discussed how *Warhol* fits into the story of fair use, but what about *Google LLC v. Oracle Am., Inc.?*[161] Where does the Supreme Court's *other* recent fair use case fit into the past and future of fair use? We served as co-counsel to Oracle in the appeals before the Federal Circuit and at the Supreme Court, where the Court ended up upholding a jury verdict that Google's use of Oracle's Java code to develop the Android platform was fair use.[162]

I want to make a few brief points. *First*, I am concerned that courts may be viewing *Google* as *encouraging* jury trials to decide fair use, when I do not think that was the Supreme Court's intent or indeed what the Court held, when it decided that Google's use was a fair use "as a matter of law."[163] This interpretation is buttressed by the Supreme Court's affirmance of the Second Circuit's holding of no fair use as a matter of law in *Warhol* in a summary judgment case.[164]

The *Google* case was an appeal from a jury trial on fair use,[165] yes, and that meant the Court had to grapple with the standard of review in that context where fair use is a mixed question of law and fact.[166] The Court did not, however, endorse the idea that fair use *always* must go to the jury. Rather, the Court endorsed the Federal Circuit's conclusion that although fair use involves subsidiary historical facts that may be decided by a jury, "the ultimate question" of whether a use is fair is a *legal question* for courts to decide.[167] In his majority opinion, Justice Breyer acknowledged this interpretation and wrote that fair use primarily involves "legal work."[168] So, although *Google involved* a jury verdict on fair use, I do not think it can be read as *requiring* a jury verdict on fair use. In

---

160.   *Id.* ¶ 101 (internal citations omitted).
161.   Google LLC v. Oracle Am. Inc., 593 U.S. 1 (2021).
162.   *Id.* at 40.
163.   *Id.*
164.   Andy Warhol Found. for the Visual Arts v. Goldsmith, 11 F.4th 26, 32 (2d Cir. 2021), *aff'd*, 598 U.S. 508, 551 (2023).
165.   *Google*, 593 U.S. at 16.
166.   *See id.* at 23–24; *see also id.* at 49–50 (Thomas, J., dissenting).
167.   *Id.* at 25.
168.   *Id.* at 24.

fact, as Oracle noted in its Supreme Court brief, the historical record of fair use trials is sparse. Rather, courts "'most frequently' resolve fair use as a matter of law 'at summary judgment.'"[169]

In light of this, it is interesting to me that, post-*Google*, it seems like there are more judges denying summary judgment and finding factual disputes that must go to the jury.[170] Often, of course, this is the right call; it is the jury's role to decide *material* and *genuine* factual disputes given the important Seventh Amendment right to trial by jury.[171] But with fair use, many disputes are not really about the facts. Rather, they are about the *legal interpretation* of known facts. And even if there were a factual dispute about something, not all factual disputes might materially affect the Court's ultimate balancing of the fair use factors. As I think you can tell, I like trying cases. But I also think that it is right to admit that jury trials can be expensive and burdensome for both the parties and the court.[172] Thus, I think this is an issue to watch.

Second, the *Google* Court's decision to start with factor two, the nature of the work, and champion it as a key factor is deciding fair use in software cases is well known.[173] Another issue to watch is whether we will see other applications for factor two.

For example, we have litigated a series of cases that ask whether it is fair use to depict athletes realistically in a video game—with their tattoos—based on licenses from the athletes to use their likenesses, or whether permissions from the athletes' tattooists are also needed to include the tattoos. We won the first of these cases, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, on summary judgment in the Southern District of New York on three grounds—implied license, de minimis use, and fair use—in a decision by Judge Swain.[174]

---

169.   Brief for Respondent at 37–38, Google LLC v. Oracle Am., Inc., 593 U.S. 1 (2021) (No. 18-cv-956) (quoting TCA Television Corp. v. McCollum, 839 F.3d 168, 178 (2d Cir. 2016)).

170.   *E.g.*, Grant Heilman Photog., Inc. v. Tree Center, LLC, No. 23-cv-3171, 2024 WL 2154011, at *3 (D. Md. Apr. 22, 2024); Sedlik v. Drachenberg, No. 21-cv-1102, 2023 WL 6787447, at *1 (C.D. Cal. Oct. 10, 2023) (granting motion for reconsideration but denying summary judgment).

171.   *See* Google LLC v. Oracle Am. Inc., 593 U.S. 1, 25 (2021); *see also* FED. R. CIV. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

172.   *Cf.* Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?*, 45 ST. MARY'S L.J. 333, 347 (2014) ("Abraham Lincoln wrote, 'Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.'" (quoting Abraham Lincoln,' Notes for a Law Lecture (July 1, 1850) *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 (1953).

173.   *Google*, 593 U.S. at 26.

174.   449 F. Supp. 3d 333 (S.D.N.Y. 2020). After this lecture was delivered, the Kirkland team won a jury trial in what is hopefully the last of these cases. There, the jury returned a verdict in under ninety minutes (including time for lunch), finding that the video game company's use of the tattoos was covered by an implied license that the tattoo artist had given to the tattooed athlete. *See* Judgment Entry, Hayden v. 2K Games, Inc., 2024 WL 3250749 (N.D. Ohio Apr. 19, 2024) (No. 17-cv-2635), ECF No. 339. Because of the way the verdict form was structured, the jury never reached the issue of fair use. *See* Redacted Special Interrogatories and Verdict Forms, Hayden v. 2K Games, Inc., 2024 WL 3520751 (N.D. Ohio Apr. 19, 2024) (No. 17-cv-2635) (directing jury to "skip the remaining questions" after finding for Take-Two on its implied license defense).

The nature of the work is particularly interesting in this context. Tattoos are permanently inked on human beings who have their own rights and freedoms separate from those of the copyright holder.[175] Tattoos inked on a person's body seem inherently different in nature, therefore, from a painting on a canvas or a manuscript on a piece of paper, both of which are detached from the human body. You could not show people as they actually look without their tattoos. How should factor two's analysis apply in a context like this? Should the nature of the *work* be affected by the unique nature of a tattoo being fixed on a human being's body?

Other situations may also arise where the nature of the work may prove particularly significant. Gone, I think, are the days when factor two was reduced to whether the work was published, and whether it was factual or creative.[176]

Third, there is the question of how fair use will be applied to AI. Answering AI questions seems to have become the full-time employment of the copyright bar. I wish I could tell you which way the myriad courts considering this issue will decide the many cases currently being litigated, but I cannot. This is especially true if many cases are decided via jury trials, instead of through summary judgment decisions where it is sometimes easier to see what drove the conclusion. As we know, fair use requires a case-by-case analysis such that outcomes may differ based on the facts. Where the works involved, and the uses of them, differ, the fair use factors might produce different outcomes. In other words, we might not end up with a one-size-fits-all answer to the various questions on AI and fair use. As we work through these AI issues, the ability of all the actors in the copyright system to bring their expertise to the table is going to be very important.

I have one final thing to say about litigating fair use, and that is that you do not do it alone. One of the things about litigating cases is that you work as a team with your partners, associates, and clients, and often your colleagues in the bar as amici. Everyone is part of the process, and the result is the product of teamwork. I am proud that many Kirkland colleagues past and present, as well as many clients and friends in the bar were in the audience for this Manges Lecture, because this work was done with all of them. The bottom line is that we are all lucky to be part of the diverse and passionate copyright community, and it is exciting to think how each and every person who was in the room when this lecture was delivered, later watch this lecture online, or read through this Article will help further shape the law.

---

175.   *See* Second Amended Trial Brief at 21–22, Hayden v. 2K Games, Inc., 2024 WL 3521721 (N.D. Ohio Feb. 29, 2024) (No. 17-cv-2635), ECF No. 268.

176.   *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

Sense and Separability: Clarifying *Star Athletica* Amongst Lower Court Confusion

*Collier N. Curran**

INTRODUCTION

Copyright law is designed to protect the artistic, the creative. For centuries, courts have been careful to avoid granting copyright protection to systems or processes better suited to patent protection.[1] For instance, in a book explaining how to build a house, the text of the book as creative expression would be copyrightable. However, copyright protection would not extend to the actual system or process for building the house. This idea-expression dichotomy becomes more complicated in cases of useful articles with design elements.[2] In the 1954 case *Mazer v. Stein*, the Supreme Court first addressed the need to physically and/or mentally separate the utilitarian and ornamental elements to determine which aspects, if any, may be copyrighted.[3] This case led to the codification of separability in the Copyright Act of 1976; § 101 requires that a copyrightable pictorial, graphic, and sculptural work ("PGS work") contain "sculptural features that can be identified separately from, and are capable of existing

1. *See* Baker v. Selden, 101 U.S. 99, 102 (1879) ("To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.").

2. A "useful article" is an item with a utilitarian function: a shovel, a chair, even a t-shirt. Useful articles on their own are not copyrightable. However, a wrinkle emerged as creators wished to copyright creative design elements adorning or comprising their useful articles (think: a t-shirt with an original creative design printed on it, or a lamp base that is a statuette of a dancer, as we see in Mazer v. Stein, 347 U.S. 201 (1954)).

3. *Mazer*, 347 U.S. at 213–14 ("The successive acts, the legislative history of the 1909 Act and the practice of the Copyright Office unite to show that 'works of art' and 'reproductions of works of art' are terms that were intended by Congress to include the authority to copyright these statuettes . . . Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable.").

independently of, the utilitarian aspects of the article."[4] Despite this attempt at clarification, a nine-way circuit split emerged, with courts—as well as the Copyright Office itself—taking various approaches to the separability analysis.[5] In fact, the Second Circuit developed three different approaches itself, each attempting to identify the supremacy of the artistic or creative elements over the utilitarian aspects of a work in order to award it copyright protection.[6]

In order to resolve this widespread confusion, the Supreme Court laid out its test for conceptual separability in *Star Athletica v. Varsity Brands*: an artistic design feature of a useful article is copyrightable if it: (1) "can be perceived as a two- or three-dimensional work of art separate from the useful article"; and (2) "would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imaged separately from the useful article."[7] This opinion has had far-reaching effects on lower courts trying to make sense of separability. This lower court confusion highlights the lack of clarity in the *Star Athletica* opinion.

This Note begins in Part I with a background of the development of copyright law, with particular emphasis on separability, followed by an analysis of the *Star Athletica* majority opinion, concurrence, and dissent. I argue that the *Star Athletica* decision fails to achieve the widespread clarity it had intended. Part II supports this assertion by identifying and analyzing lingering areas of confusion among lower courts attempting to implement the Supreme Court's holding: furniture and interior design, and geometric patterns on useful articles. Part III weighs various solutions to better harmonize the lower courts in these key areas. This Note argues that the most ideal solution is to amend the copyright statute utilizing the Second Circuit's approach of finding more concrete proxies for the ambiguous concepts of *separate identity* and *independent existence*. This way, copyright law can more effectively protect the artistic and creative while avoiding the purely utilitarian.

I.   BACKGROUND

A.   COPYRIGHT LAW PRE-*STAR ATHLETICA*

1. Pre-1976

Copyright law has its constitutional basis in Article I, section 8, in which the Nation's Founders endowed Congress with the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

---

4.   17 U.S.C. § 101.

5.   Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484–85 (6th Cir. 2015) (describing the various approaches to the separability analysis).

6.   *See generally* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980); Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985); Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987).

7.   Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 424 (2017).

exclusive Right to their respective Writings and Discoveries."[8] This clause makes clear that intellectual property protection should not be permanent, but should grant some form of exclusivity while it is active. The Founders also clearly differentiated scientific inventions from the writings of authors.

The Copyright Act of 1909 governed copyright prior to the passing of the current Copyright Act of 1976. Under the 1909 Act, the requirements for a work to be copyrighted borrowed heavily from the constitutional language, specifying "[t]hat the works for which copyright may be secured under this Act shall include all the writings of an author."[9] Despite the apparent narrowness of the term "writings," courts were willing to grant copyright protection to works of creative expression in a variety of media.[10]

The 1909 Act did not explicitly address ornamental designs on useful articles; in fact, this was an area of confusion for courts, creatives, and the Copyright Office itself. The Act protected "works of art; models or designs for works of art," implying that copyright protection may extend beyond the purely aesthetic.[11] However, in 1910, the Copyright Office issued a regulation narrowing its interpretation of "works of art" to only the fine arts.[12] Despite this regulation, the Copyright Office was still granting copyright registrations to utilitarian objects such as salt shakers, clocks, and candlesticks.[13] Courts took varying approaches to address this discrepancy; some adhered to the "fine arts only" view expressed in the 1910 Bulletin while others expanded their view of art to works with utilitarian function.[14] In 1948, the Copyright Office issued a regulation allowing the copyrightability of works of "artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned."[15]

---

8. U.S. CONST. art. I, § 8, cl. 8 (punctuation changed).

9. Copyright Act of 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1075, 1076 (1909) (prior to repeal by 1976 Act).

10. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (extending copyright protection to photographs: "[N]o one would now claim that the word 'writing' in this clause of the constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of those authors, and congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression . . . We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original . . . conceptions of the author.").

11. Copyright Act of 1909 § 5(g).

12. U.S. COPYRIGHT OFF., BULL. NO. 15, RULES AND REGULATIONS FOR THE REGISTRATION OF CLAIMS TO COPYRIGHT 8 (1910); *see also* Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful Articles*, 37 J. COPYRIGHT SOC'Y U.S.A. 339, 342 (1990).

13. Perlmutter, *supra* note 12, at 342–43.

14. Perlmutter, *supra* note 12, at 343. *See* Pellegrini v. Allegrini, 2 F.2d 610 (E.D. Pa. 1924); *see also* Kemp & Beatley, Inc. v. Hirsch, 34 F.2d 291 (E.D.N.Y. 1929).

15. Thomas S. Key, *Trudging Through the Thicket: Copyright Protection for Designs of Useful Articles in the Wake of* Star Athletica, 49 AIPLA Q.J. 55, 60 (2021) (quoting 37 C.F.R. § 202.8 (1949)).

In *Mazer v. Stein* (1954), the Supreme Court first addressed the concept of separability.[16] The case concerns statuettes of dancing figures that served as a base for functioning table lamps.[17] The statuettes were submitted for copyright registration without the functional lamp features (wiring, lampshade, etc.) included.[18] The Court held that the statuettes were copyrightable, despite serving as the base of a lamp and being sold as such, because they were sculptural works eligible for copyright separate from the utilitarian function of the lamp.[19]

2. The Copyright Act of 1976

The *Mazer* decision was incorporated into the Copyright Act of 1976 to create a formal separability standard. The statutory definition of "pictorial, graphic, and sculptural works" specifies that for "works of artistic craftsmanship," the "form" may be eligible for copyright protection, but not any "mechanical or utilitarian aspects."[20] The definition then lays out more specific requirements for separability: that the pictorial, graphic, or sculptural features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[21] The House Report accompanying the Act explains that either physical or conceptual separability can be a basis for finding copyright protection of a pictorial, graphic, or sculptural work.[22]

3. Circuit Confusion Pre-*Star Athletica*

While the 1976 Act attempts to "draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design,"[23] the Act's language has been confusing in its application; prior to the *Star Athletica* decision, there was a circuit split with at least nine different tests for separability. The Sixth Circuit pinpoints the following different approaches to separability in its approach to the *Star Athletica* dispute.[24]

---

16.   Mazer v. Stein, 347 U.S. 201, 205 (1954) ("The case requires an answer, not as to a manufacturer's right to register a lamp base but as to an artist's right to copyright a work of art intended to be reproduced for lamp bases.").

17.   *Id.* at 202.

18.   *Id.*

19.   *Id.* at 217.

20.   17 U.S.C. § 101.

21.   *Id.*

22.   H.R. REP. NO. 94-1476, at 55 (1976) ("A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statute or carving is used to embellish an industrial product or, as in the *Mazer* case, is incorporated into a product without losing its ability to exist independently as a work of art.").

23.   *Id.*

24.   Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484–85 (6th Cir. 2015).

a. The Copyright Office

The Copyright Office asserts that the conceptual separability requirement is met only if the pictorial, graphic, or sculptural element and the useful article "could both exist side by side and be perceived as fully realized, separate works."[25] This approach implies an at least somewhat physical approach to separability. A design element that only exhibits conceptual separability would be unlikely to satisfy a requirement of "existing side by side."

b. D.C. Circuit

The D.C. Circuit expresses a similar distaste for conceptual separability in *Esquire v. Ringer*, a pre-1976 case in which the court conducts a separability analysis.[26] The court upheld the Copyright Register's decision to refuse to extend copyright protection to the shape of a useful article, no matter how "unique [or] attractively shaped" it may be.[27] This decision appears to reject conceptual separability entirely.

c. Second Circuit

The Second Circuit has taken three distinct approaches to conceptual separability: the primary-subsidiary approach (*Kieselstein-Cord*), the objectively necessary approach (*Carol Barnhart*), and the design-process approach (*Brandir*).[28] Each of the three approaches attempts to find a proxy for the ambiguous concepts of "identified separately from" and "existing independently of."[29] *The Kieselstein-Cord* court determined that there was conceptual separability if the artistic features are "primary" to the object, and the utilitarian feature is "subsidiary."[30] In *Carol Barnhart*, the court found conceptual separability where the artistic features of the design are not necessary to the performance of the utilitarian function.[31] The Sixth Circuit in *Varsity Brands* also considers the approach taken by Judge Newman in his dissent: that there is conceptual separability if "the design creates in the mind of the ordinary [reasonable] observer two different concepts that are not inevitably entertained simultaneously."[32] Finally, the *Brandir* court held that there is conceptual separability if the pictorial, graphic, or sculptural elements reflect the artistic choices of the designer, and are not purely a result

---

25. *Id.* at 484 (citing U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS. § 924.2(B) (2014)).

26. Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978).

27. *Id.* at 800.

28. *See* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980); Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985); Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987).

29. *See* 17 U.S.C. § 101.

30. *Kieselstein-Cord*, 632 F.2d at 993.

31. *Carol Barnhart*, 773 F.2d at 419.

32. *Id.* at 422 (Newman, J., dissenting); *see also* Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484 (2015).

of functionality.[33] In *Brandir*, the court declined to find a bicycle rack copyrightable because its design, while arguably creative, was purely a result of the utilitarian goal of fitting as many bicycles on the rack as possible.[34]

d. Fifth Circuit

In *Galiano*, the Fifth Circuit focused on marketability as the requirement for separability: conceptual separability exists if the artistic elements of the useful article would still be marketable without the utilitarian elements to generate appeal (as adapted from Nimmer on Copyright).[35] This approach establishes potential market value as a proxy for independent existence of a design element.

e. Seventh Circuit

Judge Kanne's dissent in *Pivot Point* provides another option for analyzing conceptual separability.[36] In this test, there is conceptual separability if "the useful article's functionality remain[s] intact" without the design element.[37]

f. Sixth Circuit

In its *Varsity Brands* opinion, the Sixth Circuit decided that the cheerleading uniforms at issue were eligible for copyright protection even if they cannot be physically separated from the useful article. The decision explicitly recognized conceptual separability as a sole basis for copyright protection of a pictorial, graphic, or sculptural work.[38] The Sixth Circuit grounded its analysis in the text of the Copyright Act itself: first, it determined whether the uniforms would be considered useful articles.[39] After determining that the uniforms were indeed useful articles, it chose to adopt the *Carol Barnhart* objectively necessary approach to answer the question of independent existence. The Sixth Circuit also found *Brandir*'s design-process approach

---

33.   *Brandir*, 834 F.2d at 1147–48.

34.   *Id.*

35.   Galiano v. Harrah's Operating Co., 416 F.3d 411, 417 (5th Cir. 2005) (quoting 1 NIMMER ON COPYRIGHT § 2.08[B][3], at 2–101 (2004)).

36.   Pivot Point Int'l Inc. v. Charlene Prods., Inc., 372 F.3d 913 (7th Cir. 2004) (Kanne, J., dissenting).

37.   *Id.* at 934 (Kanne, J., dissenting). The *Pivot Point* majority follows the Second Circuit, combining the *Brandir* and *Carol Barnhart* tests to assert that "[i]f the [design] elements do reflect the independent, artistic judgment of the designer, conceptual separability exists. Conversely, when the design of a useful article is 'as much the result of utilitarian pressures as aesthetic choices,' the useful and aesthetic elements are not conceptually separable." *Id.* at 931 (quotation omitted).

38.   Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 493 (6th Cir. 2015).

39.   *Id.* at 487. The Sixth Circuit leaned on the definition of useful article found in 17 U.S.C. § 102: "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."

helpful, but not instructive.[40] Finally, the court leaned on the Copyright Office's approach to separability: that the artistic and utilitarian features could "both exist side by side."[41]

Respondent, Varsity Brands, a manufacturer of cheerleading uniforms, brought suit against competing manufacturer Star Athletica for alleged infringement of their copyrighted uniform designs.[42] Varsity Brands, at the time of suit, possessed over 200 copyright registrations for various designs containing chevrons, lines, and other shapes.[43] At issue was whether these designs, adorning the "useful article" of a cheerleading uniform, are in fact copyright protectable.

B.   THE *STAR ATHLETICA* DECISION

1. Justice Thomas's Majority Opinion

The *Star Athletica* majority opinion, penned by Justice Thomas, seeks to "resolve widespread disagreement" over the 1976 Act's separability standard through a two-part test.[44] The Supreme Court articulates its test as follows:

> [A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.[45]

Throughout the opinion, Justice Thomas takes a textualist approach, asserting that the text of the statute is clear and the application of his two-part test to cheerleading uniforms is "straightforward."[46] As to the first step, he encounters no difficulty imagining the designs separately from the uniforms. Though the second step is more complicated, Justice Thomas finds it similarly clear to apply. He asserts that if the designs were removed from the uniform and painted onto a canvas, that would be a work of art that is different from the uniform.[47] The majority then rebuts an argument by the dissent—one that is shared by the Petitioner—that there is no separability because any reproduction of the uniform designs in another medium would necessarily recreate the uniform itself.[48] The dissent asserts that a painting of the chevron patterns

---

40.   *Id.* at 488 ("The design-process approach may also help courts determine whether a design feature is necessary to the utilitarian aspects of the article . . . But we do not endorse the design-process approach in its entirety.").

41.   *Id.* at 488–89 (quoting COMPENDIUM, *supra* note 25).

42.   Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 405 (2017).

43.   *Id.*

44.   *Id.* at 409.

45.   *Id.*

46.   *Id.* at 417.

47.   *Id.*

48.   *Id.*

of the uniform would appear to be a painting of the uniform because the designs are so closely intertwined with the cut and shape of the uniform.[49] Justice Thomas acknowledges that this may be true, but: "[T]his is not a bar to copyright."[50] He argues that although the shape of the object played in a role in how the artistic feature is designed, the uniform designs are still copyrightable.

Justice Thomas then attempts to cabin the opinion—and reiterate the ultimate goal of separability—by pointing out that copyright protection only applies to "the two-dimensional work of art fixed in the tangible medium of the uniform fabric."[51] Any other person or entity can manufacture a cheerleading uniform with the same shape or cut without violating the copyright; they just cannot reproduce the surface decorations on or using any medium.

Justice Thomas also acknowledges the disagreement among the parties to the case as well as the Sixth Circuit regarding the function of the uniforms to signal to others that the wearer is a cheerleader.[52] While he lays out both arguments in detail, he ultimately appears to eschew the debate altogether, stating that "[t]he debate over the relative utility of a plain white cheerleading uniform is unnecessary."[53] He believes that whether the signaling function is a utilitarian feature is irrelevant, as the cheerleading uniform is a useful article regardless. Further, he asserts that the portion of the useful article "left behind" after separation from design elements need not even be a fully functioning useful article. Overall, Justice Thomas appears to take an overly permissive view of the separability analysis; all that is required for copyright protection is the capacity to imagine the design separately, and the possibility of it being recreated in another medium as a work of art.

2. Justice Ginsburg's Concurrence

While Justice Ginsburg concurs in the judgment that the designs on the cheerleading uniforms are copyrightable, she does not see a need to reach the question of separability at all.[54] She views the designs at issue as pictorial, graphic, or sculptural works that were simply reproduced on useful articles, not designs of useful articles themselves.[55] She specifically points out that the designs were originally sketched on pieces of paper, and were copyrighted as two-dimensional works of art.[56]

---

49.   *Id.* at 448 (Breyer, J., dissenting).
50.   *Id.* at 418.
51.   *Id.* at 419.
52.   *Id.* at 420.
53.   *Id.*
54.   *Id.* at 425 (Ginsburg, J., concurring).
55.   *Id.* (Ginsburg, J., concurring).
56.   *Id.* at 426 (Ginsburg, J., concurring).

3. Justice Breyer's Dissent

In his dissenting opinion, Justice Breyer argues that under the majority's own test for separability, the designs at issue cannot be copyrightable because they would fail step one.[57] Specifically, the designs on the uniforms cannot be perceived separately from the utilitarian aspects of the uniforms because to reproduce the designs just reproduces something that can only be seen as a cheerleading uniform.

In analyzing the majority's test, Justice Breyer identifies "two exercises" that judges must undergo to determine separability.[58] There is first the physical exercise of determining whether the design element can be physically separated from the useful article. For this exercise, Justice Breyer provides the example of a lamp with a Siamese cat figure sitting on top of the lamp base.[59] There is also the mental exercise of determining conceptual separability, which is much more abstract. Can the design element be conceived of separately even if doing so would damage the design element and/or the useful article?[60] In this exercise, Justice Breyer alters his lamp example to have the Siamese cat form the base itself, with wires running through it. While this lamp would demonstrate conceptual separability, Justice Breyer contrasts it from objects like heart-shaped measuring spoons or boat-shaped candleholders that do not exhibit conceptual separability.[61]

Justice Breyer is critical of the majority's focus on whether the design can be thought of as a two- or three-dimensional work of art; he argues that this test is far too permissive to provide helpful guidance.[62] Instead, he sees the conceptual separability question as whether the design features can exist separability from the useful article without "bringing along" the useful article they are adorning.[63] In his view, the cheerleading uniform designs fail this test. The designs were created with the shape of the uniform in mind, and upon transferring the designs to another medium, this shape is replicated. Further, Justice Breyer expresses doubt that the geometric shapes of the designs are creative enough to be copyrightable if they had been submitted as a two-dimensional work of art.[64]

Inherent in the dissent is Justice Breyer's view that the designs function to support the utilitarian purpose of the uniforms. Because they are so intertwined that they cannot be reproduced without reproducing the uniform, they are not works of art that happen to exist on the uniforms, but rather designs that enhance the functionality of the uniform.

---

57.   *Id.* at 439 (Breyer, J., dissenting).
58.   *Id.* at 440 (Breyer, J., dissenting).
59.   *Id.* at 441 (Breyer, J., dissenting).
60.   *Id.* (Breyer, J., dissenting).
61.   Justice Breyer explains that there is no conceptual separability when the design itself makes up the shape of the useful article, or "necessarily bring[s] along the underlying utilitarian object." *Id.* at 442–43 (Breyer, J., dissenting).
62.   *Id.* at 444 (Breyer, J., dissenting).
63.   *Id.* at 447 (Breyer, J., dissenting).
64.   *Id.* at 448 (Breyer, J., dissenting).

4. The Opinions: Differing Approaches to Separability

Justice Thomas's view that copyright is not barred when a reproduction of the uniform's designs would necessarily recreate the shape of the uniform appears to conflict with the Second Circuit's design-process approach in *Brandir*. The *Brandir* court is wary of artists receiving copyright protection for features stemming from functionality instead of creative choice.[65] However, Justice Thomas does not seem to share that concern, as the level of intertwinement between the uniform designs and the uniforms themselves does not weigh on his copyright analysis. Conversely, Justice Breyer seems to echo a similar sentiment to the Second Circuit when he declines to extend copyright protection in *Star Athletica*. If a design of a useful article is so closely interlaced with the useful article that reproducing it also reproduces a version of that useful article, it can be inferred that much of the "creative" choice put into the design actually stems from the practical limitations or guidelines imposed by utilitarian elements themselves.

Additionally, Justice Breyer and Justice Ginsburg take differing approaches to separability based on which element "came first." In *Star Athletica*, Justice Ginsburg argues that because the designs were originally sketched in two dimensions on paper, they are copyrightable pictorial, graphic, or sculptural works.[66] Whether those designs were eventually applied to a useful article is not relevant to her analysis. Conversely, Justice Breyer asserts that the designs were created with the uniforms in mind, and depend so thoroughly on the shape and cut of the uniform that they cannot be imagined separately.[67] These differing views on which element came first and how that chronology in turn affects the separability analysis presents a "chicken or the egg" issue that is likely to confuse lower courts.

Finally, both Justice Thomas's and Justice Breyer's opinions invite a discussion of the merger doctrine, which stems from the idea-expression dichotomy first addressed by the Supreme Court in *Baker v. Selden*.[68] The merger doctrine states, essentially, that while copyright protects expression and not ideas, if there are a limited number of ways to express an idea, the expression may merge with the idea itself and therefore become uncopyrightable.[69] Varsity Brands copyrighted its designs containing "chevrons . . . ,

---

65.   *See* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1147 (2d Cir. 1987) ("While the RIBBON Rack may be worthy of admiration for its aesthetic qualities alone, it remains nonetheless the product of industrial design. Form and function are inextricably intertwined in the rack, its ultimate design being as much the result of utilitarian pressures as aesthetic choices.").

66.   *Star Athletica*, 580 U.S. at 426 (Ginsburg, J., concurring).

67.   *Id.* at 439 (Breyer, J., dissenting).

68.   101 U.S. 99, 107 (1879). In this case, the Court held that blank account books could not be copyrighted because they represented Selden's system of bookkeeping, and therefore were an idea, not the expression of an idea (the latter of which would be copyright eligible).

69.   *See* Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967) ("When the uncopyrightable subject matter is very narrow, so that 'the topic necessarily requires,' if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party of parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance . . . We cannot recognize copyright as a game of chess in which the public can be checkmated.") (citations omitted).

lines, curves, stripes, angles, diagonals, inverted [chevrons], coloring, and shapes"—all common geometric elements for cheerleading uniforms.[70] It could be argued that only a finite number of arrangements of these elements would effectively serve as designs for cheerleading uniforms, as the uniforms need to be distinctive from regular dresses or athletic wear to serve their purpose of identifying the cheerleader. If signaling the wearer's position as a cheerleader is a valid utilitarian function (the Sixth Circuit ruled it was not[71]), then copyrighting these designs may be prohibiting other companies from achieving this signaling purpose by making many of the most effective designs "off-limits."

C.   WHERE THAT LEAVES US

While *Star Athletica* presents many follow-up questions and points of confusion for lower courts, the majority opinion appears to pave the way for expanded copyright protection of clothing items and costumes, areas that previously were seemingly off-limits to copyright.

The Supreme Court granting cert on *Star Athletica* was an opportunity to clarify the separability analysis in a lasting way. While Justice Thomas saw clarity in the case at hand and the two-part test he put forward, lower courts have struggled to find that same clarity in their own separability analyses.

II.   DISCREPANCIES AMONG LOWER COURTS

A.   MAJOR POST-*STAR ATHLETICA* OPINIONS

Post-*Star Athletica*, courts have become more permissive in allowing copyright protection for costumes.[72] In *Silvertop*, the Third Circuit upheld copyright protection for a banana costume.[73] The court acknowledged a previous Second Circuit case in which the court declined to address the copyrightability of costumes, but expressed that clothing items more generally are "particularly unlikely" to meet the separability tests: "[T]he very decorative elements that stand out [are] intrinsic to the decorative function

---

70.   Star Athletica, 580 U.S. at 410 (ellipsis in original).

71.   The Sixth Circuit asserts in its *Varsity Brands* decision that the function of the uniforms to identify someone as a cheerleader is not a valid utilitarian function under the Copyright Act because it merely "convey[s] information." Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 490 (6th Cir. 2015).

72.   Based on the *Star Athletica* majority opinion, this is a fair assessment by courts. The opinion itself states that the first requirement of separate identification "is not onerous"; merely identifying any element that has pictorial, graphic, or sculptural qualities is sufficient. *Star Athletica*, 580 U.S. at 414. As to step two, the Court observes that the "the independent-existence requirement is ordinarily more difficult to satisfy. *Id.* However, at this step, the Court is only looking for a PGS work that could have been created in a medium other than the useful article it is part of. *Id.* at 415. Under these guidelines, it seems inevitable that lower courts would deem costumes as meeting these permissive standards.

73.   Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc., 931 F.3d 215, 222 (3d Cir. 2019).

of the clothing."[74] The *Silvertop* court found that *Star Athletica* barred them from utilizing such an approach.[75] The opinion does not delve into the separability analysis, only acknowledging that the costume has sculptural elements that can be copyrightable.[76] The Eastern District of New York found *Silvertop* instructive when it was tasked with a copyright claim from a company selling Halloween costumes, undergoing a separability analysis to find protectable elements on the costumes at issue.[77] The *Silvertop* court expressed that while it believed clothing items were still not generally copyrightable, pictorial, graphic, or sculptural features of costumes have become an "exception" after *Star Athletica*.[78]

While courts have become more permissive in the area of costumes, they still show hesitance to allow the copyrightability of items better suited for patent protection. The Federal Circuit held in *Lanard Toys* that a toy chalk holder shaped like a pencil was not protectable under copyright law.[79] The court determined that because the copyright was for the chalk holder itself, it was invalid; under *Star Athletica*, "the feature cannot itself be a useful article."[80] Similarly, the Southern District of New York declined to extend copyright protection to a control panel operating a dryer.[81] The court held that the control panel could not exist independently of the utilitarian features because the panel itself was inherently utilitarian.[82]

B. AREAS OF LOWER COURT CONFUSION

While lower courts appear to be unified in how they now approach the copyrightability of costumes and fully-utilitarian patentable devices, there is mounting confusion in two major areas: decorative furniture or interior design, and geometric designs on useful articles.

1. Decorative Furniture and Interior Design

Lower courts have experienced significant confusion in determining separability of artistic design elements of furniture items or interior design features. In *Jetmax*, the Southern District of New York considered separability of teardrop-shaped covers for

---

74.   Whimsicality, Inc. v. Rubie's Costume Co., 891 F.2d 452, 455 (2d Cir. 1989).
75.   *Silvertop*, 931 F.3d at 222.
76.   *Id.* While the Third Circuit does not engage in the separability analysis, this was done at the district level. The district court noted that the combination of multiple features—the overall shape, length, black color on the ends, soft and smooth appearance of the fabric, and the color—is distinct from a natural banana and demonstrates sufficient creativity. Silvertop Assocs., Inc., v. Kangaroo Mfg., Inc., 319 F. Supp. 3d 754, 764–65 (D.N.J. 2018).
77.   Diamond Collection, LLC v. Underwraps Costume Corp., No. 17-CV-0061 (JS) (SIL), 2019 WL 347503, at *4 (E.D.N.Y. Jan. 22, 2019).
78.   Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc., 931 F.3d 215, 222 (3d Cir. 2019).
79.   Lanard Toys, Ltd. v. Dolgencorp LLC, 958 F.3d 1337, 1346 (Fed. Cir. 2020).
80.   *Id.* (quoting Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 415 (2017)).
81.   Town & Country Linen Corp. v. Ingenious Designs LLC, 436 F. Supp. 3d 653, 664–65 (S.D.N.Y. 2020).
82.   *Id.*

string lights.[83] Defendants in this case argued that the light set is not copyrightable because it is a useful article and lacks originality.[84] The court utilized the then-brand-new *Star Athletica* opinion to conduct a separability analysis. It was found that the light covers are sculptural elements that may be separated from the utilitarian features of the lights themselves.[85] The *Jetmax* court took a more literal or physical approach to separability than was taken in *Star Athletica*, determining that the covers can be separated because their purpose is almost purely decorative and they can be removed from the lights, leaving them still functional.[86]

The Central District of California similarly found copyright protectability in lampshades.[87] The *Corinna Warm* court admits to confusion in conducting its separability analysis: "[W]hat satisfies the 'independent-existence requirement' of *Star Athletica* is not yet well-defined in the context of the extreme breadth with which something can be construed to be a sculpture or sculptural."[88] Despite this challenge, the court asserts that the lampshades are copyrightable because they can be separated from the useful article, the core lamp features of the bulb, wires, and base.[89] Defendants argue that lampshades are themselves utilitarian, as they serve the function of softening the harsh light from the bulb.[90] The court concedes that "a lampshade is indeed part of a useful article," but extends copyright protection because the lampshades could hypothetically exist as sculptures in another medium.[91] *Corinna Warm* is a prime example of lingering court confusion; despite a lampshade serving a primarily (and undeniable) utilitarian purpose, the court upholds copyright merely because a sculpture of the same shape could exist and be considered a work of art.[92]

2. Geometric Designs on Useful Articles

There has also been confusion as to the treatment of geometric patterns adorning useful articles, both in terms of copyrightability of the geometric patterns themselves as well as their separability from the useful article. The District of New Jersey held that

---

83.   Jetmax Ltd. v. Big Lots, Inc., No. 15-cv-9597, 2017 WL 3726756, at *1 (S.D.N.Y. Aug. 28, 2017).

84.   *Id.* at *3.

85.   *Id.* at *6.

86.   *Id.* at *6. *See also Star Athletica*, 580 U.S. at 422 (undermining the physicality of separability: "The statutory text indicates that separability is a conceptual undertaking.").

87.   Corinna Warm and Studio Warm LLC v. Innermost Ltd., No. 21-cv-4402, 2022 WL 2062914, at *1 (C.D. Cal. Apr. 26, 2022).

88.   *Id.* at *3.

89.   *Id.*

90.   *See id.*

91.   *Id.*

92.   It is also worth noting that *Star Athletica* has been used by lower courts as an example of textualism. Both the First Circuit and Sixth Circuit have noted *Star Athletica* as standing for the proposition of grounding statutory interpretation purely in the language of the text. While Justice Thomas employs a textualist lens in his *Star Athletica* opinion, it is ironic to use this case as a textualist exemplar when courts have been struggling so significantly to make sense of the statutes explaining separability. *See* United States v. Arif, 897 F.3d 1, 6 n.5 (1st Cir. 2018); Hueso v. Barnhart, 948 F.3d 324, 333 (6th Cir. 2020).

geometric designs on car seat covers are eligible for copyright protection.[93] The *Day to Day* court's reasoning behind its decision indicates lingering confusion from the *Star Athletica* opinion. Primarily, the court rested on the *Star Athletica* majority's refute of Justice Breyer's argument that separating the design from the useful article simply recreates the useful article.[94] Instead, the *Day to Day* court emphasizes that even if the shape of the car seat cover is recreated by reproducing the design, that is not a bar to copyright.[95] The court also determines that the car seat cover designs can be separated from the utilitarian features of the covers in part because the design does not affect the seat covers' functionality or effectiveness.[96] This rationale, resembling the *Carol Barnhart* "objectively necessary" approach, was rejected by the *Star Athletica* majority.[97]

In *Inhale v. Starbuzz*, the Central District of California held that geometric designs on a hookah water container were not copyrightable.[98] The court takes issue with the breadth of copyright protection sought: "When an entity seeks protection for the arrangement of all the parts of an article, combined in the manner necessary to create the article, it is effectively seeking protection for the article as a whole. However, such wholesale protection is not allowed for useful articles."[99] The court cannot identify a specific pictorial, graphic, or sculptural feature to copyright separately from the utilitarian elements of the water container. Further, the design adorning the container contains geometric shapes "of the most common type."[100] Despite Justice Thomas's broad direction that courts may find a copyrightable pictorial, graphic, or sculptural work if the artistic elements could be transferred to another medium and constitute a work of art, the *Inhale* court determines that this test was not met. However, the court leaves open the possibility that a more creative geometric design could pass the *Star Athletica* test.[101] Following *Star Athletica*, courts have taken differing approaches to geometric patterns adorning useful articles, necessitating a more effective solution.

---

93.   Day to Day Imps., Inc. v. FH Grp. Int'l, Inc., No. 18-cv-14105, 2019 WL 2754996, at *1 (D.N.J. July 2, 2019).

94.   *Id.* at *5.

95.   *Id.*

96.   *Id.* at *6.

97.   Jane Ginsburg, *The Sum Is More Public Domain than Its Parts?: US Copyright Protection for Works of Applied Art Under* Star Athletica*'s Imagination Test*, 166 U. PA. L. REV. 83, 91 (2017) (quoting Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 421 (2017)).

98.   Inhale, Inc. v. Starbuzz Tobacco, Inc., No. 11-cv-03838, 2017 WL 4163990, at *1 (C.D. Cal. May 8, 2017) (This case was decided prior to *Star Athletica*, though the court declined to reconsider its decision, explaining that applying the *Star Athletica* test would not change the outcome).

99.   *Id.* at *3.

100.   *Id.*

101.   *Id.*

III. PROPOSED SOLUTION: AMENDING THE STATUTE WITH THE SECOND CIRCUIT AS A GUIDE

A. ISSUES THE SOLUTION MUST ADDRESS

1. Insufficient Distinction Between Applied Art and Industrial Design

The *Star Athletica* opinion appears to classify "art" too broadly, implying that anything with creative properties could qualify for copyright protection.[102] Justice Thomas articulates that the geometric patterns adorning the cheerleading uniforms were sufficiently creative pictorial, graphic, or sculptural works because if transferred to another medium—such as a canvas—they could be seen as a work of two-dimensional art.[103] Among lower courts, this issue appears most notably in the *Corinna Warm* decision, in which obviously utilitarian lampshades were granted copyright protection because they could have possibly existed as sculpture, had they been crafted in a different medium.[104] Both cases illustrate the potential for copyright law to be too generous to designs of useful articles, perhaps finding creativity and artistic prowess in situations not imagined by Congress or the Founders when they intended to protect the "Writings" of "Authors."[105]

2. Imaginative Nature of the Current Conceptual Separability Test

Another critical issue causing lower court confusion and disparate outcomes is the imaginative and hypothetical nature of the *Star Athletica* test. In asserting that "separability is a conceptual undertaking," the *Star Athletica* majority is necessitating an exercise that is at least partially determinative on the strength of a judge's imagination.[106] The confusion caused by this type of test is seen in Justice Breyer's use of the same test to reach a different outcome. While Justice Thomas conceived of the uniform designs as a two-dimensional work of art, Justice Breyer could not: He could only see a reproduction of the uniforms themselves.[107] While all statutes or legal tests are open to some amount of interpretation, basing a test on a judge's imaginative capabilities is a recipe for confusion that must be clarified.

---

102.   This classification becomes even broader when considering the Supreme Court's decision in *Bleistein*, in which Justice Holmes asserted that judges should not fancy themselves art critics for the purposes of determining copyrightability. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

103.   Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 417–18 (2017).

104.   *See* Corinna Warm and Studio Warm LLC v. Innermost Ltd., No. 21-cv-4402, 2022 WL 2062914, at *3 (C.D. Cal. Apr. 26, 2022).

105.   For further discussion of *Star Athletica*'s failure to properly distinguish between applied art and industrial design, see Rebecca Tushnet, *Shoveling a Path After* Star Athletica, 66 U.C.L.A. L. REV. 1216 (2019).

106.   Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 422 (2017).

107.   *See* discussion *infra* Part I.B.

B.   POTENTIAL SOLUTION I: SUPREME COURT CLARIFICATION

As a potential solution, the Supreme Court could grant certiorari on another copyright case involving an artistic design on a useful article, taking that opportunity to further clarify its approach to conceptual separability. This would allow the Court to cabin its interpretation of a design element being capable of existing as a separate work of art, and offer more standardized guidelines for judges to follow. A judicial opinion would allow for a more long-form, nuanced explanation of these issues with direct guidance on how judges should conduct their analyses.

However, there are significant logistical concerns to this solution. It is doubtful that deciding on another copyright case will lead to a revised test. Clarifying the test with the above issues in mind would likely lead to a different outcome in a case like *Star Athletica*. If the conceptual nature of the separability analysis were fettered, the cheerleading uniform designs would likely not be seen as separable works of art, but rather designs of minimal creativity that enhance the utilitarian purposes of the uniform (and cannot be separated from those purposes).

While the makeup of the Supreme Court has changed since 2017, five of the six majority voters in *Star Athletica* still currently sit on the court—Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Sotomayor, and Justice Kagan. It can be presumed that these Justices all agreed with the outcome of *Star Athletica* and the separability test as was applied. Therefore, due to the corresponding logistical challenges, Supreme Court clarification on the *Star Athletica* test is not the ideal method of clarifying lower court confusion.

C.   POTENTIAL SOLUTION II: AMENDING THE STATUTE

Another solution would be for Congress to amend a portion of the Copyright Act of 1976 to more clearly define separability or establish a statutory test. As a textualist opinion, *Star Athletica* grounds itself in admittedly ambiguous statutory text; amending that text would more effectively guide courts looking to be true to the statute. Further, it would give Congress a chance to express whether it had intended for the expanded protection now offered to costumes.[108]

Choosing not to amend the statute could have significant economic and market effects.[109] Under the current ambiguous test, litigation among fashion, furniture, and interior design companies is likely to continue as manufacturers struggle to understand what is infringement and what is not.[110] Further, the market for Halloween and other types of costumes is likely to be further disrupted as more courts rule in favor of copyrighting design elements of costumes. Halloween spending in 2023 was projected to total a record $12.2 billion; this is a major industry with the potential to take a hit

---

108.   *See* Angelo Marchesini, *Thin Separability: An Answer To Star Athletica*, 43 SEATTLE U. L. REV. 1087, 1105 (2020).

109.   *Id.*

110.   *Id.*

should costumes be copyrighted en masse.[111] Amending the statute gives Congress the power to minimize the effects on the costuming industry by choosing not to offer copyright protection, should it desire to go in that direction.

D.   THE SOLUTION: AMENDING THE STATUTE BASED ON SECOND CIRCUIT TESTS

Based on the weaknesses of the current separability test and the likelihood of success of each solution, the ideal solution would be amending the Copyright Act of 1976 using the Second Circuit's three major pre-*Star Athletica* tests—from *Brandir*, *Carol Barnhart*, and *Kieselstein-Cord*—as a guide. The Second Circuit opinions aim to concretize the ambiguous standards of being "identified separately from" and "existing independently of" utilitarian features. This type of specificity eliminates most of the imaginative guesswork currently required of judges and is vital for standardizing lower court opinions.

The primary-subsidiary test, advanced in *Kieselstein-Cord*,[112] is perhaps the least helpful in guiding the amendment of the statute; by requiring that the artistic features be "primary" to the "subsidiary" utilitarian function is missing the point of designs on useful articles. If an item is a useful article, then practically by definition, its utilitarian features will be primary to the artistic designs adorning it. The *Star Athletica* cheerleaders donned their uniforms for the primary purposes of (1) identifying themselves as cheerleaders, and (2) utilizing the uniforms' design features to aid in their cheers, tumbling, etc. Of course, the designs could have attracted the coach to choose certain uniforms over others, but it is very unlikely that these uniforms are being worn primarily for their designs (not for the utilitarian functions). Therefore, this test seems to hold PGS works adorning useful articles to too high of a standard, and one that will be difficult for judges to decide on cohesively.[113]

The design-process test from *Brandir* is much more promising.[114] The idea behind this test is that creators should not receive the benefit of copyright protection for an element that came about as a result of the utilitarian feature and was not the direct result of independent creativity.[115] Codifying a version of this test would avoid one of Justice Breyer's chief complaints about the *Star Athletica* opinion: that removing the

---

111.   Lottie Watts, *Halloween Spending To Reach Record $12.2 Billion as Participation Exceeds Pre-Pandemic Levels*, NAT'L RETAIL FED'N (Sept. 20, 2023), https://nrf.com/media-center/press-releases/halloween-spending-reach-record-122-billion-participation-exceeds-pre   [https://perma.cc/3N5H-PZS3] [https://web.archive.org/web/20240119191245/https://nrf.com/media-center/press-releases/halloween-spending-reach-record-122-billion-participation-exceeds-pre].

112.   Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980).

113.   Daan G. Erikson argues for the use of a test similar, but not identical to, the primary-subsidiary test: Judge Forrest's "primary purpose" test is utilized in Jetmax Ltd. v. Big Lots, Inc., No. 15-cv-9597, 2017 WL 3726756, at *6 (S.D.N.Y. Aug. 28, 2017). While Erikson notes that Judge Forrest's "primary purpose" test focuses more on separability than the primary-subsidiary test, I believe the same problem remains. Determining whether something is "primarily" artistic is simply too subjective to effectively clarify the post-*Star Athletica* confusion. *See* Daan G. Erikson, *Copyright Protection for Conceptually Separable Artistic Features Post-*Star Athletica*: A Useful Article on Useful Articles*, 18 CHI-KENT J. OF INTELL. PROP. 56, 78 (2019).

114.   Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1147–48 (2d Cir. 1987).

115.   *Id.* at 1145.

designs and transferring them to a piece of paper or a canvas would produce a picture of a cheerleading uniform. The designs inherently stem from the shape of the uniforms, imposing natural limitations nonexistent with a blank canvas. If a design cannot be copyrighted because it is largely the result of functional considerations, *Star Athletica* would likely be decided the other way. The lines and chevrons were designed with the purpose of appearing on the uniforms and complementing their existing shape and cut.[116] Therefore, it seems that much of the design process was the result of functional considerations rather than creativity. Including a design-process test in the statute would serve a clarifying function for lower courts while staying true to the Constitutional basis of copyright.[117]

The objectively necessary test from *Carol Barnhart* nicely complements the design-process test.[118] Determining whether the design element is necessary to the utilitarian function necessarily addresses the "signaling" issue that Justice Breyer alludes to in his dissent. *Star Athletica*'s focus on cheerleading uniforms adds a complicated dimension because the uniform designs can either be seen as purely aesthetic, or as functional in that they identify the wearer as a cheerleader in a way a plain uniform could not. While cases like this will allow for some judicial discretion, gauging whether the design element is necessary to the functioning of the useful article serves as a helpful proxy for whether the design element is truly separate.

The statute would be best amended by adding another subsection to the § 101 definitions that would better define the phrases "identified separately from" and "existing independently of."[119] These definitions should encapsulate both the design-process and objectively necessary tests. I propose that "identified separately from" be defined roughly as follows: The pictorial, graphic, or sculptural features of the design do not exist primarily to enhance, nor as a direct result of, the functionality of the useful article. I believe that the design-process test gets to the heart of the separate identification issue; if a design feature primarily exists because of the utilitarian features of a useful article, there is no meaningful separation. Of course, this proposed definition is somewhat clunky and invites further debate on what it means for a design to be the "direct result of" an object's utilitarian features. However, this definition guides judicial thinking in a more structured way by looking for creativity in the form of artistic choice, a principle at the heart of the copyright statute.[120]

Similarly, I propose that "existing independently of" be defined as follows: "The pictorial, graphic, or sculptural features of the design are not necessary in carrying out one or more of the useful article's utilitarian features. This definition, adapted from the

---

116.   Star Athletica L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 439 (2017) (Breyer, J., dissenting).

117.   It has been argued that the *Brandir* test's focus on process rather than result does not reflect existing copyright law, nor the goals of copyright law. *See* Perlmutter, *supra* note 12, at 372. However, copyright law, as specified in the Constitution, seeks to protect the "Writings" of "Authors": their original, creative work. Requiring that protectable works be the result of a creative process, rather than of limitations imposed by functionality, is in fact closely aligned with the purposes and goals of copyright.

118.   Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411, 419 (2d Cir. 1985).

119.   17 U.S.C. § 101.

120*.   See* 17 U.S.C. § 102 (requiring "original works of authorship").

objectively necessary test, seems to be the most straightforward proxy for independent existence. A design element and a utilitarian feature can only truly be independent if they do not depend on one another. Again, this definition still allows for some judicial discretion in a case like *Star Athletica*, where the parties—as well as the district and circuit courts—disagree over whether the designs play a totally aesthetic or somewhat utilitarian role.[121] However, the addition of the phrase "one or more" to the definition creates a stricter standard where copyright can be invalidated if the design feature is necessary for even one of the useful article's utilitarian functions.

It has been suggested that a more effective course of action would involve explicitly funneling useful article designs into the realm of design patents.[122] In drafting § 101, Congress did not explicitly shape a policy for designs of useful articles.[123] The *Star Athletica* majority then declined to expand Congress' conception of separability, "merely highlight[ing] § 101's flawed construction" instead of providing its own clarity.[124] While it is clear from *Star Athletica* and later lower court decisions that the separability issue has not been adequately solved, funneling useful article designs to design patents is unlikely to bring about long-term improvement.

On a functional level, design patents are unlikely to be the right avenue for costume, uniform, or fashion designers to protect their work. Design patents are only valid for fifteen years, significantly shorter than the duration of copyright protection.[125] Designers may find this time period insufficient to effectively protect their work. Further, as a form of patent protection, design patents require a long and intense application period,[126] in which the United States Patent and Trademark Office evaluates the design for novelty and non-obviousness, among other requirements.[127] These stringent requirements could disqualify a large portion of designs; many fashion designers gain inspiration from other artists, and this is not something we should seek to punish or disincentivize. Conversely, copyright's requirement of independent creation and a "modicum of creativity" is better suited to the nature of costume or uniform design.[128] Therefore, the most effective solution does not completely separate designs of useful articles, but rather places clearer restraints on the requirements of separate identification and independent existence.

---

121.   Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 470–71 (6th Cir. 2015).

122.   *See* Emily Smithey, *The Borderlands of Copyright: The Useful-Article Doctrine in Light of* Star Athletica v. Varsity Brands, 87 UMKC L. REV. 461, 478 (2019).

123.   *Id.* at 477.

124.   *Id.*

125.   35 U.S.C. § 173. *See also* Marchesini, *supra* note 91, at 1105.

126.   *See* Brief of Council of Fashion Designers of America, Inc. as Amicus Curiae in Support of Respondents at 16, Star Athletica, L.L.C. v. Varsity Brands, Inc., No. 15-cv- 866, 2016 WL 5404369 (2016) ("In 2015, the average time for an initial determination of patentability was 17.3 months, during which time a designer might release up to ten collections.").

127.   35 U.S.C. § 171.

128.   Feist Publ'ns, Inc. v. Rural Television Serv. Co., 499 U.S. 340, 346 (1991) ("originality requires independent creation plus a modicum of creativity").

IV. CONCLUSION

The *Star Athletica* opinion was published at a time when lower courts were struggling to understand separability of designs of useful articles and guidance was needed to standardize the analysis. The majority established a two-part test whose application it deemed "straightforward."[129] While the opinion successfully clarified that conceptual separability is sufficient to find a copyrightable pictorial, graphic, or sculptural work, it falls short in properly standardizing the test that should be used in the separability analysis, which has led to confusion among lower courts. We primarily notice this confusion in furniture and interior design as well as geometric designs on useful articles. Courts have struggled with the overly imaginative nature of the test and the majority's broad definition of "art." To solve this confusion, the Supreme Court's ambiguous test needs to be clarified, ideally at the statutory level, to provide workable proxies for the ambiguous requirements of "identified separately from" and "existing independently of." The Second Circuit's design-process and objectively necessary tests serve as useful guides in crafting new statutory definitions. With increased clarity, conceptual separability can become an issue better understood by judges and litigants, and decided in a more standardized way by courts.

---

129.   Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 417 (2017).

The Children Are Not for Sale: Stamping Out the Monetized Sharenting Entertainment Industry and Rehabilitating Parental Rights

Gabriella Cory

INTRODUCTION

Saving the children is once again on the sociopolitical docket, and the legislature has an opportunity to enact legislation that might actually save children.[1] A pertinent child welfare concern shared by psychologists, child advocates, and the Federal Government today is an increasing youth mental health crisis and overwhelming evidence that social media use is a primary cause. Meta has even joined the cause,[2] launching a public relations campaign voicing its openness to congressional reform.[3] Additionally, the bipartisan "Kids Online Safety Act" is pending in both the Senate and House of Representatives as parallel bills Senate Bill 1409 and House Bill 7891, respectively.[4] This is a bipartisan effort to pass evidence-based regulation aimed at protecting children by

supporting parental rights.[5] Despite this progress, there is one extremely big gap in this piece of legislation that runs the risk of undermining it entirely: a generational gap.

Children who were raised on the internet are now parenting on the internet. When a parent posts pictures, videos, or publicly discusses their child in detail online, this is called "sharenting."[6] In practice, sharenting can refer to a range of content. Some forms include high levels of child participation, such as scripted skits with their parents.[7] Others involve passive participation, such as parents incorporating filming into their daily routines.[8] Online posts divulging stories with identifiable information or repurposing of already existing photos of the child is a common form of sharenting.[9] Scholars in law and psychology problematize excessive sharenting for contributing to harm already associated with general childhood internet use: reputational harm, privacy risks, vulnerability to harassment and cyberbullying, or simply amplified general embarrassment.[10] Although those sound like harms a parent would intuitively avoid, the unregulated rollout of the internet is likely to blame for the public's unhealthy relationship with it.

As technology rapidly developed over the past several decades, the social role of the internet has been a loose cannon. Sociological shifts in internet use impacted different age demographics at different developmental moments. For example, the Millennial generation ranges from people born in roughly 1981 through 1996, and Generation Z

---

5.   *See* Press Release, Todd Young, U.S. Senator for Indiana, Young, Colleagues Introduce Bipartisan Kids Online Safety Act (May 4, 2023), https://www.young.senate.gov/newsroom/press-releases/young-colleagues-introduce-bipartisan-kids-online-safety-act/   [https://perma.cc/K658-WZM2] [https://web.archive.org/web/20241122221508/https://www.young.senate.gov/newsroom/press-releases/young-colleagues-introduce-bipartisan-kids-online-safety-act/].

6.   *Sharent*,   DICTIONARY.COM,   https://www.dictionary.com/browse/sharent [https://perma.cc/SBD8-FGZK] [https://web.archive.org/web/20240917221044/https://www.dictionary.com/browse/sharent] (last visited Sept.   25,   2024);   *Sharenting   (n.)*,   OXFORD   ENG.   DICTIONARY, https://www.oed.com/dictionary/sharenting_n?tl=true,   [https://perma.cc/UB8K-Z9TH] [https://web.archive.org/web/20241111204056/https://www.oed.com/dictionary/sharenting_n?tl=true] (last visited Oct. 10, 2024).

7.   Referred herein as "family vlog[ging]".

8.   This is also a form of family vlogging.

9.   *See, e.g.*, Christie Tate, *My Daughter Asked Me To Stop Writing About Motherhood. Here's Why I Can't Do That*, WASH. POST (Jan. 3, 2019), https://www.washingtonpost.com/lifestyle/2019/01/03/my-daughter-asked-me-stop-writing-about-motherhood-heres-why-i-cant-do-that/ [https://web.archive.org/web/20240918004428/https://www.washingtonpost.com/lifestyle/2019/01/03/my-daughter-asked-me-stop-writing-about-motherhood-heres-why-i-cant-do-that/].

10.   *See, e.g.*, Amanda G. Riggio, *The Small-Er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493 (2021); Jessica Pacht-Friedman, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected from Exploitation in the United States*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 361 (2022); Melanie N. Fineman, *Honey, I Monetized the Kids: Commercial Sharenting and Protecting the Rights of Consumers and the Internet's Child Stars*, 111 GEO. L.J. 847 (2023); Neyza Guzman, *The Children of YouTube: How an Entertainment Industry Goes Around Child Labor Laws*, 8 CHILD & FAM. L.J. 85 (2020); Charlotte Yates, *"Kidfluencing": Protecting Children by Limiting the Right To Profit From "Sharenting"*, 25 VAND. J. ENT. & TECH. L. 845 (2023).

("Gen Z") ranges from people born in 1997 through 2012.[11] At-home computer use increased rapidly in the 1990s, with internet access in American households rising from two percent in 1992 to twenty-six percent in 1998.[12] By 2007, sixty-four percent of teens ages twelve through seventeen reported engaging in some form of content creation, ranging from blogs to online communities to publishing works of art.[13] That same year, Facebook started incorporating user data into a user-targeted advertising structure and YouTube introduced in-video advertisements and its paid Partner Program.[14] The average teen's diary and locker room discussion became a marketplace overnight without any real means of understanding the implications of this shift. This same cohort is now in their twenties, thirties, and forties. Many still use social media as a form of diary or group discussion, but now the topics of discussion include their children. Although this narrative thread is not the only explanation for the proliferation of sharenting, a successful legislative agenda that aims to protect children's online safety needs to take the history of the internet into account.

An unregulated internet helped create a generation of parents primed to share an unsafe amount of information about their family life and seamlessly transitioned into an infrastructure that facilitates monetizing that habit.[15] Increasingly, parents who post pictures and videos of their kids are gaining lucrative mass followings for the content they post.[16] Parents can profit off of this following by teaming up with a given social media platform to get a share of related ad revenue from the platform, or get paid directly by companies to discuss products in their family posting.[17] Parents can also use a subscription model in which followers pay to get bonus content, though Meta announced efforts to crack down on this specific method in response to criticism that its predominant content and clientele sexualize children.[18] When follower counts start

---

11. Michael Dimock, *Defining Generations: Where Millennials End and Gen Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), https://www.pewresearch.org/short-reads/2019/01/17/where-millennials-end-and-generation-z-begins/ [https://perma.cc/L5HD-BBPT] [https://web.archive.org/web/20240918010109/https://www.pewresearch.org/short-reads/2019/01/17/where-millennials-end-and-generation-z-begins/].

12. Maria C. Papadakis, *Complex Picture of Computer Use in the Home Emerges*, NAT'L SCI. FOUND. (Mar. 31, 2000), https://www.nsf.gov/statistics/issuebrf/sib00314.htm [https://perma.cc/9SXE-B9H5] [https://web.archive.org/web/20240918010250/https://www.nsf.gov/statistics/issuebrf/sib00314.htm].

13. *More Teens Are Creating and Sharing Material on the Internet*, PEW RSCH. CTR. (Dec. 19, 2007), https://www.pewresearch.org/internet/2007/12/19/more-teens-are-creating-and-sharing-material-on-the-internet/ [https://perma.cc/3SBQ-QEF7] [https://web.archive.org/web/20240918203315/https://www.pewresearch.org/internet/2007/12/19/more-teens-are-creating-and-sharing-material-on-the-internet/].

14. *Facebook To Use Personal Information To Target Advertisements* (Nat'l Pub. Radio broadcast Aug. 28, 2007); Guzman, *supra* note 10, at 94.

15. *See generally*, Riggio, *supra* note 10.

16. *See* Sapna Maheshwari, *Online and Earning Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html [https://web.archive.org/web/20240918204412/https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html].

17. *Id.*

18. *See* Michael H. Keller & Jennifer Valentino-DeVries, *Instagram and Facebook Subscriptions Get New Scrutiny in Child Safety Suit*, N.Y. TIMES (Feb. 26, 2024), https://nytimes.com/2024/02/26/us/instagram-

reaching the thousands or millions, children can turn into an online celebrities. Child-rearing is becoming a form of self-expression in an era in which online self-expression is a viable career option, all while more and more commerce is online.[19] The result is a new entertainment industry in which parents combine their parental liberties and freedom of expression to commodify their parent-child relationship: the Monetized Sharenting[20] Industry.[21]

This Note argues that Congress should enact a wholesale ban on Monetized Sharenting content online.[22] It supplements various proposals in legal scholarship addressing sharenting in general and rejects proposals suggesting that children's

---

facebook-children-subscriptions-predators.html
[https://web.archive.org/web/20240918204716/https://www.nytimes.com/2024/02/26/us/instagram-facebook-children-subscriptions-predators.html]; Jeff Horwitz & Katherine Blunt, *Meta Staff Found Instagram Tool Enabled Child Exploitation. The Company Pressed Ahead Anyway.*, WALL ST. J. (Feb. 22, 2024), https://www.wsj.com/tech/meta-staff-found-instagram-subscription-tool-enabled-child-exploitation-the-company-pressed-ahead-anyway-a18e81e6
[https://web.archive.org/web/20241111204841/https://www.wsj.com/tech/meta-staff-found-instagram-subscription-tool-enabled-child-exploitation-the-company-pressed-ahead-anyway-a18e81e6]; Jessica Longbottom, *Parents Still Selling Revealing Content of Their Kids on Instagram, Despite Meta's Promises To Ban the Practice*, ABC NEWS (Aug. 8, 2024), https://www.abc.net.au/news/2024-08-09/instagram-meta-monetised-child-influencer-account-ban/104190956   [https://perma.cc/29KN-VPDN]
[https://web.archive.org/web/20240918205515/https://www.abc.net.au/news/2024-08-09/instagram-meta-monetised-child-influencer-account-ban/104190956].

    19.   Michelle Faverio & Monica Anderson, *For Shopping, Phones Are Common and Influencers Have Become a Factor—Especially for Young Adults*, PEW RSCH. CTR.(Nov. 21, 2022), https://www.pewresearch.org/short-reads/2022/11/21/for-shopping-phones-are-common-and-influencers-have-become-a-factor-especially-for-young-adults/   [https://perma.cc/WK7V-NSXE]
[https://web.archive.org/web/20240918205709/https://www.pewresearch.org/short-reads/2022/11/21/for-shopping-phones-are-common-and-influencers-have-become-a-factor-especially-for-young-adults/].

    20.   *Sharenting* will refer to any online content a parent or guardian publicly posts that reveals their child's face or identifiable image/footage, or any identifying or patently sensitive information. Identifying information includes, but is not limited to, the child's first, middle, and last name; date of birth; municipality; home address; current or scheduled location; and name of school. Patently sensitive information includes medical information; names of friends, acquaintances, and teachers; sexual orientation; or any information about the child that the parent/guardian knows or should have known will inflict emotional distress upon the child were the parent/guardian to discuss it online.

    21.   This Note will only frame the issue around Industrial-Level Monetized Sharenting, rather than small-scale, though some of these harms will overlap. For legal scholarship discussing the privacy and emotional harm of small-scale or non-monetized sharenting, see, e.g., Holly Kathleen Hall, *Oversharenting: Is It Really Your Story To Tell?*, 33 J. MARSHALL J. INFO. TECH. & PRIV. L. 121 (2018); Keltie Haley, *Sharenting and the (Potential) Right To Be Forgotten*, 95 IND. L.J. 1005 (2020); Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839 (2017); Kate Hamming, *A Dangerous Inheritance: A Child's Digital Identity*, 43 SEATTLE U. L. REV. 1033 (2020); Shannon Sorensen, *Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 CHILD. LEGAL RTS. J. 156 (2020).

    22.   For Sharenting to become *Monetized*, it means any form of revenue linked to the sharenting content or its user profile, either directly or by public association. This means in addition to platform-based partnerships and direct sponsorships from brands, accounts and posts with sharenting content that also link or promote additional avenues of funding count as Monetized Sharenting (e.g., an author posting sharenting content on the same user profile on which they primarily used to promote their book online).

participation in Monetized Sharenting be regulated like child actors.[23] Part I will provide a brief history of parental rights and introduction to the Child Wellbeing Framework of children's rights as it applies to the issue of sharenting, current court holdings on the constitutionality of limiting free speech to advance the state interest of child welfare, and the developing bipartisan legislative agenda around childhood social media use (currently referred to as Kids Online Safety Act). Part II will use a "Child Wellbeing" lens to analyze how anachronistic assumptions made in the Kids Online Safety Act about Millennial/Gen Z parents run a risk of compounding Monetized Sharenting's current harm towards kids and ultimately undermine the stability of parental rights by sharpening the divide between the parent and child's interests. Part III will argue that a federal legislative ban on Monetized Sharenting content is legally justifiable under the current state of family law and relevant areas of First Amendment law. This Note predicts that a wholesale federal ban with the brunt of liability placed on online platforms and advertisers is the most effective way to mitigate the harm of parental social media use on children, and will ultimately protect parental rights of younger generations of families and the individual free speech liberties of parents. It is urgent for lawmakers to recognize that the current political push for social media regulation presents an opportunity to stamp out an abusive industry before too many economic interests are tied to it.

I.   PART I: BACKGROUND

A.   BALANCING PARENTS' RIGHTS AND CHILDREN'S WELLBEING

A ban on Monetized Sharenting will create limitations on two distinct personal liberties for parents: their parental liberties and their freedom of speech. Courts and legislatures have limited the scope of parental liberties of raising children as they see fit, establishing a state interest in protecting child welfare.[24] This yielded mixed results in protecting children's wellbeing.[25] It gave the government a way to protect children, but resulted in disproportionate family breakdown among poor, Black, and Indigenous families.[26] The process of establishing the state's interest in child welfare included disentangling parents' parental liberty from their other liberties, such as freedom of

---

23.   For prior discussion on a child-labor approach to regulating Monetized Sharenting, see, e.g., Katherine Wirvin, *A Star Is Born: Lack of Income Rights for Entertainment's Newest Stars, "Kidtubers"*, 76 FED. COMMC'NS. L.J. 61 (2023); Katherine LePage, *From Playtime To Paychecks: How Parents of Child Influencers Continue To Evade Child Labor Laws*, 24 J. HIGH TECH. L. 741 (2023); Amber Edney, *"I Don't Work for Free": The Unpaid Labor of Child Social Media Stars*, 32 U. FLA. J.L. & PUB. POL'Y 547 (2022); Note, *Sharenting Is Here To Stay, so Now What?*, 45 Seattle U. L. Rev. 1229 (2023); Tabetha Bennett, *Child Entertainers and Their Limited Protections: A Call For an Interstate Compact*, 9 CHILD & FAM. L.J. 131 (2021); Erin E. O'Neill, *Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing*, 72 STAN. L. REV. ONLINE 42 (2019).

24.   *See* Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

25.   *See generally* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371 (2020).

26.   *Id.* at 1389.

expression. The history of the government and the courts' strengths and weaknesses around protecting children's wellbeing needs to be a policy consideration in and of itself in order to make a ban on Monetized Sharenting an agent of family stability and equity. The legal distinction between parental liberty and free speech liberty provides a Monetized Sharenting ban the structural integrity it needs to be benevolent *and* enforceable.

1. The Evolution of Family Law into the Child Wellbeing Approach

Some courts and legislatures appear to be moving toward a more balanced approach to child welfare, looking to empirical research when assessing harm and wellbeing.[27] When making policy or legal decisions around child welfare, it is useful to understand the legal and social history. Balancing the personal liberty interest of parents and guardians with the state's interest in the child's wellbeing is a nuanced and difficult task that courts and legislatures have struggled with over the past century.[28] Clare Huntington and Elizabeth Scott's Child Wellbeing Framework is an approach to the legal status of children that rejects this dichotomy.[29] Under the Child Wellbeing approach to child welfare, the state, the parent, and the child all have a mutual interest in the child's wellbeing.[30] The parent's individual liberty interest in their parenthood rests in the wellbeing of the child.

Although there has been progress in balancing out the tensions of past child welfare regimes, they still characterize some assumptions and case law today. Up until the twentieth-century, common law implicitly treated the parent-child relationship as if the child were the parent's property.[31] Eventually, a progressive movement in government set up institutions and laws at the end of the nineteenth century and throughout the beginning of the twentieth century—setting up child welfare agencies, restricting child labor, and requiring children attend school.[32] Courts explicitly recognized the state's interest in child welfare and its ability to limit parental liberties.[33] The Supreme Court emphasized that the state had an interest in the wellbeing of children because a "democratic society rests, for its continuance, upon a healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[34]

Although the infrastructure for helping children was significant, its execution led to some negative outcomes for children and families. As Huntington and Scott point out, many child welfare policies were disproportionately used against poor, Black, Native American, and Native Alaskan families.[35] Many legal scholars note that state

---

27. *Id.* at 1398.
28. *See generally id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1380; Sorensen, *supra* note 21, at 157.
32. Huntington & Scott, *supra* note 25, at 1381; Jonathan Grossman, *Fair Labor and Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22 (1978).
33. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 168–69 (1944).
34. *Id.*
35. Huntington & Scott, *supra* note 25, at 1388–89.

intervention sometimes break up families for parental behavior that is not categorically abusive but rather culturally offensive to middle class sensibilities.[36] Even as child welfare made a shift to recognizing children as individuals with their own rights rather than as a manifestation of state interest, unequitable outcomes persisted.[37] Children were treated both as incapable of making adult decisions in some contexts, while having a certain level of individual interest and responsibility as a citizen in others. Contradictions in the law made young people legally vulnerable to harsh punishment during the tough-on-crime era.[38] Courts and legislatures struggled to develop a coherent legal definition of childhood that protects them from harm while also keeping their autonomy and individual rights intact.

Huntington and Scott posit that a Child Wellbeing conception of legal childhood is a viable path forward to fixing the state of family law.[39] Increasingly, legislators are looking more toward empirical research on childhood development in the fields of psychology and biology, providing a path forward for a more objective assessment of child welfare.[40] The Child Wellbeing framework prescribes: (1) an emphasis on empirical research in regulation; (2) an increased recognition of the collective self-interest we as a society have in the wellbeing of children; and (3) recognizing and remedying the threat of racial and class bias to the legitimacy of state regulation of children.[41] This approach also favors respecting the social role of parents and giving them support rather than crisis intervention. Not only does this help parents, but it is a more effective approach to helping children, as it prevents harm and provides the stability of keeping their family intact—which is empirically proven to correlate to better developmental outcomes. It identifies the child's wellbeing as a shared mutual interest between the state, the child, and the parent (with parental liberty characterized as stake in the child's wellbeing). The zig-zagged history of children in the law has the potential to support a more holistic child welfare framework, but also leaves the door open for further incoherence in the law, depending on how it is applied moving forward.

---

36.   *Id.* at 1397.

37.   *Id.* at 1385 (explaining that the push for children's individual rights coincided with the tough on crime era, leading to "procedural due process rights for juveniles in delinquency proceedings, but also . . . to sweeping punitive changes in the 1980s and 1990s. In both the juvenile justice and child welfare systems, critics challenged the harmful impact of state intervention on families and children of color.").

38.   These changes continued the trend of inequitable outcomes by economic status and race. *Id.* at 1388.

39.   *Id.* at 1456.

40.   *Id.* at 1398.

41.   *Id.*

2. The Separation Between a Parent's Liberties of Self-Expression and their Child

Courts treat a parent's liberty of raising their child as they see fit as a separate freedom from their individual First Amendment freedoms. In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Supreme Court established the liberty for parents to make decisions about their child's education and upbringing.[42] Because the issue of the case concerned a state law prohibiting religious schools, the Court had an opportunity to discuss First Amendment concerns, but limited the discussion to the liberty interest of how one raises their child.[43] The Court did not make any assessment as to whether or not a child's upbringing could be a component of one's freedom of expression.

The Court made an explicit separation between a parent's individual First Amendment religious protection and their liberty to raise their child in *Prince v. Massachusetts*.[44] In *Prince*, a mother was charged with violating a state child labor law when she brought her children with her to preach and pass out religious print-outs on the street.[45] The Supreme Court upheld this conviction.[46] In addition to strengthening the state's interest in child welfare and limiting the scope of parental liberties over upbringing, this had two implications for a parent's First Amendment rights. The first, more general First Amendment takeaway from *Prince*, is that the state can limit a parent's freedom of religious expression if it interferes with a compelling state interest.[47] The second, more nuanced takeaway, is that it drew a clear line between the parent's parental liberty interest from their First Amendment interest. According to the court, the mother in *Prince* claimed that the child labor law in question was a state incursion on "acts said to be a rightful exercise of *her* religious convictions."[48] The Court nonetheless posed the legal question around violation of two distinct liberties: the parent's liberty of dictating their child's upbringing, and the child's liberty to exercise their religion.[49] The extent of the overlap between the mother's religion and the child's upbringing was the right to encourage them to exercise their religious beliefs.[50] At no point does the Court engage with the notion that the parent's upbringing of the child constitutes a form of expression for the purposes of First Amendment protections. Although this detail is typically not what scholars note as the primary holding of *Prince*,

---

42.   Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
43.   *See* Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).
44.   Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944).
45.   *Id.* at 161–162.
46.   *Id.* at 171.
47.   *Id.* at 166. For application of *Prince* to limiting parental religious expression, see, e.g., Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348, 353 (4th Cir. 2011); Whitlow v. California, 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016); Doe v. Christie, 33 F. Supp. 3d 518, 528–529 (D.N.J. 2014), *aff'd sub nom.* Doe ex rel. Doe v. Governor of New Jersey, 783 F.3d 150 (3d Cir. 2015).
48.   *Prince*, 321 U.S. at 159 (emphasis added).
49.   *Id.* at 164.
50.   *Id.* at 165.

courts have applied this component of the ruling, re-enforcing a refusal to collapse parental liberty into a parent's First Amendment claim.[51]

The Court also notes the inherent risk of the particular form of religious expression. Proselytizing religion on the street has a potential for inciting ire from strangers, which may pose a type of harm to the child that cannot be prevented by parental supervision.[52] Just because the First Amendment protects a parent's right to engage in a form of risky expression does not mean they have the right to subject their child to the same risk.[53] Therefore, *Prince* established that the state can encroach on a parent's First Amendment rights if they interfere with the state's interest of protecting child welfare, and precludes parents from incorporating child-rearing activities as a form of constitutionally protected expression.

B.   FREE SPEECH LIMITS TO PROTECT CHILD PSYCHOLOGICAL WELLBEING

A ban on Monetized Sharenting needs its own First Amendment assessment because its ban would impact multiple parties. Although parents will be the primary gatekeepers of production, social media companies and advertisers help create the market for it and contribute to distribution. A federal statute holding these entities liable for Monetized Sharenting needs to overcome the general First Amendment interests of anyone involved in production or distribution—not just in the family law context. Under current applicable legislation, social media's liability for approving illegal or harmful forms of expression for advertisement revenue remains an unanswered question.[54] Although commercial speech does not traditionally have as strong First Amendment protections as non-commercial speech, its protections have slowly increased such that legislation around monetization should be prepared to pass intermediate or strict scrutiny.[55] The history of child pornography bans serves as a reference point for when courts permit legislative limits on free speech in order to protect child welfare. Lower courts have generally upheld convictions on the distribution of morphed child porn, defining a child's protection from psychological, emotional, and reputational harm as a discrete state interest, giving insight to how long-accepted limits on free speech may be applied in the digital era.[56]

---

51.   *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 104 (1st Cir. 2008).

52.   *Prince*, 321 U.S. at 169–70.

53.   *Id.* at 170 ("Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.").

54.   *See* Gonzalez v. Google LLC, 598 U.S. 617 (2023) (per curiam).

55.   *See* Nathan Cortez & William M. Sage, *The Disembodied First Amendment*, 100 WASH. U. L. REV. 707, 709 (2023) ("The Court's initial instinct to apply intermediate scrutiny to corporate commercial speech gradually mutated to 'heightened' scrutiny and *de facto* strict scrutiny."); *Commercial Speech*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/commercial_speech [https://perma.cc/RK82-9MTT] [https://web.archive.org/web/20240916150153/https://www.law.cornell.edu/wex/commercial_speech] (last visited Sept. 23, 2024).

56.   *See, e.g.*, United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020); Doe v. Boland, 698 F.3d 877, 883 (6th Cir. 2012).

56.   United States v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014).

1.   The Child Pornography Laws: The State's Ability To End Exploitative Industry To Protect Children's Psychological Welfare

Laws against child pornography are the most clear-cut example of states encroaching on free speech rights in order to stamp out an industry that psychologically harms children. *New York v. Ferber* is the foundation of jurisprudence regarding the constitutionality of state and federal bans on distributing child pornography.[57] In writing the opinion of the Court, Justice White emphasized the importance of the state interest in protecting the physical *and* emotional wellbeing of children, applying these as examples of the state interest established in *Prince*.[58] Although he states that the Court need not second-guess legislative judgment, he nonetheless gives insight into the type of evidence they considered in establishing a justification for the state's interest in preventing the production and distribution of child pornography.[59] The Court cites academic and clinical journals about developmental psychology, as well as literature cited by the Department of Health and Human Services ("HHS").[60] A lot of the literature cited discusses the social and emotional impact of the recording and distribution more than the actual physiological impact of the sexual act that was recorded.[61] Although the Court is clear that this statute is a means of putting a stop to the act of sexual exploitation, it acknowledges the additional harm that the distribution itself creates. It also notes the link between the distribution network creating the economic incentive to engage in the illegal activity of production, asserting that drying up the market demand is a valid way for the state to stop harmful conduct.[62]

The Court's Opinion then made two somewhat contradicting points that left the Justices divided in various Concurrences. First, Justice White states that, because the goal of the state it to prevent child exploitation, it does not matter whether the pornography is "patently offensive," and emphasizes that it is irrelevant to the child whether or not there are societal benefits to their exploitation—the harm is there regardless.[63] He then turns around and incorporates the lack of societal benefit as part of his analysis.[64] He rounds this out by concluding that certain content bans on free speech are sometimes permissible if the evil outweighs the expressive interest.[65] In her Concurrence, Justice O'Connor asserts that the holding of this case indicates that the statute in question could be applied to child pornography that had societal benefit, pointing out that making exceptions would ultimately police speech further, subjecting it to specific tastes and sensibilities.[66] By contrast, Justices Brennan, Marshall, and

---

57.   *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 234–35 (2002).
58.   New York. v. Ferber, 458 U.S. 747, 757–59 (1982).
59.   *Id.*
60.   *Id.* at 9–10.
61.   *See, e.g., id.* at 10.
62.   *Id.* at 760.
63.   *Id.* at 761.
64.   *Id.* at 762–63.
65.   *Id.* at 763–64.
66.   *Id.* at 774–75 (O'Connor, J., concurring).

Stevens only concur in the judgment, stating that distribution of child pornography as phrased in the statute may be protected under the First Amendment if it served as a contribution to art, literature, or science.[67] Although the opinion of the Court held that distributing child pornography was categorically not protected by the First Amendment, and therefore not subject to a balancing test,[68] some of the Concurring opinions implied that a balancing test might be more appropriate.[69] Under either analysis, the Court determined that the First Amendment did not protect an industry predicated on abuse to children, citing the state's interest in the wellbeing of children.[70]

It is not yet clear whether protecting children from psychological and reputational harm permits categorical ban of certain types of speech, or if it merely triggers a balancing test. In the 1990s, Congress expanded the scope its child pornography legislation in response to the proliferation of new forms of sexual child content as more Americans had internet access. In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down sections of the Child Pornography Prevention Act, which banned computer animated or adult-acted simulated depictions of children engaging in sexual acts.[71] The Court explained that the categorical ban of real child pornography in *Ferber* was justified because there was a direct harm against the children being exploited in its production and circulation.[72] It briefly suggested that the section banning morphed child pornography may be treated the same as *Ferber*, but it did not engage in the legal question, as it was not relevant to the case.[73]

Morphed child pornography is an image or video in which a real child's face is edited onto a body engaging in a sexual act.[74] There is a circuit split regarding whether or not a categorical exemption from First Amendment protections apply to these images as it does in *Ferber*.[75] The majority rule is that the reputational and emotional harm to the child constitutes a sufficient enough state interest to categorically exclude morphed

---

67.   *Id.* at 776 (Brennan, J., and Marshall, J. concurring in judgment) ("[A]pplication of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment … For the Court's assumption of harm to the child resulting from the 'permanent record' and 'circulation' of the child's 'participation,' lacks much of its force where the depiction is a serious contribution to art or science."); *id.* at 778–80 (Stevens, J., concurring in judgment) (Justice Stevens's primary concern seemed to be distinguishing those participating in the child pornography industry from those using the material to create legislation or study human behavior—which could remedy the very harm that it causes—however he also noted that "it is at least conceivable that a serious work of art" could also receive First Amendment protection if done in the proper setting).

68.   *Id.* at 764 (White, J.) (" When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.").

69.   *Id.* at 776 (Brennan, J., and Marshall, J. concurring in judgment).

70.   *See id.* at 775 (O'Connor, J., concurring).

71.   Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

72.   *Id.* at 249.

73.   *Id.* at 242.

74.   *See* Taylor Comerford, *No Child Was Harmed in the Making of This Video: Morphed Child Pornography and the First Amendment*, 62 B.C.L. REV. E-SUPPLEMENT II.-323 (2021).

75.   *Id.*

pornography.[76] The minority rule, solely found in the Eighth Circuit, is that a First Amendment balancing test must be applied because there is no underlying crime of child sexual activity involved in the creation of morphed child pornography.[77] However, the state's interest in protecting a child from emotional and reputational harm was compelling enough to pass strict scrutiny and overcome a First Amendment challenge.[78] The Supreme Court has yet to rule on whether or not the First Amendment protects the creation or distribution of media that creates reputational or emotional harm to the child without a long-held crime underlying the production process. However, the current circuit majority holding is that this type of media is not protected under the First Amendment.[79] And in the event that it is protected, prevention of reputational and emotional harm appears to be a strong enough state interest to overcome its vulnerability to an assessment of competing personal liberty interests.

The legal context of child pornography and morphed child pornography is relevant to assessing the constitutionality of a ban on Monetized Sharenting. Most of the harm Monetized Sharenting inflicts on children is psychological and reputational. Child pornography is tied to sexual abuse—an act that by itself is both physically and mentally harmful to children. Banning Monetized Sharenting will rely on courts taking seriously the psychological and emotional harms it purports to protect against in *Ferber*. Furthermore, although limitations to commercial speech traditionally only need to stand up to intermediate scrutiny under the First Amendment, standards on commercial speech tend to fluctuate, making the court's assessment of children's psychological wellbeing a more useful frame of reference for shaping a constitutionally defensible ban on Monetized Sharenting. In anticipation of a legal challenge from large social media companies, it is worth investigating whether or not a ban would pass strict scrutiny, or even if the harm in question warrants a categorical exclusion from First Amendment protection similar to child pornography.

---

76. *Id.*; United States v. Mecham, 950 F.3d 257, 260 (5th Cir. 2020); Doe v. Boland, 698 F.3d 877,883 (6th Cir. 2012).

77. United States v. Anderson, 759 F.3d 891, 895 (8th Cir. 2014).

78. *Id.* at 895–96.

79. Taylor Comerford, *No Child Was Harmed in the Making of This Video: Morphed Child Pornography and the First Amendment*, 62 B.C.L. REV. E-SUPPLEMENT II.-323, II.-325 (2021).

C.   THE CURRENT LEGAL AND POLITICAL LANDSCAPE ON CHILDHOOD SOCIAL MEDIA USE

1.   Federal Legislation and Regulation of Children's Use of Social Media Platforms Heavily Rely on Parental Liberties and Judgment

There are numerous pieces of federal legislation aimed at protecting children from the harms of social media. The Kids Online Safety Act[80] appears to be set to pass.[81] KOSA was originally introduced to the Senate in May of 2023, and is now on the legislative calendar for 2024 after some amending.[82] A parallel bill was introduced in the House of Representatives in April of 2024 as House Bill 7891.[83] This bipartisan effort aims to regulate social media companies such that they take reasonable measures to mitigate online harms against users under the age of thirteen.[84] Under the current drafting of the Senate bill, KOSA calls for social media companies to mitigate the following online harms:

> (1) Consistent with evidence-informed medical information, the following mental health disorders: anxiety, depression, eating disorders, substance use disorders, and suicidal behaviors.
> (2) Patterns of use that indicate or encourage addiction-like behaviors.
> (3) Physical violence, online bullying, and harassment of the minor.
> (4) Sexual exploitation and abuse.
> (5) Promotion and marketing of narcotic drugs (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), tobacco products, gambling, or alcohol.
> (6) Predatory, unfair, or deceptive marketing practices, or other financial harms.[85]

---

80.   Note that the pending Senate Bill and House Resolution, both entitled the Kids Online Safety Act ("KOSA"), are nearly identical in content. The primary difference is that currently House Bill 7891 has more safeguards for the business interest of social media start-ups. Hereinafter, "KOSA" will refer to both bills and legislative agendas, noting differences between the Senate and House legislation when relevant.

81.   Christiano Lima-Strong, *Senate Poised To Pass Biggest Piece of Tech Regulation in Decades*, WASH. POST (Feb. 15, 2024), https://www.washingtonpost.com/technology/2024/02/15/kids-online-safety-act-kosa-senate/
[https://web.archive.org/web/20241111212942/https://www.washingtonpost.com/technology/2024/02/15/kids-online-safety-act-kosa-senate/].

82.   S. 1409, 118th Cong. (2023–24).

83.   H.R. 7891, 118th Cong. (2023–24).

84.   S.   1409   § 2;   S.   1409,   118th   Cong.   KOSA   Summary   (2023–24) https://www.congress.gov/bill/118-congress/senate-bill/1409
[https://web.archive.org/web/20240916100725/https://www.congress.gov/bill/118-congress/senate-bill/1409] (last visited Sept. 16, 2024).

85.   S. 1409 § 3(a)(1)–§ 6. Note that corresponding House Bill 7891 Section 102(a) duty of care list does not include a corresponding subsection to Senate Bill 1409 Section 3(a)(6): "Predatory, unfair, or deceptive marketing practices, or other financial harms."

KOSA requires that social media companies implement features that enable parents to monitor use time and control privacy setting of the child's account.[86] Neither bill acknowledges the parent's use of social media and how that might impact the stated purpose of the legislation. This aligns with prior online regulation, as the Children's Online Privacy Protection Act ("COPPA"), which aimed to protect children's online privacy and protect them from misleading commercial practices achieved some of its aims by requiring social media companies to get consent from parents in order to collect certain kinds of data.[87] One of KOSA's strengths is that its stated government interest advances the empirical knowledge that is compatible with the Child Wellbeing framework. KOSA instructs the Federal Trade Commission ("FTC") to collaborate with the National Academy of Sciences and the Secretary of Health and Human Services to establish ongoing research into the efficacy of the legislation, and to identify other harms created by social media use.[88]

KOSA, though controversial, has received a lot of momentum. It has received a lot of support from the medical and psychiatric fields, including the American Psychiatric Association.[89] Advocates for civil liberties came out against KOSA for data privacy and speech concerns, as well as concerns for worsening abusive situations for children who do not have an alternative way to communicate with others.[90] Social media companies seem to be engaging in some pushback, but appear to want to be on the side of parental rights. For example, a former Meta employee testified to Congress that Meta had data indicating harms to children and used that data in their profit calculus rather than in their user experience policy.[91] A week after this testimony, Meta announced a public campaign of expressing a desire to collaborate with Congress on social media reform to promote parental rights, while rejecting its approach to regulation.[92] On the national political stage, there seems to be no discussion of regulating parental distribution of content and information of minors on their own social media platforms.

---

86.   S. 1409 § 6.

87.   Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6501–6505 (1998).

88.   S. 1409 § 7(a)–(h); H.R. 7891 § 106(a).

89.   Lauren Feiner, *Lawmakers Update Kids Online Safety Act To Address Potential Harms, but Fail To Appease Some Activists, Industry Groups*, CNBC (May 2, 2023), https://www.cnbc.com/2023/05/02/updated-kids-online-safety-act-aims-to-fix-unintended-consequences.html   [https://perma.cc/6QYR-QRAD] [https://web.archive.org/web/20240918220939/https://www.cnbc.com/2023/05/02/updated-kids-online-safety-act-aims-to-fix-unintended-consequences.html].

90.   Lauren Feiner, *Kids Online Safety Act May Harm Minors, Civil Society Groups Warn Lawmakers*, CNBC (Nov. 28, 2022), https://www.cnbc.com/2022/11/28/kids-online-safety-act-may-harm-minors-civil-society-groups-warn.html   [https://perma.cc/MZE3-FETZ] [https://web.archive.org/web/20240925175026/https://www.cnbc.com/2022/11/28/kids-online-safety-act-may-harm-minors-civil-society-groups-warn.html].

91.   *Social Media and the Teen Mental Health Crisis: Hearing Before the S. Comm. on Privacy, Technology, and the Law.*, 118th Cong. (2023) (testimony of Arturo Bejar, former Director of Engineering for Protect and Care, Facebook); Katie Paul, *Former Meta Employee Tells Senate Company Failed To Protect Teens' Safety*, REUTERS (Nov. 7, 2023), https://www.reuters.com/technology/cybersecurity/former-meta-employee-tells-senate-company-failed-protect-teens-safety-2023-11-07/ [https://web.archive.org/web/20240110105152/https://www.reuters.com/technology/cybersecurity/former-meta-employee-tells-senate-company-failed-protect-teens-safety-2023-11-07/].

92.   Davis, *supra* note 3.

2. State-Level Legislative Movements To Regulate Monetized Sharenting

Legislative movements on the state-level are primarily led by teens and explicitly address the issue of the Monetized Sharenting Industry. The state-level approach is regulating the industry with child labor laws similar to state laws regulating traditional entertainment industries.[93] Illinois, followed recently by California, are the only two states to date that have passed a law guaranteeing that children who participate in monetized online content will receive a cut of the revenue received.[94] The sponsor of the bill brought it to the state legislature after a fifteen-year-old from his district raised concern about the exploitative nature of the Monetized Sharenting Content she saw online.[95] This law originally had provisions requiring family vloggers to register their channels and gave children the right to request the social media platform to delete all content of them when they turn eighteen, but both of these were stripped from the bill before passing.[96] With the advocacy of eighteen-year-old Chris McCarty, a similar bill was proposed in Washington state, with both the wage structure and option to remove content in adulthood—however, it stalled in the state legislature.[97] McCarty also founded Quit Clicking Kids, an organization that spreads awareness of Monetized Sharenting and promotes support similar state bills under review.[98] Most recently, a California bill was signed into law, but is also limited in scope to monetary interest alone.[99] All state legislation appears to be aimed at regulating this parental conduct, rather than banning it. Although this does help mitigate financial harm and may act as a deterrent to some Sharenters, it does not get at the root of the problem: the inherently harmful nature of the Monetized Sharenting Industry.

II.   PART II: ISSUE—THE MONETIZED SHARENTING INDUSTRY

The state, parents, and children all have an interest in shutting down the Monetized Sharenting Industry. This section will first go through harms to the child's wellbeing

---

93.   Claire Savage & The Associated Press, *New Law Entitles Child Social Media Influencers To a Percentage of Earnings: 'It's a New World'*, FORTUNE (Aug. 12, 2023), https://fortune.com/2023/08/12/new-law-entitles-child-social-media-influencers-to-percentage-of-earnings-kidfluencers-sharenting/ [https://perma.cc/8BWP-5QE6] [https://web.archive.org/web/20240921072349/https://fortune.com/2023/08/12/new-law-entitles-child-social-media-influencers-to-percentage-of-earnings-kidfluencers-sharenting/].

94.   *Id*.; Trân Nguyễn, *Parents will have to set aside some earnings for child influencers under new California Law*, NBC BAY AREA (Sept. 29, 2024), https://www.nbcbayarea.com/news/california/child-influencer-earnings-new-laws/366321/ [https://perma.cc/KFW4-649V] [https://web.archive.org/web/20241110232658/https://www.nbcbayarea.com/news/california/child-influencer-earnings-new-laws/3663211/].

95.   Savage, *supra* note 93.

96.   *Id*.

97.   *Id*.; H.B. 1627, 68th Leg., Reg. Sess. (Wash. 2024).

98.   QUIT CLICKING KIDS, https://quitclickingkids.com/ [https://perma.cc/JMK7-PFJY] https://quitclickingkids.com/ [https://web.archive.org/web/20240808003944/https://quitclickingkids.com/] (last visited Sept. 27, 2024).

99.   S.B. 764, 88th Leg., Reg. Sess. (Ca. 2024); Nguyễn, *supra* note 94.

associated with Monetized Sharenting. That is, harms that are associated with publicly distributing sensitive information about one's child to the general public online for monetary gain. Second, it will assess the parent's speech and parental liberties and societal benefits that a First Amendment analysis of a Monetized Sharenting ban would need to address in the event that courts subject it to a balancing test. Third, it will use the Child Wellbeing framework of family law to explain why the Kids Online Safety Act and its accompanying political movement runs the risk of proliferating the harms of the Monetized Sharenting Industry.

A.   THE HARMS OF THE MONETIZED SHARENTING INDUSTRY DIRECTLY CONTRADICT THE CHILD, STATE, AND PARENT'S INTERESTS IN THE CHILD'S WELLBEING

The harms to children associated with creation and distribution of Monetized Sharenting content are extensive enough to either justify a categorical exclusion from First Amendment protection or to pass a First Amendment balancing test at any level of scrutiny. Creation and distribution of this content is empirically and anecdotally associated with emotional and reputational harm, such as the child's emotional distress resulting from personal information shared or increased exposure to online predators. Furthermore, it fundamentally increases the risk of harm that the federal government is currently seeking to mitigate under proposed legislation like KOSA.[100] It also runs the risk of escalating parental behavior to a point of abuse that might not otherwise occur. By taking away children's autonomy over how they present themselves online, it negatively impacts their ability to develop the digital citizenship necessary to be an informed citizen in a twenty-first century democracy.[101] The Monetized Sharenting Industry is a type of speech that is directly linked to emotional and reputational harm, justifying a government prohibition.

1.   Monetized Sharenting Increases the Risk of Harm that Congress Seeks to Mitigate in Prior and Currently Pending Legislation

In theory and in practice, Monetized Sharenting contradicts the government's evidence-based approach to protecting child wellbeing online. KOSA aims to prevent cyber-bullying, harassment or sexual exploitation, and mental health issues.[102] COPPA, although mostly targeted at the use of data for commercial purchases, aims to protect

---

100.   S. 1409, 118th Cong. KOSA Summary (2023–24) https://www.congress.gov/bill/118th-congress/senate-bill/1409
[https://web.archive.org/web/20240916100725/https://www.congress.gov/bill/118th-congress/senate-bill/1409] (last visited Sept. 16, 2024).

101.   Raymond H. Brescia, *Social Change and the Associational Self: Protecting the Integrity of Identity and Democracy in the Digital Age*, 125 PENN ST. L. REV. 773 (2021).

102.   S. 1409, 118th Cong. § 3 (2023–24) ("Duty of Care"); H.R. 7891, 118th Cong. § 102 (2023–24) ("Duty of Care").

children's online privacy.[103] As part of the Monetized Sharenting Industry, parents engage in mass distribution of their child's sensitive and identifiable information—a practice that government agencies and legislators link to increased likelihood of online harm to children.

Under the current drafting of KOSA, Congress delegates HHS as an agency to research the type of harm to children facilitated by social media companies.[104] HHS shares many resources for preventing online exploitation and harassment. These resources encourage both parents and children not to publicly share information such as routine location, detailed information about interpersonal relationships, birthday, and sometimes pictures of themselves.[105] Based on decades of research, the Center for Missing and Exploited Children advises that publicly posting details about a child's interests and activities enable bad actors to more effectively groom and coerce children into exploitative online relationships.[106] Online predators can use a child's interests or personal issues that children present themselves as relatable or supportive. One former Monetized child recalls strangers online using information about her interests and personal issues discussed in her mom's blog to try to start relationships with her.[107] Any item of personal or sensitive information provides a foot in the door for those engaging in online exploitation of children.

As Monetized Sharenting moves from written blog format to a high frequency churn of picture and video format, an increased risk of in-person harm such as harassment or abduction is added to the mix. A current trend in Monetized Sharenting includes making videos breaking down parenting routines.[108] On-the-go images of a family's daily routine can result in unintentional distribution of geolocation.[109] For

---

103.   *See* Children's Online Privacy Protection Rule, 78 Fed. Reg. 4008 (Jan. 17, 2013) (to be codified at 16 C.F.R pt. 312).

104.   Kids Online Safety Act, S. 1409, 118th Cong. § 7(a) (2024).

105.   *See* NETSMARTZ, TEACHING MODERN SAFETY INTO THE CLOUD, NAT'L CTR FOR MISSING AND EXPLOITED CHILDREN (Presenter's Guide) (2019), Available at https://www.missingkids.org/netsmartz/resources [hereafter NetSmartz 2019]; NETSMARTZ, INTERNET SAFETY: PARENTS, GUARDIANS, COMMUNITIES, NAT'L CTR FOR MISSING AND EXPLOITED CHILDREN (Presenter's Guide) (2023), Available at https://www.missingkids.org/netsmartz/resources [hereinafter NetSmartz 2023]; *What Should I Teach My Child About Safe Online Behavior*, COMMON SENSE MEDIA (July 25, 2022), https://www.commonsensemedia.org/articles/what-should-i-teach-my-child-about-safe-online-behavior [https://perma.cc/Z6WV-Z3WJ] [https://web.archive.org/web/20240920215216/https://www.commonsensemedia.org/articles/what-should-i-teach-my-child-about-safe-online-behavior].

106.   *See* NetSmartz 2019, *supra* note 105.

107.   *Featuring Kids Is Good Business for Influencer Parents, but at the Cost of Their Future*, NPR (July 9, 2023) [hereinafter, NPR], https://www.npr.org/transcripts/1186674958 [https://perma.cc/243B-ZWVR] [https://web.archive.org/web/20240919185135/https://www.npr.org/transcripts/1186674958].

108.   *See* Stephanie Sy & Sam Weber, *'Momfluencers' Urged to Stop Showing Kids on Social Media To Protect Their Privacy*, PBS (Feb. 13, 2024), https://www.pbs.org/newshour/show/momfluencers-urged-to-stop-showing-kids-on-social-media-to-protect-their-privacy [https://web.archive.org/web/20240920234828/https://www.pbs.org/newshour/show/momfluencers-urged-to-stop-showing-kids-on-social-media-to-protect-their-privacy].

109.   The Senate defines geolocation as "information sufficient to identify street name and name of a city or town." S. 1409, 118th Cong. § 2(4) (2023–24). The House of Representatives defines geolocation as

example, one Monetized Sharenter posts videos on Instagram of her family's "Sunday Routine" to her following of over half of a million Instagram users, also publicly accessible to users outside of her following.[110] One Sunday Routine video included a clip of her four-year-old son at hockey practice, followed by a shot of the outside of the diner where the family went to brunch afterwards.[111] With a quick internet search of the name of the diner seen in the video, anyone can find the location of the only diner in the country under this name, along with a local hockey rink a few blocks away. Within minutes, anyone with internet access knows what this child looks like, along with his age, first name, and an educated guess of his—if not exact—geolocation every Sunday morning during hockey season.[112] Similarly, one former Monetized child recalls a time that a stranger online told her that he saw her out in public, which, in addition to safety concerns, ended up marking the beginning of anxiety issues for this child.[113] Even if children escape these types of harm, privacy issues associated with publishing identifying information can follow children into adulthood. One study predicts that by 2030, every year hundreds of millions of dollars' worth of identity-theft damages will be attributed to information shared online by parents.[114] Even Monetized Sharenting content that seemingly involves little participation on the child's end can still severely increase the risk of harm that the federal government is seeking to avoid.

"information that identifies the location of an individual, but with a precision of less than 5 miles." H.R. 7891, 118th Cong. § 201(2) (2023–24).

110. *See generally* Brooke Raybould (@BrookeRaybould), INSTAGRAM, https://www.instagram.com/brookeraybould/ [https://perma.cc/CF7D-3HHM] (last visited Nov. 22, 2024) (Brooke Raybould's Instagram account has roughly 782,000 followers, and is viewable by anyone with an Instagram account because the privacy setting is off. Her posts include a variety of "routine" videos and parenting tips. The profile description includes a link to her website and her hlighilight reels include links to sponsored discount codes).

111. Brooke Raybould (@BrookeRaybould), *Sports Sunday! Double Tap if You Can Relate*, INSTAGRAM (Jan. 9, 2024), https://www.instagram.com/reel/C140D_cOKju/?utm_source=ig_web_copy_link [https://perma.cc/4EJ3-VLQS] [https://web.archive.org/web/20240927202917/https://www.instagram.com/reel/C140D_cOKju/] (last visited Oct. 6, 2024) (The cited Instagram post contains a video with clips of Raybould's family accompanied by her voiceover commentary and written closed captions describing her schedule from the time each family member wakes up. One clip shows her son at a hockey rink activity with other children, accompanied by Raybould mentioning his first name and age. This is shortly followed by a clip that pans over the exterior of a diner with a fascia sign in view, with a voiceover about the family going out for breakfast. It then cuts to the family eating inside of a diner with menus that match the outside signage. Each of her four sons' faces are fully visible at least once in the video.).

112. *See* S. 1409 § 2(4) (defining geolocation as "information sufficient to identify street name and name of a city or town").

113. Fortesa Latifi, *Influencer Parents and the Kids Who Had Their Childhood Made Into Content,* TEEN VOGUE (Mar. 10, 2023), https://www.teenvogue.com/story/influencer-parents-children-social-media-impact [https://web.archive.org/save/https://www.teenvogue.com/story/influencer-parents-children-social-media-impact].

114. *See* Mark Travers, *2 Major Risks Linked With 'Sharenting' Your Kids' Lives on Social Media*, FORBES (June 17, 2023), https://www.forbes.com/sites/traversmark/2023/06/17/2-major-risks-linked-with-sharenting-your-kids-lives-on-social-media/?sh=7de7aff562e2 [https://perma.cc/BQ9X-HBNW] [https://web.archive.org/web/20240920234527/https://www.forbes.com/sites/traversmark/2023/06/17/2-major-risks-linked-with-sharenting-your-kids-lives-on-social-media/?sh=7de7aff562e2].

In addition to grooming, sharing personal information can increase risks of cyberbullying. The HHS defines cyberbullying as "sending, posting, or sharing negative, harmful, false, or mean content about someone else. [Cyberbullying] can include sharing personal or private information about someone else causing embarrassment or humiliation."[115] Monetized Sharenting Content has led to both cyberbullying and in-person bullying, with strangers writing mean comments about children and school peers bullying children based on the sharenting content they viewed online.[116] In fact, some have argued that certain sharenting content should be treated as a form of bullying as a matter of policy.[117] Some former Monetized children described behavior that could plausibly fall under the HHS's definition of cyberbullying, including sharing information that they find embarrassing or untrue.[118] Monetized Sharenting increases the risk of cyberbullying by prompting it to a wide audience, and possibly perpetrates it on its own.

The federal government's policy around online social media use is rooted in empirical data that sets up a clearly defined and substantial government interest as applicable to a First Amendment test. By deferring to developmental research, it is also compatible with the Child Wellbeing approach to family law. When assessing the government's ability to limit this type of speech, it is important to note the direct overlap between the empirical research used to identify harm and the characteristics inherent to the form of speech.

2. Links Between Monetized Sharenting Entertainment and Child Abuse

In addition to incentivizing new forms of harmful behavior by parents, Monetized Sharenting shows preliminary signs of link to behaviors already considered abusive. Because the success of Monetized Sharenting relies on views and engagement, there is a monetary incentive to create content that amasses more views.[119] A lot of the literature that government entities on youth and social media use discuss the negative effects of upsetting online content on mental health, and also acknowledge that social media companies are businesses designed to promote engagement rather than wellbeing.[120] The underlying assumption indicates that there is a link between high engagement and upsetting content.[121] Without addressing Monetized Sharenting, the

---

115.   *What Is Cyberbullying,* STOPBULLYING.GOV, https://www.stopbullying.gov/cyberbullying/what-is-it   [https://perma.cc/L2SG-CTH3] [https://web.archive.org/web/20240920235359/https://www.stopbullying.gov/cyberbullying/what-is-it] (last visited Sept. 20, 2024).

116.   *See* Latifi, *supra* note 113.

117.   *See* Note, *supra* note 23, at 1237.

118.   *See, e.g.*, Latifi, *supra* note 113; NPR, *supra* note 107.

119.   *See* Maheshwari, *supra* note 16.

120.   *See, e.g.*, OFF. OF SURGEON GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY 9 (2023) [hereinafter, SOCIAL MEDIA ADVISORY].

121.   *See* Sarah Oh, *The Most 'Engaging' Social Media Content Is the Worst for You,* FORBES (Sept. 1, 2023), https://www.forbes.com/sites/sarahoh/2023/09/01/the-most-engaging-social-media-content-is-the-

government has not grappled with the market corollary of this issue: If you want your social-media content to get a lot of engagement, make it upsetting.

Preliminary empirical and anecdotal data supports a link between abusive parental behavior and online engagement. One analysis of content posted by TikTok users showed a dramatic increase in views and likes on videos featuring a parent engaging in emotional abuse toward their children, as opposed to a video featuring children without abusive behavior.[122] Parents who enter the Monetized Sharenting Industry are therefore entering into a market that rewards posting abusive behavior. Anecdotal evidence from other platforms hosting Monetized Sharenting content follows suit with this phenomenon. One Sharenting couple lost custody of their children for their YouTube channel series with a "family prank" theme. Some of these videos involved staging fake break-ins in which the father drew out a gun, lying to a child about being adopted, and in pushing one child to the ground and filming the child's subsequent crying fit despite the child asking him to put the camera away.[123] This channel had hundreds of thousands of subscribers and millions of views, making it a financially lucrative following. Although this type of content is not the only content that gets a large following, it is one of the well-known originating genres of the Monetized Sharenting Industry.[124] The paid subscription model in which parents use a social media platform's subscription feature to sell exclusive content of their children modeling bikinis and leotards is increasing in popularity—a phenomenon that Meta was reluctant to acknowledge and is struggling to address.[125] This is an entertainment industry that structurally makes experimenting with abusive behavior an economically rational choice for parents.

3. Monetized Sharenting May Encourage Dysfunctional Childhood Development

Monetized Sharenting inherently warps two forms of development: (1) the parent-child relationship; and (2) the child's digital citizenship and footprint. Although there may be more than one way to have a healthy parent-child relationship, Monetized Sharenting incentivizes a dynamic known to be correlated with negative

---

worst-for-you/?sh=4bf5af311627 [https://perma.cc/6349-9XFR] [https://web.archive.org/web/20240921000234/https://www.forbes.com/sites/sarahoh/2023/09/01/the-most-engaging-social-media-content-is-the-worst-for-you/?sh=4bf5af311627].

122. Bri Stormer et al., *Caregiver Psychological Maltreatment Behaviors Toward Children on TikTok*, 24 CHILD MALTREATMENT 587, 587 (2023).

123. Mahita Gajanan, *YouTube Star DaddyOFive Loses Custody of 2 Children Shown in 'Prank' Videos*, TIME (May 3, 2017), https://time.com/4763981/daddyofive-mike-martin-heather-martin-youtube-prank-custody/ [https://perma.cc/M5G8-XSG4] [https://web.archive.org/web/20240921000526/https://time.com/4763981/daddyofive-mike-martin-heather-martin-youtube-prank-custody/]; Philip DeFranco, *WOW . . . We Need To Talk About This*, YOUTUBE (Apr. 17, 2017), https://www.youtube.com/watch?v=fvoLmsXKkYM [https://perma.cc/EAM7-5FLC] [https://web.archive.org/web/20240921000853/https://www.youtube.com/watch?v=fvoLmsXKkYM].

124. *See, e.g.*, Note, *supra* note 23, at 1231.

125. *See* Horwitz & Blunt, *supra* note 18; Longbottom, *supra* note 18.

developmental outcomes, and children featured in both monetized and non-monetized sharenting have come forward and attested to the harm they feel it has caused to their relationship with their parents and their childhood.[126] Monetized Sharenting also precludes children from organically forming a sense of autonomy in their digital citizenship and profile, which is becoming an increasingly substantive wellbeing interest in the twenty-first century.[127]

Social media use has pros and cons, yielding mixed effects on mental health for users of any age. The user experience, rather than the length of time spent on social media, tends to determine the impact this has on the user's mental health.[128] Fixating on comparing status and quantitative interactions such as "likes" is one form of social media experience that is highly correlated with symptoms of depression, anxiety, body image concerns, and general decrease in self-esteem.[129] In the context of Monetized Sharenting, any form of financial success comes from views, likes, and subscriber counts—focusing on these metrics are inherently part of the user experience. This has two potential impacts. One, if the child is aware of the Monetized Sharenting arrangement, and has access to social media, they are likely to engage in the type of status comparison that mental health professional warn may yield long-term self-image impacts. Two, even in the case that the child is unable to access the online content, there is a financial incentive to engage in parenting behaviors that negatively impact child development according to empirical developmental knowledge.

Development of self-esteem and self-image during childhood and adolescence has repercussions lasting into adulthood, with poor self-esteem linked to dysfunctional behavior and psychiatric difficulties.[130] Empirical developmental research shows that parenting style has a notable influence a child's development of self-esteem.[131] Many studies link low self-esteem with a child's perception of overly-controlling parental behavior and a lack of emotional support.[132] Poor self-esteem is also correlated to

126.	*See* Rachel L. Harris & Lisa Tarchak, *Mom and Dad, It's My (Digital) Life,* N.Y. TIMES (Sept. 2, 2019), https://www.nytimes.com/2019/09/02/opinion/children-internet-privacy.html?smid=url-share [https://web.archive.org/web/20240921001524/https://www.nytimes.com/2019/09/02/opinion/children -internet-privacy.html?smid=url-share].

127.	For discussion on internet use and development of self, see Andrea M. Matwyshyn, *Generation C: Childhood, Code, and Creativity*, 87 NOTRE DAME L. REV. 1979 (2012). For discussion on the overlap between online development and democracy, see Brescia, *supra* note 101.

128.	Zara Abrams, *How Can We Minimize Instagram's Harmful Effects?* 53 MONITOR ON PSYCH. 30 (2021); Jean Twenge & Eric Farley, *Not All Screen Time Is Created Equal: Associations with Mental Health Vary by Activity and Gender*, 56 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 207, 208 (2021).

129.	Abrams, *supra* note 128.

130.	Anne-Marie Boudreault-Bouchard et al., *Impact of Parental Emotional Support and Coercive Control on Adolescents' Self-Esteem and Psychological Distress: Results of a Four-year Longitudinal Study*, 36 J. ADOLESCENCE 695, 696 (2013); Guy Roth et al., *The Emotional and Academic Consequences of Parental Conditional Regard: Comparing Conditional Positive Regard, Conditional Negative Regard, and Autonomy Support as Parenting Practices*, 45 DEV.'L PSYCH. 1119 (2009); Nantje Otterpohl et al., *Clarifying the Connection Between Parental Conditional Regard and Contingent Self-esteem: An Examination of Cross-lagged Relations in Early Adolescence*, 89 J. PERSONALITY 986, 986–87 (2021).

131.	Boudreault-Bouchard et al., *supra* note 130, at 696–97.

132.	*Id.* at 695.

parents engaging too much in conditional parental regard.[133] Conditional parental regard is characterized by a noticeable increase level of affection or attention in response to desired behavior or a withdraw of the same in response to undesired behavior.[134] It is possible some parents who engage in Monetized Sharenting will not show disapproval or withdraw affection if children do not participate or yield lower view counts. However, habitually viewing metrics of an internet audience of the child's behavior structurally creates a situation that would incentivize a parent to engage in criticism or over-controlling behavior over the child's daily life that they might not otherwise.

Preliminary evidence suggests Monetized Sharenting does directly impact parent-child relationships and may prompt developmentally inadvisable parenting behaviors. Some formerly Monetized children have anonymously come forward saying that they feel resentful towards their parents for the dynamic the productions and distribution created.[135] This included pressure to continue with the business from their parents when they do not engage in filming or they express that they want to quit.[136] This is a fairly straightforward example of conditional parental regard.[137] Another former Monetized child complained about the complete lack of autonomy over her digital footprint.[138] Infringements on autonomy like this can undermine perceptions of parental emotional support.[139] It appears to be too soon to empirically assess long-term impacts of Monetized Sharenting on parent-child relationships, but literature on traditional child entertainers is relevant. One study assessing over seventy famous former child performers found that parents who served as their child's professional managers are more likely to be perceived as less caring and overcontrolling by their child than those who were not their managers.[140] One developmental psychologist with expertise in children in media points out that in traditional media industries, parents are most protective when they serve as a buffer between the producers and the wellbeing of the child—a dynamic that erodes when parents act as producers in a Monetized Sharenting context.[141]

In the twenty-first century, researchers and advocates increasingly identify navigating the internet as part of childhood development.[142] Some legal scholars have suggested that digital online childhood should have a legally protected status, because

---

133.   Otterpohl et al., *supra* note 130, at 988.

134.   *Id.* at 987.

135.   Latifi, *supra* note 113.

136.   *Id.*

137.   Roth et al., *supra* note 130 (defining conditional parental regard); Otterpohl et al., *supra* note 130.

138.   NPR, *supra* note 107.

139.   Roth et al., *supra* note 130.

140.   L.J. Rapport & M. Meleen, *Childhood Celebrity, Parental Attachment, and Adult Adjustment: The Young Performers Study*, 70 J PERSONALITY ASSESSMENT 484, 484 (1998).

141.   NPR, *supra* note 107.

142.   *See generally* AM. ACAD. PEDIATRICS, *Center of Excellence on Social Media and Youth Mental Health*, AAP, https://www.aap.org/en/patient-care/media-and-children/center-of-excellence-on-social-media-and-youth-mental-health/ [https://perma.cc/3U59-9HHD] [https://web.archive.org/web/20241111221153/https://www.aap.org/en/patient-care/media-and-children/center-of-excellence-on-social-media-and-youth-mental-health/] (last visited Sept. 23, 2024).

experimenting with communication and creativity online is a part of learning how to be a member of society in the twenty-first century.[143] Other legal scholars have suggested that online communication has affected political organization and created new ways to express freedom of association.[144] In interacting online and developing a digital persona, one develops social capital that can better help them engage in a democracy.[145] Government agencies and advocacy organizations concerned with children's health and safety around internet use emphasize the importance of parents in both promoting responsible internet use and facilitating healthy socialization with their peers over the internet.[146] By modeling risky social media use and making decisions about their child's digital citizenship, Monetized Sharenters disrupt their children's digital development.

Monetized Sharenting can also cause severe reputational damage by creating an unflattering digital footprint. Many colleges and employers look at a candidate's online presence during the admissions and hiring processes.[147] One former Monetized child no longer goes by their legal name because they do not want their digital footprint following them.[148] One child, in reference to regular sharenting, recalled a time where her dad shared a picture of awards received by an organization she led.[149] She was concerned that it would come across as her taking credit for a project that a team of forty people worked on, which could have had reputational repercussions.[150] Children have a material interest in their digital autonomy. If their digital footprint does not accurately represent who they are, this can have social, professional, and emotional harm. In addition to the state's interest in protecting a child from reputational harm, the state also has an interest in the internet's impact on the job market. If parents distort their child's digital footprint, colleges and employers may be assessing candidates based on inaccurate information.

---

143.   Matwyshyn, *supra* note 127, at 2009, 2017, 2011–12.

144.   Brescia, *supra* note 101, at 813–15, 829.

145.   *Id.* at 816–18.

146.   *See, e.g.*, SOCIAL MEDIA ADVISORY, *supra* note 120, at 17; OFF. OF SURGEON GEN., U.S. DEP'T. OF HEALTH & HUM. SERVS., PROTECTING YOUTH MENTAL HEALTH: U.S. SURGEON GENERAL'S ADVISORY, 16–18 (2021); NETSMARTZ 2023, *supra* note 105, at 14.

147.   *Kaplan Test Prep Survey: Social Media Checks by College Admissions Officers Decline Due to Savvier Applicants and Shifting Attitudes*, KAPLAN (Nov. 27, 2018), https://www.kaptest.com/blog/press/2018/11/27/ [https://perma.cc/7MVV-L7S7] [https://web.archive.org/web/20241111221732/https://www.kaptest.com/blog/press/2018/11/27/]; *70% of Employers Are Snooping Candidates' Social Media Profiles*, CAREER BUILDER, https://www.careerbuilder.com/advice/blog/social-media-survey-2017 [https://web.archive.org/web/20241111221717/https://www.careerbuilder.com/advice/blog/social-media-survey-2017] (last visited Oct. 18, 2024); *7 in 10 Hiring Managers Admit To Spying on Social Media To Get Answers To Illegal Interview Questions*, RESUME Builder (June 12, 2023), https://www.resumebuilder.com/7-in-10-hiring-managers-admit-to-spying-on-social-media-to-get-answers-to-illegal-interview-questions/ [https://web.archive.org/web/20240000000000*/https://www.resumebuilder.com/7-in-10-hiring-managers-admit-to-spying-on-social-media-to-get-answers-to-illegal-interview-questions/] (last visited Oct. 18, 2024).

148.   Latifi, *supra* note 113.

149.   Harris & Tarchak, *supra* note 126.

150.   *Id.*

When parents are in a position of producing and monetizing content of their child, their success in the industry in which they work hinges on engaging in parent-child relationships that empirical research has links to dysfunctional development. This is in direct conflict with their parental liberties as justified through a child wellbeing framework.

B. POSSIBLE INDIVIDUAL AND SOCIAL VALUE SUPPORTING FIRST AMENDMENT PROTECTIONS FOR MONETIZED SHARENTING

Although the harms linked to Monetized Sharenting are aligned with harm prevention that previously justified a categorical First Amendment exemption, it is still possible that courts will assess the social value of Monetized Sharenting.[151] This Section will describe the social value Monetized Sharenting provides and analyze the boundaries between parental liberties and individual free speech rights of the parents.

There is an inherent tension between the rights of an individual to parent and their right to free speech. This is especially true in the digital era, where sharing content online is now a viable career option for creatives.[152] If someone has used the internet to express their life experiences for years, it seems that discussing their experience as a parent would naturally fall in line with that. One Monetized Sharenter and author, Christie Tate, published an article discussing her experience of her daughter confronting her over articles the mother had written online featuring the daughter's picture, name, and stories about her life.[153] After her daughter demanded that she stop, Tate explained in her article that she was unable to do so.[154] As an author, she makes her living writing about her experiences, which involves her experiences being a mother—which is directly linked to information about her daughter. She went on to explain that because she is a writer, editing out her daughter from her experiences would be akin to "amputating" a part of her.[155] She also implied that a societal demand for her to not write about her daughter undervalued her creative labor—dismissing the value that her writing on parenthood and motherhood offers.[156]

There is an individual freedom of speech value to Monetized Sharenting, as well as a broader social value. In response to the backlash to Tate's article, another Sharenter and author, Stephanie Sprenger, pointed out that this type of writing does not only

---

151.   *See* Counterman v. Colorado, 600 U.S. 66, 73–74 (2023) (reiterating the findings of *United States v. Stevens*, 559 U.S. 460, 470 (2010), holding that typically categorical exclusions from First Amendment protections provide low social value).

152.   *See, e.g.,* Jill Blackmore Evans, *The Artists Making a Living (or Trying To) with Patreon,* FORMAT (Oct. 26, 2018), https://www.format.com/magazine/features/art/artists-making-living-patreon [https://perma.cc/UMW6-WFKM] [https://web.archive.org/web/20241111223958/https://www.format.com/magazine/features/art/artists-making-living-patreon].

153.   Tate, *supra* note 9.

154.   *Id.*

155.   *Id.*

156.   *Id.*

benefit the writer, but the audience.[157] She explains that parents and mothers who are confused and isolated can find support from people who are writing about their parenting experiences online.[158] Indeed, there is some empirical data to back this up.[159] It follows that people engaging in this work should be compensated. This is especially true considering how increasingly difficult it is to raise a family on just one income.[160] The individual and social benefit of Monetized Sharenting is strong, but it collapses the parent's parental liberty interest with a First Amendment interest by assuming that it is has either a mutually beneficial or de minimis effect on their child's development.

C.   FEDERAL AND STATE LEGISLATION DO NOT ADEQUATELY PROTECT AGAINST HARMS OF MONETIZED SHARENTING

Current legislative campaigns around social media and child wellbeing fail to protect against Monetized Sharenting. Although KOSA acknowledges known risks of social media use, it categorically presupposes that parents will have better judgment about mitigating those risks, despite documentation that common uses by parents contribute to some of the same risks.[161] For example, the federal government has acknowledged the phenomenon of children being harmed or injured by recreating dangerous TikTok trends, but fails to identify the "prank" genre of Monetized Sharenting.[162]

Due to a generational gap between the authors of the bill, who are in their seventies, and the younger generation of parents, they may not realize how ubiquitous maladaptive relationships with social media are among parents. The risks of harm this regulation aims to address are characteristic of some Millennial/Gen Z childhoods. Many parents who are now Monetized Sharenters of young children likely developed their understanding of the internet before mental health effects on youth were being fully evaluated. This leaves current children vulnerable to parents' bad decision-making.

Under this current approach of mitigating harm against children, harmful behavior will only be addressed through crisis intervention.[163] Relying on this crisis intervention approach is in direct conflict with the harm prevention approach that the Child Wellbeing framework prescribes and KOSA seeks to implement. It also runs the risk

---

157.   Stephanie Sprenger, *Enough with the Attacks on "Mommy Bloggers"*, (Jan. 10, 2019), https://stephaniesprenger.com/enough-with-the-attacks-on-mommy-bloggers/ [https://web.archive.org/web/20240000000000*/https://stephaniesprenger.com/enough-with-the-attacks-on-mommy-bloggers/].

158.   *Id.*

159.   *See* Ria Novianti et al., *Sharenting: Sharing for Healing. Can Parents Do Gain Better Mental Health?*, 45 J. PUB. HEALTH, 398, 398–99 (2023).

160.   *Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RSCH. CTR. (Nov. 4, 2015), https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/   [https://perma.cc/YE59-DY8W] [https://web.archive.org/web/20240919184130/https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/].

161.   *See, e.g.*, Hall, *supra* note 21, at 122–23.

162.   SOCIAL MEDIA ADVISORY, *supra* note 120, at 23 nn.45–46.

163.   *See, e.g.*, Gajanan, *supra* note 123.

of furthering inequities that have traditionally harmed families and children. Taking a case-by-case basis approach of penalizing sharenting behavior may ultimately incorporate cultural sensibilities into shaping definitions of abuse. This is the exact type of inequity that the Child Wellbeing framework identifies as harmful.

Some literature already suggests that there is a lagging effect on learning about online safety precautions, with poorer people being less likely to have access to online safety training and programming.[164] Establishing a ban on Monetized Sharenting would help prevent reliance on crisis-intervention, both mitigating harm to the child and protecting parental liberty interests long-term by not having their parental right revoked.

Although state legislation may mitigate harm by regulating the monetary interest around Monetized Sharenting, it does not address the root of the problem that young people are concerned about: the distribution of the content, and the industry itself. As one former Monetized child put it, "[a]ny amount of money you receive will be greatly overshadowed by years of suffering," and another echoing this sentiment, stating that nothing their parents do now can take away the years of work they put in.[165] Regulating the Monetization might deter some parents from engaging in it, but it does not eliminate the harm. The Industry is the harm, and regulatory agendas run the risk of legitimizing an inherently harmful business.

III.   PART III: THE CASE FOR BANNING MONETIZATION

The Monetized Sharenting Industry harms children and parents. This Section will first propose a loose outline of what a ban on Monetized Sharenting might look like. It will discuss the legal justification for the limitations on free speech it will impose on parents. It will then explain why this legislative approach is a crucial component of preventing online harms to children by their parents.

A.   OUTLINE OF PROPOSED BAN ON MONETIZED SHARENTING

Congress should pass a statute banning the creation and distribution of Monetized Sharenting. The foundational premise of the bill establish that no social media platform shall allow a guardian or anyone serving in loco parentis to create and digitally distribute monetized content of their children's private information or digital personhood. It should impose a duty of care to actively seek out instances of Monetized Sharenting, and remove posts or accounts that violate the ban. Implementation should be accompanied by a robust public health campaign to notify the public of this new change, and the reasons for it.[166] The brunt of the regulation and enforcement should

---

164.   Candice L. Odgers & Michaeline R. Jensen, *Annual Research Review: Adolescent Mental Health in the Digital Age: Facts, Fears, and Future Directions*, 61 J. CHILD PSYCH. & PSYCHIATRY 336 (2020).

165.   Latifi, *supra* note 113.

166.   For further discussion on a public health approach to Monetized Sharenting, see Steinberg, *supra* note 21.

target social media companies. KOSA can serve as a good regulatory structure for the bill, combining the researching and regulatory capabilities of the HHS and FTC.[167]

First, a compulsory implementation of no Monetized Sharenting in each social media company's terms of service. Once this goes into effect, all companies are required to send special clear and conspicuous notice to their users.[168] Parents, guardians, and anyone supervising anyone serving in loco parentis may not profit off of identifiable or sensitive information they distribute of their child on social media. For the purposes of the statute, identifiable information should include: image or footage of the child's face; image or footage of distinctive physical characteristics; first, middle, and last name; date of birth; municipality; home address; current or scheduled location; name of school; medical information; full legal names of friends, acquaintances, and teachers; or sexual orientation. (A special exception regarding medical condition can be made for websites like GoFundMe.) This list is in part based on the type of information that HHS-recommended resources on internet safety, such as The Center for Missing Children, discourage children from sharing online.[169] It is also based on what children themselves have expressed. Many former Monetized children have made simple demands that their name and photo not be used when parents discuss them online.[170] Others have asked that parents not discuss personal matters. This definition also precludes the production of family prank videos. It leaves enough wiggle room for parents to make money off of writing or content about parenting their children so long as they do not disclose information that could lead a stranger back to their child, or cause reputational harm should someone in their community find out about their parents' content.

This definition of what content cannot be monetized is a key component of the legislation because it is based on a combination of empirical data and of children's self-advocacy. It serves the First Amendment purpose of being tailored to the state's interests because it limits banned content to that which is empirically shown to cause harm, and permits some forms of commercial parental expression.[171] It also comports with the Child Wellbeing approach to legal childhood, as it is based on developmental knowledge from the applicable fields of childhood development.[172] The fact that children themselves are speaking out about this further supports the notion that this is linked to Child Wellbeing—it is not the government imposing a cultural standard, it is children asking the government to protect them from a current cultural standard.[173]

---

167. Kids Online Safety Act, S. 1409, 118th Cong. § 12 (2023–24); H.R. 7891, 118th Cong. § 11 (2023–24).

168. Both COPPA and KOSA set the precedent of regulating services of social media companies. *See generally* Kids Online Safety Act, S. 1409, 118th Cong. § 12 (2023); Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2013).

169. *See, e.g.*, Tate, *supra* note 9; NPR, *supra* note 107.

170. Harris & Tarchak, *supra* note 126.

171. The allowed forms of parental expression would not identify the child or publicize sensitive information.

172. *See* Huntington & Scott, *supra* note 25, at 1435.

173. Although teens have been running a campaign for regulating monetized sharenting, rather than banning it, their own commentary on their reasoning suggests they are using it as a blunt instrument for

Focusing on demonetization is another core component of the legislation. It keeps the regulation in the domain of commercial speech, therefore giving it more flexibility if it faces First Amendment challenges in court. Furthermore, it avoids criminalization or civil liability for parents who genuinely use social media similarly to how some people use holiday cards or photo albums. It also gets at some of what is fueling this phenomenon—the monetary incentive for social media companies to promote this content.[174] As a demonetization effort, a social media company should take the following actions on account with the above-listed identifiable information:

(1) Company may not collect advertising revenue off of the content this user posts.

(2) Company may not permit user to upload commercial links, discount codes, or commercially sponsored content in posts, comments, bios, direct messages, or any other means of commercial interaction the platform facilitates.

(3) Company may not allow profile to use any form of "subscription" feature.

(4) Company may not sell user data from this account.

This behavior represents the most common current forms of monetization of Sharenting content, but the FTC should be vigilant about new forms that arise, in addition to checking for compliance. The FTC should conduct an annual audit of the top fifty social media companies engaged into commercial activity, or any social media company identified as a "high impact online company" as outlined by the current draft of House Bill 7891.[175] A fine should be imposed, calculated based off of the number of violations the FTC identifies, tailored to the revenue of the social media company that year. Additional penalties will be imposed if a social media company fails to decrease the number of monetized sharenting accounts. The FTC should also do research on forms of online, social-media based activity so congress can update the statute as necessary, similar to the research regime outlined in KOSA.[176]

All parties will be liable, with different degrees of liability. Social media companies and companies reaching out for sponsorship will bear the brunt of the liability. Parents will not be held liable unless they establish a pattern of repeat offenses after repeated notification. They will initially receive a notice from the government with information about the illegality of Monetized Sharenting and its known harms. This prioritization

---

deterrence, rather than pushing it as their preferred policy. *See* Latifi, *supra* note 113 (noting one teen testifying in favor of a Washington State Bill HB 1727 that regulates monetized children's compensation with personal testimony and emphasis on the psychological and emotional issue of digital footprints).

174.   Social media companies are generally known to promote or favor influencers. *See, e.g.*, Elizabeth Dwoskin, *YouTube's Arbitrary Standards: Stars Keep Making Money Even After Breaking the Rules*, WASH. POST (Aug. 18, 2019), https://www.washingtonpost.com/technology/2019/08/09/youtubes-arbitrary-standards-stars-keep-making-money-even-after-breaking-rules/ [https://web.archive.org/web/20240927135944/https://www.washingtonpost.com/technology/2019/08/09/youtubes-arbitrary-standards-stars-keep-making-money-even-after-breaking-rules/].

175.   H.R. 7891, 118th Cong. § 101(5)(A)–(C) (2023–24) (defining a high impact online company as an online platform that "generates $2,500,000,000 or more in annual revenue, including the revenue generated by any affiliate of such covered platform; or . . . has 150,000,000 or more global monthly active users for not fewer than 3 of the preceding 12 months on the online product or service of such covered platform; and . . . constitutes an online product or service that is primarily used by users to access or share, user-generated content.").

176*.   See* Kids Online Safety Act, S. 1409, 118th Cong. § 12 (2023–24).

of liability is important for preserving parental rights for parents who break this law out of ignorance or economic desperation in order to avoid the inequities that the Child Wellbeing Framework aims to prevent.

This ban would be its own bill, but in the meantime, Congress should incorporate research into monetized sharenting into the language of KOSA in order to instruct the relevant regulatory agencies to look into the effects of Sharenting and Monetized Sharenting into the research it is already prescribing them to investigate.

B. LEGAL DEFENSE OF MONETIZED SHARENTING BAN

1. The Type of Harm Presented by the Monetized Sharenting Industry Overcomes General First Amendment Claims

A ban on Monetized Sharenting is legally permissible because it would serve a harm prevention function that constitutes a rational link to a substantial government interest. The Monetized Sharenting Industry poses unique harms that are directly linked to the types of abuse that courts have held as justification for both categorical exclusions from First Amendment protections and for passing First Amendment balancing tests under intermediate and strict scrutiny. In *Ferber,* the Supreme Court noted the link between the commercial industry of distributing child pornography and its production of abusive material.[177] As discussed in Part II, Monetized Sharenting is similar in that it creates and promotes abusive conditions. Parents are incentivized to engage in high-risk online behavior that can and does directly harm their child. Some of these harms are already legally established as abuse, while some are matters of public health and safety that Congress is currently in the process of addressing through legislation.

In *Ferber,* the Court emphasized the reputational and emotional harm of the distribution of child pornography. Although categorical exclusions from First Amendment protections are typically rooted in long-standing tradition, the Court's focus on this type of harm leaves the door open for such an exemption to apply to behavior that does not necessarily have the same ubiquitous cultural disapproval that child pornography has. Perhaps as the distribution of child pornography is categorically not protected speech, Monetized Sharenting could also be categorically excluded. Although it is related to child pornography, circuit court decisions on morphed child pornography suggest that courts do take seriously psychological harms that certain types of speech create for children.

Furthermore, the evidence that the Supreme Court looks to in *Ferber* to justify the state's interest in protecting children from the harm of child pornography mirrors the type of evidence that currently exists regarding the harms described in this note. For example, the Court references materials distributed by HHS reports, which involve fairly similar references to current government agencies' information on the harms of

---

177.   *New York v. Ferber,* 458 U.S. 747, 760–63 (1982).

online safety.[178] The court also emphasizes the harm that is tied to the circulation of harmful material and the trauma that comes from this.[179] The same holds true for the harm of sharenting: the distress and psychological harm comes from the distribution and preservation of the harmful experience. When taking the consideration of the inherent tie between the harm caused by the perpetuation of such an industry, the courts should feel empowered to define Monetized Sharenting as a form of speech which does not benefit from First Amendment protection. However, if even if they refuse to do so, the harms associated with Monetized Sharenting still constitute a substantial enough interest to pass intermediate or strict scrutiny.

2. Parents' First Amendment Rights Are Separate and Second To Their Parental Rights and Obligations

In the event that the court does not determine that Monetized Sharenting is exempt from First Amendment protection, the Court's decision in *Prince v. Massachusetts* still justifies a Monetized Sharenting ban.[180] *Prince* sets the foundation for separating an individual's freedom of speech from their freedom to raise their child as they choose.[181] A legislative approach to banning Monetized Sharenting would build off that framework and apply a similar legal issue to a modern context: establishing that one's child is not, legally speaking, an expression of one's self.

Looking back to the example of the Sharenter and author, Christie Tate: She claimed that a restriction on sharing information about her child would be akin to amputating a part of herself.[182] However, this argument does not take into account that with her Monetized Sharenting, she is amputating a part of her child's identity and ability to express herself. Tate could have expressed herself without using her daughter's name and image, something that her daughter ultimately asked of her, and a sentiment that many children of Monetized Sharenters have echoed.[183] Furthermore, *Prince* indicates not only that the state's interest in a child's wellbeing can limit a parent's First Amendment rights, but reiterates that one's child is not a component of their freedom of expression. Just because Tate is creating a highly personal digital footprint of her own life in a very high-risk digital world does not mean she can make the same decision for her child. As stated in *Prince*, "[p]arents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[184]

The social value of Monetized Sharenting can still exist while staying in compliance with this proposed law. In fact, the Monetized Sharenting Industry somewhat frustrates

---

178. *Id.* at 9–10.
179. *Id.* at 757–62.
180. Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).
181. *Id.* at 170.
182. Tate, *supra* note 9.
183. *See id.*; NPR, *supra* note 107.
184. *Prince*, 321 U.S. at 170.

its own social benefit. If the goal is to provide advice to parents and assure them that they are not a bad parent, that goal is undermined if the process incorporates developmentally harmful parenting behavior. In Tate's case, the majority of her writing would likely be permitted under the proposed statute if she had never shared her daughter's real name and pictures. These modifications can be applied even in the video context of Monetized Sharenting. Although the previously noted "Sunday Routine" video would not be permitted, it may have been had the mother kept shots of her children or their locations out of the screen. Other parent influencers have managed to achieve the same effect while protecting their children's identities. One online mom influencer posts videos such as "breakfast in the trailer park as a 23-year-old mom of 4."[185] Her children's faces do not appear once on her social media account, and she blurs them if they ever step into frame. She appears to be cultivating a community of parents thanking her for her affordable cooking tips. It is authentic and relatable content that appears to fill a similar social role to the previously-discussed Sunday Routine video. She currently has about half a million followers on Instagram and over one million on TikTok.[186] This illustrates how the personal and social benefits of monetizable public self-expression of parenthood experiences could survive a ban of the Monetized Sharenting Industry. Under such a ban, non-monetized sharenting would be permissible, as would monetized independent expressions of parenting experiences.

C. POLICY ARGUMENT FOR MONETIZED SHARENTING BAN

By making the images and recordings of the child's face, voice, and name unmonetizable (both by advertiser sponsorship and monetizing platform tools), this creates clear line separating the boundary between a parent's right to self-expression and the parents' parental rights. This line is artificial, but it does serve a function. Deciding on a case-by-case basis what sharenting constitutes abusive content has high potential for inequitable enforcement. Engaging in such an enforcement scheme is exactly the type of appraisal of taste that Justice O'Connor wanted to address in her

---

185.   Alexandra Blogier, *23-Year-Old "Trailer Park" Mom of 4 Shares What She Feeds Her Kids Every Day*, YOURTANGO (Oct. 20, 2023), https://www.yourtango.com/entertainment/23-year-old-trailer-park-mom-4-shares-what-she-feeds-her-kids-every-day [https://perma.cc/KEC3-BRAL] [https://web.archive.org/web/20241111224323/https://www.yourtango.com/entertainment/23-year-old-trailer-park-mom-4-shares-what-she-feeds-her-kids-every-day]; Nadgeena Jerome, *Taste Tots, I'm a Mom of Four Who Lives in a Trailer Park at 22*, U.S. SUN (June 20, 2023), https://www.the-sun.com/lifestyle/8411295/mom-of-four-trailer-park-easy-go-to-meal/ [https://perma.cc/744C-L6VE] [https://web.archive.org/web/20240919185722/https://www.the-sun.com/lifestyle/8411295/mom-of-four-trailer-park-easy-go-to-meal/].

186.   Christa Celia (@christacelia), TIKTOK, https://www.tiktok.com/@christacelia?lang=en [https://perma.cc/D6LW-5AX8] [https://web.archive.org/web/20240919185916/https://www.tiktok.com/@christacelia?lang=en] (last visited Sept. 17, 2024); Christa Celia (@christaceliaa), INSTAGRAM, https://www.instagram.com/christaceliaa/reels/?hl=en [https://perma.cc/NWT4-6UUS] [https://web.archive.org/web/20240927015405/https://www.instagram.com/accounts/login/?next=https%3A%2F%2Fwww.instagram.com%2Fchristaceliaa%2Freels%2F%3Fhl%3Den&is_from_rle] (last visited Sept. 17, 2024).

Ferber concurrence: Weighing the social benefit with the abusive behavior can lead to social sensibilities determining that some abusive material has value, and is therefore not subject to law enforcement.[187] As applied to Monetized Sharenting, this might result in enforcement against one type of content over another simply because one gets labeled "tacky" while the other is labeled "cute," despite both types inflicting similar harm on the child. Such a legal scheme would likely result in the enforcement of middle-class sensibilities that has led to inequitable outcomes in family law.[188] Indeed, preliminary studies suggest that such inequities may present themselves further down the line, as there appears to be a lag in online safety information resources for families from lower economic statuses.[189] It is quite possible that this will lead to different cultural sensibilities about what type of Sharenting content is "worth" the internet safety risks, across socioeconomic lines. A categorical ban on Monetized Sharenting is the only way for the state to maintain an interest in the wellbeing of the child while empowering parental liberty. A categorical exclusion from First Amendment protection cuts out a factor that breeds the extremes of a generation of parents with maladaptive internet use. Stamping out this industry will prevent the proliferation of this abuse and may have the trickle-down effect of curbing sharenting impulses in general.

A ban on monetization also serves a practical preventative function by getting rid of the incentive of garnering an audience.[190] This allows parents to use social media to share family photos, which although still yielding risk of psychological harm, is much less likely to cause harm than a commercialized audience. This protects the child from harm, and protects the parents' interests by eliminating an easily accessible source of revenue that may prompt a parent to engage in harmful or abusive behavior that the parent would otherwise not have engaged in. Ultimately, this may help preserve their parental rights.

This approach has an accommodating function of not punishing today's parents for regulatory failings of their childhood. Teaching children responsible internet use is a parenting standard that will likely become the norm over time. As the law does seem to be shifting toward a Child Wellbeing framework, developmental psychology will probably start shaping various reasonableness standards for parents. Technology and the way it is used progresses so rapidly that the same website can serve a fundamentally different social function within a decade. Parents are going to make some mistakes, and most of these mistakes should go unpunished. But the United States needs to decide now that such mistakes will not be an entertainment industry.

---

187.   *See* New York v. Ferber, 458 U.S. 747, 774–75 (1982) (O'Connor, J., concurring) ("[T]he Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph 'edifying' or 'tasteless.' The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.").

188.   Huntington & Scott, *supra* note 25, at 1388–89.

189.   Odgers & Jensen, *supra* note 164, at 345.

190*.   See* Yates, *supra* note 10, at 845.

IV. CONCLUSION

The state, parents, and children all have an interest in establishing healthy norms and standards when it comes to a child's development of digital identity. The Monetized Sharenting Industry completely undermines this goal and destabilizes all relationships in the process. The process of producing and circulating this type of content directly contributes to well-documented psychological and reputational harm. In its monetized form, this harm is unique enough to warrant a categorical exclusion from First Amendment protection and severe enough to constitute a rational government interest justifying legislation banning it. No matter what type of scrutiny is applied, a legislative ban is legally defensible. Furthermore, such a ban would ultimately preserve family stability and prevent inequities that might arise from a crisis intervention or a case-by-case assessment of instances of Monetized Sharenting.

Although a ban on Monetized Sharenting should not be the only approach to mitigating the harms of general non-monetized sharenting (ideally, other proposals suggesting the right to be forgotten or a right to sue parents for harmful sharenting would also be considered),[191] it is a key step. KOSA has created a rare political opportunity: a moment of strong bipartisan cooperation to regulate some of the most influential actors in the technological industries that shape our everyday life. The government needs to act quickly to prevent the Monetized Sharenting Industry from becoming as established as the film industry. If the federal government does not acknowledge the creation of this abusive industry that was born out of decades of unregulated social media use, they will never be able to effectively protect children from online harm.

---

191.   *See, e.g.*, Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers,"* 169 U. PA. L. REV. 577 (2021); Leah Plunkett, *To Stop Sharenting & Other Children's Privacy Harms, Start Playing: A Blueprint for a New Protecting the Private Lives of Adolescents and Youth (PPLAY) Act*, 44 SETON HALL LEGIS. J. 457 (2020); Haley, *supra* note 21; Hamming, *supra* note 21; Kodie McGinley, *"Take Your Pictures, Leave Your (Digital) Footprints": Increasing Privacy Protections for Children on Social Media*, 53 GOLDEN GATE U. L. REV. 199 (2023); Bennett, *supra* note 23.