

THE COLUMBIA JOURNAL OF LAW *& the* ARTS

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Deepfakes in Domestic and International Perspective

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Regulating AI: Differences Between the U.S. and the EU

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A New Era in the Creator Economy:

Addressing Copyright Issues Between Creators on YouTube

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Mass Digitization of Literary Works and the Legality of
Controlled Digital Lending

Alexa Paladino

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Deepfakes in Domestic and International Perspective

Jane C. Ginsburg* and Graeme W. Austin**

INTRODUCTION

Have you always (or ever) yearned to produce your own recording of Elvis Presley singing great baritone arias from Italian opera? Or to make a movie starring Nicole Kidman as Lady Macbeth? Or a videogame featuring the bully who tormented you in high school suffering repeated tortures worthy of the Christian martyrdoms recounted with gusto in *The Golden Legend*? You can fulfill all these wishes, and more, thanks to the AI technology enabling the creation of “deepfakes”—known in legal documents as “digital replicas”—capable of simulating the visual and vocal appearance of real people, living or dead. AI programs can also generate musical compositions in the style of well-known composers or performers, as well as video sequences. What may be good fun in private may become pernicious, offensive, and even dangerous, if widely disseminated over social media or through commercial channels. But, at least in the U.S., legal protections for performers and ordinary individuals against digital replicas, are at best, scanty.

Introduced into the U.S. Congress with bipartisan and extensive industry support,¹ the “Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2025,” or the

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1. See Press Release, Adam Schiff, Representative, House of Representatives, *Schiff Joins Salazar & Bipartisan House Colleagues in Introducing the NO FAKES Act* (Sept. 12, 2024), <https://web.archive.org/web/20240912230923/https://schiff.house.gov/news/press-releases/schiff-joins-salazar-and-bipartisan-house-colleagues-in-introducing-the-no-fakes-act>. The bill has garnered support from many groups. See Gene Maddaus, *Entertainment Industry Backs Bill To Outlaw AI Deepfakes*, VARIETY (July 31, 2024), <https://variety.com/2024/politics/news/ai-bill-outlaw-no-fakes-sag-aftra-1236091652/> [https://perma.cc/E7CU-KXYP] [https://web.archive.org/web/20250108161910/https://variety.com/2024/politics/news/ai-bill-outlaw-no-fakes-sag-aftra-1236091652/]; SAG-AFTRA *Applauds Introduction of NO FAKES Act in the House*, SAG-

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“NO FAKES Act of 2025,”² aims to address these and other harms, and fill gaps in U.S. law by “protect[ing] intellectual property rights in the voice and visual likeness of individuals, and for other purposes.”³ One of its congressional sponsors expanded on the motivations for the 2024 House version of the bill as follows:

From the biggest entertainers to everyday Americans, non-consensual voice and image clones can ruin careers, deceive families and friends, and traumatize victims. The American people need clear rules that empower individuals to control their own faces and voices while encouraging innovation and ensuring that the United States remains the world leader on artificial intelligence.⁴

AFTRA (Sept. 12, 2024), <https://www.sagaftra.org/sag-aftra-applauds-introduction-no-fakes-act-house> [https://perma.cc/FT5Z-MEGN] [https://web.archive.org/web/20241014203509/https://www.sagaftra.org/sag-aftra-applauds-introduction-no-fakes-act-house]; Nina Frazier, *NO FAKES Act Introduced in the Senate: Protecting Artists' Rights in the Age of AI*, RECORDING ACAD. (Aug. 9, 2024), <https://www.recordingacademy.com/advocacy/news/no-fakes-act-introduced-in-the-senate> [https://perma.cc/83NP-926Z] [https://web.archive.org/web/20250211192024/https://www.recordingacademy.com/advocacy/news/no-fakes-act-introduced-in-the-senate]; Association of American Publishers (@AmericanPublish), X (Sept. 12, 2024, 11:40 AM), <https://x.com/AmericanPublish/status/1834255710445547896?mx=2> [https://perma.cc/M6PV-RMDB]; NO FAKES Act, HUMAN ARTISTRY CAMPAIGN, <https://www.humanartistrycampaign.com/nofakesact> [https://perma.cc/A3RZ-Y7LA] [https://web.archive.org/web/20250203113025/https://www.humanartistrycampaign.com/nofakesact] (last visited Feb. 19, 2025). The bill's purported solicitude for AI developers has provoked OpenAI and IBM to declare their support as well. See Press Release, Chris Coons, Senator, Senate, *Senators Coons, Blackburn, Klobuchar, Tillis Introduce Bill To Protect Individuals' Voices and Likenesses from AI-Generated Replicas* (July 31, 2024), <https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-introduce-bill-to-protect-individuals-voices-and-likenesses-from-ai-generated-replicas> [https://perma.cc/3EFG-CELY] [https://web.archive.org/web/20250215001542/https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-introduce-bill-to-protect-individuals-voices-and-likenesses-from-ai-generated-replicas].

2. H.R. No. 2794, No Fakes Act, 119th Cong. (2025) (introduced April 9, 2025) .

3. *Id.* The NO FAKES Act is one of several legislative proposals aimed at curbing deepfakes. See also Tools To Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks (TAKE IT DOWN) Act, S. 4569, 118th Cong. (2024); Disrupt Explicit Forged Images and Non-Consensual Edits (DEFIANCE) Act of 2024, S. 3696, 118th Cong. (2024); Content Origin Protection and Integrity from Edited and Deepfaked (COPIED) Media Act of 2024, S. 4674, 118th Cong. (2024); Preventing Deep Fake Scams Act, H.R. 5808, 118th Cong. (2023); Protect Elections from Deceptive AI Act, S. 2770, 118th Cong. (2023); No Artificial Intelligence Fake Replicas and Unauthorized Duplications (NO AI FRAUD) Act, H.R. 6943, 118th Cong. (2023); Defending Each and Every Person from False Appearances by Keeping Exploitation Subject To (DEEPFAKES) Accountability Act, H.R. 5586, 117th Cong. (2021); *AI Deepfake Legislation Tracker*, BALLOTEDIA, <https://legislation.ballotpedia.org/ai-deepfakes/home> [https://perma.cc/6ELM-Y35G] [https://web.archive.org/web/20250305010444/https://legislation.ballotpedia.org/ai-deepfakes/home] (last visited Mar. 4, 2025).

4. Press Release, María Elvira Salazar, Representative, House of Representatives, *Salazar Introduces the NO FAKES Act* (Sept. 12, 2024), <https://salazar.house.gov/media/press-releases/salazar-introduces-no-fakes-act> [https://perma.cc/SK4U-F93R] [https://web.archive.org/web/20250122093702/https://salazar.house.gov/media/press-releases/salazar-introduces-no-fakes-act].

This statement encompasses three potentially conflicting objectives: to prevent deception;⁵ to provide rights to individuals to control the use of their faces and voices; but not to do either in a way that discourages innovations in AI. (As our analysis in Part II will show, however, the bill generally favors the last objective over the other two, neglecting or even undermining the interests of individuals and of the broader public.)

The statement also encompasses different perspectives on the bill's geographical scope. The creators and disseminators of deep fake videos and musical compositions need not be based within the United States (indeed, many are likely to be located abroad, especially in the case of deepfake pornography⁶). But some of the bill's promises seem to have Americans in mind. It is the "American people" who need the deception-discouraging "clear rules," and, by creating a "federal intellectual property right,"⁷ the bill will address the need of "everyday Americans" to be protected against the harms associated with false and deceptive uses of image and voice clones. Even so, the protections to be afforded to the "biggest entertainers," of whom the bill is mostly solicitous, are not necessarily conditioned on U.S. citizenship or domicile. Taking account of the stated anti-deception objective of the proposed legislation,⁸ a less parochial approach makes some sense. The harms to which "ordinary Americans" might be exposed are likely to be the same whether the unauthorized digital replicas be of Cate Blanchett, Catherine Deneuve, or Catherine Keener—"big" entertainers who are, respectively, Australian, French, and American. Foreigners who are sufficiently well-known in the United States would appear to have standing to enjoin and seek other relief for domestic U.S. creation and distribution of deepfakes. But the bill's drafting evinces little congressional solicitude for less well-known victims, whether American or foreign. And neither the bill nor general principles of private law clearly remedy the creation and dissemination abroad of Americans' unlicensed digital likenesses.

The first part of this Essay reviews existing protections against the creation and dissemination of deep fakes under U.S. copyright and trademarks laws as well as representative state right of publicity laws. Our brief survey supports the conclusion of the U.S. Copyright Office that "new federal legislation is urgently needed" because "existing laws fail to provide fully adequate protection."⁹ These failures appear plainer

5. For an insightful discussion of the risks of deepfakes in the political context, see Shannon Sylvester, Note, *Don't Let Them Fake You Out: How Artificially Mastered Videos Are Becoming the Newest Threat in the Disinformation War and What Social Media Platforms Should Do About It*, 73 FED. COMM'NS. L.J. 369, 370 (2021).

6. See Complaint ¶¶ 15–18, *People v. Sol Ecom. Inc.*, No. CGC-24-617237 (Cal. Super. Ct. Aug. 16, 2024) [hereinafter, Complaint].

7. Schiff, *supra* note 1.

8. As we will see, the bill in fact scarcely addresses the public's transparency concerns.

9. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 1: DIGITAL REPLICAS 22–23 (July 2024), <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf> [https://perma.cc/WVA2-SZPH] [https://web.archive.org/web/20250211082624/https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf].

still once consideration extends to the capacity of these doctrines to reach foreign violations. The second part of this Essay's analysis will show how the currently pending legislation may, and may not, provide performers and ordinary individuals with enforceable rights against the use of their voices and visual likenesses in digital replicas. Given the few material barriers to cross-border dissemination of deep fakes, any evaluation of the strength of the protections afforded by a new U.S. intellectual property right should consider its international scope, particularly in light of recent Supreme Court caselaw restricting the territorial reach of U.S. intellectual property protections.¹⁰

I. CURRENT POSITIVE LAW IN THE UNITED STATES

Suppose Taylor Swift discovers a TikTok or YouTube posting of a video performance of a song stylistically similar to her compositions, in which the voice and physical appearance of the singer bear a very strong resemblance to Taylor Swift. The resemblance is no accident; the person posting the video will have used AI programs that work from actual photographs or video clips and from recordings of Swift's voice in order to generate highly realistic emulations of Taylor Swift, performing works she never in fact performed. What recourse does current U.S. intellectual property law afford her?

A. COPYRIGHT LAW

Let us start with copyright. We'll soon see that we come up short. Copyright secures the author's exclusive rights to reproduce, adapt, distribute, publicly perform or publicly display her work. But copyright protects neither ideas nor artistic style. Writing a song in the style of Taylor Swift, that is not substantially similar to any songs she in fact wrote, is not infringement. Reproducing clips from a music video might infringe, but generating a new video that neither tracks actual videos, nor reproduces her musical compositions would not violate any rights of Swift (or of the video producer). For example, in a current lawsuit against an AI music-generator, the defendant, Suno, Inc., has responded to allegations of copying sound recordings of musical compositions:

To be clear, the model underpinning Suno's service is not a library of pre-existing content, outputting a collage of "samples" stitched together from existing recordings. Instead, it is a vast store of information about what various musical styles consist of, used to generate altogether new auditory renditions of creations in those styles.

10. See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255, 278 (2010); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 117, 127 (2013); *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016); *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 412–13 (2018); *Hernandez v. Mesa*, 589 U.S. 93, 109–110 (2020); *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 632–34 (2021); *Yegiazaryan v. Smagin*, 599 U.S. 533, 541–42 (2023).

... [T]he outputs of tools like Suno, which do not reprise “the actual sounds fixed” in any “recording” owned by any record label, are not and cannot be even *prima facie* copyright infringements. The outputs generated by Suno are *new* sounds, informed precisely by the “styles, arrangements and tones” of previous ones.¹¹

Note Suno’s emphasis on “actual sounds”; that is because the scope of copyright protection in a sound recording is limited to the “actual [recorded] sounds.”¹² No matter how close-sounding the imitation, no copyright claim arises if the sounds are in fact independently generated.

If the person posting to TikTok or YouTube used a voice clone, the analysis depends on whether the clone re-manipulated the actual sounds of a Swift recording, or if instead the AI voice generation program simply “learned” from extant Swift recordings, but created the sounds “from scratch.” According to its defenders, voice cloning does not reproduce actual recordings but uses AI to mimic vocal patterns. AI models analyze hours of recordings to understand unique characteristics like tone, pitch, and speaking style. The AI then predicts how the voice would sound with new words or phrases and generates entirely original audio. If that is true, there would be no copyright infringement of the sound recording for the reasons we have already explored. If the voice clone program started out with actual recorded sounds, which it re-manipulated to create the vocal performance of the deepfake, the question would be whether the re-manipulated sounds were substantially similar to the recorded sounds—in other words, whether the original audio clip was recognizable in the replica.

Even were the original sound recording recognizable, an important impediment remains to Swift’s claims: There may be an infringement of the sound recording copyright, but she may no longer have rights in the copied sound recording.¹³ A similar problem of copyright ownership arises with respect to photographs that may have served as source material for the video: even if the photograph was copied and remained recognizable in the deepfake video, Swift may not own the copyright in the photo. The copyright starts out with the photographer; unless Swift obtained a transfer of exclusive rights from the photographer, she has no copyright claim. And even if Swift obtained the copyright in at least some photographs, she would need to establish that they had been used by the AI software—a task that, in the absence of robust watermarking and a strong transparency requirement,¹⁴ could prove daunting. In any

11. Answer to Complaint at 3–4, 8, *UMG Recordings, Inc. v. Suno, Inc.*, 24 Civ. 11611 (D. Mass. Aug. 1, 2024).

12. 17 U.S.C. § 114. See *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1289 n.18 (11th Cir. 2011) (“A copyright in the recording and in the song are separate and distinct and by statute are treated differently.”).

13. Raisa Bruner, *Here’s Why Taylor Swift Is Re-Releasing Her Old Albums*, TIME (Mar. 25, 2021), <https://time.com/5949979/why-taylor-swift-is-rerecording-old-albums/> [<https://perma.cc/T2YN-SCCU>] [<https://web.archive.org/web/20250228182344/https://time.com/5949979/why-taylor-swift-is-rerecording-old-albums/>].

14. Cf. Recitals (132)–(136), Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (L. 1689) [hereinafter, E.U. AI Act] (on transparency obligations regarding certain AI-produced

event, the other internet-available images whose copyrights she does *not* own will likely provide sufficient grist to the deepfake mill.

Whether, even assuming proof of copying, the photographer has a claim will turn on the circumstances in which the photographer made her work available to the public. If, for example, she released the photo under a Creative Commons license, she might have (unwittingly) consented to its reuse in digital replicas. The current version of the 4.0 attribution license provides:

You are free to:

Share—copy and redistribute the material in any medium or format for any purpose, even commercially.

Adapt—remix, transform, and build upon the material for any purpose, even commercially.

The licensor cannot revoke these freedoms as long as you follow the license terms.

Under the following terms:

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No additional restrictions—You may not apply legal terms or technological measures that legally restrict others from doing anything the license permits.¹⁵

The permission to “adapt” may well be broad enough to extend to the reuse of a photograph in a deepfake. The “attribution” requirements condition that permission; the obligation not to suggest the photographer’s endorsement provides some protection to the photographer, and to the public who will encounter the deepfake, but the limitations do not apply to the subject of the photograph.

Similarly, suppose the photographic or video deepfake was based on content a non-celebrity produced and posted to YouTube or TikTok. The Terms of Service may be broad enough to cover the reuse of that content in the creation of deepfakes. For

outputs); *see especially id.*, recital (134) (“[D]eployers who use an AI system to generate or manipulate image, audio or video content that appreciably resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful (deep fakes), should also clearly and distinguishably disclose that the content has been artificially created or manipulated by labelling the AI output accordingly and disclosing its artificial origin.”); *id.* art. 50.4 (“Deployers of an AI system that generates or manipulates image, audio or video content constituting a deep fake, shall disclose that the content has been artificially generated or manipulated. . . . Where the content forms part of an evidently artistic, creative, satirical, fictional or analogous work or programme, the transparency obligations set out in this paragraph are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work.”).

15. Attribution 4.0 International Deed, CREATIVE COMMONS, <https://creativecommons.org/licenses/by/4.0/> [<https://perma.cc/B3FN-49W3>] [<https://web.archive.org/web/20250228010112/https://creativecommons.org/licenses/by/4.0/>] (last visited Mar. 6, 2025).

example, TikTok's terms of service ("TOS") permit the service to engage in an extremely wide range of uses, and to authorize third parties to make those uses as well.¹⁶ As a result, even if the digital replica incorporated copyright-protected material, its author may have surrendered any rights.

Protections afforded to foreign individuals are likely to confront the same difficulties. Let's suppose that the deepfake victim retains ownership of sufficient copyright material on which to base a claim. U.S. implementation of national treatment obligations under the Berne Convention and other international accords,¹⁷ places foreign copyright claimants on an equal footing with U.S. individuals.¹⁸ With a few exceptions, almost all foreign-origin copyright-protected material, including the material that could, in theory, form the basis of an infringement action targeting deepfakes, is now protected under U.S. law. The difficulty, as we have seen, is that rights afforded by domestic copyright law are unlikely to prove useful. Foreigners are thus in the same position as Americans when it comes to copyright's inadequacies.

Many deepfakes may not originate in the U.S.; they may be created and disseminated abroad. But if they become accessible in the U.S., the victim (assuming she is a copyright owner) may find redress in U.S. courts under U.S. law, at least as to harm caused in the U.S.¹⁹ By contrast, without that U.S. point of attachment, enforcement of U.S. rights against foreign-created deepfakes may encounter intractable difficulties. Suppose Taylor Swift learned of instances of deepfakes created and disseminated abroad and sought redress from U.S. courts. First, she would need to demonstrate the court's subject matter jurisdiction over the claim, that is, that the claim arises under U.S. copyright law, or, in the absence of federal question jurisdiction, that the parties are of diverse citizenship. A claim alleging purely foreign acts does not arise under the U.S. copyright law because copyrights, like other intellectual property laws, are territorially contained. That is, protections afforded under U.S. copyright law normally reach no further than the nation's borders.²⁰ Recent Supreme Court caselaw reaffirms the

16. "[B]y submitting User Content via the Services, you hereby grant us an unconditional irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorise other users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented." *Terms of Service*, TIKTOK (Nov. 2023), <https://www.tiktok.com/legal/page/us/terms-of-service/en> [https://perma.cc/KV32-KHN4] [https://web.archive.org/web/20250228184106/https://www.tiktok.com/legal/page/us/terms-of-service/en].

17. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971, and *amended* Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986).

18. Under § 104(a) of the Copyright Act of 1976, all unpublished words are protected under U.S. copyright law without regard to the nationality or domicile of the author. Non-U.S. published works are protected under § 104(b) on the basis of compliance with a range of connecting factors, including the author's domicile. 17 U.S.C. § 104.

19. See, e.g., *Sound N Light Animatronics Co. v. Cloud B, Inc.*, No. 16 Civ. 5271 (BRO) (JPR), 2017 WL 3081685, at *6 (C.D. Cal. Apr. 7, 2017); *Crunchyroll, Inc. v. Pledge*, No. 11 Civ. 2334 (SBA), 2014 WL 1347492, at *17 (N.D. Cal. Mar. 31, 2014); *Shropshire v. Canning*, 809 F. Supp. 2d 1139, 1141 (N.D. Cal. 2011).

20. Section 101 of the U.S. Copyright Act defines the "United States" as comprising "the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the

geographic confines of U.S. intellectual property laws, at least in the absence of specific congressional authorization of extraterritorial application.²¹ Alternatively, a U.S. court sitting in diversity could apply foreign law to the infringement claims, but Swift would still need to establish that the U.S. court has personal jurisdiction over the foreign defendant. In the case of a non-resident whose alleged infringements neither originated in nor impacted U.S. users, there may be no basis for long-arm jurisdiction.²²

B. TRADEMARK LAW

Even with respect to deepfakes made or disseminated in the U.S., Taylor Swift will not fare much better under U.S. trademark law, and the position for ordinary non-celebrities will be worse. The federal trademark act, titled the Lanham Act, includes a provision, § 43(a), which courts have interpreted to afford rights against false endorsements,²³ a perspective that aligns with the Lanham Act's concern with

jurisdiction of the United States Government." 17 U.S.C. § 101. Some circuit courts of appeals have developed an exception to the territoriality principle, known as the "predicate act doctrine." See, e.g., *Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd.*, 108 F.4th 458, 473 (7th Cir. 2024), *reh'g and reh'g en banc dismissed*, 2024 WL 4416886 (7th Cir. 2024) (allowing recovery for infringements that occurred abroad that were enabled by the creation of an infringing copy within the United States); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940) (finding that profits from overseas infringement can be recovered on the theory that the infringer holds them in a constructive trust for the copyright owner and reversing the grant of summary judgment). See also *Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 306–08 (4th Cir. 2012); *L.A. News Serv. v. Reuters Television Int'l (USA) Ltd.*, 340 F.3d 926, 928 (9th Cir. 2003), *as amended on denial of reh'g* (Oct. 7, 2003); *Liberty Toy Co. v. Fred Silber Co.*, 149 F.3d 1183, 1998 WL 385469, at *3 (6th Cir. 1998) (unpublished table decision). For analysis of the application of the predicate act theory in the context of digital networks, see Jane C. Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 15 SANTA CLARA COMPUT. & HIGH TECH. L.J. 347 (1999); Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1 (1999). But this doctrine is premised on an initial infringing act in the U.S., and therefore it will not enable a rightsholder to reach infringing conduct in foreign territories if she cannot trace the origin of the foreign infringements to a predicate infringement committed in the U.S.

21. *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412 (2023) (trademark law). See also *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1091 (9th Cir.1994) (en banc) (recognizing that infringing actions that take place entirely outside the United States are not actionable); *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, No. 96 Civ. 1103 (MBM), 1996 WL 724734, at *6 (S.D.N.Y. Dec. 17, 1996) (same). In *Motorola*, 108 F.4th at 472–73, the Seventh Circuit acknowledged, in light of the Supreme Court's decision in *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) that "[l]ike all federal statutes, the Copyright Act is subject to the presumption against extraterritoriality." However, the court sidestepped deciding whether the predicate act doctrine survived the Court's reinvigorated commitment to the presumption against extraterritoriality, holding instead that the doctrine did not apply on the facts.

22. This assumes compliance with other conditions in the relevant long-arm statute. See, e.g., N.Y. C.P.L.R. 302(a)(3)(ii) (McKinney 2008) (stating that the defendant needs to reasonably expect "the act to have consequences in the state and [the defendant] derives substantial revenue from interstate or international commerce").

23. Lanham Act § 43(a) (15 U.S.C. § 1125) provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

unauthorized commercial uses.²⁴ For example, Woody Allen successfully sued a video rental store whose advertisement featured a Woody Allen look-alike holding a subscriber card and appearing to express satisfaction with the store's services.²⁵ The court ruled that consumers might be confused into thinking either that Allen appeared in the advertisement, and therefore endorsed the store's services, or that, even if the public realized the happy customer in the advertisement was not in fact Woody Allen, consumers might believe Allen authorized the appearance of a look-alike in the advertisement. Taylor Swift might make a similar argument respecting the use of a digital replica: If the replica and video are of very high quality, the public might think the deepfake video portrays a real Taylor Swift performance. Even if the video does not dupe the public into believing it is watching an actual Swift performance, the public might, given the burgeoning practice of licensing deepfakes, believe that Swift authorized the appearance of a digital replica.

To any trademark claim, it should make little difference if the quality of the digital replica sang with even better pitch and danced with even greater precision than Swift herself. Modern trademark doctrine's solicitude for *consistent* quality,²⁶ not merely protections against the denigration of goodwill, should be adaptable to protections for celebrity personality. Accordingly, it should be no answer that the deepfake's performance is superior (or at least not defamatory). And, to reference an increasingly prevalent use of AI technology, whether to undergo a digital "de-ageing" process,²⁷ or perhaps a less drastic facial touch up, should be for the celebrity to decide.²⁸

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

24. U.S. COPYRIGHT OFF., *supra* note 9 at 24 (describing the Lanham Act's focus on commercial uses as an impediment to protections against deepfakes).

25. *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985). *See also* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *as amended* (Aug. 19, 1992); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *abrogated on other grounds by* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

26. *See Société Des Produits Nestlé, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 636 (1st Cir. 1992).

27. *See* Melena Ryzik, *Tom Hanks and Robin Wright Open a New Box*, N.Y. TIMES (Nov. 1, 2024), <https://www.nytimes.com/2024/11/01/movies/tom-hanks-robin-wright-here-forrest-gump.html> [<https://web.archive.org/web/20250305023336/https://www.nytimes.com/2024/11/01/movies/tom-hanks-robin-wright-here-forrest-gump.html>] (discussing the use of digital technologies to de-age Hollywood celebrities).

28. Under the current draft of the NO FAKES Bill, the requirement that a "digital replica" be "newly created" indicates that a technological de-ageing "fix" to the appearance of a human actor is not in scope. At the same time, the bill's application to deceased celebrities indicates that a newly created (and therefore within the bill's scope) digital replica representing an actor's younger self is not disqualifying on the basis that the depiction is not "highly realistic." *See* H.R. No. 2794, *supra* note 2.. On the use of AI to enhance (real) actors'

But, supposing Swift succeeds in proving a claim under the Lanham Act, it is not certain that a court would enter an injunction against all disseminations of the video. Rather, given that the video is an expressive work that does not infringe any copyrights (we posit), a court may be reluctant to compel its withdrawal from public view. Rather, the court may determine that a clear and prominent disclaimer adequately protects the public's interest, and Swift's.²⁹ If the video's creator were to preface the video with statements such as the following, then, arguably, the creator would have headed off attempts to compel the video's removal:

This video contains a digital replica of Taylor Swift generated using artificial intelligence and other technologies. The likeness and voice used in this video were not authorized by Taylor Swift, her team, or her record label. This content is a simulated representation and is not intended to mislead viewers into believing it is an authentic performance by Taylor Swift. For clarity, the creation of this digital replica was entirely for illustrative and creative purposes, and the video does not represent any participation or endorsement by Taylor Swift.³⁰

What of cases in which either the defendant is not American or the deepfake is created or distributed outside of the United States? In essence, § 43(a) federalizes common law passing-off, with the consequence that the cause of action relies on a reputation within the jurisdiction, and attendant consumer confusion, or likely confusion, arising from the defendant's actions.³¹ Woody Allen's Lanham Act claim was grounded on his familiarity to "millions of people,"³² and the possibility that average lay

performances in recent movies, see Amy Hume, *When Does an Actor Stop, and AI Begin? What The Brutalist and Emilia Pérez Tell Us About AI in Hollywood*, CONVERSATION (Jan. 22, 2025), <https://theconversation.com/when-does-an-actor-stop-and-ai-begin-what-the-brutalist-and-emilia-perez-tell-us-about-ai-in-hollywood-247796> [https://perma.cc/U8TG-T7N3] [https://web.archive.org/web/20250228192821/https://theconversation.com/when-does-an-actor-stop-and-ai-begin-what-the-brutalist-and-emilia-perez-tell-us-about-ai-in-hollywood-247796].

29. *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 362, 369–70 (S.D.N.Y. 1988) (discussing sufficiency of disclaimers); *Jackson v. MPI Home Video*, 694 F. Supp. 483, 492 (N.D. Ill. 1988); *Consumers Union of U. S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983). See also Ethan LeBleu, *Trademark Modernization Act and the Codification of the Presumption of Irreparable Harm*, 30 J. INTELL. PROP. L. 206 (2022) (explaining how the *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) decision discouraged the granting of injunctions in trademark infringement cases by eliminating the presumption of irreparable harm, leading to inconsistent rulings, and how the Trademark Modernization Act of 2020 restored clarity by codifying the presumption).

30. See also Hang Lu and Shupey Yuan, *"I Know It's a Deepfake": The Role of AI Disclaimers and Comprehension in the Processing of Deepfake Parodies*, 74 J. COMM'N 359, 364 (2024) (finding that an AI disclaimer for deepfake parody ("This is a lip-synched video, meaning that it was created using an artificial intelligence algorithm to change the original lip movements of the speaker and make him say whatever the video creator wanted him to say.") significantly improved the audience's comprehension and ability to recognize the parody").

31. *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 627 (S.D.N.Y. 1985) ("The court . . . finds it helpful, in applying the likelihood of confusion standard to the facts of this case, to refer to traditional trademark analysis.").

32. *Id.* at 617.

observers might be confused.³³ A Cate Blanchett or Catherine Deneuve might satisfy these requirements,³⁴ but other foreign victims, including victims of deepfake pornography,³⁵ otherwise anonymous to the American public, are unlikely to do so.

As for (sufficiently well-known) plaintiffs seeking relief for conduct abroad, the recent Supreme Court decision in *Abitron Austria GmbH v. Hetronic International, Inc.*,³⁶ calls into question the continued viability of Lanham Act claims directed at activity in foreign territories. The decision marked the first time the Court had engaged with the capacity of the Lanham Act to afford relief for trademark infringement abroad since its 1952 decision in the *Steele v. Bulova Watch Co.*³⁷ In the earlier case, the Court held that, at least in cases involving U.S. defendants, infringing conduct occurring in foreign territories, but that that targeted U.S. residents or which had ripple effects in the United States could be enjoined under the Lanham Act.³⁸ Without expressly overturning *Steele*,³⁹ the Court applied a “presumption against extraterritoriality” to trademark cases alleging infringing activity abroad.⁴⁰ Overcoming the presumption requires plaintiff to pass a “two-step” test: Congress must have unmistakably instructed that a provision should apply to foreign conduct; if not, the court must be satisfied that the claim requires a “(permissible) domestic”—not an “(impermissible) foreign”—application of the provision.⁴¹ At least with tangible goods, foreign sales to foreign customers of goods to which the plaintiff’s trademark had been affixed did not pass muster, as the Tenth Circuit Court of Appeals confirmed on remand,⁴² nor did “downstream” foreign sales

33. *Id.* at 630 (Congress prohibited only likelihood of confusion as to “average lay observer”) (citing *Warner Bros., Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 246 (2d Cir. 1983)).

34. David W. Dunlap, *For Lesbian Magazine, a Question of Image*, N.Y. TIMES (Jan. 8, 1996), <https://www.nytimes.com/1996/01/08/business/for-lesbian-magazine-a-question-of-image.html> [<https://web.archive.org/web/20250228194657/https://www.nytimes.com/1996/01/08/business/for-lesbian-magazine-a-question-of-image.html>] (explaining that *Deneuve* magazine voluntarily changed its name to *Curve* to avoid litigation costs when Catherine Deneuve sued for trademark infringement). *See also* Complaint, *Pele IP Ownership LLC v. Samsung Elecs. Co.*, 16 Civ. 3354 (N.D. Ill. Mar. 16, 2016) (Pelé sued Samsung for false endorsement after they used a look-alike in a soccer-themed advertisement, claiming it deceptively implied his endorsement and damaged his brand value; the case settled several years later.).

35. *See* Press Release, David Chiu, City Attorney, San Francisco, *City Attorney Sues Most-Visited Websites that Create Nonconsensual Deepfake Pornography* (Aug. 15, 2024), <https://www.sfcityattorney.org/2024/08/15/city-attorney-sues-most-visited-websites-that-create-nonconsensual-deepfake-pornography/> [<https://perma.cc/F4PY-9X6B>].

36. 600 U.S. 412 (2023).

37. 344 U.S. 280 (1952).

38. *Steele v. Bulova Watch Co.* spawned a complex body of jurisprudence testing the scope of its doctrine, described by one commentator as a “[m]otley [c]rew of [c]ircuit [c]ourt [t]ests.” TIM W. DORNIS, TRADEMARK AND UNFAIR COMPETITION CONFLICTS: HISTORICAL-COMPARATIVE, DOCTRINAL, AND ECONOMIC PERSPECTIVES 161 (2017).

39. *Cf.* *Hetronic Int’l, Inc. v. Hetronic Ger. GmbH*, 99 F.4th 1150, 1170 (10th Cir. 2024) (“[P]ost-*Abitron*, *Steele* no longer carries weight in the extraterritoriality analysis.”).

40. *Abitron Austria GmbH v. Hetronic Int’l, Inc.*, 600 U.S. 412, 415 (2023).

41. *Id.* at 418.

42. *Hetronic Int’l, Inc. v. Hetronic Ger. GmbH*, 99 F.4th at 1167.

of products that ended up in the United States.⁴³ These uses did not constitute “use in commerce” regulated by the Lanham Act.

With online exploitation of digital replicas, the position is less clear. The *Abitron* Court acknowledged that use in domestic commerce could include advertising in the U.S. As the Tenth Circuit confirmed, “advertising . . . infringing products online to U.S. customers would qualify as domestic infringing uses in commerce under *Abitron*,” including, it seems, advertising initiated abroad.⁴⁴ And at least one district court has held, post-*Abitron*, that foreign use of the plaintiff’s mark, including in internet advertising, might provide circumstantial evidence of an intention to reach U.S. customers with its promotional material.⁴⁵ It is not obvious, however, that these possibilities for localizing foreign activities in the context of false endorsement claims would assist in claims targeting foreign exploitations of deepfake replicas. If courts see an analogy between foreign-sourced deepfake celebrity endorsements and advertising that affects U.S. commerce, Lanham Act claims might survive, but, post-*Abitron*, this is likely to prove an uphill battle. Much will depend on the facts, and whether disclaimers nullify the possibility of consumer confusion. In any event, many deepfakes would not be endorsements at all: An Elvis Presley clone crooning “Largo al factotum” from *The Barber of Seville* to sell haircare products might be within the Lanham Act’s scope if viewed in the U.S., but it may just as likely to be created (and even shared) for personal amusement as for commercial ends, and thus escape the Lanham Act’s reach on other grounds.

C. RIGHT OF PUBLICITY

Unlike trademark rights which, at least in theory, do not afford “rights in gross” against non-consensual exploitations of individuals’ identities, state law publicity rights may be enforced even in the absence of consumer confusion. The nature of a right of publicity claim lies in misappropriation, not deceit.⁴⁶ A majority of states have some form of right of publicity, either judge-made or by statute, and often derived from protections of personal privacy. For example, the New York States Civil Rights law, Section 51, provides:

Action for injunction and for damages. Any person whose name, portrait, picture, likeness or voice is used within this state for advertising purposes or for the purposes

43. *Id.* at 1169. *See also id.* (“Products bound for the United States but sold abroad cannot premise a Lanham Act claim without some domestic conduct tying the sales to an infringing use of the mark in U.S. commerce.”); Timothy R. Holbrook & Anshu Garg, *Confusion over Trademark Extraterritoriality . . . and Beyond*, 73 AM. U. L. REV. 989, 1035 (2024) (“[A]n effect (of some level) on U.S. commerce is no longer germane to the extraterritoriality analysis of the Lanham Act.”).

44. *Hetronic Int’l, Inc. v. Hetronic Ger. GmbH*, 99 F.4th at 1171.

45. *Hazelden Betty Ford Found. v. My Way Betty Ford Klinik GmbH*, No. 20 Civ. 409 (JRT) (TNL), 2023 WL 6318164, at *9 (D. Minn. Sept. 28, 2023). *See also* *Rockwell Automation, Inc. v. Parcop S.R.L.*, No. 21 Civ. 1238 (GBW) (JLH), 2023 WL 4585952, at *3 (D. Del. July 18, 2023).

46. For differences between infringement of the right of publicity and false endorsement, see, e.g., J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:14 (5th ed. 2024).

of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using such person's name, portrait, picture, likeness or voice, to prevent and restrain the use thereof[.]. . .⁴⁷

The original version of the text did not include “voice” within the protected subject matter, reflecting how legislators, when initially drafting the statute, did not foresee voice as a key element of personal identity.⁴⁸ New York courts had interpreted the statute liberally in regards to physical appearance, but consistently barred actions involving sound-alikes.⁴⁹ While New York and other states now recognize voice as part of an individual's personality,⁵⁰ and some have created claims against deepfakes of deceased (but not living) persons,⁵¹ this shift highlights how laws can lag behind emerging technologies and social realities—just as deepfakes may be slipping through the cracks today.

For present purposes, it suffices to establish that the scope of protection may vary from state to state, spawning uncertainty for individuals and users alike.⁵² Hence the perception of the need for some form of federal protection against digital replicas.⁵³ In

47. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2024). “Voice” was added to the list of protectable attributes in 1995. Act of Aug. 9, 1995, ch. 674, 1995 N.Y. Laws 3642 (codified at N.Y. CIV. RIGHTS LAW § 51).

48. *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 259 (Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (1985).

49. *Id.* See also *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 620 (S.D.N.Y. 1985); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

50. CAL. CIV. CODE § 3344(a) (West 1989); IND. CODE § 32-36-1-6; NEV. REV. STAT. § 597.770; 765 ILL. COMP. STAT. 1075; OHIO REV. CODE ANN. § 2741.01 (West); TENN. CODE ANN. § 47-25-1101 (West); WASH. REV. CODE § 63.60.010; TEX. PROP. CODE ANN. § 26.002 (West). In contrast, the following statutes still do not explicitly mention “voice.” See FLA. STAT. § 540.08; KY. REV. STAT. ANN. § 391.170 (West); MASS. GEN. LAWS ch. 214, § 3A; VA. CODE ANN. § 8.01-40.

51. See N.Y. CIV. RIGHTS LAW § 50-f.

52. For an analysis of some of the differences in the scope of state right of publicity laws, see Responses of Professor Jennifer E. Rothman to Questions for the Record of Representative Dean, *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI, Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 118th Cong. (Feb. 27, 2024) (written responses of Jennifer E. Rothman), https://rightofpublicityroadmap.com/wp-content/uploads/2024/03/Rothman_Answers-to-Rep-Dean-Questions-for-the-Record_Feb-27_2024.pdf [<https://perma.cc/A4AZ-2PQR>] [https://web.archive.org/web/20240420020337/https://rightofpublicityroadmap.com/wp-content/uploads/2024/03/Rothman_Answers-to-Rep-Dean-Questions-for-the-Record_Feb-27_2024.pdf].

53. U.S. COPYRIGHT OFF., *supra* note 10, at 22–23; Coons, *supra* note 1 (Vice President of Global Affairs at OpenAI explained that “[c]reators and artists should be protected from improper impersonation, and thoughtful legislation at the federal level can make a difference.”); Schiff, *supra* note 1 (Representative Madeleine Dean expressed that “as AI's prevalence grows, federal law must catch up”). To avoid a proliferation of potentially inconsistent rights, a new federal publicity right concerning deepfakes should create a uniform national standard, preempting state legislation. See Jennifer E. Rothman, *Senate Holds Hearing on Ways to Improve Draft Digital Replica Bill*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (May 1, 2024), https://rightofpublicityroadmap.com/news_commentary/senate-holds-hearing-on-ways-to-improve-draft-digital-replica-bill/ [<https://perma.cc/GD2L-QAWF>] [https://web.archive.org/web/20250407141510/https://rightofpublicityroadmap.com/news_commentary/senate-holds-hearing-on-ways-to-improve-draft-digital-replica-bill/] (“All witnesses who addressed the question suggested the need for the federal law to preempt a confusing and conflicting set of state laws. The alignment of the recording industry, tech platforms, movie industry, and academic witness around this issue

addition, considerable uncertainty has surrounded the protection of the publicity rights of foreigners and of individuals domiciled outside of the state in which the acts were committed in violation of the right.⁵⁴ Because publicity rights have been treated as akin to privacy rights, the law of the place of domicile at the time of the alleged violation occurred is frequently applied (or, in the case of deceased celebrities, the law of the place of domicile at the time of death⁵⁵). This has sometimes deprived foreign or out-of-state plaintiffs of any relief.⁵⁶

II. PROPOSED LEGISLATION: NO FAKES ACT

The following discussion analyzes some of the bill's highlights. The bill is too long and complex to consider all its provisions. Notably, we do not review the extensive provisions regarding the exploitation of digital replicas of dead celebrities, and we offer no reflections on the adequacy of and avenues for securing remedies, except to invite some further consideration of the decision to adopt a single remedial regime for claims by celebrities and ordinary individuals: remedies tailored to protecting the commercial interests of the former might not be well adapted to vindicating the dignitary interests of the latter. And we leave for another occasion the bill's treatment of the secondary liability of internet services that disseminate third party-created digital replicas.⁵⁷

is a shift from prior discussions.”). The 2025 version of the Bill does not fully reflect these views. The rights established under the Bill will preempt “cause[s] of action under State law for the protection of an individual’s voice and likeness in connection with a digital replica . . . in an expressive work” but the Bill will nevertheless preserve *inter alia* “causes of action under State statutes or common law in existence, as of January 2, 2025, regarding a digital replica.” No Fakes Act, 119th Cong. § 2(g)(1), (2)(A) (2025) (unintroduced bill) (on file with authors).

54. Mary LaFrance, *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule*, 37 CARDOZO ARTS & ENT. L.J. 1 (2019).

55. LOUIS ALTMAN & MALLA POLLACK, 4 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:34 (4th ed. 2024); *see also* A.L.I., PRINCIPLES OF INTELLECTUAL PROPERTY § 301 (2008) (section on territoriality); N.Y. CIV. RIGHTS LAW § 50-f(b) (creating a cause of action against unauthorized digital replicas of deceased personalities but limiting relief to a “deceased natural person domiciled in this state at the time of death”).

56. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1149 (9th Cir. 2002) (holding that because Princess Diana was domiciled in the United Kingdom at the time of her death and U.K. law does not provide post-mortem publicity rights, no claim could be brought in California); *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir. 1989); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1197 (S.D.N.Y. 1983); *Se. Bank, N.A. v. Lawrence*, 489 N.E.2d 744, 745 (N.Y. 1985).

57. The bill creates a notice-and-take-down regime similar to the Copyright Act’s § 512, but with an important clarification: While courts have divided on the permissibility of a take-down-stay-down remedy under § 512 (*Compare* Capitol Recs., LLC v. Vimeo, LLC, 826 F.3d 78, 83 n.4 (2d Cir. 2016) (“Plaintiffs and their amici protest that copyright owners are shortchanged by the compromise. . . . [A]ssuming copyright owners’ complaint has merit, the need for remediation is a question for Congress.”), *with* EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79, 91 (2d Cir. 2016) (“[R]equiring MP3tunes to extend that policy to users who sideloaded infringing content may not be an unreasonably burdensome request. . . . MP3tunes would simply have had to make use of information already within its possession and connect that information to known users.”)), the bill’s provision on safe harbors excludes liability if the service “removes, or disables access to all other publicly available instances of the work embodying the claimed unauthorized digital replica” (emphasis added). This must be done “as soon as is technically and practically feasible for that online service.” The condition is subject to the further requirement that there be a match

A. WHAT ARE “DIGITAL REPLICAS?”

The bill regulates “digital replicas,” which it defines as:

(A) ... a newly created, computer-generated, highly realistic electronic representation¹² that is readily identifiable as the voice or visual likeness of an individual that—

(i) is embodied in a sound recording, image, audiovisual work, including an audiovisual work that does not have any accompanying sounds, or transmission—

(I) in which the actual individual did not actually perform or appear; or

(II) that is a version of a sound recording, image, or audiovisual work in which the actual individual did perform or appear, in which the fundamental character of the performance or appearance has been materially altered;⁵⁸

The definition makes clear that the bill in no way regulates sound recordings, images, audiovisual works, or live performances that are not computer-generated. Thus, the bill would not jeopardize the careers of Elvis imitators, whether appearing live in Las Vegas or on recordings, etc. Unlicensed hologram shows⁵⁹—such as the remarkably successful “ABBA Voyage”⁶⁰—are, however, likely to be covered. A “digital replica” must be “embodied in a sound recording . . . or audiovisual work.”⁶¹ However lifelike and freestanding holograms may appear to an audience, they will be the projections of digital sound recordings and audiovisual works incorporating AI-generated vocal and audio elements.

The definition imposes no citizenship or domicile limitations on the individuals whose identities might be susceptible to digital replication.⁶² Replicas of our French and Australian Catherines and Cates would seem to qualify. Celebrities of their magnitude would easily surmount the ‘readily identifiable’ threshold. But what of the everyday individuals who do not enjoy such fame and whose likenesses are replicated? The term “readily identifiable” suggests a higher threshold than “recognizable.” And

with a digital fingerprint of an unauthorized digital replica that was specifically identified in the notice sent by the right holder and that the other publicly available instances of the work were uploaded after the applicable notice was submitted to, and processed by, the provider. H.R. 2794 § 2(d)(1)(B)(ii)(II). This may require the service provider to render inaccessible not only the digital replica specifically noticed by the individual or right holder, but also any other qualifying appearances of that replica on the host’s servers. *See id.*

58. H.R. 2794 § 2(a)(2).

59. Rachel Hall, *AI Elvis Not the First Hologram Star To Shake His Moves on Stage*, *GUARDIAN* (Jan. 4, 2024), <https://www.theguardian.com/music/2024/jan/04/ai-elvis-not-the-first-hologram-star-to-shake-his-moves-on-stage> [https://perma.cc/Z8ZD-N5K7] [https://web.archive.org/web/20250201170115/https://www.theguardian.com/music/2024/jan/04/ai-elvis-not-the-first-hologram-star-to-shake-his-moves-on-stage].

60. ABBA VOYAGE, <https://abbavoyage.com/> [https://perma.cc/GN5A-WGCU] [https://web.archive.org/web/20250307005408/https://abbavoyage.com/] (last visited Mar. 7, 2025).

61. H.R. 2794 § 2(a)(2)(i).

62. The first U.S. federal copyright law, the Copyright Act of 1790, expressly applied only to citizens or residents of the U.S. Copyright Act of 1790, § 1, 1 Stat. 124 (1790).

“readily identifiable” to whom? To the ordinary observer? To the individual’s local community? We might expect, for example, digital replicas of professors to be “highly recognizable” in their university contexts, but few of us enjoy recognition beyond these milieux. Even then, close familiarity may result in the deepfake not being “highly realistic,” because close friends and family (and colleagues and students) may be able to tell the difference. Even for domestic plaintiffs, the bill will require considerable judicial construction if it passes in this form.

The problems will be compounded for foreign individuals who do not enjoy the benefits and burdens of American celebrity. Whether the harms are lessened if the individuals are unrecognized by the public to which the deepfake is made available will surely depend on the context.⁶³ The dignitary violations and outrage induced by a foreign individual’s discovery that her likeness has been deployed in deepfake pornography or “deepnudes,”⁶⁴ for example, should provide a *sufficient* basis for a claim under the proposed regime, even if the affronts might be more deeply felt when the individual is “readily identifiable” to a local viewership. For many foreign and U.S. claimants, the rights to be afforded by the NO FAKES Act would be illusory if only famous individuals’ likenesses counted as “digital replicas”—and would be contrary to the expressed intent of the bill’s sponsors.⁶⁵ The intention that the bill should prevent the production and dissemination of non-consensual pornographic imagery,⁶⁶ for example, will be realized only if the “readily identifiable” criterion does not impose an unrealistic barrier to relief.

If the difficulties attending the “readily identifiable” standard cannot be resolved through sensible statutory construction, some rethinking of the legislative text might be warranted. One approach might be to adopt the language used in § 2256 of Title 18, the definition of “sexually explicit conduct” to which the NO FAKES bill cross-refers.⁶⁷ In the context of child pornography, § 2256, which also refers to “computer-generated image[s],”⁶⁸ requires only that the person depicted be an “identifiable minor” who is “recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature.”⁶⁹ The individuals to be protected under the NO FAKES bill include minors;⁷⁰ accordingly, consistent definitions would better align the NO FAKES regime with other legal

63. See H.R. 2794 § 2(c)(1), (2) (describing the bases for liability). These are discussed *infra* Part II.D.

64. See Complaint, *supra* note 7, ¶ 4.

65. Schiff, *supra* note 1 (Rob Wittman said that “we must protect all Americans—from artists to innocent young children—from deepfakes,” while Chris Coons added: “Everyone deserves the right to own and protect their voice and likeness, no matter if you’re Taylor Swift or anyone else.”).

66. H.R. 2794 § 2(c)(5)(B); Schiff, *supra* note 1 (Representative Wittman affirmed that the “NO FAKES Act is an important step in safeguarding Americans from bad actors who may try to . . . generate sexually explicit deepfakes.”).

67. Section 2(c)(5)(B) provides that the delineated exclusions “shall not apply where the applicable digital replica is used to depict sexually explicit conduct, as defined in section 2256(2)(A) of title 18, United States Code.” S. 4875 § 2(c)(4)(B). See 18 U.S.C. § 2256.

68. 18 U.S.C. § 2256(8).

69. *Id.* § 2256(9).

70. The NO FAKES Act includes detailed provisions relating to licenses of digital replica image rights involving individuals who are younger than eighteen years of age. See H.R. No. 2794 § 2(b)(2)(B)(ii).

protections for children against exploitation and abuse. More generally, the “Take it Down Act,” sec. 2(b)(1)(C) defines an “identifiable individual” as

an individual—

- (i) who appears in whole or in part in an intimate visual depiction; and
- (ii) whose face, likeness, or other distinguishing characteristic (including a unique birthmark or other recognizable feature) is displayed in connection with such intimate visual depiction.⁷¹

Requiring that the depiction incorporate “recognizable features” or be recognizable “as an actual person” would better realize the aspiration that “[e]veryone deserves the right to own and protect their voice and likeness.”⁷²

B. WHO OWNS THE RIGHTS?

Under the bill, “each individual or right holder shall have the right to authorize the use of the voice or visual likeness of the individual . . . in a digital replica.”⁷³ The bill defines a “right holder” as “the individual, the voice or visual likeness of whom is at issue with respect to a digital replica or a product or service described in subsection (c)(2)(B)⁷⁴ or that person’s successor in title.”⁷⁵ Living individuals may not assign their digital replica rights, but they may license them “in whole or in part, exclusively or non-exclusively”⁷⁶ for a maximum duration of ten years.⁷⁷

If the drafters sought to protect individuals by prohibiting a total *inter vivos* assignment of the right, the breadth of the licensing provision seems to undermine that objective. Apart from the limited duration of a license—which in fact is limited only as to new uses of deepfakes; previously-licensed uses may continue to be exploited even after the license’s expiration⁷⁸—it is not obvious that there is any meaningful difference between an assignment of all rights and an exclusive license of digital replica rights “in whole.” It seems the drafters intended a narrower scope for licenses relative to assignments, because, in addition to the ten-year limit, the bill also conditions a license’s validity on being “in writing and signed by the individual or an authorized representative of the individual; and [] includ[ing] a reasonably specific description of

71. S. 146, 119th Cong. (introduced 01/16/2025).

72. Schiff, *supra* note 1.

73. H.R. 2794 § 2(a)(6)(B).

74. *Id.* § 2(c)(2)(B)(i) (“is primarily designed to produce one or more digital replicas of a specifically identified individual or individuals”).

75. *Id.* § 2(a)(6).

76. *Id.* § 2(b)(2)(A)(i)(III).

77. *Id.* § 2(b)(2)(B)(i)(I).

78. *Id.* § 2(b)(2)(E) (providing that any uses already made before the license’s expiration may continue to be exploited even after expiration). See Jennifer E. Rothman, *NO FAKES Act Introduced in Senate*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Sept. 9, 2024), https://rightofpublicityroadmap.com/news_commentary/no-fakes-act-introduced-in-senate/ [https://perma.cc/KV6H-D8YY] [https://web.archive.org/web/20250208031242/https://rightofpublicityroadmap.com/news_commentary/no-fakes-act-introduced-in-senate/].

the intended uses of the applicable digital replica.”⁷⁹ But the possibility of licensing the right “in whole” would seem to circumvent the requirement of specificity. Moreover, it is not clear whether “in writing and signed” would include click on assent to Terms of Service, such as the TikTok TOS discussed above.⁸⁰

C. WHAT ARE THE RIGHTS?

Subject to a variety of exceptions, the following acts violate the individual’s or right holder’s digital replica rights:

The public display, distribution, transmission, or communication of, or the act of otherwise making available to the public, a digital replica without authorization by the applicable right holder.⁸¹

The acts listed echo the exclusive rights under copyright and seem relatively noncontroversial. The bill also, in language echoing the circumvention device-trafficking prohibitions in the Digital Millennium Copyright Act,⁸² bars:

Distributing, importing, transmitting, or otherwise making available to the public a product or service that—

- (i) is primarily designed to produce 1 or more digital replicas of a specifically identified individual or individuals without the authorization of such individual or individuals or the law;
- (ii) has only limited commercially significant purpose or use other than to produce a digital replica of a specifically identified individual or individuals without the authorization of such individual or individuals or the law; or
- (iii) is marketed, advertised, or otherwise promoted by the individual or entity described in paragraph (1), or another individual or entity acting in concert with the individual or entity described in paragraph (1) with the knowledge of the individual described in paragraph (1), as a product or service designed to produce an unauthorized digital replica of a specifically identified individual or individuals without the authorization of such individual or individuals or the law.⁸³

The version of the Bill introduced in 2024 did not include device-trafficking prohibitions.⁸⁴ Under that Bill, liability extended to the mere “production” of digital replicas without consent; that version did not condition liability on dissemination of the deepfake. By contrast, the Copyright Office, in a 2024 report to Congress advised

79. No Fakes Act, § 2(b)(2)(B)(i)(II).

80. See Rothman, *supra* note 78.

81. No Fakes Act, § 2(c)(2)(A).

82. 17 U.S.C. § 1201(a)(2), (b)(1).

83. No Fakes Act, § 2(c)(2)(B).

84. See S. 4875, 118th Cong. § 2(c)(2) (2024).

“proscribing [only] activities that involve dissemination to the public.”⁸⁵ The Office cautioned: “[T]he creation of a digital replica in itself could be part of an artist’s experimental process or for a consumer’s personal entertainment. Such purely personal use would ordinarily be innocuous and can foster further creativity.”⁸⁶ The 2025 version of the Bill now hews more closely to that recommendation.

As a result, the current version of the Bill permits individuals to create digital replicas for recreational purposes, as it imposes no liability for mere reproduction. However, a person’s ability to produce a deepfake will depend on the availability of tools that facilitate its creation. While the Bill’s language aims to reduce access to such tools, it currently allows services to avoid liability if they are sufficiently diversified—i.e., if they support substantial non-infringing uses and do not explicitly promote creation of unauthorized deepfakes.⁸⁷ Accordingly, the Bill’s practical impact hinges on whether most services involved in production of unauthorized deepfakes are primarily or exclusively dedicated to that purpose. In practice, most are not.⁸⁸

The creation of a deepfake typically involves five key stages that a user must actively initiate and manage: data collection, preprocessing, model training, synthesis, and post-processing.⁸⁹ Deepfake creators complete the pre-processing and other steps using a variety of tools. They first gather photos, videos, or audio of the target. That data is then preprocessed using tools to crop faces or clean audio.⁹⁰ Machine learning platforms use the data to train a model that mimics the target’s likeness or voice.⁹¹ Alternatively, some users skip these initial steps by downloading a pre-trained model created by others and proceed directly to the synthesis stage.⁹² Synthesis tools take the trained model and apply it to new content. In the case of video, these tools generate footage by replacing the face in a source video with the target’s face learned by the model, adjusting for movements, expressions, and angles.⁹³ For audio, they generate new

85. U.S. COPYRIGHT OFF., *supra* note 10, at 33.

86. *Id.* (citing *Chapman v. Maraj*, No. 18 Civ. 9088 (VAP) (SS), 2020 WL 6260021, at *10 (C.D. Cal. Sept. 16, 2020) (holding that the creation of a derivative work without disseminating it was a fair use, and noting that “artists usually experiment with works before seeking licenses from rights holders”).

87. No Fakes Act, § 2(c)(2)(B)(i)–(ii).

88. Thanks to Makena Binker Cosen for the following description of the creation of deepfakes.

89. Catherine Bernaciak & Dominic A. Ross, *How Easy Is it To Make and Detect a Deepfake?*, SOFTWARE ENG’G INST. BLOG (Mar. 4, 2022), <https://insights.sei.cmu.edu/blog/how-easy-is-it-to-make-and-detect-a-deepfake/> [https://perma.cc/YT54-HHH3] [https://web.archive.org/web/20250421235721/https://insights.sei.cmu.edu/blog/how-easy-is-it-to-make-and-detect-a-deepfake/]; Edward Hays, *Unraveling the Deepfake Creation Process: A Step-by-Step Guide*, MEDIUM (Aug. 4, 2024), <https://medium.com/@toddkslater/unraveling-the-deepfake-creation-process-a-step-by-step-guide-682dcfb5e53d> [https://perma.cc/NYY8-NUB6] [https://web.archive.org/web/20250421235849/https://medium.com/@toddkslater/unraveling-the-deepfake-creation-process-a-step-by-step-guide-682dcfb5e53d].

90. *Id.*

91. *Id.*

92. See Brian Timmerman et al., *Studying the Online Deepfake Community*, 2J. ONLINE TRUST & SAFETY 1, 8 (2023).

93. See *supra* note 89.

speech in the target's voice from input text or sound.⁹⁴ Post-processing tools refine the output for realism.⁹⁵ Each stage of creating a deepfake can be facilitated by widely available programs or services—many of which are not explicitly designed for deepfakes but may be used to address one or more steps in the process. These tools may also be used for a variety of legitimate purposes.

Image generation platforms—which popularly serve many purposes—can also be used to create deepfakes by uploading small add-on models called low-rank adaptations, more commonly referred to as, “LoRAs”, which can adjust the base system to mimic a specific individual's appearance.⁹⁶ Face-swapping tools streamline the creation of deepfakes even further, but are typically bundled with other visual effects services, such as changing the appearance of an individual's age, gender, or facial expression.⁹⁷ Voice cloning technology is frequently marketed to generate authorized digital replicas of a person's voice for use in podcasts, social media, and other content.⁹⁸ Even if a platform offers unauthorized voice replicas, it may still avoid liability under the Bill if it provides a substantial number of models of fictional or cartoon characters, which are not protected under its definition of an “individual.”⁹⁹ Lip-syncing models that align images

94. Jeong-Eun Choi, Karla Schäfer & Sascha Zmudzinski, *Introduction to Audio Deepfake Generation: Academic Insights for Non-Experts*, ACM DIGIT. LIBR. (June 10, 2024), [https://dl.acm.org/doi/pdf/10.1145/3643491.3660286] [https://web.archive.org/web/20250422001329/https://dl.acm.org/doi/pdf/10.1145/3643491.3660286].

95. See *supra* note 89.

96. Joshua Noble, *What Is LoRA (Low-Rank Adaption)?*, IBM (Jan. 28, 2025), [https://www.ibm.com/think/topics/lora] [https://perma.cc/ZUL7-W4SJ] [https://web.archive.org/web/20250421224303/https://www.ibm.com/think/topics/lora]; @rocketguyishere, *Lora Models and How To Use Them with Stable Diffusion (by ThinkDiffusion)*, CIVITAI (Sept. 5, 2023), [https://civitai.com/articles/2099/lora-models-and-how-to-use-them-with-stable-diffusion-by-thinkdiffusion] [https://perma.cc/MMG7-6YJD] [https://web.archive.org/web/20250421224706/https://civitai.com/articles/2099/lora-models-and-how-to-use-them-with-stable-diffusion-by-thinkdiffusion].

97. See, e.g., *FaceSwapper*, [https://faceswapper.ai] [https://perma.cc/QU95-XPT7] [https://web.archive.org/web/20250421223839/https://faceswapper.ai/] (last visited Apr. 21, 2024).

98. See, e.g., *Use Cases*, ELEVENLABS, [https://elevenlabs.io/use-cases] [https://perma.cc/6DP4-D9ZG] [https://web.archive.org/web/20250310233109/https://elevenlabs.io/use-cases] (last visited Apr. 21, 2024). See also Grace Geyde, *AI Voice Cloning: Do These 6 Companies Do Enough to Prevent Misuse?*, CONSUMER REPS. (Mar. 10, 2025), [https://innovation.consumerreports.org/AI-Voice-Cloning-Report-.pdf] [http://perma.cc/M76R-PV6U] [https://web.archive.org/web/20250411223906/https://innovation.consumerreports.org/AI-Voice-Cloning-Report-.pdf].

99. The Bill exclusively protects the voice and likeness of “individual[s],” who are defined as “human being[s], living or dead”. See No Fakes Act, 119th Cong. §§ 2(a)(3), 2(a)(6), 2(b)(1) (2025) (unintroduced bill) (on file with authors). Thus, the Bill does not cover fictional or cartoon characters like SpongeBob or a “Minecraft Villager,” which were the top two trending voice clones on Jammable at the time of publication. See @Yazi, *AI SpongeBob (1000) Voice*, JAMMABLE, [https://www.jammable.com/custom-spongebob-1000] [https://perma.cc/D5JJ-7RKD] [https://web.archive.org/web/20250421224702/https://www.jammable.com/custom-spongebob-1000] (last visited Apr. 21, 2025); @q9du0qwdiq, *AI Minecraft Villager Voice*, JAMMABLE, [https://www.jammable.com/custom-minecraftvillager] [https://perma.cc/JJ56-KPLS] [https://web.archive.org/web/20250421224832/https://www.jammable.com/custom-minecraftvillager] (last visited Apr. 21, 2025). For example, while Tom Kenny—the voice actor behind SpongeBob—is

or videos with audio—including potential digital replicas—are also widely used in corporate training videos, AI-powered dubbing and translation, and virtual assistants.¹⁰⁰ Even real-time face substitution tools may be used to anonymize a streamer’s identity during livestreams.¹⁰¹ Since these services support diverse, non-infringing uses—and typically include terms of service prohibiting misuse, even if enforcement is limited—they are unlikely to incur liability under the Bill as currently drafted.¹⁰²

D. EXCEPTIONS

The bill incorporates a variety of exclusions from liability, primarily for the benefit of certain expressive or informational uses. Thus, § 2(c)(5)(A) excludes, among other things, use of a digital replica “in a bona fide news, public affairs, or sports broadcast or account, provided that the digital replica is the subject of, or is materially relevant to, the subject of such broadcast or account.”¹⁰³ As a result, incorporation of a digital replica in a news story about AI-generated deepfakes would satisfy the requirement of a nexus between the news use and the digital replica. The nexus requirement would, by contrast, preclude uses such as digital replica of a sportscaster to provide an account of a sporting event.

The exclusions also cover “a representation of the applicable individual as the individual in a documentary or in a historical or biographical manner, including some degree of fictionalization,” so long as “the production or use of that digital replica [does not] create[] the false impression that the work is an authentic sound recording, image,

protected as an “individual,” a voice clone that mimics SpongeBob does not identify Kenny; it identifies the fictional character, who is not covered by the Bill. While Jammable also offers voice clones of Taylor Swift, Donald Trump, and hundreds of other individuals the Bill aims to protect, it arguable is not *primarily* designed to produce unauthorized digital replicas, nor is it clear that Jammable’s non-infringing voice clone offerings serve a “limited commercially significant purpose.” See generally JAMMABLE, <https://www.jammable.com> [https://perma.cc/XYQ9-JFWQ] [https://web.archive.org/web/20250407024537/https://www.jammable.com/] (last visited Apr. 21, 2025).

100. See, e.g., *AI Lip Sync Video Generator*, VOZO, <https://www.vozo.ai/lip-sync> [https://perma.cc/65XM-HLYK] [https://web.archive.org/web/20250421223235/https://www.vozo.ai/lip-sync] (last visited Apr. 21, 2024).

101. For other legitimate uses, see *Deepfake Live: Real-Time Face Swaps Made Easy with Deep Live Cam*, VAARHAFT, <https://www.vaarhaft.com/post/deepfake-live-real-time-face-swaps-made-easy-with-deep-live-cam> [https://perma.cc/B5QV-K5U7] [https://web.archive.org/web/20250421225107/https://www.vaarhaft.com/post/deepfake-live-real-time-face-swaps-made-easy-with-deep-live-cam] (last visited Apr. 21, 2025).

102. As explained, the Bill does not allow websites that host user-uploaded models to be shut down if they also offer substantial non-infringing content—a likely sensible safeguard. However, it still permits rights holders to seek an injunction against a specific unauthorized model. Yet, the burden remains on individuals to monitor these services and request takedowns. See No Fakes Act, § 2(h)(2). This is a particularly heavy burden given the wide range of services that facilitate deepfake creation and rights holders’ likely lack of familiarity with the services they must monitor.

103. *Id.* § 2(c)(5)(A)(i).

transmission, or audiovisual work in which the individual participated.”¹⁰⁴ This exception would permit a music documentary that uses a digital replica of Taylor Swift in scenes that reimagine certain parts of her life, so long as the scenes are labeled as AI-generated. (This provision appears to be the only part of the NO FAKES Act to address transparency concerns, even obliquely.)

The bill also includes a general exemption, inspired by the U.S. copyright fair use exception for uses “consistent with the public interest in bona fide commentary, criticism, scholarship, satire, or parody.”¹⁰⁵ For example, a skit uses a digital replica of a politician that exaggerates her speech patterns or gestures to criticize her policies, or for comedic effect. The bill does not exempt expressive uses generally; such a carve-out would effectively nullify protection, since the bulk of the uses of digital replicas are likely to be produced or used for entertainment purposes.¹⁰⁶

The bill incorporates a *de minimis* exception for uses that are “fleeting or negligible.”¹⁰⁷ This exclusion would appear to be innocuous, until one realizes that much of the work of motion picture “extras” could fall into this category. Under the bill, it seems that a film producer could replace these actors with crowds of digital replicas. Background actors would need to look to private agreements, such as the one recently negotiated between the Screen Actors Guild and motion picture producers, to ensure continued employment and compensation.¹⁰⁸

E. WHAT GOALS SHOULD A NO FAKES ACT PURSUE, AND HOW MIGHT IT BETTER ACHIEVE THEM, DOMESTICALLY AND INTERNATIONALLY?

Apart from the provision disqualifying the exception for biographical or documentary uses of digital replicas if these do not dispel false impressions that the replica was part of an authentic performance, the bill does not focus on deceit. On the contrary, the bill declares that “[i]t shall not be a defense . . . that the defendant displayed or otherwise communicated to the public a disclaimer stating that the

104. *Id.* § 2(c)(5)(A)(ii) (also including a further condition on this exclusion: “[T]he digital replica is [not] embodied in a musical sound recording that is synchronized to accompany a motion picture or other audiovisual work, except to the extent that the use of that digital replica is protected by the First Amendment to the Constitution of the United States.”).

105. *Id.* § 2(c)(5)(A)(iii).

106. The bill also excludes uses of digital replicas for certain pornographic purposes. *See id.* § 2(c)(5)(B) (the exclusions “shall not apply where the applicable digital replica is used to depict sexually explicit conduct, as defined in section 2256(2)(A) of title 18, United States Code.”).

107. *Id.* § 2(c)(5)(A)(iv).

108. SAG-AFTRA, BACKGROUND ACTORS CONTRACTS DIGEST: A HANDBOOK FOR PERFORMERS WORKING AS BACKGROUND ACTORS (July 2024), <https://www.sagaftra.org/sites/default/files/Digest%20-%20Background%20Actors.pdf> [https://perma.cc/C44C-J3R9] [https://web.archive.org/web/20250307024047/https://www.sagaftra.org/sites/default/files/Digest%20-%20Background%20Actors.pdf]; Tom Ara et al., *Inside the SAG-AFTRA Collective Bargaining Agreement*, DLA PIPER (Dec. 20, 2023), <https://www.dlapiper.com/en-cn/insights/publications/2023/12/inside-the-sag-aftra-collective-bargaining-agreement> [https://perma.cc/CH3V-SQUB] [https://web.archive.org/web/20250208031218/https://www.dlapiper.com/en-cn/insights/publications/2023/12/inside-the-sag-aftra-collective-bargaining-agreement].

applicable digital replica, or the applicable product or service described in subsection (c)(2)(B), was unauthorized or disclosed that the digital replica, product, or service was generated through the use of artificial intelligence or other technology.”¹⁰⁹ In other words, and contrary to our speculations about trademarks law,¹¹⁰ clear disclaimers are unavailing. This provision establishes that the true purpose of the NO FAKES Act is to provide individuals (primarily celebrities) an enforceable property right to prevent—or perhaps more significantly—to control the marketing of their voices and visual likenesses. Or more accurately, and potentially perniciously, given the ambiguities surrounding the granting of rights, to provide licensee right holders, especially motion picture and record producers, with rights exclusively to exploit digital replicas.

By contrast, transparency concerns more fully inform the E.U. AI Act, which imposes labelling obligations on users of AI systems that generate or manipulate image, audio or video content that appreciably resembles existing persons and would falsely appear to be authentic or truthful. Such users must clearly and distinguishably disclose that the content has been artificially created or manipulated “by labelling the AI output accordingly and disclosing its artificial origin.”¹¹¹ Where the content forms part of an “evidently creative, satirical, artistic, fictional or analogous work” the transparency obligations are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work.¹¹² The AI Act tasks the E.U. AI Office with encouraging and facilitating the drawing up of codes of practice to facilitate effective implementation of the labeling obligations.¹¹³

The NO FAKES Act’s lack of transparency provisions exemplifies its shortcomings relative to the general public. But even as to the subjects of deepfakes, the bill appears to favor grantees who exploit deepfakes over individual subjects. For example, despite the ten-year ceiling on the licensing of *inter vivos* rights, the grant of digital replica rights will in many instances in fact endure for the length of the digital rights term, seventy years after the death of the individual. That is because, as we have seen,¹¹⁴ expiration of the license terminates rights only as to new uses; digital replicas already created and used during the ten-year license period may continue to be exploited after the license’s expiration. This means, for example, that if Taylor Swift granted her record producer rights to create a music video of a digital replica’s performance of a song, and the producer exercised those rights during the license’s ten-year term, the record producer could continue exclusively to exploit that music video for another five years, and then for renewals of successive five-year periods until the extinction of the rights, seventy years after Swift’s death. As a result, the rights may never fully return to the individual who licenses them.

109. No Fakes Act, § 2(e)(3).

110. See *supra* Part I.B.

111. E.U. AI Act, *supra* note 15, art. 50.4, recital (134).

112. *Id.*, recital (134).

113. *Id.*, art. 50.7.

114. See *supra* Part II.B.

The scope of the licensing provisions draws attention to another gap in coverage of individuals' interests: the absence of protections analogous to moral rights. Once rights are licensed, or, in the case of deceased celebrities, assigned "in whole," there appears to be no recourse anticipated in the case of uses that impugn the dignity or integrity of the person depicted. Perhaps the provision for licensing rights "in part,"¹¹⁵ allows individuals to retain greater control over the uses made of the deepfake, particularly because the required signed writing must "include[] a reasonably specific description of the intended uses of the applicable digital replica."¹¹⁶ But much may depend on the interpretation of "a reasonably specific description."¹¹⁷ Dignitary interests may be implicated, for example, if, in the exercise of a grant for uses in musical performances, a digital likeness of a renowned Latina opera singer depicts her singing an anthem associated with white supremacists. But how may the singer draft the grant to limit the authorization to artistically or politically appropriate uses in deepfake musical performances?

The Court of Justice of the European Union ("CJEU") has suggested in the copyright context that the association of the works of an author—in the specific case, a deceased one—with a racist message might weigh against the availability of the parody defense,¹¹⁸ perhaps a step on the way toward harmonized E.U. moral rights protections.¹¹⁹ If, as the CJEU suggested, such associations are defense-disqualifying in E.U. member states in the case of an author's copyright-protected work, the case for protections seems just as strong for imposing comparable limits on the rights obtained by a grantee under a license or assignment to use an individual's likeness. The U.S. is notoriously lax in its protection of authors' moral rights,¹²⁰ and one may fear a similar *laissez-faire* approach to digital replica rights, once licensed. Protections equivalent to moral rights, it might be argued, are too significant a discouragement to innovating with AI, one of the expressed aims of the NO FAKES bill. At the same time, the bill's aims also evince at least some concern with dignity interests that might be compromised by the creation and dissemination of deepfakes. If the NO FAKES Act or similar bill is repropose in the current Congress, we would encourage some further

115. No Fakes Act, § 2(b)(2)(A)(i)(III), (iii)(I) (2025) (unintroduced bill) (on file with authors).

116. *Id.* § 2(b)(2)(B)(i)(II)(bb).

117. *Id.* § 2(b)(2)(B).

118. Case C-201/13, *Deckmyn v. Vandersteen*, ECLI:EU:C:2014:2132 (Sept. 3, 2014).

119. Aaron Schwabach, *Bringing the News from Ghent To Axanar: Fan Works and Copyright After Deckmyn and Subsequent Developments*, 22 TEX. REV. ENT. & SPORTS L. 37, 68 (2021) (suggesting that the right of an author to keep his work free from a racist message is "based on a moral rights theory with no equivalent in U.S. copyright law").

120. Jane C. Ginsburg, *Keynote Address: The Most Moral of Rights: The Right To Be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT'L COM. L. 44, 46, 52 (2016); Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS & ENT. L.J. 73, 74, 89 (2012); Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111, 144–50 (2005).

thinking about how these interests might be protected following a grant of rights under a license or assignment.¹²¹

The question of the bill's international reach also warrants further consideration. Where uses are regulated through private arrangements—as in the case of the SAG-AFTRA 2023 Agreement with motion picture and television producers¹²²—we may expect questions such as to whom and where the stipulations apply to be left to private ordering. Beyond those contexts, there is a case for attending to these matters in the legislation. Our brief survey of extant legal measures reveals a number of uncertainties about such questions.

Given its focus on the inadequacies of U.S. domestic laws, it is understandable that the Copyright Office did not address the international dimensions of the proposed NO FAKES regime. For future bills, there are both practical and legal reasons for identifying the international dimension as an area for further consideration. As for the protection of foreigners in the U.S., the NO FAKES draft discloses no discriminatory intent: The “individual” who is the beneficiary of the right is simply defined to mean “a human being, living or dead,” conditioned on neither nationality nor domicile. Even so, the strength of protections for many foreign individuals may turn on the construction of “readily identifiable” in the definition of “digital replica.” It would be unfortunate if the bill permitted backdoor parochialism, on the basis that many foreigners will be insufficiently well known to American audiences.

Congress should also work through the extent to which protected individuals may seek relief for infringements of the right in foreign territories. The means to seek relief in non-U.S. jurisdictions, under the applicable foreign laws, will be available to none but the wealthiest individuals—a result that is hardly consistent with the espoused aims to protect ordinary individuals. If anything, the suite of recent Supreme Court cases adopting a more stringent approach to the extraterritorial reach of domestic statutes—including intellectual property legislation¹²³—teaches that it cannot be assumed that courts will, or any longer can, construe domestic legislation to reach foreign conduct, in the absence of explicit provision for extraterritorial application. But because the presumption against extraterritorial application is just that, a presumption, not a prohibition, those cases sketch a blueprint for legislative drafting. To surmount the presumption, the bill's drafting, and the policy analysis informing it, should clearly identify the intended geographical reach of any new intellectual property right.

121. This may require, for example, providing additional detail on the meaning of “a reasonably specific description of the intended uses of the applicable digital replica” in the stipulations for a valid license under § 2(b)(2)(B). No Fakes Act, § 2(b)(2)(B)(i)(bb).

122. 2023 Memorandum of Agreement Between the Screen Actors Guild-American Federation of Television and Radio Artists and the Alliance of Motion Picture and Television Producers (2023), https://www.sagaftra.org/sites/default/files/2023_Theatrical_Television_MOA.pdf [<https://perma.cc/73KQ-CMMR>] [https://web.archive.org/web/20250208230725/https://www.sagaftra.org/sites/default/files/2023_Theatrical_Television_MOA.pdf].

123. See *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412 (2023).

Congress might, for example, affirm the availability of supplemental jurisdiction to plead claims arising under foreign laws in conjunction with claims arising under U.S. law.¹²⁴ Application of foreign laws would align with the Supreme Court's determination, reflected in the presumption against extraterritorial application of domestic laws discussed above, to prevent unintended clashes with foreign laws,¹²⁵ including foreign intellectual property laws.¹²⁶ That said, given the recent emergence of issues surrounding the regulation of deepfakes, and the corresponding legislative vacuum in many jurisdictions, the prescriptive comity concerns underlying the Court's reticence about extraterritorial applications of U.S. laws might not apply with the same force. The risk of serious clashes with foreign laws might be diminished in an area of legal regulation in which many countries (outside of the E.U.) have yet to devise distinct domestic responses. Accordingly, it might also be appropriate for Congress to explore potential extraterritorial applications of the prescriptions in the NO FAKES Act, including reaching foreign dissemination of deepfakes if their creation or initial dissemination originated in the U.S. This approach echoes copyright's "predicate acts" doctrine,¹²⁷ which enables a U.S. court to award damages for foreign-distributed copies if the initial copy was made in the U.S.

Looking beyond extraterritoriality, a bill regulating digital replicas might also provide a context in which Congress could experiment with a site blocking regime¹²⁸—a remedy that is available in over fifty nations,¹²⁹ including members of the European

124. In the copyright context, the ability to identify and adjudicate foreign laws was confirmed in *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998). The Supreme Court of the United Kingdom held in *Lucasfilm Ltd. v. Ainsworth* [2011] UKSC 39 that a domestic court may exercise jurisdiction over foreign copyright disputes, applying foreign laws, only where proceedings are not principally concerned with question of title. U.S. courts sitting in diversity have also applied foreign copyright laws even in the absence of a copyright infringement allegedly occurring in the U.S. See, e.g., *London Film Prods. Ltd. v. Intercont'l Commc'ns., Inc.*, 580 F. Supp. 47 (S.D.N.Y. 1984) (holding that no U.S. copyright claim existed because the films' U.S. copyrights had expired, while adjudicating copyright claims concerning their unauthorized exhibitions in several Latin American nations).

125. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *Equal Emp' Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). See Rochelle Dreyfuss & Linda Silberman, *Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases*, 8 CYBARIS INTELL. PROP. L. REV. 265, 272 (2017).

126. See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007); *Abitron Austria GmbH*, 600 U.S. at 426–28.

127. See, e.g., *Tire Engineering and Distribution, LLC v. Shandong Linglong Rubber Company, Ltd.*, 682 F.3d 292, 306–08 (4th Cir. 2012); *Los Angeles News Serv. v. Reuters TV Int'l.*, 149 F.3d 987, 990–92 (9th Cir. 1998); *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988). *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939).

128. In 2023, the U.S. Patent and Trademark Office held a series of roundtables focusing on anti-piracy efforts, including website blocking. Legislation providing for the issuing of orders requiring the blocking of access to foreign websites was introduced into Congress in 2025 by Representative Zoe Lofgren. Foreign Anti-Digital Piracy Act H.R.791, 119th Cong. (2025).

129. WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) ADVISORY COMM. ON ENFORCEMENT, SHARING EXPERIENCES AND BEST PRACTICES ON SITE BLOCKING/NO-FAULT INJUNCTIONS (2025), https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_17/wipo_ace_17_14_prov.pdf [<https://perma.cc/M7BW-FRMV>]

Union,¹³⁰ enabling right holders to seek a court order requiring local internet service providers to block subscribers' access to websites that facilitate copyright and other forms of intellectual property piracy.¹³¹ U.S. proposals for introducing site blocking to combat industrial scale copyright piracy attracted pushback,¹³² and skeptics continue to decry the case for bringing U.S. copyright law into line with other jurisdictions.¹³³ Even so, the normative case for blocking access to sites peddling or facilitating access to deepfakes is perhaps even more compelling than for copyright. Deepfake technology is frequently (on some accounts overwhelmingly)¹³⁴ used to generate pornographic material—and the individuals left without recourse under current laws are likely to be the “everyday” people to whom the NO FAKES Act’s congressional sponsors referred, rather than corporate owners of lucrative portfolios of personality rights. Seen in this light, the need to secure effective relief for deepfake victims should, we hope, garner greater sympathy than advocates of site-blocking to remedy copyright infringement have enlisted. Site blocking orders are, however, only a localized remedy—the defendants are the internet service providers operating within the jurisdiction.¹³⁵ They therefore affect only the availability of the offending websites in the territory in which

[https://web.archive.org/web/20250220020248/https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_17/wipo_ace_17_14_prov.pdf].

130. Article 8(3) of the Information Society Directive requires that rightsholders should be in a position to apply for an injunction against an intermediary whose services are used by a third party to infringe copyright or a related right. Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10. The EU Enforcement Directive extends the obligation to all intellectual property rights. See Directive 2004/48/EC of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157) 45.

131. The Digital Millennium Copyright Act (1998) gives courts the power to enter “[a]n order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider’s system or network,” but it is not clear how often copyright holders seek or obtain that remedy. 17 U.S.C. § 512(j)(1)(A)(i). See *Mavrix Photographs LLC v. LiveJournal, Inc.*, No. SACV 13-517 (CJC), 2014 WL 6450094, at *9 (C.D. Cal. Sept. 19, 2014), *rev’d*, 853 F.3d 1020 (9th Cir. 2017), *opinion amended and superseded*, 873 F.3d 1045 (9th Cir. 2017), and *rev’d*, 873 F.3d 1045 (9th Cir. 2017) (finding that such relief is moot where internet service providers already disable access to infringing content and terminate repeat offenders who have uploading infringing content to the platform).

132. See Karyn A. Temple, *Beyond Whack-A-Mole: Content Protection in the Age of Platform Accountability*, 45 COLUM. J.L. & ARTS 147, 158–59, 167 (2022) (discussing widespread opposition to the adoption in the U.S. of site blocking orders).

133. See, e.g., Mitch Stoltz & Katharine Trendacosta, *The Motion Picture Association Doesn’t Get To Decide Who the First Amendment Protects*, ELEC. FRONTIER FOUND. (Apr. 10, 2024), <https://www.eff.org/deeplinks/2024/04/mpa-doesnt-get-decide-who-first-amendment-protects> [<https://perma.cc/LQ56-48NK>] [<https://web.archive.org/web/20250303000404/https://www.eff.org/deeplinks/2024/04/mpa-doesnt-get-decide-who-first-amendment-protects>].

134. See Tom Simonite, *Most Deepfakes Are Porn, and They’re Multiplying Fast*, WIRED (Oct. 7, 2019), <https://www.wired.com/story/most-deepfakes-porn-multiplying-fast/> [<https://perma.cc/3MFR-WG74>] [<https://web.archive.org/web/20250303001258/https://www.wired.com/story/most-deepfakes-porn-multiplying-fast/>].

135. Foreign operators of the blocked websites are necessarily affected, raising due process concerns. For discussion of how these concerns were addressed by the Australian legislature, see Graeme W. Austin, *Legislating for Site-Blocking Orders*, 31 N.Z. U. L. Rev. 1, 12 (2024).

the internet service provider operates.¹³⁶ They would not assist where deepfakes continue to circulate in other jurisdictions. Hence our suggestions above focusing on other legal avenues for reaching foreign conduct.

III. CONCLUSION

We have examined the NO FAKES Act in some detail. The bill's as-yet unenacted state invites analysis in order to clarify its objectives, and, by identifying ways in which the text falls short of those objectives, we hope to improve the chances for those objectives' attainment. We also advance our critique of proposed U.S. legislation with an eye to law reform efforts in other countries, particularly in the British Commonwealth of Nations.¹³⁷ We hope that other legislative drafters, informed by our endeavors, may avoid some of the pitfalls we have pointed out, and, most importantly, may strike a better balance between the transparency interests of the general public, the personal and pecuniary interests of the subjects of deepfakes, and the commercial interests of the exploiters of deepfakes.

136. The availability of a qualifying deepfake to an American audience should suffice for a connecting factor, and blocking access would further the deception-discouraging ends touted by bill's congressional sponsors.

137. See, e.g., Ng-Loy Wee Loon, *Australian Legislation Abroad: Singaporean Pragmatism and the Role of Australian Scholarship in Singaporean Copyright Law*, in *ACROSS INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF SAM RICKETSON* 92, 92–94 (2020) (discussing the extensive borrowing from U.K. and Australian templates in the development of Singapore's copyright laws).

Regulating AI: Differences Between the U.S. and the EU

*Raquel Xalabarder**

The topic for this lecture is very much about the future. Basically, we are talking about things we are only starting to see. So, it may still be premature to talk about regulating Artificial Intelligence (“AI”). Not too long ago, several experts and tycoons in the AI community issued an open letter last year saying, in effect, “let’s pause it a bit. Let’s see how to regulate it.”¹

Since then, we have seen the rise of ever more forms of AI, notably ChatGPT, Stable Diffusion, and all these AI systems and processes of diffusing images, adding noise to them and then de-noising them, so as to subsequently generate a different image or a different audiovisual recording at the request of a prompt.² Creators and professionals are concerned about that. And so are we, professors. In fact, AI seems to be a game changer in the world of copyright. We are not Luddites but we are starting to sympathize with them (if I may put it that way). This is how much AI is shaking our lives.

Let me start by disclosing that I am going to pose more questions than answers about these AI technologies that have come to disrupt our lives. AI is not new, per se. We have been talking about AI for decades. But we are now seeing an explosion of AI systems, resulting from a specific combination of enhanced computing power and

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1. *Pause Giant AI Experiments: An Open Letter*, FUTURE OF LIFE INST. (Mar. 22, 2023), https://futureoflife.org/wp-content/uploads/2023/05/FLL_Pause-Giant-AI-Experiments_An-Open-Letter.pdf [<https://perma.cc/MV7P-AWUV>] [https://web.archive.org/save/https://futureoflife.org/wp-content/uploads/2023/05/FLL_Pause-Giant-AI-Experiments_An-Open-Letter.pdf].

2. To generate an output from an input image, Stable Diffusion “adds noise” to the input, based on a “seed” (a number to be used by its noise generator algorithm). The amount of noise added (Denoising Strength) determines how close the output image will be to the input one. Outputs will depend on the seed number and Denoising Strength, as well as on the prompt and parameters applied to obtain them. For more explanations and examples, see *Guide: What Is a Stable Diffusion Seed and How To Use It*, ONCE UPON AN ALGORITHM (Mar. 14, 2023), <https://onceuponanalgorithm.org/guide-what-is-a-stable-diffusion-seed-and-how-to-use-it/> [<https://perma.cc/N4HN-VRY3>] [<https://web.archive.org/web/20250404215110/https://onceuponanalgorithm.org/guide-what-is-a-stable-diffusion-seed-and-how-to-use-it/>].

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connectivity, on the one hand, and an enormous increase of data (big data) available in digital and accessible formats, on the other. This combination has fostered the development of algorithms capable of learning fast (trained with data) and making further connections (through neuronal networks).

AI being the all-encompassing term, we use the term “machine learning” to refer to the process of training algorithms with further data and, specifically, to “deep learning” when these machine-learning algorithms involve multilayered neuronal networks capable of reading vast amounts of data. The more data we feed them, the more training data and of better quality, the better and more precise the outputs from these AI systems, the more reliable or valuable their outputs would be. And let us not forget that this data is not simply data. It is very often copyrighted works, performances, recordings.

But AI systems may be of very different kinds. For the purposes of today’s lecture, I would like to distinguish among two kinds: *functional artificial intelligence systems* and *generative artificial intelligence systems*. The former, to refer to algorithms which are meant to fulfil a task, a function: translate, locate, identify patterns, obtain information, etc. For instance, internet search engines or dedicated search engines like the Google Books Project; another example: programs that transcribe handwritten texts. These programs are meant to achieve a task, to do something. By contrast, generative AI is meant to produce new outputs, new contents, new software (apparently, ChatGPT is very good at writing code, better than people who write code). Generative AI can produce “performances,” “recordings,” news, legal texts, such as case briefs (though the tendency of ChatGPT to invent case citations shows how wrong some of these outputs can go³), as well as new “works” (if you let me use the term without vesting a copyright significance).

Generative AI can also produce novels and essays. ChatGPT may not (not yet?) be very good at being correct and accurate, but it is very good at inventing and generating very well-written texts, often better than students’ writings—I can confirm that. What about works of art, images, comic books, and graphic novels? New comic books and graphic novels have already been generated by Stable Diffusion and Midjourney.⁴

From a copyright perspective, this whole process poses at least three main questions:

(1) The use of copyrighted contents as inputs for the training of the AI systems: machine learning or text and data mining (“TDM”), as we call it in the European Union. Is this an infringement? Does it need a license? Can authors oppose it?

3. Benjamin Weiser, *ChatGPT Lawyers Are Ordered To Consider Seeking Forgiveness*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2023/06/22/nyregion/lawyers-chatgpt-schwartz-loduca.html?searchResultPosition=2> [<https://web.archive.org/save/https://www.nytimes.com/2023/06/22/nyregion/lawyers-chatgpt-schwartz-loduca.html?searchResultPosition=2>] (reporting on a S.D.N.Y. judge fining lawyers who filed a brief with spurious citations composed by ChatGPT).

4. Letter re: *Zarya of the Dawn* (Registration #VAu001480196), U.S. COPYRIGHT OFF. (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf> [<https://perma.cc/GV2T-EGWW>] [<https://web.archive.org/save/https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>] (canceling the copyright registration for *Zarya of the Dawn* after determining that its images were generated using Midjourney and issuing a new registration for the expressive elements original to the author).

(2) The outputs resulting from these AI systems, which are sometimes very similar to the inputs fed to the algorithm: Are they infringing contents? Should they be licensed? Should perhaps the answer be different depending on whether they were created by functional or generative AI?

(3) What about generative AI outputs: Can they (should they?) be protected at all? If so, who owns them? As interesting as it is, we will not have time to examine this last topic today.

And here goes another disclaimer: It is impossible to draw general conclusions since probably a case-by-case analysis would be required at all times.

So let us start with TDM to train the AI system. We take for granted that machine reading, TDM, implies a reproduction of the works, performances, recordings; anything that is protected under copyright and is ingested by the system is being, at least, reproduced. Of course, machine reading also implies reproduction of raw data. But I am not going to deal with raw data. Data as such is not protected by copyright.⁵

Machine learning also involves disaggregating the work or recording; for instance, in order to identify grammatical components such as nouns, adjectives, or verbs or in order to allow the process of “noising and denoising” used by generative AI. Furthermore, the resulting data is then stored, communicated to the public (or at least, made available) in order for the AI system to work. Such actions happen as part of the machine learning process and, from a copyright perspective, they go beyond simple act of reproduction itself. So, as long as machine learning deals with copyrighted works, does it need a license? If there is a limitation or an exception in our laws that permits such training (TDM, in Europe), should we pay attention to the scope of this exception and run the specific machine learning activities through its filter? Is there a statutory license or an authorization granted by law in some specific cases, such as for scientific research purposes? And, if there is no license (voluntary or statutory), is machine learning based on copyrighted works an infringement? In the United States, the relevant question should be: Does the fair use doctrine provide a defense against all scenarios of machine learning? These are the questions we can discuss today. But before that, and just for the sake of argument, let us pause for a moment and consider that machine learning may not be an act of exploitation subject to the exclusive rights of the author or copyright owner.

Some professors, especially in Europe, defend this position. Professor Alain Strowel proposes that we should only be talking about exploitation when the work is being used as a work.⁶ A bit like what happens with descriptive uses of trademarks: One can use a

5. The European Union protects data through a *sui generis* right for databases, which grants database producers the authority to control (prohibit or authorize) the extraction and reuse of substantial or entire parts of a database. See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20. Works, performances, recordings, i.e., everything that is protected under copyright, may be reproduced as part of algorithmic training in machine learning.

6. See Rossana Ducato & Alain M. Strowel, *Ensuring Text and Data Mining: Remaining Issues with the EU Copyright Exceptions and Possible Ways Out*, 43 EUR. INTELL. PROP. REV. 322, 334 (2021) (suggesting “an infringement test requiring that for the reproduction right to be infringed the *work* should be used as a *work* and perceived as a work by a public”).

trademark to identify the trademark owner or its goods, but not to identify the source of one's own goods.⁷ A competitor can refer to Coca-Cola in an advertisement asserting that the competitor's beverage tastes better, but the competitor cannot call its beverage Coca-Cola. The argument asserts that we should recognize an analogous exception to copyright because a machine reading a work does not involve an act of exploitation of this work when the AI program is merely recording the work as data, rather than using the work as it should be used, i.e., as an expressive work of authorship.

There is an exception or an exemption in Japanese law that is consistent with this approach. Under the Japanese TDM exception, acts of exploitation of works that are not for purposes of enjoying the work as a work will not be subject to the author's exclusive rights.⁸ We will get back to this later on. For now, I just want to point out the fact that, on both sides of the Atlantic, we have all taken for granted that machine learning, TDM, involves at least an act of exploitation, of reproduction. From that starting point, different jurisdictions have dealt differently with the consequences of the initial reproduction into training data.

Let us start with Europe. The European Union would like to be a worldwide hub for AI. In 2018, the European Union started issuing several communications about AI.⁹ Every few months, there has been a new communication by the European Commission, including Artificial Intelligence for Europe,¹⁰ Coordinated Plan on Artificial Intelligence ("AI made in Europe"),¹¹ and Building Trust in Human-Centric Artificial Intelligence.¹² The High-Level Expert Group on AI also issued Ethics Guidelines for Trustworthy Artificial Intelligence.¹³ The Commission released a regulatory proposal, known as the Artificial Intelligence Act ("AI Act").¹⁴ The AI Act identifies different risk categories for the development of an AI system. AI systems that present an *unacceptable*

7. In U.S. trademark law, this is called "nominative fair use." See *New Kids on the Block v. News Am. Publ'g*, 971 F.2d 302, 308 (9th Cir. 1992). See also 15 U.S.C. § 1115(b)(4) (providing that "use, otherwise than as a mark . . . which is descriptive and used fairly and in good faith only to describe the goods or services of [the user]" constitutes a defense to trademark infringement).

8. See Chosakukenhō [Copyright Act], Law No. 48 of 1970 (as amended up to Jan. 1, 2022), art. 30-4 (Japan) [hereinafter, Japanese Copyright Act], translated in WIPO Lex, <https://www.wipo.int/wipolex/en/text/584874> [https://perma.cc/S25W-ZBY2] [<https://web.archive.org/save/https://www.wipo.int/wipolex/en/text/584874>].

9. See, e.g., Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Artificial Intelligence for Europe, COM (2018) 237 final (Apr. 25, 2018).

10. *Id.*

11. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Coordinated Plan on Artificial Intelligence, COM (2018) 795 final (July 12, 2018).

12. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building Trust in Human-Centric Artificial Intelligence, COM (2019) 168 final (Apr. 8, 2019).

13. HIGH-LEVEL EXPERT GROUP ON ARTIFICIAL INTELLIGENCE, ETHICS GUIDELINES FOR TRUSTWORTHY AI (Apr. 8, 2019).

14. Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final (Apr. 21, 2021).

risk will not be allowed, at all. For instance, the Chinese government's use of AI systems to control and score people's activity is an unacceptable risk. *High risk* includes, for instance, facial recognition and the AI Act also identifies liability conditions for the development of these "high risk" AI systems. The other permitted categories are *limited risk* applications and *minimal risk* applications. These risk categories follow the European Union's approach to personal data protection set out in the General Data Protection Regulation ("GDPR"). The GDPR identified different kinds of personal data, and depending on the risk involved in using that personal data, implemented different requirements and conditions to use that data.¹⁵

We are not talking about AI and copyright only; several other regulations may also have an impact on AI. In addition to the GDPR, we're talking about the Digital Services Act,¹⁶ the Digital Markets Act,¹⁷ the Data Governance Act,¹⁸ and the Open Data Directive,¹⁹ which in the old times used to be a Public Sector Information Directive. And now, there is a proposal on a new Data Act. How to navigate among all these regulations and succeed in implementing an AI project will certainly keep lawyers and consulting companies busy for a while.

But let us focus on TDM. The DSM Directive specifically concerns copyright and contains two exceptions and/or limitations that specifically refer to TDM.²⁰ The exception in Article 3 specifically allows TDM for scientific research purposes.²¹ Under Article 4, member states may set exceptions or limitations allowing TDM for any other purposes, beyond scientific research.²² Under Article 3, member states may not provide any compensation scheme to the copyright owners of the source works.²³ Article 3 is therefore a true exception, rather than a limitation subject to compensation.²⁴ In

15. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1.

16. Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1.

17. Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1.

18. Regulation 2022/868 of the European Parliament and of the Council of 30 May 2022 on European Data Governance and Amending Regulation (EU) 2018/1724 (Data Governance Act), 2022 O.J. (L 152) 1.

19. Directive 2019/1024 of the European Parliament and of the Council of 20 June 2019 on Open Data and the Re-use of Public Sector Information (recast), 2019 O.J. (L 172) 56.

20. Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92 [hereinafter, DSM Directive].

21. *See id.* art. 3.

22. *See id.* art. 4.

23. *See id.* recital (17) ("In view of the nature and scope of the exception, which is limited to entities carrying out scientific research, any potential harm created to rightholders through this exception would be minimal. Member states should, therefore, not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by this Directive.").

24. In Europe, we have lots of limitations (compensated exceptions) such as for private copying. *See, e.g.*, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the

Article 4, by contrast, the European Union leaves member states the possibility to decide which TDM purposes should be authorized by law and whether or not to subject it to a compensation.²⁵

Turning to the text of the DSM Directive's provisions on TDM. First, the definition of TDM is very broad: "[T]ext and data mining' means any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations."²⁶ I am stopping at this definition because perhaps we could start questioning whether the 2019 DSM Directive is really prepared to exempt generative AI. Recital 8 adds that the text and data to be analyzed could be "text, sounds, images, or data," i.e., anything goes as to the subject matter covered by TDM.²⁷ The goal is to gain knowledge, to generate information, patterns, trends, correlations, to enable the "processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible."²⁸ In other words, neither Article 3 nor its accompanying Recitals indicate anything close to generate new products, rather to "only" obtain information and knowledge. *De lege lata*, it makes sense, since the DSM Directive far predates the raise of generative AI. *De lege ferenda*, should we apply its provisions to deal with TDM for generative AI?

Under Article 3, the TDM exception for scientific research purposes authorizes reproduction of works and sound recordings (which in Europe, the latter are the subject of a related right), and the extraction and re-utilization of databases not covered by copyright but by the *sui generis* right.²⁹ Article 3 also authorizes the reproduction and making available of works covered by a new ancillary right given to press publishers, for two years, to control "online use by information society service providers" of their press publications. Research organizations and cultural heritage institutions are the beneficiaries of this uniform exception.

The term "research organizations" seems to exclude individual researchers. "Research organizations" are defined as "a university, including its libraries, a research institute, or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research . . . on a not-for-profit basis. . ." and can include public-private partnerships.³⁰ Accordingly, a TDM project funded by private investment could also benefit from this exception, as long as the research organization has decisive influence over how the

Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5, 2001 O.J. (L 167).

25. See DSM Directive, *supra* note 20, art. 4.

26. *Id.* art. 2(2).

27. *Id.* recital (8) ("New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Text and data mining makes the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible.").

28. *Id.*

29. See Directive 96/9/EC, *supra* note 5, for an explanation of the *sui generis* right.

30. DSM Directive, *supra* note 20, art. 2(1).

results of the TDM activity are going to be used.³¹ This is, on the one hand, very broad but, on the other, quite restrictive in that it is limited to nonprofit research purposes. That said, the public-private partnerships allowed by the Directive often have blurred lines. One may be developing TDM projects on a research organization funded by private money, but it is very difficult to say that the results of this TDM are not going to end up in the private hands of those who invested in it. Additionally, cultural heritage institutions “means a publicly accessible library or museum, an archive or a film or audio heritage institution.”³² The DSM Directive does not explicitly say so, but it is plausible to think that the same public-private partnership could also apply to these cultural heritage institutions.

This exemption to conduct TDM applies only to materials to which these institutions (research organizations, universities, research centers, libraries, museums, archives) have lawful access.³³ What is lawful access? This includes licensed contents or subscription access to a database, as well as open access, be it under a license, such as a Creative Commons license, or simply posted on the internet, and declared freely available to the public. Recital 14 notes that lawful access includes works freely available online.³⁴ In other words, as long as access is unrestricted or licensed, that content will be capable of being subject to TDM purposes for research purposes by research organizations or museums, etc.

This is a uniform mandatory exception, with a clear mandatory scope. All the national laws in the European Union must say the same. Why? Because the potential harm of this exception to do TDM for research purposes, by research institutions, is minimal. Hence the EU legislature’s determination that the exception will be uniform and uncompensated across all national laws. Research organizations can do this TDM for free, and member states cannot provide compensation.

Furthermore, the exception cannot be overruled by contracts. If content has been licensed by subscription, the licensor cannot bar the licensee from conducting TDM; such a contractual clause would be unenforceable. In other words, anything that has been lawfully accessed or licensed can be used for TDM (machine-learning) purposes. However, the DSM Directive doesn’t say anything about the use of technological protection measures (“TPM”), which remains one of the very difficult issues in the European Union. It is easy to foresee that technological protection measures could de facto prevent research organizations and cultural institutions from benefiting from the exception.³⁵ That result is problematic in light of the mandatory character of the

31. See *id.*

32. *Id.* art. 2(3) (“[C]ultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution[.]”).

33. See *id.*, art. 3(1); see also *id.*, recital (33). Lawful access should be understood as covering access to content based on an open access policy or through contractual arrangements between rightsholders and research organizations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in the case of subscriptions taken by research organizations or cultural heritage institutions, the persons attached thereto and covered by those subscriptions should be deemed to have lawful access. Lawful access should also cover access to content that is freely available online.

34. See *id.* recital (14).

35. See *id.* recital (7).

exception. If the exception cannot be contracted out of, then TPMs should not neutralize the exception's operation, either. The Directive, however, does not explicitly prohibit the use of TPMs. The Court of Justice of the European Union ("CJEU") will likely be presented with cases to clarify many of these issues.

Additionally, storage is allowed.³⁶ Thus, all the results from the TDM may be stored for later verification of the research results. Specific protection measures should be applied to ensure that these TDM results will be kept safe and will not be spread beyond the research organization.³⁷ Furthermore, member states should encourage commonly agreed best practices to keep these results safe and how to conduct TDM.³⁸

And one last comment regarding Article 3 (and, as we shall see, Article 4): These TDM articles only provide an exception or limitation to the reproduction right for works and sound recordings, but not to the right of communication to the public. Paragraph 1 references "Article 2 of Directive 2001/29/EC [the Infosoc Directive]" which concerns the right of reproduction, but not Article 3 of that Directive, which covers the right of communication to the public. This brings us back to the initial comment regarding the whole purpose of TDM as envisioned by the DSM Directive (to obtain information and knowledge), according to the TDM technology available at the time of its drafting and approval. We will consider the significance of the omission of the right of communication to the public when we discuss Article 4.

Turning now to Article 4, it covers TDM for any other purposes beyond scientific research. Article 4 involves startups, journalists, individual researchers (remember they were not in Article 3), search engines, translation tools, and marketing. Search engines fall within Article 4 because, as far as I am aware, there is no national law in the European Union that allows or that has any exception or limitation for search engines. So, while in the United States, the copying in which search engines engage may be fair use,³⁹ the functioning of search engines according to European copyright laws remains in a very gray zone.

In Spain, we had a beautiful case that dealt with the Google search engine. The plaintiffs tried to shut down the Google search engine, claiming that Google was showing their contents and web page, and that they had not authorized Google to link, search, and show snippets of its contents. The Spanish Supreme Court agreed with the plaintiff that there is no exception or limitation in the Spanish copyright law saying

36. See *id.* art. 3(2) ("Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.").

37. See *id.*, art. 3(3) ("Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.").

38. See *id.* art. 3(4) ("Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively.").

39. Compare *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (holding that copying images found on the internet and creating thumbnails was fair use), with *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 742 (9th Cir. 2019) (holding that the copying of plaintiff's photographs were not fair use because "the label 'search engine' is not a talismanic term that serves as an on-off switch as to fair use").

that search engines can search and can identify or show a bit of your work.⁴⁰ However, the Spanish Supreme Court found that Google's conduct was not infringing, and that the plaintiffs had gone too far and abused their copyright.⁴¹ By the same token, I wonder whether a court might conclude that it would be an abuse of copyright to prevent showing results from a TDM algorithm or a TDM project.

While Article 4 is a mandatory provision for member states, they may choose to impose compensation for the scope of TDM chosen to be permitted by law. As far as I know, there is no national law that does this. Seeing that the TDM coverage under Article 4 is quite broad, encompassing TDM done by anyone for any purposes, could one expect that Article 4 may be more favorable towards generative AI? In fact, Recital 18 notes that TDM is used for "government services, complex business decisions, and the development of new applications or technologies."⁴² Could this include generative AI? Even then, we would be facing the same problem as before: The TDM exception might allow for the creation of new content through generative AI, but the exception would not authorize the communication to the public of any outputs that incorporate copied content because Article 4, like Article 3, only exempts and limits the right of reproduction.

Like Article 3, Article 4 is limited to lawfully accessible content. But Article 4 presents a big difference in comparison with Article 3, in addition to the breadth of its beneficiaries. Article 4 "shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their right holders in an appropriate manner, such as machine-readable means in the case of content made publicly available online."⁴³ In other words, right holders may "opt out" of the application of the exception or limitation. Instead, since Article 3 cannot be opted out, Article 4 explicitly states that it "shall not affect the application of Article 3 of this Directive."⁴⁴ Research organizations will always be able to do TDM using any content to which they have lawful access. (In addition, the temporary acts of reproduction authorized by Article 5(1) of the Infosoc Directive that do not have an independent economic significance remain permissible under Article 4.⁴⁵)

How can this opt-out reservation be administered in an appropriate manner? Recital 18 references machine-readable means, such as robot exclusion protocols, robot texts, metadata, terms and conditions on a website or a service, contractual agreements, or,

40. S.T.S., Apr. 3, 2012 (T.S., No. 3942/2012, p. 1, 4) (Spain); *see also* Raquel Xalabarder, *Spanish Supreme Court Rules in Favour of Google Search Engine . . . and a Flexible Reading of Copyright Statutes?*, 3 J. INTELL. PROP., INFO. TECH., & ELEC. COM. L. 162, 163 (2012).

41. Xalabarder, *supra* note 40, at 164–65. The Court also found that the conduct at issue fell within the doctrine of *ius usus inocui*, or the "right to make a harmless use of someone else's property."

42. DSM Directive, *supra* note 20, recital (18).

43. *Id.*, art. 4.

44. *Id.*

45. *See id.* recital (9) ("There can also be instances of text and data mining that do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques that do not involve the making of copies beyond the scope of that exception.").

basically, a unilateral declaration on a website.⁴⁶ Additionally, it is not clear whether the opt-out reservation in Article 4 should also apply to content posted before the 2019 Directive promulgation (or its 2021 deadline for implementation)? That would seem fundamentally unfair since authors who posted content before 2019 did not know that they had to reserve their copyrights so that their works would not be used for TDM purposes. I anticipate the CJEU may also have to resolve this retroactivity issue at some point.

In summary, Article 3 is very straightforward: It is a mandatory exception, and member states must adopt it as is. By contrast, Article 4 leaves a lot of leeway for member states, yet most of them have failed to make use of its full potential as it can be seen now that the Directive has been implemented in almost all the member states. Let me start with its awkward implementation in Spain.

Spain has implemented Articles 3 and 4 in a single exception without distinguishing between research uses or other uses for TDM.⁴⁷ Thus, TDM of copyrighted content is allowed for all TDM purposes in Spain as long as it has not been reserved by the copyright owner. Additionally, no special treatment exists for scientific research TDM: A copyright owner in Spain could prohibit the use of any TDM including for scientific research purposes (thus contravening Article 3 of the DSM Directive). I anticipate that, unless revised, Spain's implementation may be challenged at some point in front of the CJEU.

By comparison, the United Kingdom, which is no longer in the European Union and has no obligation to implement the DSM Directive (because that text post-dates Brexit),⁴⁸ permits TDM subject to a requirement of lawful access, and only for non-commercial research purposes. The United Kingdom was tempted to expand this exception to other users but decided not to.⁴⁹

46. See *id.* recital (18) ("In the case of content that has been made publicly available online, it should only be considered appropriate to reserve those rights by the use of machine-readable means, including metadata and terms and conditions of a website or a service.").

47. C.E., B.O.E. N. 263, Nov. 3, 2021 (Spain).

48. The United Kingdom did not implement the DSM Directive because the implementation deadline by EU member states expired after both the United Kingdom's exit from the European Union and the subsequent implementation period, when EU law by and large still applied in the United Kingdom. See Chris Skidmore, Minister of State for Business, Energy and Industrial Strategy, Written Answer to Question 4371 (Jan. 21, 2020), <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371> (stating that "[a]ny future changes to the UK copyright framework will be considered as part of the usual domestic policy process").

49. See *Intell. Prop. Off., Artificial Intelligence and Intellectual Property: Copyright and Patents: Government Response to Consultation* (June 28, 2022) (U.K.) (announcing plans to broaden the TDM exception for any purpose, with copyright protection limited to lawful access); see also *HC Deb* (Feb. 1, 2023) (727) cols. 162–63 (George Freeman, MP, Minister for Science, Research and Innovation, noting that the proposal would not be going forward after receiving a "huge response" requiring more time to "get the balance right").

In Germany, TDM of lawfully accessed contents is also permitted.⁵⁰ In Switzerland, which is not an EU country, TDM is permitted for scientific research only, with or without commercial purposes, which is wider than the DSM Directive.⁵¹

By comparison, in the United States TDM does not need a specific statutory exception or a limitation because of the fair use exception. TDM and machine learning may be permitted as a fair use under U.S. law. There are rulings dealing with fair use, including cases which consider copying the whole image contents of the internet in order to index for search engines, and show thumbnails to identify the search results,⁵² or scanning whole books to index, search, and show snippets.⁵³ If the fair use defense did not apply, all of these actions could be infringing because they are reproducing and communicating to the public without an authorization by the copyright owner.

As the Supreme Court stated in *Campbell v. Acuff-Rose*, “some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’”⁵⁴

Let us consider the application of the previously-mentioned Google Books case in that light. Google’s scanning and storing in a searchable database of millions of in-copyright books and delivering “snippets” responsive to search terms enabled users to identify books that contained the content they sought. Judge Pierre Leval affirmed the lower court’s ruling that providing users with the ability to search large texts and be shown snippets of books that meet the search criteria changed the text’s purpose and character, in delivering information *about* the relevant books.⁵⁵ The service provided by Google made a “transformative use” of the copied books because it informed, identified, and located books, without impinging on the authors’ rights to make derivative works. In providing a new service, Google was not exploiting works as works. Its new service added value (and could even help identify books that were already forgotten) but did not supplant or supersede the market for the scanned works. The significant public benefits of the project were sufficient to trump the infringement claim, the unauthorized reproduction and communication to the public that was being done by Google. And it is in that sense of providing a new service, that the requirement of “transformative use” may be understood, rather than providing new derivative

50. Gesetz über Urheberrecht und verwandte Schutzrechte [Act on Copyright and Related Rights], translated in the Federal Office of Justice, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html [https://perma.cc/2BGQ-5B4N] [https://web.archive.org/web/20250219045145/https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html] (Ger.).

51. Bundesgesetz über das Urheberrecht und verwandte Schutzrechte vom 9. Oktober 1992 [Federal Act of October 9, 1992, on Copyright and Related Rights], translated in WIPO Lex, <https://www.wipo.int/wipolex/en/text/584729> [https://perma.cc/E9JW-JMTP] [https://web.archive.org/web/20250307192807/https://www.wipo.int/wipolex/en/text/584729] (Switz.).

52. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

53. See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

54. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const. art. I, § 8, cl. 8).

55. *Authors Guild*, 804 F.3d at 217–18.

works, as the Google Books ruling seems to be read, which, clearly, conflicts with the very scope of the exclusive rights.

So, if we apply Google Books to what I called functional (not generative) AI, it may easily qualify as a fair use. That would be my bet and I am sure courts in the United States will be called upon to resolve cases of that kind.

But let me move on to Japanese law. Basically, Japanese law permits acts of exploitation that are necessary to achieve three goals, as long as these acts are not “for the enjoyment of the works used”: for testing technological developments; for (any) TDM purposes; and for playing music to animals or plants (e.g., to make them more productive).⁵⁶ All of these uses are permitted also for commercial purposes, as long as they do not “unreasonably prejudice the interests of the copyright holder.”⁵⁷ It is unclear whether or not Article 30 would allow the use of copyrighted works in AI outputs because as soon as the algorithm issues these outputs, someone is enjoying the work, at least if the work is substantially reproduced in the outputs.

Furthermore, Japanese law does not allow authors to opt out of having their works harvested and there is no requirement in Japanese law that the copied materials have been lawfully accessed. Japan, therefore, may become a safe haven for machine learning and text and data mining.⁵⁸

So, it seems, for now, that Japan has the most welcoming environment for technology companies seeking to text and data mine and scrape the web in other ways. The United States may be also leaning towards prioritizing technological development over copyright, at least with respect to “functional AI” (“generative” AI remains to be seen). And lastly, the European Union seems to be the outlier here because statutory authorization for TDM (and perhaps other machine reading processes) is solely envisaged for scientific research purposes.

Far more difficult to predict, is whether machine learning exceptions and fair use defenses can also apply to the training of generative AI. In the United States, courts will have to decide soon whether machine learning to train Generative AI systems is also the kind of “transformative use” exempted under fair use, which—as always—will very much depend on the specific facts and circumstances of each case. On the one hand, the fair use case for generative AI outputs may be stronger if the outputs do not substantially reproduce the inputs (copyrighted works and performances). Admittedly, this seems to be a paramount consideration after the Supreme Court’s 2023 decision in *Andy Warhol Foundation v. Goldsmith*.⁵⁹ But the Court has also emphasized that the need

56. See GOV’T OF JAPAN, INTEGRATED INNOVATION STRATEGY 2022 (June 30, 2022), https://www8.cao.go.jp/cstp/english/strategy_2022.pdf [https://perma.cc/3B2H-6ED6] [https://web.archive.org/web/20250307194534/https://www8.cao.go.jp/cstp/english/strategy_2022.pdf] (setting forth three areas for growth, including promoting advanced and emerging technologies).

57. Japanese Copyright Act, *supra* note 8, art. 30.

58. Min Jeong Lee & Natsuko Katsuki, *Google Alums Go Big in Japan with Months-Old Startup Sakana AI*, BLOOMBERG LAW (Apr. 11, 2024), https://www.bloomberglaw.com/product/blaw/bloombergterminalnews/bloomberg-terminal-news/SAOYIOT0AFB4?criteria_id=9c7124c5fe575996e07e171c65ad1c9d (describing interest to develop “Japan’s untapped AI landscape”).

59. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

for a justification for the copying will vary with the extent to which the defendant's use does not substitute for the plaintiff's use of its work.⁶⁰ If one determines that a use that generates an output that does not substitute for the plaintiff's exploitation of its work is sufficiently "transformative," then it may not matter that the output fails to comment on, criticize, or otherwise be "about" the copied inputs. That said, the question of substitution may require a different assessment in the AI content, because an output might not compete with any particular copied work, but it might compete with the copied author's future prospects of being hired to create works that AI can now generate.⁶¹ Whether courts in fair use cases can or should take account of that kind of substitution is a big question. One might wonder if these outputs advance or undermine the very goal of copyright, which is to advance the progress of science and useful arts, and to do that by encouraging authorship. I think there is room for doubting that generative AI will foster creativity. It is one thing to identify, locate, generate information, but creating new industries, new performances, and new works (if we want to call them that) seems very different to me.

Moving to the European Union, as mentioned, the EU legislature was not thinking about generative AI when drafting Articles 3 and 4 of the 2019 DSM Directive. The definition of TDM in this Directive was clearly aimed at gathering data for analytic uses (to extract information, patterns, and knowledge), but not (at least, not formally so) at "generating" new material.⁶² Furthermore, generative AI not only reproduces but transforms the works in the data set, or at least makes derivative works or protected subject matter (i.e., a database), and the AI program communicates the outputs to the public. Whether the CJEU will allow the TDM exception in Article 4 of the DSM Directive to apply to machine learning for use in generative AI is yet to be seen. Additionally, as we mentioned before, Articles 3 and 4 of the DSM Directive do not concern the right of communication to the public, let alone the right of transformation (which is not harmonized in the European Union). Regardless of all these caveats, public debate in Europe seems to take for granted that the TDM provision in Article 4 of the DSM Directive is applicable to permit the training of generative AI systems

60. *Id.* at 533–36.

61. See David Cremer et al., *How Generative AI Could Disrupt Creative Work*, HARV. BUS. REV. (Apr. 13, 2023), <https://hbr.org/2023/04/how-generative-ai-could-disrupt-creative-work> [<https://perma.cc/JD3S-BUCL>] [<https://web.archive.org/web/20250307211631/https://hbr.org/2023/04/how-generative-ai-could-disrupt-creative-work>]; Winston Cho, *The Hollywood Jobs Most at Risk from AI*, HOLLYWOOD REP. (Jan. 30, 2024), <https://www.hollywoodreporter.com/business/business-news/ai-hollywood-workers-job-cuts-1235811009/> [<https://perma.cc/2VXR-5S9S>] [<https://web.archive.org/web/20250307211715/https://www.hollywoodreporter.com/business/business-news/ai-hollywood-workers-job-cuts-1235811009/>]; Alexander Cuntz et al., *Artificial Intelligence and Intellectual Property: An Economic Perspective*, World Intell. Prop. Org. (WIPO), Economic Research Working Paper No. 77 (2024).

62. See DSM Directive, *supra* note 20, arts. 3–4. Note that the term used in the DSM Directive is not revised in the AI Regulation adopted in March of 2024. See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (L 1689) 1.

unless the copyright owners have “opted out” of it. Whether or not this is the correct interpretation will be determined by courts, but seeing the prevailing reading of this provision among stakeholders, there seems to be a good argument that Article 4 of the DSM Directive, notwithstanding the caveats mentioned above, will end up governing not only TDM for purposes of “functional” AI, but also for “generative” AI.

Turning again to Japanese law, it is unclear whether or not Article 30 would allow the use of copyrighted works in AI outputs because the minute the algorithm issues these outputs, someone is enjoying the work, at least if the work is substantially reproduced in the outputs.

Another open question: Does it make a difference if the AI output consists almost entirely of newly generated content? You can have a creative project that is almost entirely generated by an AI algorithm. AI has the ability to generate deepfakes. Programs can copy the voice of an actor or any other person whose voice it can access a recording of, even the voice of the president, and manipulate the voice to say things that he or she has not said. Certainly, there are positive instances where this could be used as well as negative ones. An actor’s performance in a movie can be translated and performed in other languages in his or her own voice, for example. But this would be a case where the use was authorized. Not all such uses are done with permission, and the consequences of unauthorized uses of another’s voice can be serious and even dangerous.

But deepfakes are not the only material that may be generated “new” by AI and we have to wonder how current laws would apply to these situations. Will Article 4 of the DSM Directive, which may be implemented and interpreted by each member state differently, have any bearing on AI’s generation of “new” works?

Before we wrap up, let me quickly look at the outputs generated by these algorithms. I can think of two issues worth looking into: Whether or not these outputs may qualify as direct infringement, and whether these AI systems may qualify as an indirect, contributory infringement—specially, through the *Grokster* case and the inducement theory. As a rule of thumb, it seems that if these outputs are infringing, then these systems are clearly inducing or contributing to this infringement.

As far as direct infringement, it might be argued that there is no infringement (notwithstanding the copying of copyrighted inputs) if the outputs do not reproduce recognizable portions of the source material. In Europe, the CJEU decided a case involving a two-second extract of a 1977 song, “Metall auf Metall,” from an old German group called Kraftwerk, which was continuously sampled (looped) in a hip-hop song.⁶³ The CJEU said that sampling violates a phonogram producer’s exclusive right to reproduce and distribute their phonogram, unless the sample is “in a modified form unrecognizable to the ear.”⁶⁴ One might extrapolate from that decision a threshold requirement of recognizability, but one should also be cautious because the case

63. Case C-416/17, *Pelham and Others v. Hütter and Schneider-Esleben*, ECLI:EU:C:2019:624 (July 29, 2019).

64. *Id.* ¶ 39.

involved sound recordings, which under EU law are treated somewhat differently than other kinds of works of authorship covered by traditional copyright law.⁶⁵

In the United States, you have had similar issues also relying on the fair use doctrine. In *Cariou v. Prince*, the Second Circuit held that many of the images generated by Richard Prince on the basis of Cariou's photographs of Rastafarians could constitute fair use, and remanded a few to be reassessed by the lower court.⁶⁶ Although the Second Circuit explained (perhaps wrongly) that many of the thirty pictures amounted to a "transformative" fair use of Cariou's works, it is not less true that in this case the recognizability test played an important role.⁶⁷

Then there is the other Prince. The one whose image was re-used by the Andy Warhol Foundation. In *Warhol v. Goldsmith*, the Supreme Court also used the transformative and the fair use doctrine, basically to say this was not a fair use because the series of fifteen works done by Warhol in 1984 was "substantially similar" to the original photograph taken by Goldsmith in 1981, as licensed by *Vanity Fair*.⁶⁸ In EU language, we may reach the same result by arguing that Warhol's series could not be exempted as a quotation or a parody, and that no other statutory exception would permit the making of these derivative works.

And one last recent case in the United States, the ruling by the Supreme Court in favor of fair use in *Google v. Oracle*.⁶⁹ The Court confirmed the concept of "transformativeness" for the purposes of the fair use defense, in the sense of a new product or service, not so much a derivative work. The fact that Google had copied part of the code used in Oracle's Java's APIs, so that the new code could be written for the Android system, was found to be "transformative" in the sense that Google had developed a "new product" with significant public benefits.⁷⁰ In summary, we could conclude that either under the U.S. fair use doctrine or in Europe, under the CJEU's non-recognizable test, similar conclusions could be reached: If the results generated by AI allow for the original work(s) to be identified, to be recognized, they would

65. See Irina Eidsvold-Tøien & Are Stenvik, *Copyright for Performers—An Obligation Under International Law*, 18 J. INTELL. PROP. L. & PRAC. 754 (2023).

66. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013). Cariou had taken pictures of Rastafarians and published them in an art book. Prince transformed these pictures (by adding eyes and hair, placing guitars in their hands, and making collages of several photos) and sold the distorted photographs for a lot of money. In some of them, the original painting could be easily identified. In others, it could not be. The Supreme Court denied Cariou's petition for a writ of certiorari, 571 U.S. 1018 (2013), and the case settled in 2014.

67. *Cariou*, 714 F.3d at 710 (finding it significant that a source photograph was "heavily obscured and altered to the point that Cariou's original is barely recognizable").

68. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508 (2023). An original photograph taken by Goldsmith in 1981 was licensed in 1984 to Warhol to create a reference for a silkscreen illustration of Prince to be published, by agreement with Goldsmith, only once, with her credited. Warhol created not one, but fifteen new works (the "Prince series"). Goldsmith found out in 2016, when Condé Nast published another work in the Prince series (licensed by the Warhol Foundation) on a magazine cover. The Second Circuit concluded against a fair use because the series retained the essential elements (lighting, shades, contrasts) of the original photograph without adding anything new. A classic case of "derivative work" under the scope of exclusive rights, and a classic case of contractual infringement too. *Id.*

69. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021).

70. *Id.* at 30.

constitute an infringement; instead, if the generative AI outputs do not allow for the original work(s) (trained and machine learned and put in the database) to be identified, then these outputs would not be infringing, *per se*. And notice that we are only assessing the infringing character of the AI outputs, not the eventual infringement incurred in making them possible through TDM and machine learning processes.

On the issue of secondary liability, the test may be quite different in the United States and European Union. Indirect liability has not been harmonized in the European Union, and it remains a matter of national laws, usually based on concepts such as negligence, unjust enrichment, as well as contribution to the damage caused.⁷¹ For our purposes, the only exception is the “safe harbours” for Internet Service Providers in the e-Commerce Directive (2001),⁷² and more recently confirmed by the Digital Service Act (2022),⁷³ and specifically, the special rule in Article 17 of the DSM Directive applicable to user-generated-content platforms.⁷⁴ A more interesting question might be whether AI systems and platforms could be considered under Article 17 of the DSM Directive. That would very much be counterintuitive because, under Article 17, these platforms require a license to reproduce and communicate works to the public, and, as already explained, the transformation right is not part of the EU *acquis*.

In the United States, generative AI systems might be examined under contributory infringement doctrine (after Sony/Betamax⁷⁵) and the inducement test (after *Grokster*⁷⁶). In the *Betamax* case, the court found the existence of fair use because many copies were being made for time-shifting purposes; subsequently, based on the lack of an underlying infringement the Court concluded that there was no contributory infringement.⁷⁷ Taking into account that many generative AI outputs cannot be deemed a fair use, examining generative AI under the Sony contributory infringement doctrine (and its test of “substantial non-infringing uses”) may lead to the opposite result and assign liability to generative AI platforms/producers for contributory infringement. Also under the inducement doctrine (*Grokster*), generative AI systems may be seen as inherently designed and trained to precisely produce new outputs that

71. The concept of negligence usually refers to a breach of a standard “duty of care,” and lack of action upon knowledge. Contribution involves an active role (a substantial participation in the sense of directly, and knowingly, contributing to the infringement), but also the incitement or fostering of the action. Unjust enrichment relies on the existence of an economic interest and actual knowledge. See Raquel Xalabarder, *Intermediarios Tecnológicos y Bases para la Responsabilidad. Intervención Voluntaria u Obligatoria* [Technological Intermediaries and Bases for Liability: Voluntary or Mandatory Intervention], in DIFUSIÓN Y GESTIÓN DE LAS OBRAS PROTEGIDAS POR EL DERECHO DE AUTOR EN INTERNET [DISSEMINATION AND MANAGEMENT OF COPYRIGHT-PROTECTED WORKS ON THE INTERNET] 405–21 (2016).

72. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (“Directive on Electronic Commerce”), arts. 12–15, 2000 O.J. (L 178).

73. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), arts. 4–8, 2022 O.J. (L 277).

74. See DSM Directive, *supra* note 20, art. 17.

75. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

76. See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

77. Sony, 464 U.S. at 442.

will likely infringe copyright. But these are just speculations, and U.S. courts will most likely examine them in the near future.

Some concluding remarks. We are only starting to identify a few issues that arise related to AI. It is hard to regulate if we do not know yet what we are regulating. We have more questions than solutions. Some say we should wait and see where technology takes us. Copyright will certainly play an important role in the development of AI technology. And we better get it right, because we have all seen the *Terminator* movie, and we know how it ends. We do not wish to send someone from the future into the present to address any mistakes committed. Thank you very much for inviting me to share with you some of the many open questions.

A New Era in the Creator Economy: Addressing Copyright Issues Between Creators on YouTube

Makena Binker Cosen*

INTRODUCTION

The creator economy is the future of American media—a reality content platforms, consumers, traditional media, and brands have recognized for the past decade. The creator economy refers to an “ecosystem of content creation activities in which independent creators generate content on a self-directed basis that is monetizable by the creator.”¹ A quarter of weekly media hours are dedicated to watching user-generated video, with YouTube dominating the market as the largest video-sharing platform.² Every day, over half of adults and almost three-quarters of teenagers turn to

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1. Doug Shapiro, *Getting Creators Paid Is the Next Big Thing in Media*, MEDIUM (Aug. 17, 2020), <https://dougshapiro.medium.com/getting-creators-paid-is-the-next-big-thing-in-media-8d5e88bc7895> [<https://perma.cc/8QWG-JYQP>] [<https://web.archive.org/web/20250308005851/https://dougshapiro.medium.com/getting-creators-paid-is-the-next-big-thing-in-media-8d5e88bc7895>].

2. See Todd Spangler, *User-Generated Content Represents 39% of Time Spent with Media: Study*, VARIETY (Jan. 4, 2022), <https://variety.com/2022/digital/news/cta-user-generated-content-study-1235146175/> [<https://perma.cc/4VXT-NEHY>] [<https://web.archive.org/web/20250213185912/https://variety.com/2022/digital/news/cta-user-generated-content-study-1235146175/>]. YouTube commands 79% of the market, while the second-leading platform, Vimeo, only takes up 17%. *Online Video Platforms Market Share*, DATANYZE, <https://www.datanyze.com/market-share/online-video—12> [<https://web.archive.org/web/20250213190702/https://www.datanyze.com/market-share/online-video—12>] (last visited Mar. 7, 2025).

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YouTube.³ Independent “creator” content is “changing [consumers’] definition of quality,” diminishing the significance of traditional media’s high production value.⁴ Among streaming services, YouTube garners more views than Netflix and as many as Hulu, Disney+, Max, Peacock, and Paramount+ combined.⁵ At the same time, consumer preference for YouTube videos is expected to increase as the release of new virtual production and AI technologies empower more creators to make content with high production value.⁶ For perspective, in the time it takes Hollywood to release 15,000 hours of TV and film, people already post 250 million hours of content to YouTube; if consumers considered only 0.01% of this content to be competitive with Hollywood, YouTube would still double Hollywood’s annual output.⁷ Accordingly,

3. See Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RSCH. CTR. (Apr. 10, 2019), <https://www.pewresearch.org/short-reads/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> [https://perma.cc/5645-DYN3] [https://web.archive.org/web/20250308011131/https://www.pewresearch.org/short-reads/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/]; Monica Anderson et al., *Teens, Social Media and Technology 2023*, PEW RSCH. CTR. (Dec. 11, 2023), <https://www.pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/> [https://perma.cc/7HMM-QWF7] [https://web.archive.org/web/20250308010913/https://www.pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/].

4. Doug Shapiro, *What Is Scarce When Quality Is Abundant?*, MEDIATOR (Oct. 22, 2023), <https://dougshapiro.substack.com/p/what-is-scarce-when-quality-is-abundant> [https://web.archive.org/web/20250213185412/https://dougshapiro.substack.com/p/what-is-scarce-when-quality-is-abundant].

5. Erik Gruenwedel, *Nielsen: Streaming Video Market Share Reached Record High in July*, MEDIA PLAY NEWS (Aug. 15, 2023), <https://www.mediaplaynews.com/nielsen-streaming-video-market-share-reached-record-high-in-july/> [https://perma.cc/79GQ-X9S5] [https://web.archive.org/web/20250308012031/https://www.mediaplaynews.com/nielsen-streaming-video-market-share-reached-record-high-in-july/].

6. See Doug Shapiro, *Forget Peak TV, Here Comes Infinite TV*, MEDIATOR (Jan. 4, 2023), <https://dougshapiro.substack.com/p/forget-peak-tv-here-comes-infinite-tv> [https://web.archive.org/web/20250308012450/https://dougshapiro.substack.com/p/forget-peak-tv-here-comes-infinite-tv]. In one survey, more than half of video creators reported that they were using AI in their creative process. See Rebecca Helfenbaum, *How Brands Can Play and Win in the Creator Economy*, ARTLIST (May 15, 2024), <https://artlist.io/blog/trend-report-2024/> [https://web.archive.org/web/20240225120717/https://artlist.io/blog/trend-report-2024/]. YouTube is rolling out guardrails that will require creators to disclose when they have used AI-generated content in their videos. The platform will also introduce content tags that creators can add to their videos to notify users if what they are watching is altered or synthetic. See Jennifer Flannery O'Connor & Emily Moxley, *Our Approach To Responsible AI Innovation*, YOUTUBE OFF. BLOG (Nov. 14, 2023), <https://blog.youtube/inside-youtube/our-approach-to-responsible-ai-innovation/> [https://perma.cc/UF3T-8QUL] [https://web.archive.org/web/20250308013027/https://blog.youtube/inside-youtube/our-approach-to-responsible-ai-innovation/].

7. See Shapiro, *supra* note 4. Researchers, largely unable to access data behind major platforms like YouTube, conducted a study using a randomized sampling process. Their findings show that “the number and perhaps even importance of [viral and popular] videos are dwarfed by hours-long church services, condo-board meetings, and other miscellaneous clips that you’ll probably never see.” Ryan McGrady, *What We Discovered on ‘Deep YouTube’*, ATLANTIC (Jan. 26, 2024), <https://www.theatlantic.com/technology/archive/2024/01/how-many-videos-youtube-research/677250/> [https://perma.cc/7AQG-F5DW].

content creators hold a growing influence over the ideas we share and the culture we foster.

The term was first coined around 2008 by technology forecaster Paul Saffo to describe the shift from a consumer economy to one focused on massive data generation and collection through no- and low-cost digital services, which has since morphed into an explosion of user-generated content enabled by web 2.0 platforms.⁸ Following a series of acquisitions in 2011, YouTube adopted the term “creator” to strengthen its position among platforms hosting user-generated content.⁹ Additionally, contributing factors include a reduction in content-publishing barriers, improved affordability and quality of film equipment and software, along with the proliferation of high-tech smartphones, social media, internet advertising, and influencer marketing.¹⁰ The COVID-19 pandemic further accelerated participation in the creator economy. Notably, the global creator economy doubled to 303 million creators between 2021 and 2022.¹¹ Currently valued at \$250 billion, the industry is expected to jump to \$480 billion by 2027.¹²

[<https://web.archive.org/web/20250307025902/https://www.theatlantic.com/technology/archive/2024/01/how-many-videos-youtube-research/677250/>].

8. See Ted Greenwald, *The Creator Economy: Futurist Paul Saffo on the New Business Epoch*, FORBES (Oct. 19, 2011), <https://www.forbes.com/sites/tedgreenwald/2011/10/19/the-creator-economy-futurist-paul-saffo-on-the-new-business-epoch/?sh=1127e0eb61c1>; Franklin Graves, Address at the Nashville Bar Association Annual Entertainment, Sports & Media Law Institute: Creator Economy Law (Dec. 2023), https://www.linkedin.com/posts/franklingraves_creator-economy-law-nashville-bar-association-activity-7136822952397828096-Mx29?utm_source=share&utm_medium=member_desktop&rcm=ACoAABGTeyoB8QZ1FSfHyWsBNE6yct3EwBtMxEU [https://perma.cc/Z9BC-KAMG] [https://web.archive.org/web/20250308015202/https://www.linkedin.com/posts/franklingraves_creator-economy-law-nashville-bar-association-activity-7136822952397828096-Mx29?utm_source=share&utm_medium=member_desktop&rcm=ACoAABGTeyoB8QZ1FSfHyWsBNE6yct3EwBtMxEU].

9. Taylor Lorenz, *The Real Difference Between Creators and Influencers*, ATLANTIC (May 31, 2019), <https://www.theatlantic.com/technology/archive/2019/05/how-creators-became-influencers/590725/> [<https://web.archive.org/web/20250308014048/https://www.theatlantic.com/technology/archive/2019/05/how-creators-became-influencers/590725/>].

10. Graves, *supra* note 8.

11. “Future of Creativity” Study: 165+ Creators Joined Creator Economy Since 2020, ADOBE (Aug. 25, 2022), <https://news.adobe.com/assets/downloads/pdfs/2022/08/082522-adobefutureofcreativity.pdf> [https://perma.cc/4GVV-EH8H] [<https://web.archive.org/web/20250308032515/https://news.adobe.com/assets/downloads/pdfs/2022/08/082522-adobefutureofcreativity.pdf>].

12. *The Creator Economy Could Approach Half-a-Trillion Dollars by 2027*, GOLDMAN SACHS (Apr. 19, 2023), <https://www.goldmansachs.com/intelligence/pages/the-creator-economy-could-approach-half-a-trillion-dollars-by-2027.html> [https://perma.cc/DXZ8-YN2] [<https://web.archive.org/web/20250308032937/https://www.goldmansachs.com/intelligence/articles/the-creator-economy-could-approach-half-a-trillion-dollars-by-2027.html>].

Nearly a third of children aspire to become professional YouTubers.¹³ More than two million adults are already living out their dreams.¹⁴ However, the profession is plagued by waves of burnout.¹⁵ Making it on YouTube requires dedication. A survey found that it takes an average of seven hours to make a one- to five-minute YouTube video—and the average YouTube video is at least three times longer than that.¹⁶ Aspiring YouTubers are recommended to post new videos between once a day and once a week to find success on the platform.¹⁷ Most creators maintain a full-time job while striving to meet ambitious posting schedules.¹⁸ For those who persevere, the hustle is deemed worthwhile despite the many sacrifices that come with it. Yet, that delicate balance is tipped off-kilter when the videos YouTubers pour their hearts into making are repeatedly taken down, stolen, and shared without credit.

Part I of this Note outlines some of the issues creators run into in relation to copyright law. Whereas most scholarship in the field discusses copyright issues between creators and traditional media companies, this Note primarily focuses on disputes between creators. It focuses on how these issues unfold on YouTube, given its status as the longest-standing platform of its kind and its established record of implementing creator-friendly reforms.¹⁹ Part II explains how content creation challenges copyright law's economic incentives model and why YouTubers are not

13. See *LEGO Group Kicks Off Global Program To Inspire the Next Generation of Space Explorers as NASA Celebrates 50 Years of Moon Landing*, HARRIS POLL (July 16, 2019), <https://theharrispoll.com/briefs/lego-group-kicks-off-global-program-to-inspire-the-next-generation-of-space-explorers-as-nasa-celebrates-50-years-of-moon-landing/> [https://perma.cc/PS6T-5RMM] [https://web.archive.org/web/20250308033318/https://theharrispoll.com/web/20250308033318/https://theharrispoll.com/briefs/lego-group-kicks-off-global-program-to-inspire-the-next-generation-of-space-explorers-as-nasa-celebrates-50-years-of-moon-landing/].

14. See ROBERT SHAPIRO & SIDDHARTHA ANEJA, *TAKING ROOT: THE GROWTH OF AMERICA'S NEW CREATIVE ECONOMY* (2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf> [https://perma.cc/L3PK-FNN7] [https://web.archive.org/web/20250226171705/https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf].

15. See Julia Alexander, *YouTube's Top Creators Are Burning Out and Breaking Down En Masse*, POLYGON (June 6, 2018), <https://www.polygon.com/2018/6/1/17413542/burnout-mental-health-awareness-youtube-elle-mills-el-rubius-bobby-burns-pewdiepie> [https://web.archive.org/web/20250308034039/https://www.polygon.com/2018/6/1/17413542/burnout-mental-health-awareness-youtube-elle-mills-el-rubius-bobby-burns-pewdiepie].

16. See Vidya Narayanan, *How Long Does It Take To Create a YouTube Video?*, MEDIUM (Sept. 25, 2019), <https://medium.com/rizzle/how-long-does-it-take-to-create-a-youtube-video-266ae3496bf3> [https://perma.cc/Q9VX-5Y6K]; Julia Alexander, *YouTube Videos Keep Getting Longer*, VERGE (July 26, 2019), <https://www.theverge.com/2019/7/26/8888003/youtube-video-length-contrapoints-lindsay-ellis-shelby-church-ad-revenue> [https://perma.cc/9ATP-M3SD].

17. *How Often Should You Post on Youtube: The Ultimate Guide*, REPEATUBE, <https://www.repeatube.net/blog/how-often-should-you-post-on-youtube/> [https://perma.cc/5HXD-KWE6] [https://web.archive.org/web/20250308035909/https://www.repeatube.net/blog/how-often-should-you-post-on-youtube/] (last visited Mar. 7, 2025).

18. ADOBE, *supra* note 11.

19. While this Note focuses on creators based on YouTube, most creators are active on multiple platforms and face copyright issues across them, e.g., a YouTube video is re-uploaded without authorization on TikTok. Furthermore, it is important to understand the interplay between platforms. As platforms compete to retain talent, they are pushed to test and adopt new features.

seeking legal remedies for the copyright issues they face. Part III argues that recent and forthcoming changes in the creator economy and legal landscape will encourage YouTubers to rely on copyright law to make a living and improve the conditions of the profession. Anticipating this transition, Part IV reviews existing proposals that would facilitate the resolution of the copyright issues raised in Part I. Looking ahead to the creator economy's legal needs, conducting a comprehensive examination of challenges and proposed solutions can empower content creators and initiate meaningful discussions within the legal community to support its new clients.

A. YOUTUBE'S COPYRIGHT MANAGEMENT SYSTEM

YouTube utilizes an automated content recognition system called Content ID that scans uploaded videos against reference files submitted by copyright holders. In 2006, YouTube entered a licensing agreement with Audible Magic for an “audio identification technology” to detect copyright infringement.²⁰ Still in its early stages, between 2007 to 2009, Viacom, Mediaset, and the English Premier League sued YouTube for insufficient copyright protection efforts.²¹ In June 2007, YouTube initiated trials for its own infringement detection tool on uploaded videos.²² Upon testing its own Content ID system, YouTube terminated its deal with Audible Magic.²³ In 2022, Google reported Content ID payouts of approximately \$50 billion to copyright holders in the previous three years, with development costs exceeding hundreds of millions of dollars.²⁴

20. *YouTube: A History*, TELEGRAPH (Apr. 17, 2010), <https://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/7596636/YouTube-a-history.html>

[<https://web.archive.org/web/20250308040338/https://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/7596636/YouTube-a-history.html>].

21. *See Viacom Will Sue YouTube for \$1bn*, BBC (Mar. 13, 2007), <http://news.bbc.co.uk/1/hi/business/6446193.stm> [<https://perma.cc/LBD3-FLSD>]

[<https://web.archive.org/web/20250308040644/http://news.bbc.co.uk/2/hi/business/6446193.stm>]; Giada Zampano & Liam Moloney, *Update: Mediaset Files EUR500 Million Suit Vs. Google's YouTube*, CNN (July 30, 2008), https://money.cnn.com/news/newsfeeds/articles/djf500/200807301025DOWJONESDJONLINE000654_FORTUNE5.htm [<https://perma.cc/FLT2-L6TE>]

[https://web.archive.org/save/https://money.cnn.com/news/newsfeeds/articles/djf500/200807301025DOWJONESDJONLINE000654_FORTUNE5.htm]; *Premier League To Take Action Against YouTube*, TELEGRAPH (May 4, 2007), <https://www.telegraph.co.uk/sport/football/2312532/Premier-League-to-take-action-against-YouTube.html> [<https://web.archive.org/web/20250225194839/https://www.telegraph.co.uk/sport/football/2312532/Premier-League-to-take-action-against-YouTube.html>].

22. *See* Steve Chen, *The State of Our Video ID Tools*, GOOGLE OFF. BLOG (June 14, 2007), <https://googleblog.blogspot.com/2007/06/state-of-our-video-id-tools.html> [<https://perma.cc/KX8U-VPEF>] [<https://web.archive.org/web/20250405005203/https://googleblog.blogspot.com/2007/06/state-of-our-video-id-tools.html>].

23. Daniel Sanchez, *Google and YouTube Accused of Stealing Content ID...*, DIGIT. MUSIC NEWS (Jan. 12, 2017), <https://www.digitalmusicnews.com/2017/01/12/google-youtube-audible-magic-content-id/>.

24. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT 1 (2022), <https://www.digitalmusicnews.com/wp-content/uploads/2023/07/youtube-transparency-report-H2->

When a match occurs—even in a short segment of a video—Content ID automatically applies policies pre-selected by right holders, like diverting ad revenue to the claimant or blocking the video entirely.²⁵ While Content ID provides right holders efficient tools to monetize or remove potential infringement at scale, it also creates a “guilty until proven innocent” system against content creators.²⁶ In the event of a disagreement with a Content ID decision on YouTube, users can submit a counter-claim form. However, this submission is forwarded directly to the copyright owner, who holds ultimate authority over the outcome unless legal measures are taken.

Critically, Content ID lacks the capacity to accurately assess whether a video’s use of copyrighted material falls under fair use or is permitted under a licensing agreement.²⁷ Thus, Content ID frequently flags legal uses. This is exacerbated by right holders’ overzealous claims, perhaps resulting from the perceived absence of legal risk for abusing the system.²⁸ Fearing legal repercussions or constrained by resources, creators often opt for video removal instead of challenging copyright claims.²⁹ A study suggests that 72% of individuals who receive copyright infringement notices from online platforms would be less inclined to share content in the future.³⁰ This paints a picture of a system that may inadvertently hinder creative expression.

The Copyright Strikes system on YouTube allows right holders to manually request removal of allegedly infringing videos. When YouTube receives a “complete legal”

2022.pdf [https://perma.cc/4SJM-MZJ5]
[https://web.archive.org/web/20250207162206/https://www.digitalmusicnews.com/wp-content/uploads/2023/07/youtube-transparency-report-H2-2022.pdf].

25. *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> [https://perma.cc/B4FS-ES2L]
[https://web.archive.org/web/20250225195009/https://support.google.com/youtube/answer/2797370?hl=en] (last visited Feb. 24, 2025).

26. Paul Tassi, *The Injustice of the YouTube Content ID Crackdown Reveals Google’s Dark Side*, FORBES (Dec. 19, 2013), <https://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/?sh=1a8ac20666c8> [https://perma.cc/RM6R-AWEK]
[https://web.archive.org/web/20250225195210/https://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/?sh=1a8ac20666c8].

27. See Mike Masnick, *How Google’s ContentID System Fails at Fair Use & the Public Domain*, TECHDIRT (Aug. 8, 2012), <https://www.techdirt.com/2012/08/08/how-googles-contentid-system-fails-fair-use-public-domain/>
[https://web.archive.org/web/20250225195420/https://www.techdirt.com/2012/08/08/how-googles-contentid-system-fails-fair-use-public-domain/].

28. YouTube adjusted this approach following *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (requiring copyright holders to consider whether potentially infringing material was fair use before issuing a takedown notice). See *Submit a Copyright Removal Request*, YOUTUBE, <https://support.google.com/youtube/answer/2807622?sjid=14485426572126247897-NA> [https://perma.cc/59YL-CJ2J] (last visited Apr. 4, 2025) (warning users not to make false claims: “Misuse of the removal request webform, such as submitting false information, may result in the suspension of your account or other legal consequences”).

29. Corynne McSherry, *Hey, Warner, Leave Those Kids Alone*, ELEC. FRONTIER FOUND. (Feb. 26, 2009), <https://www.eff.org/deeplinks/2009/02/hey-warner-leave-those-kids-alone> [https://perma.cc/Y35P-7MFD]
[https://web.archive.org/web/20250225195625/https://www.eff.org/deeplinks/2009/02/hey-warner-leave-those-kids-alone].

30. Johnathon W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 STAN. TECH. L. REV. 412, 447 (2019).

takedown notice under the DMCA, it will remove the identified content and issue a strike against the uploading user's account.³¹ Multiple strikes can lead to account termination: Three strikes result in cancellation of the account, any associated accounts, and deletion of all the user's videos. A creator can resolve the strike by (i) waiting six months for a strike to expire automatically; (ii) getting the claimant to retract their takedown request; or (iii) submitting a DMCA counter-notification and successfully arguing that the video removal was a mistake.³² If the counter-notification meets legal requirements, the uploader can have the strike removed and video restored in fourteen days unless the copyright holder files a lawsuit. Thus, while the Copyright Strikes system gives copyright holders enhanced abilities to enforce claims, accused users still have some built-in statutory protections.

I. COPYRIGHT ISSUES BETWEEN CONTENT CREATORS

Videos are reproduced in re-posted in clips or in full, non-transformative reaction videos, and recreated scene-by-scene, line-by-line in an appropriative manner. Infringement is done by fellow creators and faceless content farms. By stealing from multitudes of creators and generating a hub of curated content, infringers can out-produce and amass more views than any individual creator could. Theoretically, this implies that content thieves could introduce smaller creators to new viewers. However, comedy YouTuber Jack "jacksfilms" Douglass disagrees.³³ In practice, while viewers might seek out an original creator's work, he explains that they are unlikely to watch the same video twice. Once a content thief re-uploads a creator's entire catalogue, the hoax of exposure value disappears. The reality is that infringers are taking creators' views, watch time, and user engagement, interfering with their advertising revenue and, more importantly, with their ability to bargain with brands for more competitive sponsorship deals—the main source of most creators' income.³⁴ While infringement

31. *Copyright Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2814000> [<https://perma.cc/66UL-NNYM>] [<https://web.archive.org/web/20250211180711/https://support.google.com/youtube/answer/2814000>] (last visited Feb. 11, 2025).

32. *See Retract a Copyright Removal Request*, YOUTUBE, <https://support.google.com/youtube/answer/2807691> [<https://perma.cc/J5BJ-MSCC>] [<https://web.archive.org/web/20250211180857/https://support.google.com/youtube/answer/2807691>] (last visited Feb. 11, 2025); *Submit a Copyright Counter Notification*, YOUTUBE, <https://support.google.com/youtube/answer/2807684?sjid=9221366119256600641-NA> [<https://perma.cc/2VUP-J63P>] [<https://web.archive.org/web/20250211181842/https://support.google.com/youtube/answer/2807684?sjid=9221366119256600641-NA>] (last visited Feb. 11, 2025).

33. jacksfilms, *The War on Stolen Content!*, YOUTUBE (Sept. 29, 2023), <https://youtu.be/eI0VD3Hut0Y?si=yVGyyUQ4tJ-Hze88> [<https://perma.cc/KV3J-ECYV>] [<https://web.archive.org/web/20250214133642/https://www.youtube.com/watch?v=eI0VD3Hut0Y>].

34. *See Creator Earnings: Benchmark Report 2023*, INFLUENCER MKTG. HUB (June 24, 2024), <https://influencermarketinghub.com/creator-earnings-benchmark-report/> [<https://perma.cc/78E9-Y3J4>] [<https://web.archive.org/web/20250308141843/https://influencermarketinghub.com/creator-earnings-benchmark-report/>].

occurs cross-platform, it is critical to stop it on platforms like YouTube, Instagram, TikTok, and Twitch, where brands look at a creator's statistics to negotiate sponsorship deals.³⁵

A. RE-UPLOADED VIDEOS

Non-consensual re-uploads of clips or full-length videos undermine creators' ownership rights and livelihoods. Small creators—including creators with half a million subscribers—report devastated view counts when their content or livestreams of reactions to their content are re-posted on YouTube.³⁶ For example, an upload of a livestream reaction of Orr “Pinely” Piamenta's video essay “How to Radicalize a Celebrity” surpassed the original video's views on its first day on YouTube.³⁷ In a follow-up video, Piamenta explained that he gives streamers like Hasan “HasanAbi” Piker permission to react to his content on other platforms like Twitch, where viewers enter the livestream because they are interested in the Piker, and Piamenta's video is a small portion of the livestream.³⁸ However, even though many streamers consent to viewers permission to re-upload their livestreams to YouTube, Piamenta does not. He distinguishes the two, explaining that this content competes with his on the same platform, as viewers click on the video for its subject matter, not personality.³⁹ Furthermore, these re-uploads are more likely to be favored by YouTube's recommendation algorithm—firstly, because the streamer's reaction makes the video twice as long, enabling YouTube to place more advertisements on it and, secondly, because channels that regularly publish non-original content tend to post much more frequently.

While the channel “Hasan Compilations” credited Piamenta in the title, “How to Radicalize a Celebrity | HasanAbi reacts to Pinely,” it replaced his image in the thumbnail with Hasan's and did not link to Piamenta's video. The re-upload was taken down after Piamenta's complaint was picked up by Piker, whom the compilation channel bases its content around. Ironically, after further research, Piker's followers found that “Hasan Compilations” has flooded competing compilation channels with

35. 2021 State of Influencer Rates Report, BANKNOTES (Feb. 12, 2021), <https://hashtagpaid.com/banknotes/creator-rates> [https://perma.cc/H7NW-PZK6] [https://web.archive.org/web/20250308142010/https://hashtagpaid.com/banknotes/creator-rates].

Creators are left to utilize non-copyright protection mechanisms, such as trademarks and name, image, and likeness rights, to build a robust brand and business protection plan.

36. Colin Rosenblum & Samir Chaudry, *The Murky Ethics of Clipping on YouTube*, COLIN & SAMIR SHOW (Dec. 1, 2023) <https://open.spotify.com/episode/1SYfLEyZQPqdx0GoDSqsCy?si=82fe2a8706ee46cf> [https://perma.cc/H2MC-M43N] [https://web.archive.org/web/20250214134046/https://open.spotify.com/episode/1SYfLEyZQPqdx0GoDSqsCy?si=82fe2a8706ee46cf&nd=1&dlsi=e1e2dd8238fc46b6].

37. Pinely, *How To Steal a YouTube Video*, YOUTUBE (Jan. 5, 2023), <https://www.youtube.com/watch?v=Pb7xJK5aitc> [https://perma.cc/6PXX-M3ZH] [https://web.archive.org/web/20250214134221/https://www.youtube.com/watch?v=Pb7xJK5aitc].

38. *Id.*

39. *Id.*

copyright claims to increase its following.⁴⁰ This example highlights how the complex nature of permission and cross-platform interactions demands thorough, manual review by persons knowledgeable in both content creation and the law for infringement claims.

B. NON-TRANSFORMATIVE REACTION VIDEOS

A reaction video is a genre where individuals or groups provide real-time responses to content they are experiencing for the first time.⁴¹ These videos typically feature additional context and commentary, enhancing the viewer's connection with the reactor. One major concern is the proliferation of reaction videos that fail to sufficiently transform the source material or provide meaningful commentary, essentially appropriating creators' content. In the landmark case *Hosseinzadeh v. Klein*, the U.S. District Court distinguished that "[s]ome reaction videos . . . intersperse short segments of another's work with criticism and commentary, while others are more akin to a group viewing session without commentary."⁴²

For example, Douglass has accused popular YouTuber Alia "SssniperWolf" Shelesh of merely summarizing TikToks, cutting them short to appropriate the creator's punchline, and covering up the creators' usernames. He has identified several instances where Shelesh does not react to the TikToks in her videos or even include side-by-side footage of herself on-screen.⁴³ After news broke that Shelesh bought a multi-million-dollar mansion, Douglass alleged that she reacts to the same TikToks within and across videos to make them long enough to be eligible for additional ad spots on YouTube.⁴⁴

Similarly, Twitch streamer Félix "xQc" Lengyel has also generated controversy for posting monetized streams on YouTube that play other creators' full videos. Though he credits creators in his video and description, many claim he does not add commentary in his reactions. Furthermore, whereas Shelesh usually "reacts" to short-form content, Lengyel "reacts" to videos that are almost two hours long, which take much more work to research, script, and produce. After Lengyel was called out online for his behavior, creators felt that he made a mockery of their concerns by leaving the room for ten minutes during a livestream without pausing the video he was "reacting"

40. *Id.*

41. *Reaction Videos: Why They're So Trendy and How To Make Them*, PODCASTLE (Aug. 8, 2023), <https://podcastle.ai/blog/what-are-reaction-videos/> [https://perma.cc/5NYU-FVUN] [https://web.archive.org/web/20250214134703/https://podcastle.ai/blog/what-are-reaction-videos/].

42. *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 40 n.1 (S.D.N.Y. 2017).

43. jacksfilms, *Sssniperwolf Is Getting Worse. Here's Proof*, YOUTUBE (Aug. 16, 2023), <https://www.youtube.com/watch?v=DB7LvVllAQI> [https://perma.cc/4DCV-C429] [https://web.archive.org/web/20250214135013/https://www.youtube.com/watch?v=DB7LvVllAQI].

44. Matt Porter, *SssniperWolf Shows What a YouTube Career Can Buy with Insane New House Tour*, DEXERTO (July 22, 2019), <https://www.dexerto.com/entertainment/sssniper-wolf-shows-what-a-youtube-career-can-buy-with-insane-new-house-tour-832686> [https://perma.cc/89EB-KZK2] [https://web.archive.org/web/20250211193529/https://www.dexerto.com/entertainment/sssniper-wolf-shows-what-a-youtube-career-can-buy-with-insane-new-house-tour-832686/].

to—and proceeding to play the entirety of it during his absence.⁴⁵ Such exploitative practices starkly contrast with collaborative reaction video projects between react channels and source creators that expand mutual reach.

C. RECREATED VIDEOS

Still, other channels misappropriate ideas more subtly. By recreating videos scene-by-scene, line-by-line, these videos bypass technologies that identify infringement, only to be caught by viewers who have watched both videos attentively. It is difficult for creators to identify and take legal action against this kind of content theft because it is non-literal infringement. A video title or thumbnail may just be an idea; speech patterns and editing techniques may just be style. However, a sequence of information, graphics, and shots certainly constitutes expression. Moreover, when all these elements substantially resemble a creator's video, their copyright is likely being infringed.⁴⁶

It is surprising to see personalities with large followings—like Topper Guild or Brent Rivera, who each have almost 30 million subscribers—engage in this behavior, given the value of authenticity on the platform.⁴⁷ Some credit its allowance to the “Mr. Beastification” of YouTube: Top creator Mr. Beast claims he strategically makes his videos devoid of personality to be palatable to more audiences, and many have followed suit.⁴⁸ Such derivative videos propagate homogeneity, working against copyright law's purpose of incentivizing creative works that are presumably diverse.⁴⁹ Having the same work recreated over and over again without any additions does not contribute to the “Progress of Science and the useful Arts.”⁵⁰

D. LACK OF ATTRIBUTION

Even when a creator's content is used fairly, there remains the issue of attribution. On average, creators value attribution for their work more than getting paid for it or

45. Luci S., *The Controversy with xQc and Reaction Content Explained*, GAMERANT (Aug. 4, 2023), <https://gamerant.com/xqc-reaction-content-controversy-explained/> [https://perma.cc/EU3F-R7T3] [https://web.archive.org/web/20250211185815/https://gamerant.com/xqc-reaction-content-controversy-explained/].

46. *But see* Sandra E. Garcia, *Can You Copyright a Vibe?*, N.Y. TIMES (Dec. 5, 2024), <https://www.nytimes.com/2024/12/05/style/clean-girl-aesthetic-influencer-lawsuit.html> [https://web.archive.org/web/20250211185106/https://www.nytimes.com/2024/12/05/style/clean-girl-aesthetic-influencer-lawsuit.html].

47. *See* The Asher Show, *The TikTok Food Waster Is Now Copying Mr Beast.*, YOUTUBE (July 23, 2023), <https://www.youtube.com/watch?v=P6FcbF3CVAw> [https://perma.cc/7YNB-XDXQ] [https://web.archive.org/web/20250214135731/https://www.youtube.com/watch?v=P6FcbF3CVAw]; Mogul Mail, *This YouTuber Steals From Smaller Creators*, YOUTUBE (Apr. 22, 2023), <https://www.youtube.com/watch?v=XyoThIYua88> [https://perma.cc/8VH8-8XQQ] [https://web.archive.org/web/20250214135938/https://www.youtube.com/watch?v=XyoThIYua88].

48. Pinely, *The MrBeast-ification of Youtube*, YOUTUBE (July 30, 2022), <https://www.youtube.com/watch?v=gauf6ZmIXxs> [https://perma.cc/TZA8-P7B6] [https://web.archive.org/web/20250214140236/https://www.youtube.com/watch?v=gauf6ZmIXxs].

49. *See* Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143 (2020).

50. U.S. CONST. art. I, § 8, cl. 8.

protecting it from modification or commercialization by platforms.⁵¹ Attribution can be categorized into:

- (1) “the right to be known as the author of his work;” (2) “the right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written;” (3) “the right to prevent others from being named as the author of his work;” (4) “the right to publish a work anonymously or pseudonymously, as well as the right to change his mind at a later date and claim authorship under his own name;” and (5) “the right to prevent others from using the work or the author’s name in such a way as to reflect adversely on his professional standing.”⁵²

For creators, attribution increases productivity and motivates creativity.⁵³

The leading priority of the Creators Guild of America is to create an accreditation database as production or work credits “demonstrate a public record of accomplishment, the foundation on which [one’s] reputation rests.”⁵⁴ It also enables audiences who appreciate a creator’s work to easily find more of it and financially invest in its continuation through channel memberships, super chat, super stickers, and super thanks.⁵⁵ Even if consumers do not pay creators for their work directly, in an attention-based economy, they support creators by consuming and engaging with more of their work. On YouTube, longer watch time is directly associated to advertising revenue and favored by the algorithm that recommends videos to others. The size of audience a creator reaches defines their ability to negotiate rates with brands seeking to sponsor their videos. Attribution regimes also counteract content theft by fostering respect for intellectual property rights and enhancing the perceived legitimacy of copyright law.⁵⁶

On YouTube, creators can be attributed in a video, its title, thumbnail, end screen links, description, and tags. Most commonly, creators express desire to be credited in

51. Uri Y. Hacohen et. al., *A Penny for Their Creations—Apprising Users’ Value of Copyrights in Their Social Media Content*, 36 BERKELEY TECH. L.J. 511, 575 (2021).

52. MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 8D.02 (2025).

53. See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 151 (2015); TERESA AMABILE & STEVEN KRAMER, *THE PROGRESS PRINCIPLE: USING SMALL WINS TO IGNITE JOY, ENGAGEMENT, AND CREATIVITY AT WORK* 89 (2011).

54. *Accreditation: What Is It, and Why Is It Important?*, CREATORS GUILD OF AM. (Apr. 23, 2024) <https://creatorsguildofamerica.org/news/accreditation-what-is-it-and-why-is-it-important> [<https://perma.cc/FV2P-HH7V>]

[<https://web.archive.org/web/20250211184606/https://creatorsguildofamerica.org/news/accreditation-what-is-it-and-why-is-it-important>].

55. Super Chat, Super Stickers, and Super Thanks are YouTube features that let viewers financially support creators. Super Chat allows fans to pay to highlight their messages during live streams and Premieres, with higher payments making the messages more prominent. Super Stickers are animated images viewers can purchase to express support visually in live chats. Super Thanks lets fans tip creators on regular videos (not just live content), with the option to leave a highlighted comment to show appreciation. See *Choose How You Want To Monetize*, YOUTUBE, <https://support.google.com/youtube/answer/94522?hl=en> [<https://perma.cc/SUKN-EFQE>] [<https://web.archive.org/web/20250211192525/https://support.google.com/youtube/answer/94522?hl=en>] (last visited Feb. 21, 2025).

56. See Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006).

the video, with links to their work in its description. Assuming Shelesh's reaction videos were deemed transformative, they would still violate cultural norms of attribution on YouTube. Viewers and fellow creators have criticized her for covering up or cropping out usernames on the reels she reacts to without providing any other form of credit.⁵⁷ This lack of attribution negates any exposure value she could provide smaller creators with her large following. While viewers could go out of their way to identify a creator she reacts to, they are unlikely to do so when she quickly moves on to react to another dozen uncredited shorts. As previously mentioned, Shelesh has also been caught cutting comedy reels short to appropriate the creators' punchlines.⁵⁸ This type of misattribution suggests that she is not using other people's work to comment on it or share it with new viewers, but for her own benefit. At the moment, YouTube does not give creators the ability to report lack of attribution where there is no copyright infringement.

Attribution is considered a moral right within copyright law. It originates from the European copyright tradition and is codified internationally in the Berne Convention.⁵⁹ The United States takes a minimalist approach to attribution rights compared to many other countries. The absence of strong moral rights protections has been a point of contention, with legal scholars arguing that the existing patchwork of state and federal laws does not provide equivalent protections to an explicit moral rights law.⁶⁰ While the Visual Artists Rights Act ("VARA") provides limited attribution rights, it covers only specific categories of visual artworks, excluding audiovisual works.⁶¹ In denying moral rights protections to audiovisual works, lawmakers assumed that right holders could restrict circulation of their works to particular settings.⁶² However, social media algorithms lack comparable controls over content distribution.⁶³ As a result, audiovisual media uploaded to platforms like YouTube cannot reliably safeguard the type of constrained access that Congress envisioned. Instead, online works tend to spread rapidly beyond any single creator's oversight. Thus, when it comes to attribution, creators are inadequately protected by both the platforms themselves and existing legal frameworks.

II. WHY CONTENT CREATORS HAVE RELIED ON SELF-HELP

Videos are within the scope of copyrightable subject matter.⁶⁴ Since YouTube's early days, creators have had the option of addressing the improper copying of their videos through the platform's copyright management tools, notice-and-takedown requests,

57. See jacksfilms, *supra* note 33.

58. See *id.*

59. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised July 24, 1971, and amended Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986).

60. H.R. REP. NO. 100-609, at 33-34 (1988).

61. 17 U.S.C. § 106A.

62. H.R. REP. NO. 101-514, at 6119 (1990).

63. See Alexandra Smrynios, Note, *Classy, Bougie, Credit: TikTok Choreographers' Fight Against Savage Copycats*, 50 AIPLA Q.J. 821 (2022).

64. 17 U.S.C. § 102(6).

and litigation.⁶⁵ Instead of leaning on this legal infrastructure, creators have frequently tolerated copying or made videos calling out copycats. This Part explains why creators have found that making such videos is more accessible than pursuing legal action.

A. COPYING IS ENCOURAGED

There is a difference between tolerating and encouraging copying. Tolerating copying implies the act is still reprehensible, whereas encouraging it may remove moral judgment in the eyes of the public. As detailed below, big YouTubers have found it beneficial to encourage viewers and other creators to copy their work. However, smaller creators often do not experience the same gains. In a context like this, where copying is encouraged by leading figures on the platform, it may be more challenging for creators and viewers alike to distinguish instances of permissible and improper copying.

Re-uploading videos without permission is a straightforward case of copyright infringement. Yet, even here, the practices of major YouTubers may normalize copying regardless of the underlying content's origin. YouTube giants like Jimmy "Mr. Beast" Donaldson or Colin Rosenblum and Samir Chaudry of "Colin and Samir" have given viewers express permission to clip and re-post their content for profit.⁶⁶ Colin and Samir see "ethical clipping" as "free advertising" for creators. However, the "ads" are not really free: Clipping is often done by clipping channels that are large enough to claim AdSense from YouTube on the content they re-upload. Notably, Colin and Samir granted permission *after* users started re-uploading clips online. The creators explain that they originally intended to compete with clipping channels but quickly found that the channels were faster and better at identifying key moments that would draw new viewers back to the original video. The encouragement of clipping by leading YouTubers may lead viewers to assume all clipping is authorized and that creators who disallow clipping are being imprudent.

It may be harder to determine whether a reaction video adds sufficient commentary or criticism to qualify for fair use. Like clips, popular react channels may provide creators "free advertising." Furthermore, recurring reactions may turn passive viewers into a repeat audience for the reaction video's underlying content. For example, the channel Cut recently celebrated Cody Ko, a creator who reacts to its content, by collaborating with him in their videos. Cut is a creator company with a substantial following of 11 million subscribers built over nine years.⁶⁷ It has gained prominence

65. Kevin J. Delaney, *YouTube To Test Software To Ease Licensing Fights*, WALL ST. J. (June 12, 2007), <https://www.wsj.com/articles/SB118161295626932114> [<https://web.archive.org/web/20250308153211/https://www.wsj.com/articles/SB118161295626932114>].

66. Rosenblum & Chaudry, *supra* note 36.

67. Hannah Doyle & Nathan Graber-Lipperman, *The Success Behind the Cut x Cody Ko Collab*, PUBLISH PRESS (Nov. 15, 2023), <https://news.thepublishpress.com/p/success-behind-cut-x-cody-ko-collab> [<https://perma.cc/ATP9-Z7Z9>] [<https://web.archive.org/web/20250213010210/https://news.thepublishpress.com/p/success-behind-cut-x-cody-ko-collab>].

through social experiment shows. Its success has spurred a subgenre of creators producing reaction videos specifically responding to Cut's content, with Cody Ko emerging as a leading figure.⁶⁸ Notably, Ko's reaction videos to Cut's show "The Button" consistently accrue impressive viewership, often exceeding 3 million views per video.⁶⁹ Acknowledging how Ko's humor has added value to channel's content, Cut brought him onto three episodes of "The Button" as a host.⁷⁰ The channel explained that this collaborative effort serves as a strategic approach for it to broaden its audience outreach across diverse demographics and content genres.⁷¹ To a certain extent, the prevalence of entertaining, transformative reaction videos on YouTube enables reactions whose commentary is more dubious to stay online.

Video recreations may be the most challenging copies to categorize, as they are unlikely to be perfect matches of the underlying content. This is further exacerbated as creators copy the topics, thumbnails, content formats, and editing styles of successful videos to increase the likelihood that YouTube's recommendation algorithm will disseminate their videos.⁷² The "how to make a video like [X creator]" genre is very popular among aspiring creators on YouTube. Viewers and fellow creators may be unsympathetic to complaints of copying as it implies a creator's video was ultimately successful. In addition, recreations may increase the likelihood that YouTube will recommend the original, as the videos are similar enough that the algorithm may predict users who liked one will like the others.

B. BARRIERS TO LEGAL ENFORCEMENT

1. Infringement Is Hard To Identify with Certainty

The low barrier to entry to YouTube implies that creators start off with varying degrees of knowledge of copyright law.⁷³ Judges often disagree about whether works are substantially similar or whether the subsequent work is a fair use. Many creators may not have the knowledge and training to identify infringement with enough certainty to act on it. As explained above, even creators with more sophisticated understandings of copyright law may be confused about how the encouragement of copying on the platform factors into the analysis. For many YouTubers, their first encounter with copyright law is as a policing force asserted against them. Given the size of the creator economy, providers have emerged with solutions to alleviate

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See Carla Marshall, *How To Optimize Your Thumbnail and Title Click-Through Rates*, TUBEBUDDY (May 24, 2023), <https://www.tubebuddy.com/blog/optimize-youtube-thumbnail-title-ctr/> [<https://perma.cc/YH9B-TDJJ>].

73. Xiaoren Wang, *Youtube Creativity and the Regulator's Dilemma: An Assessment of Factors Shaping Creative Production on Video-Sharing Platforms*, 32 ALB. L.J. SCI. & TECH. 197 (2022).

creators' worries of committing accidental copyright infringement.⁷⁴ While this has facilitated the creator economy's growth, it has also delayed efforts to educate its members about the law. Revealingly, discussions about copying on YouTube identify the issue as "plagiarism"—which people learn about as early as elementary school—rather than copyright infringement. Thus, even when creators identify copyright infringement, many lack awareness of available enforcement options.

2. Litigation Is Expensive and Lengthy

When creators do realize copyright law empowers them with tools to protect their work, they often run into the issue of formalities. Registration is required to pursue a claim of a U.S. work in court.⁷⁵ Furthermore, early registration is a prerequisite for statutory damages and attorney's fees—remedies that make litigation financially viable for many, including small creators. Engaged in the production of multiple weekly videos, many of whose publication is urgent given time-sensitive trends, it becomes impractical and prohibitively expensive to regularly register groups of unpublished videos or singular published videos. As a result, creators are compelled to selectively register only their most viewed or highest-earning works one at a time, after they have received online attention. This selective registration practice exacerbates the frustration for creators with limited resources, who struggle to navigate the intricate process and determine optimal registration strategies. Many creators, facing resource constraints, choose to forgo registration altogether, retaining only tenuous rights over extensive collections of unregistered content. The New Media Rights Group argues that the absence of robust protections relegates under-resourced creators to "second class copyright owners," impeding enforcement even in cases of clear infringement.⁷⁶ Based on its clients' experiences, the group reports that litigators often decline to represent unregistered copyright holders, irrespective of the merits of the case, leaving creators defenseless against corporate appropriation.⁷⁷ Even when creators have registered their works, actually going to court is exceedingly expensive, especially to face the risk that the case might not go their way. To creators, time spent on legal issues could have been spent making more videos.

74. See, e.g., ENVATO ELEMENTS, <https://elements.envato.com/> [https://perma.cc/MZ6D-LCGJ] [https://web.archive.org/web/20250213012622/https://elements.envato.com] (last visited Feb. 12, 2025) (providing royalty-free media for content creators); EPIDEMIC SOUND, <https://www.epidemicsound.com/youtube/> [https://perma.cc/4P5G-BWFW] [https://web.archive.org/web/20250213012344/https://www.epidemicsound.com/youtube/] (last visited Feb. 12, 2025) (same).

75. 17 U.S.C. § 411(a).

76. Art Neill & Erika Lee, *Fixing Copyright Registration for Online Video Creators: The Case for Group Registration of Published Videos*, 28 TEX. INTELL. PROP. L.J. 87, 89 (2019).

77. *Id.*

3. Harsh Consequences Harm Reputation

While creators are entitled to feel wronged by improper copying, harsh consequences for copycats may inadvertently harm the reputation of the original creators. Creators who call out copycats online frequently preface their statements requesting that their followers to refrain from harassing copycats. Despite the initial wrong, condoning fans who target copycats may be perceived as cyberbullying. Successfully submitting takedown requests or copyright claims through YouTube's CMS adds copyright strikes to the channel where infringing content was posted. YouTube deletes channels that receive three strikes, as well as all their videos.⁷⁸ Thus, creators taking legal action against improper copying may want to consider how frequently the opposing creator copies content, if they do willfully, and how well-liked they are. Creators can reach out to copycats to resolve the issue without such harsh consequences—many creators settle for the deletion of the copied content, an apology, and a commitment to refrain from copying in the future. With this in mind, pursuing litigation may be viewed as excessive, particularly considering the modest earnings most YouTubers make from their channels.⁷⁹

4. Limitations of YouTube's Copyright Management System

Frequently, creators are so busy producing content that they are oblivious to potential infringements until notified by their fan base. Small creators have access to a webform for individual takedown submissions or may apply to access the Copyright Match Tool. Creators in the YouTube Partner Program have immediate access to this tool, which scans for potential matches of their videos on other YouTube channels. Creators using this tool must still manually review all matches and decide whether to leave the video up, file a takedown request, or contact the uploader.⁸⁰ By contrast, Content ID automatically blocks and pauses the monetization of a video matching an uploaded reference file. As one invalid reference file can negatively impact thousands of videos and users, YouTube limits access to Content ID to movie studios, service providers, and other publishers.⁸¹ Currently, there are less than 10,000 partners with access to Content ID.⁸² Concerningly, the video matching technology for Copyright

78. *Youtube Community Guidelines Enforcement*, GOOGLE, <https://transparencyreport.google.com/youtube-policy/removals?hl=en> [https://perma.cc/B6M2-RG3A] (last visited Mar. 8, 2025).

79. See Guy Pessach, *Deconstructing Disintermediation: A Skeptical Copyright Perspective*, 31 CARDOZO ARTS & ENT. L.J. 833 (2013) (arguing that there is no direct correlation between lessening of copyright protection and the proliferation of content flow and distribution channels, and that extreme concentration of media power could derive not only from excessive copyright protection, but also from excessive ability to freely utilize content).

80. See *YouTube Copyright Transparency Report*, GOOGLE, <https://transparencyreport.google.com/youtube-copyright/intro?hl=en> [https://perma.cc/7LYW-J2DJ] (last visited Feb. 12, 2025).

81. *Id.*

82. See *YouTube Copyright Transparency Report*, *supra* note 80.

Match Tool and Content ID miss copies with minor alteration, such as mirroring image, pitch-shifting audio, or juxtaposing content with other materials like gameplay. There is a risk that scanning videos for such alterations would overstep onto similar works.⁸³ Overall, YouTube's CMS does nothing to protect creators whose videos have been recreated with substantial similarity.

C. MAKING A VIDEO IS EASY, CHEAP, EFFECTIVE, AND FAMILIAR

Making a video denouncing copying is technically easy for creators who make videos for a living. Such videos do not need to be high-quality productions. In fact, a more stripped-back video interrupting a creator's regular posting schedule may appear more authentic and urgent to viewers. The videos do not need to be long or argumentative either. Viewers can compare the works for themselves, with publication dates posted in the videos' descriptions to determine which one came first. Making a ten-minute video is certainly less time-consuming than pursuing legal action—whether it be going to court or completing a webform. Most importantly, creators have important rapport with their audiences that makes video an impactful tool. YouTube provides creators with significant data on user engagement on their videos that can empower creators to tailor videos to their viewers. With more and more videos calling out copycats, viewers are also familiar with the format. The same day as a creator posts a video calling out a copycat, it may garner enough views and attention that the copycat takes their video down. Professors Adler and Fromer raise the concern that self-help “enable[s] individuals to act as judge, jury, and executioner.”⁸⁴ While encouraging copying may create a culture that disregards intellectual property rights, public shaming of copying may chill speech. Congress and the courts put much work into balancing intellectual property rights and the public good. Putting copyright determinations in the hands of creators and the public risks making wrong judgment calls without opportunity for due process and review.

III. CHANGES IN THE CREATOR ECONOMY WILL INCREASE RELIANCE ON COPYRIGHT LAW

A. MAKING A VIDEO IS NO LONGER EFFECTIVE

1. Subcultures Are Insular

The creator economy's immense growth has signaled to individuals and corporations alike the virtually limitless opportunities to make a profit on YouTube. The video market is so saturated that opportunistic entities can copy a video without audiences noting; i.e., there is little overlap between the viewers watching an original

83. *Id.*

84. Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. 1455, 1505 (2019).

video and those watching a copy. As creators usually discover copying through their viewers, the insular nature of YouTube subcultures poses difficulties in detection.

2. Shift To Idea-Centric Videos

Colin and Samir have noted an industry shift from “creator-based videos” to “idea-based videos” that indicates a growing distance in parasocial relationships between creators and viewers.⁸⁵ Viewers are increasingly more interested in discovering exciting video concepts than following the journey of a particular creator. With the success of content farms and the rise of channels hosted by AI avatars, some viewers may not care about how their content is sourced.⁸⁶ Despite the size of their platforms, creators may not have the power to persuade audiences to consume exclusively original content.⁸⁷

3. Audiences Cannot Carry the Burden of Policing Infringement

Audiences cannot be expected to bear the burden of policing copyright infringement, as they lack both the tools and the responsibility to do so. Creator Jack Douglass has voiced concerns that efforts to raise awareness about content theft among viewers may not effectively reach audiences like those of Shelesh, which largely consist of children who may not fully grasp the implications of infringement.⁸⁸ While creators often take on the role of monitoring and calling out infringement on behalf of one another, there are lingering doubts about their ability to do so accurately and fairly.⁸⁹ The complexities of copyright law and the nuances of transformative use make it difficult even for experienced creators to determine when a violation has occurred, further highlighting the impracticality of relying on audiences for enforcement.

85. Rosenblum & Chaudry, *supra* note 36.

86. For more information on content farms, see Sara Gates, Note, “Going Viral” by Stealing Content: Can the Law Cure the Problem of Viral Content Farming?, 26 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 689 (2016). For more information on AI avatars, see Makena Binker Cosen, Will AI Avatars Ease Creator Burnout?, JLA BEAT (Feb. 7, 2024), <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/680> [https://perma.cc/8VH7-F256] [https://web.archive.org/web/20250221195355/https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/680].

87. See A.W. Ohlheiser, *Plagiarism Doesn't Need AI To Thrive Online*, VOX (Dec. 7, 2023), <https://www.vox.com/technology/2023/12/7/23991236/youtube-plagiarism-artificial-intelligence> [https://perma.cc/758X-NPQD] [https://web.archive.org/web/20250214123929/https://www.vox.com/technology/2023/12/7/23991236/youtube-plagiarism-artificial-intelligence].

88. jacksfilms, *Let's Ttaltk About Ssniperwolf*, YOUTUBE (July 26, 2023), https://youtu.be/oMjWaPsGY80?si=xdxd4EtPOx_fjGmc [https://perma.cc/4ZCX-43ZC] [https://web.archive.org/web/20231120131701/https://www.youtube.com/watch?v=oMjWaPsGY80].

89. See, e.g., Evil Pinely, *He Responded*, YOUTUBE (Feb. 15, 2024), <https://www.youtube.com/watch?v=MbENUD454XI> [https://perma.cc/TQ34-WFNF] [https://web.archive.org/web/20240215165143/https://www.youtube.com/watch?v=MbENUD454XI].

B. CREATORS ARE READY FOR LEGAL SOLUTIONS

1. The Professionalization Movement

The platform's extensive reach has led to an influx of authors and artists from traditional media, presenting an opportunity to transfer enforcement mechanisms knowledge from other industries.⁹⁰ Notably, leaders in the industry's professionalization movement are drawing inspiration from Hollywood, as evidenced by the establishment of the Creators Guild of America. This guild aims to create a comprehensive accreditation database akin to IMDb and prioritize DMCA rights.⁹¹ Since 2016, creators have been endeavoring to form unions, and the recent success of the Screen Actors Guild-American Federation of Television and Radio Artists in Hollywood strikes could potentially pave the way for a robust union among creators.⁹² Presumably, such unions would demand platforms to intervene and provide better solutions to content theft than self-regulation.

2. Increased Advocacy Against Copying

YouTube's appetite for long-form content means more and more creators are dedicating weeks to research, script, film, and edit hour-long video essays.⁹³ Seeing videos that took so much work to make being widely stolen has made YouTubers more sensitive to plagiarism. Video essayist Harris "Hbomberguy" Brewis recently released a viral four-hour exposé on the issue, tallying 3 million views within forty-eight hours. By highlighting high-profile cases like fellow essayist Internet Historian, culture commentator James Somerton, and former IGN editor Filip Miucin, Brewis stirred anxious discourse around originality standards and attribution norms. After being called out for plagiarism, Somerton deleted his Patreon and Discord community and

90. See Stuart Dredge, *YouTubers Hit Mainstream as Digital Media Become Top Choice for New Talent*, GUARDIAN (Apr. 9, 2016), <https://www.theguardian.com/media/2016/apr/09/youtubers-hit-mainstream-digital-media-top-choice-new-talent> [https://perma.cc/L4PQ-86SR] [https://web.archive.org/web/20250208004636/https://www.theguardian.com/media/2016/apr/09/youtubers-hit-mainstream-digital-media-top-choice-new-talent]; Ana Eksouzian-Cavadas, *All the Celebrities You Didn't Know Had YouTube Channels*, VOGUE (Mar. 17, 2021), <https://www.vogue.com.au/vogue-codes/news/all-the-celebrities-you-didnt-know-had-youtube-channels/image-gallery/411d765887ab0b53588838800a03f280> [https://web.archive.org/web/20250208005104/https://www.vogue.com.au/vogue-codes/news/all-the-celebrities-you-didnt-know-had-youtube-channels/image-gallery/411d765887ab0b53588838800a03f280].

91. Accreditation, *supra* note 54.

92. See Hannah Doyle & Nathan Graber-Lipperman, *The Big Battle for Creators*, PUBLISH PRESS (Nov. 22, 2023), <https://news.thepublishpress.com/p/big-battle-creators> [https://perma.cc/252D-MWWW] [https://web.archive.org/web/20250208005458/https://news.thepublishpress.com/p/big-battle-creators].

93. *Long Form Video Content on YouTube Is Evolving. As Influence Marketers, Here's What You Need to Know*, KOL SQUARE (Mar. 16, 2023), <https://www.kolsquare.com/en/blog/long-form-video-content-on-youtube-is-evolving-as-influence-marketers-heres-what-you-need-to-know> [https://perma.cc/GC3H-3HWD] [https://web.archive.org/web/20250208005803/https://www.kolsquare.com/en/blog/long-form-video-content-on-youtube-is-evolving-as-influence-marketers-heres-what-you-need-to-know].

disabled YouTube comments. Writers like Gita Jackson, Katelyn Burns, and Mick Abrahamson, whose words were reused without credit in Somerton's videos, have also spoken up, with Abrahamson calling the video a "wake-up call."⁹⁴ Douglass has advocated for creators to utilize available tools from YouTube's CMS, emphasizing its effectiveness in combating content theft by "reaction" and compilation channels. He hopes that inundating infringing channels with take-down notices will act as a deterrent against infringement.

3. The Incentive of Direct Monetization

The lack of transparency and the dynamic nature of YouTube's advertising guidelines and monetization restrictions have recurrently endangered creators' income streams, especially during the 2017 "Adpocalypse."⁹⁵ When sudden policy shifts led to the demonetization of videos addressing sensitive topics, creators in various niches, such as LGBTQ+ advocacy and political commentary, experienced substantial declines in revenue though they did not violate any of YouTube's community guidelines.⁹⁶ While YouTube asserted that these changes aimed to align content with advertiser preferences for brand safety, suspicions arose regarding an ulterior profit motive aimed at attracting corporate sponsors and reshaping viewer demographics.⁹⁷ Irrespective of YouTube's intentions, this episode underscored the fragility of building a creative career contingent on the unpredictable shifts of the platform's algorithm.⁹⁸ Not to

94. Hannah Doyle & Nathan Graber-Lipperman, *How a 4-Hour Video Essay on Plagiarism Went Viral*, PUBLISH PRESS (Dec. 11, 2023), <https://news.thepublishpress.com/p/behind-scenes-karos-creator-popup> [<https://perma.cc/Z3YD-KZFW>]

[<https://web.archive.org/web/20250214174044/https://news.thepublishpress.com/p/behind-scenes-karos-creator-popup>].

95. Julia Alexander, *YouTube Addresses "Aggressive Action" Amid Creator Concerns over New "Adpocalypse"*, POLYGON (Nov. 29, 2017), <https://www.polygon.com/2017/11/29/16716176/youtube-adpocalypse-kids> [<https://perma.cc/7KSD-ZE4W>]

[<https://web.archive.org/web/20250212095158/https://www.polygon.com/2017/11/29/16716176/youtube-adpocalypse-kids>].

96. *Id.* See also Amanda Hess, *How YouTube's Shifting Algorithms Hurt Independent Media*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/2017/04/17/arts/youtube-broadcasters-algorithm-ads.html> [<https://web.archive.org/web/20250405012608/https://www.nytimes.com/2017/04/17/arts/youtube-broadcasters-algorithm-ads.html>]; Aja Romano, *A Group of YouTubers Is Claiming the Site Systematically Demonetizes Queer Content*, VOX (Oct. 10, 2019), <https://www.vox.com/culture/2019/10/10/20893258/youtube-lgbtq-censorship-demonetization-nerd-city-algorithm-report> [<https://perma.cc/6YXE-75KC>].

97. Susan Wojcicki, *Expanding Our Work Against Abuse of Our Platform*, YOUTUBE OFF. BLOG (Dec. 5, 2017), <https://blog.youtube/news-and-events/expanding-our-work-against-abuse-of-our/> [<https://perma.cc/ZWT2-V6Z5>].

98. Also consider the volatile longevity of platforms, as seen with the potential TikTok ban in the United States. See Sapna Maheshwari, *What We Know About the TikTok Ban*, N.Y. TIMES (Jan. 19, 2025), <https://www.nytimes.com/article/what-we-know-tiktok.html> [<https://web.archive.org/web/20250218041535/https://www.nytimes.com/article/what-we-know-tiktok.html>] [<https://web.archive.org/web/20250405012800/https://blog.youtube/news-and-events/expanding-our-work-against-abuse-of-our/>].

mention, only 3% of YouTube channels earn above the poverty level through ad spots.⁹⁹ These experiences have incentivized creators to diversify their revenue streams beyond YouTube. Some creators have forayed into traditional media, signing deals with book publishers and starring in television and movies. More commonly, through the cultivation of direct fan funding and exploration of alternative distribution channels, creators aim to mitigate the risk of succumbing to future algorithm-driven purges.

Creators are increasingly transitioning to subscription and licensing models enforced by copyright law to become independent of platform for their livelihood—having a presence on many platforms and creating their own. Sites like Patreon, which hosts over 300,000 creators monetizing exclusive content for 10 million paying fans, facilitate direct consumer funding.¹⁰⁰ As TikTok, Twitch, and Instagram compete for creator talent, YouTube has similarly introduced the ability for creators with more than 30,000 subscribers to offer subscription tiers with different perks, which may include early access to content or merchandise, personalized shoutouts or the ability to influence content.¹⁰¹ While this increases monetization opportunities independent of advertising, creators are still seeking more control. Launched in 2021, Nebula is the largest wholly creator-owned internet streaming platform with over 650,000 subscribers.¹⁰² Creator e-commerce platform Fourthwall is making it more accessible for creators to control their subscriptions by helping them launch fully-branded mobile apps for their members.¹⁰³

Licensing back catalogs to third-party streaming services and investors provides alternate monetization streams. For instance, YouTubers like Steven He have upgraded production quality by licensing their videos to companies like Spotter in exchange for upfront sums of money.¹⁰⁴ Even Mr. Beast, the largest creator on YouTube, has made a

99. Chris Stokel-Walker, “Success” on YouTube Still Means a Life of Poverty, BLOOMBERG (Feb. 27, 2018), <https://www.bloomberg.com/news/articles/2018-02-27/-success-on-youtube-still-means-a-life-of-poverty> [<https://web.archive.org/web/20241207104851/https://www.bloomberg.com/news/articles/2018-02-27/-success-on-youtube-still-means-a-life-of-poverty>].

100. See *The Story of Patreon*, PATREON, <https://www.patreon.com/about> [<https://perma.cc/LC57-3MUJ>] [<https://web.archive.org/web/20250405010956/https://www.patreon.com/about>] (last visited Apr. 4, 2025).

101. Shapiro, *supra* note 1.

102. Jennifer Maas, *Nebula CEO Says Indie Streamer Isn’t Trying To Become a YouTube Competitor—It’s Aiming for a Netflix Competitor with A24 Vibes*, VARIETY (Nov. 8, 2023), <https://variety.com/2023/streaming/news/nebula-ceo-dave-wiskus-interview-1235782591/amp/> [<https://web.archive.org/web/20241203120540/https://variety.com/2023/streaming/news/nebula-ceo-dave-wiskus-interview-1235782591/amp/>].

103. Nathan Graber-Lipperman & Hannah Doyle, *Fourthwall Launches Fully-Branded Mobile Apps for Creators*, PUBLISH PRESS (Nov. 6, 2023), <https://news.thepublishpress.com/p/100-thieves-lays-off-20-staff> [<https://perma.cc/RU8J-UBZL>] [<https://web.archive.org/web/20250308220529/https://news.thepublishpress.com/p/100-thieves-lays-off-20-staff>].

104. Hannah Doyle & Nathan Graber-Lipperman, *This Full-Time Creator Bought a Course Company*, PUBLISH PRESS (Dec. 20, 2023), <https://news.thepublishpress.com/p/fulltime-creator-bought-course-company> [<https://perma.cc/88B6-ZNHC>].

deal with Spotter to fund the translating of his videos into 14 different languages.¹⁰⁵ Licensing also enables wider distribution, as FilmRise adapts videos for streaming on Hulu and Roku.¹⁰⁶ Similarly, the Dude Perfect Streaming Service now licenses content to Roku and Samsung TV.¹⁰⁷ A curated, ad-supported feed of Rhett and Link's Mythical shows debuted on Amazon's Freevee streaming platform.¹⁰⁸ Ultimately, whether selling subscriptions or licensing catalogs, creators' ability to monetize access, fight piracy, and capture value beyond ad revenue is backed by copyright law. With platforms competing over talent, creators are leveraging new monetization tools and emerging streaming markets to increase income security through diversification of revenue streams. Rather than relying on YouTube's volatile policies, benefitting from multi-platform distribution and direct user payments allows creators to sustainably fund their work.

C. THE COPYRIGHT CLAIMS BOARD DECREASES BARRIERS TO ENFORCEMENT

Previously, the costs and uncertainty of litigation made going to court impractical for creators. However, since 2022, it has become more viable for small creators to seek legal recourse through the Copyright Claims Board ("CCB"). Established by Congress in 2020 as an affordable and voluntary alternative to federal court for minor copyright cases, the CCB streamlines accessibility and reduces financial burdens.¹⁰⁹ Moreover, all CCB proceedings are held electronically, obviating travel requirements.¹¹⁰ Creators can also represent themselves without attorneys or have supervised law students represent them given simplified filing processes. For a single work infringement claim, fees comprise only \$100 to file, \$6 to designate an agent, and \$50 for expedited registration.¹¹¹ The viability of enforcement beyond YouTube should motivate the platform to improve its copyright system. The CCB's impact is still emerging—while

105. *Spotter and YouTube Partner in Supporting Creator Expansion To Global Audiences*, PR NEWSWIRE (Sept. 28, 2023), <https://www.prnewswire.com/news-releases/spotter-and-youtube-partner-in-supporting-creator-expansion-to-global-audiences-301941766.html> [https://perma.cc/6CPQ-7DWT].

106. Hannah Doyle & Nathan Graber-Lippman, *What It's Like To Share a YouTube Channel*, PUBLISH PRESS (Dec. 1, 2023), <https://news.thepublishpress.com/p/like-share-youtube-channel> [https://perma.cc/A3JL-KALW].

107. Hannah Doyle & Nathan Graber-Lippman, *Dude Perfect, Now Streaming*, PUBLISH PRESS (Oct. 11, 2023), https://news.thepublishpress.com/p/dude-perfect-made-kidfriendly-streamer?utm_campaign=how-dude-perfect-made-a-kid-friendly-streamer [https://perma.cc/LT98-V3LX].

108. Hannah Doyle & Nathan Graber-Lippman, *Theorist Media Licenses YouTube Content To Streaming Platforms*, PUBLISH PRESS (Dec. 1, 2023), <https://news.thepublishpress.com/p/like-share-youtube-channel> [https://perma.cc/4P53-7CTS] [https://web.archive.org/web/20250208010930/https://news.thepublishpress.com/p/like-share-youtube-channel].

109. See 17 U.S.C. § 1502.

110. 17 U.S.C. § 1506(c).

111. *About the Copyright Claims Board*, COPYRIGHT CLAIMS BD., <https://ccb.gov/about/> [https://perma.cc/U39U-PZTW] [https://web.archive.org/web/20250304231512/https://ccb.gov/about/] (last visited Feb. 7, 2025).

over 900 claims have been filed with the tribunal, outcomes are mixed.¹¹² More than half of all claims face dismissal due to service or compliance issues, highlighting a critical gap in legal education.¹¹³ The fact that 63% of claimants represent themselves in CCB proceedings further underscores this challenge.¹¹⁴ While the CCB makes copyright disputes more accessible to individual creators, significant work remains to make the process truly navigable for those seeking to defend their rights.

IV. HOW TO MAKE COPYRIGHT LAW ACCESSIBLE TO CONTENT CREATORS

A. EDUCATION

Copyright law as it stands today already offers creators substantial rights and remedies. Firstly, to enforce these rights, creators must be informed. Secondly, education can further serve to foster a culture of respect for creators' works, encouraging audiences to refrain from consuming infringing works. Thirdly, lawyers must learn more about the creator economy to help creators and continue finding creative legal solutions that improve their work conditions. When the legal community hears creators seriously, they will begin to meaningfully lean on them for support.

1. For Content Creators

A critical first step is properly informing creators of their rights under existing copyright law. Video sharing platforms could implement a notification system that educates creators about copyrights when they upload videos and provides links to register their works with the Copyright Office. Others have already proposed that Congress mandate that ISPs educate creators receiving copyright claims about fair use rights and procedures for contesting inaccurate copyright claims under the DMCA and platforms' takedown systems.¹¹⁵ In that vein, creators should be incentivized by the platform to place copyright claims or take-down notices when they perceive their content is being infringed. Furthermore, YouTubers should be made aware that the CCB process is available to them. A web campaign co-led by the CCB and YouTube could disseminate this information on the platform's Creator Studio. Should creators proceed through the CCB, the process in itself would be an educational experience about fair use and the DMCA.¹¹⁶ Mobilizing creators may also inspire them to pressure

112. COPYRIGHT CLAIMS BD., KEY STATISTICS (Oct. 2024), <https://ccb.gov/CCB-Statistics-and-FAQs-April-2024.pdf> [https://perma.cc/G9N8-TPUS] [https://web.archive.org/web/20250219090812/https://ccb.gov/CCB-Statistics-and-FAQs-Oct-2024.pdf].

113. *Id.*

114. *Id.*

115. Leron Solomon, Note, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237, 239 (2015).

116. Jamie O'Neill, Note, *Lowering Barriers To Entry: YouTube, Fair Use, and the Copyright Claims Board*, 33 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 176, 218 (2022).

Congress towards expanding moral rights statutes. The beauty of educating creators is that, as storytellers with devoted audiences, they may then educate their communities about the law, too.

2. For Audiences

Beyond directly informing creators, broader educational efforts focused on general audience members could also curb infringement, misattribution, and misappropriation. Given the vast reach of the Internet, creators most often discover misuse of their content through notifications from their followers.

Douglass strives to educate viewers about non-transformative reaction videos by modeling ethical reaction videos on his new channel “Jjjacksfilms,” a play on Shelesh’s username “SssniperWolf.” In these videos, he requests voluntary submissions to critique and properly credits sources on-screen and in the description.¹¹⁷ Making audiences care encourages them to self-select non-infringing content, which may shift the recommendations YouTube’s algorithms offers viewers. This change in the algorithm would alleviate creators’ need to conform to trends and result in more unique content, giving viewers more distinctive choices in alignment with copyright law’s purpose. Thus, large-scale public outreach illuminating infringement harms coupled with increased exposure to properly attributed transformative works could organically enhance copyright standards.

3. For Lawyers

Finally, legal professionals must better equip themselves to understand the intricacies of the creator economy and address novel copyright issues that are sure to arise as it continues to expand. As the New Media Rights Group highlights, creators are often turned away from legal aid for failing to register their works.¹¹⁸ Yet, the number of creators impacted demands that attorneys proactively involve themselves in the industry to extend support before situations become dire. Since law school primarily bases its pedagogy on the judicial case method, and creator disputes rarely enter litigation, law students receive limited exposure to this area in the first-year curriculum and introductory intellectual property courses. Currently, less than 1% of cases at the CCB are represented by a law student representative in a pro bono clinic.¹¹⁹ Attorney Franklin Graves is now producing the first, open-source textbook on creator economy law.¹²⁰ In addition, the University of Miami School of Law hosted the first

117. Jjjacksfilms, *Welcome To CREATOR BINGO!*, YOUTUBE (Nov. 13, 2023), <https://youtu.be/8VUFLZnpbNw?si=rILMMPCOvr6Br1hG> [https://perma.cc/J8K9-BFKN] [https://web.archive.org/web/20250108200749/https://www.youtube.com/watch?v=8VUFLZnpbNw].

118. Neill & Lee, *supra* note 76, at 89.

119. COPYRIGHT CLAIMS BD., *supra* note 112.

120. See Franklin Graves, *Creator Economy Law: An Open Access Casebook with Materials*, CREATOR ECONOMY LAW (Aug. 8, 2024), <https://creatoreconomylaw.com/book/> [https://perma.cc/BAW5-ZE66] [https://web.archive.org/web/20250405021636/https://creatoreconomylaw.com/book/].

conference bringing together law students, influencers, artists, and trendsetters for a negotiations competition and a conference. The conference hosted panels on the business of content creation, fair use for content creators, clearances for creators, brand deals, compliance and regulatory considerations for creators, and promoter liability.¹²¹ As more lawyers grow conversant with the realities creators face, they can advocate for and provide counsel tailored to this unique constituency. Only when the legal community makes an effort to engage with creators will they begin to meaningfully lean on the law for support—but see class actions.

B. AMEND REGISTRATION REGULATIONS

1. Group Registration of Published Videos

To initiate a claim at the CCB—whether to deter overzealous right holders from issuing baseless claims or to discourage other creators from replicating one’s videos—a creator must have their work registered for copyright. Copyright law permits the Register to authorize “a single registration for a group of related works,” as recognized by Congress to avoid unnecessary burdens and expenses. Consequently, the Copyright Office allows group registration for specific published works like photographs, serials, newspapers, and newsletters. Group registration for published videos is a pragmatic solution, enabling creators to affordably protect their extensive content libraries, while keeping up with their intense and fast-paced posting schedule.¹²² This change could be implemented without the need for passing a statute or amendment through Congress; rather, the Copyright Office could initiate a rulemaking process. As New Media Rights Group explains, changes since the 1970s and parallelisms with existing group registration categories show the suitability of this approach for online videos.¹²³

2. Disclaiming AI-Generated Media

Creators are increasingly integrating AI-generated works into their videos—from using it to generate scripts and music, to adding details into their backdrops. The Copyright Office has stated that original authorial contributions to AI-assisted works may be copyrightable.¹²⁴ However, AI-generated elements must be disclaimed. In practice, creators may be able to protect the whole work if human and AI-generated parts are sufficiently enmeshed. Yet, if most elements are AI-generated, a creator may only have thin copyright in a compilation. A few notable creators claim to be posting

121. See *Counseling Creators Conference*, U. MIAMI SCH. OF L., <https://www.law.miami.edu/events/counseling-creators/> [https://perma.cc/5R65-EMZN] [https://web.archive.org/web/20250221194157/https://www.law.miami.edu/events/counseling-creators/] (last visited Feb. 21, 2025).

122. Neill & Lee, *supra* note 76, at 88.

123. *Id.* at 90–94.

124. Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023).

videos entirely generated by AI.¹²⁵ Courses are being sold on how to use AI to create films from ideation to post-production.¹²⁶ Creators engaging in such work should understand that these works are likely not copyrightable and will probably become part of the public domain—available for clipping, re-uploads, re-creations, and integrations into other videos beyond fair use cases.¹²⁷ As creators copy elements of videos that are successful, one might expect that AI-generated elements of viral videos will be widely copied.

3. Definition of Online Publication

Publication in copyright law is crucial as it impacts various aspects. Timely registration around publication strengthens copyright validity.¹²⁸ Owners who register before infringement can claim attorneys' fees and statutory damages, with a grace period for published works.¹²⁹ While notice omission does not forfeit copyright, access to a notice affects infringement claims.¹³⁰ Copyright duration for certain works hinges on publication date.¹³¹ Authors or heirs can terminate transfers related to publication.¹³² Fair use analysis considers a work's publication status, respecting an author's control over first publication.¹³³

The Copyright Act defines publication as “the distribut[ion] of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”¹³⁴ While this definition was clear when the act was established in 1976, modernizing it for the electronic age has posed challenges. Copyright Office regulations mandate that copyright registration applications indicate whether a work has been published, requiring details such as the date and nation of first publication. Typically, the determination of whether a work is published is left to the applicant, following statutory guidelines. As the Copyright Office is currently taking comments to update its regulations, creators are encouraged to advocate for a “publication” term that includes uploading and publishing a video on YouTube.¹³⁵

125. See, e.g., Binker Cosen, *supra* note 86.

126. See, e.g., CURIOUS REFUGE, <https://curiousrefuge.com/ai-filmmaking> [<https://perma.cc/7PKV-YPM6>] [<https://web.archive.org/web/20250221200359/https://curiousrefuge.com/ai-filmmaking>] (last visited Feb. 21, 2025).

127. See Jane C. Ginsburg & Luke Ali Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. 343 (2019); but see Samantha Fink Hedrick, *I “Think” Therefore I Create: Claiming Copyright in the Outputs of Algorithms*, 8 N.Y.U. J. INTELL. PROP. & ENT. L. 324 (2019).

128. 17 U.S.C. § 410(c).

129. 17 U.S.C. § 412.

130. 17 U.S.C. § 401(d).

131. 17 U.S.C. § 302(c).

132. 17 U.S.C. § 203(a)(3).

133. 17 U.S.C. § 107; see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552–53 (1985).

134. 17 U.S.C. § 106(3).

135. *Online Publication*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/rulemaking/online-publication/> [<https://perma.cc/BJ4P-YQJR>] [<https://web.archive.org/web/20250221200746/https://www.copyright.gov/rulemaking/online-publication/>] (last visited Feb. 21, 2025).

C. IMPROVING AND EXPANDING YOUTUBE'S COPYRIGHT MANAGEMENT SYSTEM

Most creators can access Content ID for a small administrative fee by using a third-party service provider. YouTube could safely make Content ID available to all users of its system, or at least more users than it currently does, if it improved its underlying operation and technology. Several scholars have identified small, key changes YouTube could implement to substantially improve its copyright system.¹³⁶ Firstly, the platform should restrict access to systems beyond statutory requirements to copyright holders who can prove ownership. Secondly, Content ID should differentiate between egregious and non-egregious uses, with manual review processes for the latter. Thirdly, funds generated from the monetization of claimed content should be held in escrow until a final decision is reached through a manual review, court ruling, or settlement. Fourthly, if the user acknowledges the copyright claim, funds in escrow can be released to the copyright owner, with future revenue reflecting the percentage of the video deemed infringing. Fifthly, disputing a claim should not be contingent on the creator's standing within the platform. Lastly, both YouTubers and claimants should be subject to strikes for system misuse, with three strikes resulting in the suspension of their access to the Content ID system. Altogether, these changes would protect creators from unwarranted demonetization, censorship, and strikes that stifle non-infringing expression. In turn, they would enable more creators to directly access Content ID.

A more demanding proposal would require YouTube to train the AI powering Content ID to consider fair use in its calculations.¹³⁷ The magnitude of this proposal would probably require major ISPs to collaborate in building a library of examples of content that qualifies or does not qualify as fair use, along with the system's confidence scores, and what criteria it used in making those fair use judgments. Once this updated technology is launched, its fair use evaluation reports could then be sent to right holders, who would review the identified content and determine in good faith whether it is actually fair use. Under such a set-up, it would be beneficial to have a peer-review system in which volunteer, veteran YouTubers trained on copyright law assess any appeals. Back to the proposal, the final fair use decisions by rightsholders would be incorporated back into the training dataset to further improve the systems' ability to recognize permitted fair uses of copyrighted material. Thus, both the automated fair use detection and the human review help refine the data that teaches these algorithms. This iterative process could allow infringement detection tools to become more precise and circumscribed in what gets flagged, eventually decreasing the proportion of manual review needed. Given the complexity of the AI proposal, it would likely only occur if, as its author advocates, Congress held that failure to do so results in liability for

136. See, e.g., Benjamin Boroughf, *The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALB. L.J. SCI. & TECH. 95 (2015); Lauren D. Shinn, *Youtube's Content Id As A Case Study of Private Copyright Enforcement Systems*, 43 AIPLA Q.J. 359, 385 (2015).

137. Justin R. Lizalek, *Flipping the DMCA and Its Progeny on Their Heads: Content Creators Reclaiming Revenue from Improper Copyright Claims*, 54 U.I.C. L. REV. 757, 790 (2021).

misrepresentation under the DMCA. This could take a long time. Alternatively, YouTube could simply set an automated fair use threshold at x% identity between uploaded content and fingerprint-identified proprietary content, with appeal of and/or manual review of postings that exceed the identity threshold.

While the DMCA places the burden on copyright owners to monitor infringement, platforms like YouTube could benefit from taking additional steps beyond their basic legal obligations. Namely, fostering a better environment for creators could help YouTube retain talent as it competes with TikTok and Twitch. If YouTube does not take action and Congress does not compel it to, then maybe YouTube will if enough creators go to court. Previously, creators lacked the resources to individually sue copyright infringers or copyright holders submitting wrongful DMCA takedowns. In those times, it was proposed that creators unite in a class action and file a lawsuit, arguing that if their works meet the criteria of fair use, actions such as blocking, monetization, and/or tracking constitute infringement on their exclusive rights under 17 U.S.C. § 106(3).¹³⁸ The new CCB presents a more accessible, lower-cost avenue for resolving copyright disputes. Overall, the goal would be to secure enough favorable rulings to deter improper copying and wrongful takedown notices on YouTube. Facing potential CCB liability for willful disregard of fair use, along with the social media backlash associated to facing Internet celebrities in court, might compel creator and companies to reform takedown practices. In effect, by lowering the barrier to enforcement, the CCB opens a path for fair use advocacy that could restrain copyright abuses on YouTube.

D. INSTITUTING MORAL RIGHTS

Legal commentators have proposed extending VARA to protect audiovisual works.¹³⁹ Given that VARA already codifies attribution and integrity rights, amending it to cover more creators would provide a familiar channel for defining these rights, though context of incorporeal rights is quite different than physical originals.¹⁴⁰ Capitalizing on VARA's three-decade existence enhances legislative familiarity and public awareness.¹⁴¹ This proposed amendment recognizes that online videos now face attribution vulnerabilities akin to the physical artworks that VARA intends to safeguard. Critically, a moral rights regime could compel platforms to implement rights enforcement technologies like those used for copyright infringement.

Currently, VARA establishes non-transferable moral rights that can be waived via signed written agreement. VARA's waiver provision responded to efficiency concerns about limiting waivability, enabling negotiation of moral rights in contracts.¹⁴²

138. See Laura Zapata-Kim, Note, *Should YouTube's Content ID Be Liable for Misrepresentation Under the Digital Millennium Copyright Act?*, 57 B.C. L. REV. 1847, 1849 (2016); O'Neill, *supra* note 106.

139. See, e.g., Smrynios, *supra* note 63.

140. See 17 U.S.C. § 106A(a) (describing the rights of attribution and integrity).

141. See U.S. COPYRIGHT OFF., *WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS* (1996).

142. See 17 U.S.C. § 106A(e); H.R. REP. NO. 101-514, at 18 (explaining that the Committee determined that prohibiting waivability would inhibit commercial practices).

However, the proposed amendment stresses the need for restrictions on coercion. Even applying VARA's current statute to online video would prove insufficient, as platforms could mandate waiver signatures before uploading through broadly drafted terms of service. While the Berne Convention allows waivability, it does not require it; nations can surpass minimum rights thresholds.¹⁴³ Proponents of the amendment anticipate an increased burden on platforms like YouTube to address attribution claims promptly. To mitigate this, they propose waiver provisions for bad faith or arbitrary assertions of rights. This would prevent frivolous lawsuits, while still empowering creators to report attribution violations. If Congress were mobilized to adopt such a solution, it would provide the greatest degree of protection for creators.

Others have proposed to consider attribution rights within the fair use analysis.¹⁴⁴ The courts have traditionally viewed copyright through an economic lens, prioritizing financial interests over moral ones.¹⁴⁵ In practice, however, some claim this justification is more aspirational than a reality.¹⁴⁶ Even if courts maintain such an approach, attribution also carries monetary value that would allow judges to exclude ethical considerations from copyright disputes.¹⁴⁷ Furthermore, there is some precedent of courts weighing defendants' proper acknowledgment of source materials when evaluating claims of infringement. In a few instances, crediting has served as evidence of permissible use and counterevidence to willful misappropriations.¹⁴⁸ Given the evolving landscape of content creation and distribution enabled by modern technologies, explicitly factoring attribution into fair use analyses aligns with contemporary information spreading and its economic impacts. The most compelling aspect of this proposal is that, procedurally, it is more straightforward to change the common law than statutes. Even adding attribution as a fifth fair use factor under Section 107 would be complex.¹⁴⁹ Fortunately, its essence already falls within the existing four factors. Considering attributive use alongside transformative use and commerciality can qualify the purpose and character of potentially infringing conduct. Nonetheless, relegating attribution rights to an infringement defense ignores their role in clear fair use cases. Thus, such proposals would not provide sufficient protection to content creators.

143. See *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTEL. PROP. ORG., https://www.wipo.int/treaties/en/ip/berne/summary_berne.html [https://perma.cc/XMR3-GJLF] [https://web.archive.org/web/20250116164452/https://www.wipo.int/treaties/en/ip/berne/summary_berne.html] (last visited Feb. 14, 2025).

144. See Jane. C. Ginsburg, *The Most Moral of Rights: The Right to Be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT'L COM. L. 44 (2016).

145. See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law . . . does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.").

146. See John Tehranian, *Toward A New Fair Use Standard: Attributive Use and the Closing of Copyright's Crediting Gap*, 96 S. CAL. L. REV. 1 (2022).

147. *Id.* at 7–8.

148. See *Williamson v. Pearson Educ., Inc.*, No. 00 Civ. 8240 (AGS), 2001 WL 1262964, at *5 (S.D.N.Y. Oct. 19, 2001); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

149. Greg Lastowka, *Digital Attribution: Copyright and the Right To Credit*, 87 B.U. L. REV. 41, 84 (2007).

V. CONCLUSION

The creator economy is entering a new era where creator content not only rivals traditional media but also competes within the creator community itself. While creators have historically depended on self-help methods, the evolving landscape of the industry indicates a growing importance of copyright law as a valuable tool for protection. This shift presents opportunities for advancements in education, technological enhancements, and meaningful legal reforms aimed at bolstering access to safeguard creators' original expressions and their fundamental right to be recognized as the authors of their work. As the creator economy continues to grow, embracing these opportunities will be critical to promoting a more equitable and supportive environment for creators to thrive and innovate.

A Case for Libraries' Survival in the Internet Age: Mass Digitization of Literary Works and the Legality of Controlled Digital Lending

*Alexa Paladino**

INTRODUCTION

In the United States, copyright law rests upon a delicate balancing act. Our system aims to maximize both incentives for right holders to create and public access to creative works under a constitutional mandate to “[p]romote the Progress of Science and useful Arts.”¹ Forces of technology and globalization have compounded the complexities of striking that balance, making it far easier for a physical literary work to be scanned, digitized, and shared around the world—often without the author’s express permission. In turn, the digitization of creative works offers widespread benefits for the maximization of public accessibility: A work can reach the hands of countless students and scholars who would not otherwise have the funds, resources, or accommodations to read it.

Such public benefits are not always zero-sum in favor of readers at the expense of authors. For one, the ability to access written works on the Internet can plausibly increase readership for a book whose physical copy sits untouched on the shelf amidst eras of online schooling and the rise of a “generation of digital natives.”² Still, the issues of author permission and potential market supplantation remain. In the United States, the clash of interests arising from the expansion of online access to books continues to engender litigation by and among publishers, authors, archives, libraries, and corporations over the legal viability of digital libraries. This litigation illustrates a case study of American fair use in the modern internet era and an ever-changing legal landscape for those who seek to consume or distribute literary resources.

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1. U.S. CONST. art. I, § 8, cl. 8.

2. JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (2008).

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Through the lenses of the prior mass digitization cases, fair use precedents, and the recent Internet Archive (“IA”) litigation—with its appeals process transpiring in the Second Circuit at the time of writing³—this Note will examine the controversy surrounding digital libraries and question what makes controlled digital lending (“CDL”) “fair” or “unfair” for authors, readers, and publishers. Part I will provide a brief overview of U.S. copyright law, the judicial development of the fair use doctrine and its steadfast focus on notions of transformativeness, and the historical role of physical and digital libraries within the copyright law regime. Part II will introduce, compare, and contrast two mass digitization disputes: the Google Books saga and the IA’s descent into heated litigation. Part III will examine the IA’s loss in federal district court and argue that future cases should not foreclose the fair use defense for libraries employing a more tailored CDL scheme than the IA.

Ultimately, while the transformativeness and inherent limitations of Google Books (that is, providing full, limited, or no internal content from a book depending on a work’s copyright status or agreements with right holders) saved that project from legal demise, the IA’s controlled digital lending scheme may well meet a different fate. On the surface, the IA’s comparatively uncapped and untailored provision of digital copies looks more like pure format-shifting and supplantation of the e-book market than innovative transformation. However, when future cases arise concerning libraries with more tailored scanning practices than the IA, courts must take into close consideration the overarching goals of copyright law if libraries are to maintain their fundamental role in facilitating equitable public access to literary and academic resources in an increasingly digital age.

I. BACKGROUND INFORMATION

A. UNITED STATES COPYRIGHT LAW

Copyright protection originates in the U.S. Constitution, which empowers Congress to enact intellectual property legislation in order to “[p]romote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

3. Since the time of writing, the Second Circuit has affirmed the district court’s decision in *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024), ruling in favor of the publishers.

As predicted, the Second Circuit found that the IA itself went too far with its own CDL scheme. The Second Circuit rejected a finding of transformativeness for the IA’s CDL practices, largely agreeing with the format-shifting rationale of the district court (laid out in detail *infra*). *Id.* at 181–82. On its face, this reasoning could plausibly apply to any library, archive, or other such entity engaging in CDL. However, of course, the Second Circuit’s decision was tailored to the facts and parties on the record in front of it. This Note will explore why libraries employing a more tailored CDL scheme than the IA should retain a viable fair use defense in light of functional transformativeness, non-commercial and educational purposes, and the history of U.S. copyright law.

Further, although the publishers still came out victorious, the Second Circuit’s holding that the IA’s use was non-commercial—disagreeing with the district court’s finding of commerciality—aligns with this Note’s argument that nonprofit CDL by libraries should not be deemed commercial by courts. *See id.* at 185–86.

the exclusive Right to their respective Writings and Discoveries.”⁴ The text of this “IP Clause” signals the primarily utilitarian justifications underlying our copyright doctrine—it centers “[p]rogress” and “useful[ness]” as it confers a “limited” monopoly for creators.⁵ This utilitarian tone set the landscape for the subsequent codification of copyright doctrine into a statutory scheme. As Justice Stewart put it in *Twentieth Century Music Corp.*, the limited scope of copyright’s statutory monopoly “reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”⁶ In other words, American copyright law was not structured for the benefit of publishers or for the purpose of profit: While the “immediate effect” of copyright law is to secure a return on labor for creators, the “ultimate aim” is to stimulate that creativity for the public good.⁷

B. FAIR USE DOCTRINE AND TRANSFORMATIVENESS

Today, the Copyright Act of 1976 (the “Copyright Act”) constitutes the modern system of liability premised on copying. This system of liability maintains a number of statutory “escape valves” for certain forms of *acceptable* copying, which “provide ample space for artists and other creators to use existing materials to make valuable new works.”⁸ One such “escape valve” is the judge-made doctrine of fair use, which Congress codified within § 107 of the Copyright Act.⁹ Fair use doctrine permits a party to use a copyrighted work without the right holder’s permission for certain productive purposes.¹⁰ Fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”¹¹ In doing so, the doctrine aims to strike the same delicate balance as copyright law writ large, tasking courts with the oft-difficult job of “defin[ing] the boundary limit of the original author’s exclusive rights in order

4. U.S. CONST. art. I, § 8, cl. 8.

5. *Id.*

6. *Twentieth Century Music Corp. v. Aiken*, 95 S. Ct. 2040, 2044 (1975).

7. *Id.*

8. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1287 (2023). *See also id.* (“Finally, copyright law is replete with escape valves: the idea-expression distinction; the general rule that facts may not receive protection; the requirement of originality; the legal standard for actionable copying; the limited duration of copyright; and, yes, the defense of fair use, including all its factors, such as whether the amount taken is reasonable in relation to the purpose of the use.”).

9. 2 PETER S. MENELL ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGY AGE*: 2023, at 801–03 (2023).

10. *What Is Fair Use?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/what-is-fair-use/> [<https://perma.cc/4BTF-88Q9>] [<https://web.archive.org/web/20250206180529/https://copyrightalliance.org/faqs/what-is-fair-use/>] (last visited Feb. 6, 2025).

11. *Warhol*, 143 S. Ct. at 1274 (quoting *Stewart v. Abend*, 110 S. Ct. 1750, 1768 (1990)).

to . . . expand public learning while protecting the incentives of authors to create for the public good.”¹²

As the drafters of the Copyright Act explained in its legislative history, Congress sought in § 107 to “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”¹³ Section 107 includes a non-exhaustive list of enumerated categories including criticism, news reporting, scholarship, research, and teaching. Seemingly, most library activities should cleanly fit under at least one of these categories. Case closed, right? Not exactly, or this Note would be much shorter. While these examples provide “general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses” prior to enacting § 107, they are *not* automatic exceptions.¹⁴ In practically every single copyright case, regardless of whether a use falls under an enumerated category, courts run through each of § 107’s four codified factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the potential market effects for the copyrighted work.¹⁵

In the seminal case of *Campbell v. Acuff-Rose Music*, Justice Souter drew on Judge Pierre Leval’s influential law review article, *Toward a Fair Use Standard*, and Justice Story’s formulation of fair use in order to articulate a transformative use variant of the four-factor doctrine.¹⁶ Addressing the purpose and character factor of § 107, Justice Souter explained that the central purpose of the fair use inquiry is to bifurcate uses that “merely supersede” the original and those that add new meaning, “with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁷ Lower courts took this guidance seriously: The aftermath of *Campbell* led to a de facto stampeding of the other fair use factors by “transformativeness,” such that when courts found *transformative* use, the overwhelming majority then concluded with a finding of *fair use*.¹⁸

In the spring of 2023, fair use scholars watched closely as the Supreme Court took up the *Warhol* case.¹⁹ In 1981, *Newsweek* commissioned the *Warhol* plaintiff, photographer Lynn Goldsmith, to capture photographs of the then-“up and coming”

12. Authors Guild v. Google, Inc., 804 F.3d 202, 213 (2d Cir. 2015).

13. H.R. REP. NO. 94-1476, at 66 (1976).

14. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170 (1994).

15. See Brief of Professors Peter S. Menell, Shyamkrishna Balganesh, and Jane C. Ginsburg as Amici Curiae in Support of Respondents at 16–17, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1287 (2023) [hereinafter, Menell et al. Amicus Br.] (“*eBay* . . . emphasized that each of the factors needed to be independently considered and applied, despite Congress merely referencing them in its adoption of ‘principles.’”); see also MENELL ET AL., *supra* note 9, at 801–79.

16. *Campbell*, 114 S. Ct. at 1171 (citing Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).

17. *Id.*

18. See Menell et al., Amicus Br., *supra* note 15, at 17–18.

19. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

musician (now well known as) Prince.²⁰ A few years later, Goldsmith licensed the photograph to *Vanity Fair* for an “artist reference” on the condition that the use of her photograph be for “one time only.”²¹ *Vanity Fair* then hired the already-well-known artist Andy Warhol to make a silkscreen of the photograph, which *Vanity Fair* published with source credit to Goldsmith. The story may have ended there had Warhol not made fifteen additional silkscreens of the photograph. The Andy Warhol Foundation for the Visual Arts, Inc. (“AWF”) subsequently licensed one of these silkscreens to Condé Nast for another Prince article in 2016.²² AWF received \$10,000 for the use of the work—with no profit or credit to Goldsmith—and AWF proceeded to preemptively sue Goldsmith after she informed AWF that she believed its use of her photograph infringed on her copyright.²³

The Supreme Court held for Goldsmith rather narrowly: The ruling turned on the specific instance of AWF’s 2016 licensing of “Orange Prince” to *Vanity Fair*. Writing for the majority, Justice Sotomayor took an analytical dive into questions of transformativeness and commerciality under the first fair use factor, arguing that transformativeness goes beyond a changed meaning or message to focus on a further *purpose* or different character, and that this degree of difference must be weighed against a profit (or nonprofit) motive.²⁴ The Court held that this first fair use factor weighed in Goldsmith’s favor: AWF’s use of Goldsmith’s photograph in Condé Nast (though the photograph was artistically altered by Warhol’s iconic style) served substantially the same purpose as Goldsmith’s original, and this use was of a commercial nature.²⁵ Justice Kagan penned a fiery dissent, arguing that the majority completely undervalued the critical transformativeness of Warhol’s adaptation, writing: “It will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer.”²⁶

As will be explored further in Part III, the two justices’ analyses (as well as Justice Gorsuch’s concurrence) are salient to a court’s consideration of whether a library’s digital scanning practice constitutes fair use under the first factor. The *Warhol* decision entrenched the importance of the first factor and considerations of “further purpose[s]” and profit motives within a court’s analysis of each potentially infringing use. The decision prompts lower courts to incorporate Justice Sotomayor’s nuanced understanding of transformativeness, commerciality, and nonprofit/educational

20. Goldsmith herself was a “trailblazer” for women in the male-dominated realm of rock-and-roll photography: “Goldsmith’s work appeared in *Life*, *Time*, *Rolling Stone*, and *People* magazines, not to mention the National Portrait Gallery and the Museum of Modern Art. She captured some of the twentieth century’s greatest rock stars: Bob Dylan, Mick Jagger, Patti Smith, Bruce Springsteen, and, as relevant here, Prince.” *Id.* at 1266.

21. *Id.*

22. *Id.* at 1266.

23. *Id.*

24. *Id.* at 1277.

25. *Id.* at 1287.

26. *Id.* at 1312 (Kagan, J., dissenting).

motivations into their future decisions.²⁷ And as in the digital library litigation examined by this Note, courts will need to determine how to apply this understanding to factual patterns of first impression in high-stakes fair use cases.

1. Library Exceptions

This Note focuses on a fair use case with major implications for the potential future liability of libraries. As institutions fundamentally geared towards a nonprofit, educational mission, libraries regularly pursue goals that are reflected in copyright's constitutional mandate: to encourage individual learning and to advance the collective knowledge of the populace. Accordingly, libraries have long been subject to exceptions and limitations on liability provided for by statutes, judicial doctrines, and copyright treaties.²⁸

Section 108 of the Copyright Act might be read to solve any problem related to copying by libraries, physical or digital, but most have found it inapplicable to current technological developments. Section 108 lays out the limited conditions under which library employees can reproduce copies and phonorecords of works in their possession.²⁹ For example, the conditions for producing even a *single* copy require a collection to be open to the public and open to researchers, as well as the inclusion of a copyright notice.³⁰ Another provision permitting up to *three* copies applies principally to unpublished works, "solely for purposes of preservation and security or for deposit for research use in another library or archive[.]"³¹ In each case, according to the statute, these digital reproductions may not be distributed, circulated, or publicized outside of the library's premises. These restrictions read as rather limiting for a library in the digital age—how can they ever effectively and accessibly lend out any digital copies to patrons' home devices (which, presumably, are not on library premises) under these conditions?

27. See, e.g., *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 258 (4th Cir. 2024) ("The first fair use factor, the 'purpose and character of the use,' requires us to consider whether the secondary use of the Photo was (a) transformative and (b) of a commercial nature or for nonprofit educational purposes" (citing *Warhol*, 143 S. Ct. at 1258)); *Teradyne, Inc. v. Astronics Test Sys., Inc.*, No. 20 Civ. 2713 (GW) (SHK), 2023 WL 9284863, at *17 (C.D. Cal. Dec. 6, 2023) ("The first fair use factor 'considers the reasons for, and nature of, the copier's use of an original work,' and 'focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree,' with 'the degree of difference . . . weighed against other considerations, like commercialism.'" (citing *Warhol*, 143 S. Ct. at 1258)); *Sedlik v. Drachenberg*, No. 21 Civ. 1102 (DSF) (MRW), 2023 WL 6787447, at *2 (C.D. Cal. Oct. 10, 2023) (finding that in light of *Warhol*, differences between two works "must be evaluated in the context of the specific use at issue," and in *Warhol*, the "relevant use was the Foundation's commercial licensing of Orange Prince to appear on the cover of Condé Nast's special commemorative edition not Orange Prince's meaning or aesthetic") (internal punctuation omitted)).

28. Argyri Panezi, *A Public Service Role for Digital Libraries: A Case of Emergency Electronic Access to Library Material and the Unequal Battle Against Misinformation Through Copyright Law Reform*, 31 CORNELL J.L. & PUB. POL'Y 65, 72 (2021).

29. See H.R. REP. NO. 94-1476 (1976) (explaining the special library exceptions in 17 U.S.C. § 108).

30. See Panezi, *supra* note 28, at 84 (citing 17 U.S.C. § 108(b) (2018)).

31. *Id.* at 83–84.

Well, three points demonstrate why § 108 does not yet have teeth as an enforcement mechanism for digital copyright infringement, with doctrines like fair use or first sale instead taking the mainstage: (1) the restrictions do not impose liability on librarians who do not have a reasonable basis to believe that the copied work will be utilized outside of private study or scholarship; (2) the *HathiTrust* case clarifies that libraries *can* benefit from fair use despite the simultaneous presence of specific provisions like § 108 on the books; and (3) the Copyright Office (the “CO”) has itself expressed the need to update § 108 in the face of technological developments and ensuing digitization litigation.³² The CO concluded that the § 108 exceptions are targeted at older forms of copying equipment and are thus “stuck in time”; to date, § 108 still has not been updated to explicitly address electronic copies of books or digital lending.³³ In its present form, § 108 does not solve the persistent controversy surrounding mass digitization, which has been a growing phenomenon since at least the 1970s. While this may present a ripe opportunity for Congress to step in and strike another balance in copyright law, for now, courts will need to turn to other doctrines to grapple with the fair use issues accompanying the historic rise of digital libraries.

C. A BRIEF INTRODUCTION TO DIGITAL LIBRARIES

The first claimed provider of free e-books was Michael Hart, the founder of Project Gutenberg. In 1971, Hart allegedly used a Xerox Sigma V computer at the University of Illinois to embark on a grand mission: “Everyone in the world, or even not in this world (given satellite transmission) can have a copy of a book that has been entered into a computer.”³⁴ By typing books into text format, Hart’s endeavor represented the first step in a mass digitization race that would soon drastically outpace Project Gutenberg. While Hart’s project has now reached over 75,000 e-books, newer projects like Google Books and the IA have digitized *millions* of physical books.³⁵

The popularity of mass digitization projects has presumably grown for a number of different reasons: general technological advancement and experimentation, efficiency goals, sustainability concerns, corporate information-gathering and advertising interests, and more. The rise of digital native generations, a term defined by John Palfrey and Urs Gasser, is one particularly interesting trend that may act as both an independent and dependent factor affecting digitization litigation: The

32. *Id.*; see also *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 94 n.4 (2d Cir. 2014).

33. Panezi, *supra* note 28, at 84–86.

34. *Id.* at 75 (quoting Michael Hart, *The History and Philosophy of Project Gutenberg*, PROJECT GUTENBERG, https://www.gutenberg.org/about/background/history_and_philosophy.html [https://perma.cc/KLY7-2BXL] [https://web.archive.org/web/20250307153526/https://www.gutenberg.org/about/background/history_and_philosophy.html] (last visited Feb. 20, 2025)).

35. PROJECT GUTENBERG, <https://www.gutenberg.org/> [perma.cc/UK5Y-V9DC] [https://web.archive.org/web/20250212185032/https://www.gutenberg.org/] (last visited Feb. 12, 2025).

increasingly online behavior of these individuals may spook authors and publishers into lawsuits, and these individuals may be adversely affected, or at least forced to change their everyday habits and research methods, if controlled digital lending is ruled to be *prima facie* copyright infringement.³⁶ A “digital native” is a person who grew up with the internet and has never known a world without the potential to access digital tools at their fingertips.³⁷ Plausibly, their familiarity and ease with changing technology can help them in important ways, allowing them to capitalize on the educational potential of new developments. However, Argyri Panezi argues that it can hurt in others; to a digital native, Dr. Panezi explains, an important source or piece of information simply does not exist if it cannot be located and accessed online.³⁸

One particular archive has made itself the perfect home for a digital native. The Internet Archive—the subject of recent litigation regarding digital scans (discussed in detail *infra*)—began with a recognition by its founder, Brewster Kahle, that content published on the novel and growing medium of the internet was not being saved and preserved.³⁹ The IA set out on a mission to archive these pages as “cultural artifacts” and, more dramatically, to provide “Universal Access to All Knowledge.”⁴⁰ The IA operates as a nonprofit institution (a status relevant to its claims to “non-commerciality”), and the state of California has recognized the IA as a library since 2006.⁴¹ Largely by “copying and retaining backups of webpages” and other works in order to preserve their content, the IA has achieved staggering levels of scanning and archiving, at least compared to Project Gutenberg. At the time of writing, the IA claims to contain: 835 billion web pages, 44 million books and texts, 15 million audio recordings (including 255,000 live concerts), 10.6 million videos, and 4.8 million images.⁴² Each day, the IA scans 4,400 books in twenty locations across the world.⁴³ Out-of-copyright works published prior to 1928 are freely available for anyone to download, a rather uncontroversial program. More provocatively, and to be addressed further in Parts II and III, hundreds of thousands of in-copyright books may be borrowed through the IA’s Open Library website via digital scans.⁴⁴

36. PALFREY & GASSER, *supra* note 2, at 137–43.

37. Sachitra Mahendra, *Digital Humanities at the Crossroads*, SUNDAY OBSERVER (Nov. 26, 2023), <https://www.sundayobserver.lk/2023/11/26/montage/10606/digital-humanities-at-the-crossroads/> [perma.cc/3UL6-HUK7] [https://web.archive.org/web/20250212191507/https://www.sundayobserver.lk/2023/11/26/montage/10606/digital-humanities-at-the-crossroads/#google_vignette].

38. Panezi, *supra* note 28, at 73.

39. *About the Internet Archive*, INTERNET ARCHIVE, <https://archive.org/about/> [<https://perma.cc/CW6S-UW7N>] (last visited Feb. 12, 2025).

40. *Id.*

41. Brief for Defendant-Appellant Internet Archive (Public) at 6, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 15, 2023).

42. *About the Internet Archive*, *supra* note 39.

43. *Id.*

44. Panezi, *supra* note 28, at 90–91.

As digital natives have increasingly turned to the internet for their educational, social, and informational needs—and stumbled upon vast digital libraries in their searches—so too have authors and publishers turned to the courts to challenge the digital libraries acting without their permission. Before behemoth publishers turned their ire directly towards the IA, they first faced off against other technology companies in fair use cases that set relevant precedents for the IA litigation and for the legality of digital scanning writ large.

II. THE GOOGLE BOOKS SAGA AND THE IA DISPUTE

A. GOOGLE BOOKS: AN UNLIKELY WIN FOR A COMMERCIAL DIGITAL LIBRARY

In 2005, Google embarked on its own mass digitization project, “Google Books,” that would soon prompt years of legal disputes in *Authors Guild v. Google*. A key program within Google Books was the “Library Project,” in which Google collaborated with (you guessed it) libraries ranging from the academic collections of Harvard and Stanford University to those of public institutions like the New York Public Library and the Library of Congress.⁴⁵ In bilateral partnerships with these libraries, Google scanned around twenty million books—without, however, initially seeking the permission of authors or other right holders to conduct full scans of their work.⁴⁶

This program provided Google with vast amounts of data but strictly limited its distribution to third parties. Within these partnership agreements, Google provided libraries with digital copies of each of their scanned books in return for Google’s retention of the digitized collection; thus, only Google had private access to the entire digitized corpus and any participating library would *not* receive scanned copies of works provided by another library.⁴⁷ Some libraries only provided public domain works while others, more controversially, permitted Google to digitize their in-copyright books.⁴⁸ For each of these in-copyright books, Google would then provide an end-user with access to complete, partial, or no internal content (i.e., only catalog information) in accordance with the copyright status of the work or Google’s separate agreement with the right holder.⁴⁹

In 2005, Google promptly encountered major copyright lawsuits alleging mass infringement. A coalition of individual authors and the Authors Guild (America’s

45. *Id.* at 77; *see also* *Library Partners*, GOOGLE BOOKS, https://books.google.com/intl/en_au/googlebooks/partners.html [https://perma.cc/AA7Q-R7TD] [https://web.archive.org/web/20250212200945/https://books.google.com/intl/en_au/googlebooks/partners.html] (last visited Mar. 2, 2025).

46. Kelly Morris, Note, “*Transforming*” *Fair Use*: *Authors Guild, Inc. v. Google, Inc.*, 15 N.C.J.L. & TECH. ON. 170, 185–86 (2014).

47. Panezi, *supra* note 28, at 78.

48. *Id.*

49. *Id.*

oldest and largest professional writers' organization) brought a class action lawsuit, while publishers simultaneously brought their own action. Although the publishers' action was settled, the *Authors Guild* case was drawn out into a high-profile saga until 2015—notably, parties filed over 500 *amicus curiae* briefs in the first case alone.⁵⁰

In his district court opinion finding fair use of the scanned works, Judge Chin went into great detail on the five core benefits of a digital library like Google Books. First, Google Books created “a new and efficient way” to find books.⁵¹ By making millions of books searchable and providing a searchable index, Google Books became so essential that it was integrated into information literacy curriculums for students of all levels. As an example of functional transformation relevant to the IA litigation and library digital scanning discussed in this Note, Judge Chin emphasized how Google Books made the “process of interlibrary lending more efficient” and facilitated cite-finding and cite-checking for researchers and librarians.⁵² These largely procedural or operational functions of Google Books contributed to a finding of transformative use.

Further, Google Books expanded access to literary works, especially for underserved populations. Print-disabled individuals, those with other mobility-related disabilities, or those generally without access to a well-funded, reachable library could all benefit from Google's digitization.⁵³ More specifically, Google converted books to “audio and tactile formats” and facilitated “identification and access of materials for remote and underfunded libraries” that operated on narrow margins and could only procure what they needed most prior to partnering with Google.⁵⁴ These are all laudable functions which serve the purposes of copyright law, and ones which should be taken into account by any court considering fair use in the digital library context.

Pivoting towards a consideration of benefits for authors, Judge Chin then highlighted how Google Books helped to preserve obscure or older books and inject them with new life. The opinion paints a vivid image of books “falling apart buried in library stacks” instead of being scanned and uploaded for renewed consumption and learning.⁵⁵ Lastly, speaking directly to authors and publishers, Judge Chin found that Google Books would clearly benefit them—a click on Google's search result for their book would lead users to a page offering links to sellers of the books (including Amazon, Barnes & Noble, and more) or libraries that had the physical book in their collection.⁵⁶ These views and clicks were bound to attract not only new reading audiences but also new incomes.⁵⁷

50. *Id.* at 78–79.

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

52. *Id.*

53. *Id.* at 288.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

In light of the above factors, it is not surprising that Judge Chin found Google's use of the copyrighted works to be "highly transformative," despite the utter lack of critical commentary, change in meaning, or criticism that one might expect in a traditional fair use case concerning books.⁵⁸ The transformation was instead more operational and purposive, centering on notions of accessibility, efficiency, private and public benefits, and the revitalization of forgotten literary works. As in many lower court opinions on fair use, this finding of transformativeness was a core focus of the ultimate holding.

Thus, Google won the first fair use battle, and the Authors Guild quickly appealed their loss. Relying on similar reasoning to that of the district court, the Second Circuit held that Google's digitization, search functionality, and snippets of copyrighted works were indeed fair uses. Judge Pierre Leval wrote for the Second Circuit as a jurist well-renowned for his expertise in and aforementioned scholarship on fair use.⁵⁹ Judge Leval echoed many of the benefits put forth by Judge Chin, and the ultimate course of the decision was made evident by his framing of the facts: While Google Books's search results provided only "rudimentary additional" information from within the copyrighted books, "this identifying information instantaneously supplied what would otherwise not be obtainable in lifetimes of searching."⁶⁰

As per usual, the first and fourth fair use factors did the most work in the court's opinion. For the first factor, the court found that Google was engaged in a transformative use through its innovative search function, "augment[ing] public knowledge by making available information *about* Plaintiffs' books without providing the public with a substantial substitute" for the plaintiffs' copyrighted originals *or* any potential derivatives.⁶¹ This language on the first fair use factor undoubtedly spells trouble for the IA, which faces accusations of providing paradigmatic competing substitutes (digital scans) for copyright holders' derivative works (licensed e-books).

However, the court's discussion of the fourth factor—market substitution—may provide more support for a litigant arguing that digital scans can be transformative by providing a different purpose from print books *and* e-books. Rebuking the plaintiffs' argument on Google's usurpation of paid and unpaid licensing markets, Judge Leval emphasized that the plaintiffs' licensing markets would involve "very different functions" from those that Google provided.⁶² An author's derivative rights, Judge Leval explained, do not constitute an exclusive right to supply information *about* her works.⁶³ Most importantly, this inquiry into function considers that a person searching Google Books for specific information or quotes within a book seeks out something different from a person simply purchasing a print book or e-

58. *Id.* at 291.

59. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 206 (2d Cir. 2015). Judge Leval also penned the influential law review article that Justice Souter drew on in *Campbell*, mentioned *supra* note 16.

60. *Id.* at 209.

61. *Id.* at 207.

62. *Id.*

63. *Id.*

book in full. A distinction in function reduces the potential for a substitutive market effect under the fourth fair use factor.

In the court's consideration of the fourth fair use factor, another initial parallel with the nonprofit IA (or any other library) is the status of Google as a profit-motivated entity that, according to plaintiffs, sought to "use its dominance of book search to fortify its overall dominance of the internet search market."⁶⁴ The court rejected any argument based on *indirect* profits as dispositive towards a fair use holding.⁶⁵ Therefore, in the absence of substitutive market effects and the presence of a highly transformative use, the court was not convinced by appeals to Google's overall profit motive.

With the Second Circuit's finding of fair use, the Google Books model prevailed. A Note by Kelly Morris argues that the Google Books litigation carries important implications for future cases involving digital use of copyrighted print materials, predicting that transformativeness will carry "heavy, if not determinative weight" in determining whether or not a use is truly fair.⁶⁶ Like Judge Leval, then, Morris emphasizes the question of whether the proclaimed transformative use is really performing a *different function* than the original.⁶⁷ Additionally, Morris predicts that the court's invocation of the public interest or public benefits in the string of Google Books cases will resurface in future digitization cases.⁶⁸ The extended Google Books litigation therefore provides lessons on how far a non-author or non-publisher may plausibly venture in scanning and publicizing books without express permission, and this is an insightful candidate for comparison with the recent IA litigation concerning controlled digital lending.

B. THE INTERNET ARCHIVE: A PATH FROM CAUTION TO CONFLICT

As the Google Books litigation took root in 2005, the Internet Archive had recently begun a partnership with Microsoft, Yahoo, and other stakeholders to create the Open Content Alliance ("OCA").⁶⁹ The project espoused a similar mission to Google: digitizing books and making them freely searchable and available online to all. However, in the shadow of Google's potential liability, the OCA collaborators initially proceeded with care.⁷⁰ Accordingly, while digitizing the public domain books of their library partners, the OCA allegedly sought authors' consent before digitizing in-copyright work.⁷¹ Then, in 2011, the IA also began its system of controlled digital lending. The IA created digital scans only of books that it had purchased or received via donation and allowed patrons to borrow the scans for up

64. *Id.* at 218.

65. *Id.* at 219.

66. Morris, *supra* note 46, at 195.

67. *Id.* at 196.

68. *Id.*

69. Panezi, *supra* note 28, at 86.

70. *Id.* at 86–87.

71. *Id.* at 87.

to fourteen days on a 1:1 owned-to-lent ratio (i.e., if one person checked out the scan, another person could not access it), subject to digital rights management encryption that prevented personal download or printing.⁷² In doing so, the IA refrained from lending books published within the past five years out of respect for the fact that book sales “generally peak within the first years of publication.”⁷³ However, the semblance of a more cautious approach by the IA began to take a turn towards greater experimentation and, consequently, greater risk-taking.

In 2018, the IA began the “Open Libraries” project, allowing other libraries to “contribute” their non-circulating books to the IA’s number of total copies available for CDL. Basically, if a partner library committed a book to the project, the IA would simply increase the number of available borrows for its digital scan of the book by one.⁷⁴ This move raised eyebrows: The IA allegedly does not actively police whether that library’s print books actually remain out of circulation while a scan is lent out, and obviously, the IA does not own these books or personally scan the contributing library’s physical book—it only increases the number of its own pre-existing scans of the book upon receipt of a proverbial “contribution.” This risk-taking behavior then escalated in 2020 during a period of global crisis.

As the COVID-19 pandemic spread rapidly across the United States, the IA took a dramatic move that quickly drew legal scrutiny towards its lending practices. This scrutiny would soon be targeted at not only the IA’s emergency measures, but also its regular course of CDL. In March 2020, the Executive Board of the American Library Association urged schools and librarians to shutter physical libraries across the nation.⁷⁵ Lamenting the difficulty of closing up an institution that offers solace to communities in times of crisis and unrest, the Executive Board conceded that it could not implement sufficient safety precautions to protect staff and patrons from COVID-19.⁷⁶ The statement further praised creative responses to the crisis and mentioned libraries’ provision of online services and digital resources.⁷⁷

The IA seemingly picked up on this rhetoric as an urgent, implicit invitation to act, responding with the temporary establishment of its “National Emergency Library” (“NEL”). The NEL was intended to support “emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries were closed due to COVID-19.”⁷⁸

72. Brief for Defendant-Appellant Internet Archive (Public), *supra* note 41, at 6–7.

73. *Id.* at 6.

74. *Id.* at 7.

75. Panezi, *supra* note 28, at 68 (quoting Press Release, ALA Executive Board Recommends Closing Libraries to Public, AM. LIBR. ASS’N (Mar. 17, 2020), <http://www.ala.org/news/press-releases/2020/03/ala-executive-board-recommends-closing-libraries-public> [<https://perma.cc/48XW-YU67>] [<https://web.archive.org/web/20250303123247/https://www.ala.org/news/2012/01/ala-executive-board-recommends-closing-libraries-public>]).

76. *Id.*

77. *Id.*

78. *Id.* at 68–69 (citing *National Emergency Library*, INTERNET ARCHIVE BLOGS, <https://blog.archive.org/national-emergency-library> [<https://perma.cc/HGD8-AMH4>]).

In practice, the NEL operated by suspending waitlists for the materials in the IA's lending library such that any user could access any of the IA's millions of scanned books without having to wait for anyone else to return it.⁷⁹ The IA envisioned that this would allow students to keep up with their remote assignments and patrons to continue to read despite the closure of physical libraries.⁸⁰

The simultaneous reality, though, was that far more digital copies could be lent out than authors or publishers ever intended to permit. In an attempt to alleviate blowback from right holders, the IA included opt-in and opt-out choices in which an author could opt in to donate their book to the NEL or to remove their book from the library altogether.⁸¹ However, it was not long before allegations of bootleg e-bookings circulated on social media and flowed en masse towards the IA's legal team. Angry tweets mounted: "This is . . . not a gift for authors or publishers or indie booksellers many of whom are all struggling quite a bit [right now]"; "This is piracy, plain and simple. And your local library can get you ebooks—ones they have paid for"; "Joining the chorus of authors saying not to promote [the NEL]. They have my books, scanned, without any kind of permission of license—it's just piracy."⁸² The NEL closed on June 16, 2020, after which the IA returned to its prior system of controlled digital lending. However, legal trouble quickly ensued.

Building controversy over CDL and a system of "digitization without permission" are at the center of the IA litigation that followed, with high-stakes implications for library practices writ large. On June 1, 2020, four major book publishing houses filed suit against the IA, claiming copyright infringement by the NEL *and* the IA's aforementioned Open Library.⁸³ The plaintiffs claimed infringement of their copyrights in 127 works, which were subject to the IA's practice of scanning and lending to IA users without the plaintiffs' permission, and all of which have licensed e-book derivatives.⁸⁴ In the wake of the Google Books saga, the IA, of course, responded that it had made fair use of these works.⁸⁵

Though the triggering event for the litigation was the NEL, the plaintiffs' complaint largely took aim at the IA's regular CDL practices. The publishers alleged that the rules of CDL had been developed out of thin air absent any basis in copyright law or fair use doctrine: "IA not only acts entirely outside any legal framework, it

[<https://web.archive.org/web/20250303123854/https://blog.archive.org/national-emergency-library/>] (last visited Mar. 1, 2025).

79. *Id.* at 69.

80. *Id.*

81. *Id.*

82. Nate Hoffelder, *Authors Protest Internet Archive Pirating Their Books*, DIGITAL READER (Mar. 28, 2020), <https://the-digital-reader.com/authors-protest-internet-archive-pirating-their-books/> [<https://perma.cc/LX8F-AX6L>] [<https://web.archive.org/save/https://the-digital-reader.com/authors-protest-internet-archive-pirating-their-books/>].

83. *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 374 (S.D.N.Y. 2023).

84. *Id.* The publishers were Hachette Book Group, Inc., HarperCollins Publishers LLC, Penguin Random House LLC, and John Wiley & Sons, Inc.

85. *Id.*

does so fragrantly and fraudulently.”⁸⁶ The publishers wholeheartedly rejected the IA’s self-characterization as an educational enterprise, arguing instead that it was authors and publishers for whom “education has long been a primary mission and market.”⁸⁷

The complaint also highlighted the effusive nature of digital works: Attributes of non-rivalry and potential for distribution of books across borders meant that digital copies should not be treated the same as physically lent-out books.⁸⁸ Digital books could “fly around the world in a second” without potential for physical degradation, and these perpetual risks showed why publishers had developed their own lawfully established e-book markets.⁸⁹ This dramatic rhetoric tended to forget the digital rights management and encryption that prevents screenshotting, downloads, and printing of CDL scans. Still, the publishers’ ultimate conclusion would soon prevail in district court, which concluded that the IA’s negligible transformativeness and the thriving existence of a legal market for e-books provide a textbook case for pure copying and market supplantation.⁹⁰

However, with similar vigor, the IA defended its claimed librarian and educator status and noble mission to “democratize access to information.”⁹¹ Instead of the stark dichotomy between CDL and physical book-lending raised by the publishers, the IA instead endeavored to highlight the benefits of allowing the two systems to legally co-exist, because CDL can solve many of the enduring problems and gaps that arise from physical lending. The new benefits offered by CDL include serving library patrons who previously could not have had access whether that was because of “distance, time, cost, or disability.”⁹² For the IA, this immense public benefit and allegedly controlled system of digital lending amounted to a showing of fair use.⁹³ In court, however, none of the IA’s defenses prevailed.

III. THE IA RULING AND THE PATH FORWARD FOR LIBRARIES

The IA’s loss in district court was not a close call. Granting the publishers’ motion for summary judgment and denying the IA’s cross-motion for summary judgment, Judge Koeltl found that every single fair use factor strongly favored the publishers, concluding that the IA infringed on the publishers’ copyrights in all 127 Works in

86. Complaint ¶ 6, *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 374 (S.D.N.Y. 2023) (No. 20 Civ. 4160).

87. *Id.* ¶ 8.

88. *Id.* ¶ 10.

89. *Id.*

90. *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 391 (S.D.N.Y. 2023). As discussed *supra*, note 3, the Second Circuit (in a decision issued after the time of writing) also agreed with the publishers that the IA’s CDL scans were not transformative. *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 181, 190 (2d Cir. 2024).

91. Panezi, *supra* note 28, at 92.

92. *Id.*

93. *Id.* at 93–94.

Suit.⁹⁴ This section will cover the district court's rationale, particularly on the complicated first fair use factor, and respond with an analysis of why future courts addressing library defendants should chart a narrower path of reasoning in order to serve the purposes of copyright law as applied to libraries.⁹⁵ This analysis will draw from judicial precedents, the copyright statute, the history of copyright, and the stakeholder insights of the appeals briefing and amici filed.

Ruling on the first factor, the "purpose and character of the [allegedly infringing] use," Judge Koeltl argued that the IA's position had no legal basis in fair use doctrine:

The crux of IA's first factor argument is that an organization has the right under fair use to make whatever copies of its print books are necessary to facilitate digital lending of that book. But there is no such right, which risks eviscerating the rights of authors and publishers to profit from the creation and dissemination of derivatives of their protected works. IA's wholesale copying and unauthorized lending of digital copies of the Publishers' print books does not transform the use of the books, and IA profits from exploiting the copyrighted material without paying the customary price.⁹⁶

Within this one quotation, the district court has touched on multiple fair use factors and doctrinal flashpoints, including the potential for the IA to "swallow the copyright owner's exclusive right to prepare derivative works"—a concern that the Supreme Court flagged multiple times in *Warhol*.⁹⁷ The quotation also highlights the amount and substantiality of the portion used from factor two ("wholesale copying"), the market concerns of factor four ("without paying the customary price"), and, lastly, a strong concern with a lack of transformativeness ("does not transform the use of the books").

At another point in the opinion, the court directly targets the question of the transformativeness of the IA's digital scans of literary works:

There is nothing transformative about IA's copying and unauthorized lending of the Works in Suit. IA does not reproduce the Works in Suit to provide criticism, commentary, or information about them. IA's ebooks do not "add[] something new, with a further purpose or different character, altering the [originals] with new expression, meaning or message." IA simply scans the Works in Suit to become ebooks and lends them to users of its Website for free.⁹⁸

94. *Hachette*, 664 F. Supp. 3d at 388.

95. I choose to focus on the conceptual and legal arguments surrounding the first fair use factor in this Note through considerations of transformativeness, nonprofit uses, and commerciality. Any fourth factor analysis certainly addresses commerciality as well, but a worthwhile fourth factor examination requires data and market research in each individual case. This case-by-case analysis goes beyond the scope of what I seek to argue regarding libraries' use of CDL in the abstract.

96. *Hachette*, 664 F. Supp. 3d at 386 (internal citations omitted).

97. See *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1282 (2023); see also Menell et al., *Amicus Br.*, *supra* note 15, at 14.

98. *Hachette*, 664 F. Supp. 3d at 380 (internal citations omitted).

At the core of this rationale is an assumed equivalence between the IA's digital scans of a copyrighted work and an official e-book of the same. It paints a picture of pure format-shifting—a shift from a non-infringing use (the legitimately purchased print book) to a competing market substitute for its derivative (a licensed e-book made by the publisher or author).

The court's formulation of the lack of transformativeness also fed directly into the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work." Indeed, once the equivalence between the IA's digital scans and an official e-book had been established, widespread market supplantation seemed a foregone result. The publishers pointed to the "thriving ebook licensing market for libraries," which generates tens of millions of dollars a year for publishers ("at least").⁹⁹ The IA did itself no favors when it overtly pitched its Open Libraries project to prospective library partners "in part as a way to help libraries avoid paying for licenses"—the presentation boasted, "You Don't Have to Buy It Again!"¹⁰⁰ To the District Court, this behavior encapsulated a clear usurpation of the copyright holders' legitimate market. And, if it became more "widespread," either by IA or other competing archives and libraries, this usurpation would wreak financial havoc on that market.¹⁰¹ These "bootleg ebooks" would replace sales for any authorized e-book license, for "it is difficult to compete with a product offered for free."¹⁰²

The court next considered the "public benefits [that the IA's] copying will likely produce." But no public benefit could plausibly compete with a use condemned to "bootleg" status. Therefore, to the court, the market harm inevitably outweighed the IA's seemingly persuasive arguments that CDL "makes it easier for patrons who live far from physical libraries to access books and that it supports research, scholarship, and cultural participation by making books widely accessible on the Internet."¹⁰³

Finally, the court swiftly concluded that the same reasoning applies "even more forcefully" to IA's fair use defense of the NEL.¹⁰⁴ Fair enough—if even a CDL scheme with a capped number of scans infringes on copyright, then every uncapped loan on top of that continuously compounds the infringement.¹⁰⁵ And clearly, numerous authors and publishers felt a particular ire towards the removal of the lending cap during a time of acute crisis for those in our nation without a steady income stream who may have been facing economic and/or health emergencies during the pandemic (recall the forceful tweets compiled by Nate Hoffelder, including: "This is . . . not a gift for authors or publishers or indie booksellers many of whom are all struggling quite a bit [right now].").¹⁰⁶ Indeed, the completely

99. *Id.* at 388.

100. *Id.*

101. *Id.* (citing *Warhol* for concern about one infringing action becoming widespread).

102. *Id.* at 389 (quoting *Sony BMG Music Ent. v. Tenenbaum*, 672 F. Supp. 2d 217, 231 (D. Mass. 2009)).

103. *Id.* at 390.

104. *Id.* at 391.

105. See *supra* text accompanying note 74.

106. Hoffelder, *supra* note 82.

uncapped operation of the NEL likely favors infringement under any formulation of market harm under the fourth fair use factor.

A. THE PURPOSE AND CHARACTER OF THE USE

Ultimately, the district court firmly rejected IA's fair use defenses for both its typical practices of controlled digital lending and the National Emergency Library. However, a renewed analysis of *tailored* CDL by libraries—capped, with a 1:1 physical-digital ratio of owned-to-loaned books, and with digital rights management technology to prevent screenshotting or printing—under the first fair use factor tells a different story. Though it may seem to go without saying, fair use is use-dependent: A court must take into account the who, what, how, and why of each specific use. Justice Sotomayor emphasized this point in *Warhol*, cabinining the holding to the specific use of AWF's commercial licensing of Goldsmith's photograph to Condé Nast without extensively analyzing the transformativeness of Warhol's silkscreens and his other artistic works writ large.¹⁰⁷ Therefore, while the IA may well have gone too far with its NEL and its Open Library Project—in uncapping loans, distributing scans of physical books that it did not personally own, and failing to regulate whether its partner libraries even kept their print copies out of circulation—future courts should not rule out noncommercial, capped CDL by libraries as unavailing of a fair use defense. This argument is supported by judicial precedent, numerous stakeholders (including authors, librarians, library directors, intellectual property professors, copyright scholars, and more), and the purposes of the copyright system.

Under the first fair use factor, the tailored use of CDL by a library should weigh in favor of fair use for two central reasons: (1) it is transformative in the sense of altered purpose, function, accessibility, and efficiency, and (2) it is patently noncommercial under federal courts' understanding of that term. The publishers and the district court equated CDL scans with licensed e-books to quash any hint of transformativeness. This conclusion does not adequately consider the various distinctions between a digital scan and an e-book to a library patron versus a paying customer. Still, even if these distinctions do not rise to an adequate level of transformation and “the claim to fairness in borrowing from another's work diminishes accordingly . . . other factors, like the extent of its commerciality, *loom larger*.”¹⁰⁸

Accordingly, the district court's conclusion that the IA's CDL system was clearly commercial looms large for any library engaged in controlled digital lending. The notion that the IA's CDL system is commercial because it “uses its Website to attract new members, solicit donations, and bolster its standing in the library community”

107. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1261 (2023) (“Even granting the District Court's conclusion that Orange Prince reasonably can be perceived to portray Prince as iconic, whereas Goldsmith's portrayal is photorealistic, that *difference must be evaluated in the context of the specific use at issue*.” (emphasis added)).

108. *Id.* at 1276 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1172 (1994)) (emphasis added).

should not be espoused by the Second Circuit or other future circuits addressing the issue.¹⁰⁹ This interpretation broadens the doctrinal definition of commerciality with negative consequences for libraries and archives across the nation. Instead, these nonprofit institutions' use of digital lending to the public should remain presumptively "noncommercial" activity within the fair use analysis.

1. Transformativeness

The Supreme Court's latest explanation of transformativeness encompasses the practice of strictly-tailored CDL by a library. Writing for the *Warhol* majority, Justice Sotomayor explained that the transformative use analysis goes beyond a search for a different meaning or message and instead "focuses on whether an allegedly infringing use has a *further purpose* or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, *like commercialism*."¹¹⁰ This degree of change must also "go beyond that required to qualify as a derivative."¹¹¹ As an example, Justice Sotomayor re-examined the comparison of parody and satire from *Campbell*: parody has to "mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."¹¹² The parodist has the stronger claim to fair use because her copying was functionally necessary to realize her new purpose. Even if the satirist used the same portion as her, the satirist's fair use defense is more likely to fail: "[T]he same copying may be fair when used for one purpose but not another."¹¹³ The distinction here displays how an act of copying is inextricably linked to the act's justification, and whether that justification furthers the goals of copyright to promote useful progress without dampening creative incentives.

When a library creates a digital scan of a print book that it already owns, it fulfills numerous new purposes: It enables full text search, increases accessibility for disabled readers, facilitates cite-checking and scholarly research, preserves the physical work from deterioration or destruction, and increases convenience and utility for any and all patrons who are not be able to get to a library in person or to find a particular book in print.¹¹⁴ A scan of the entire print book is reasonably

109. *Hachette*, 664 F. Supp. 3d at 383. Indeed, as addressed *supra* note 3, the Second Circuit's decision (issued after the time of writing) agreed with this point, finding that the IA's use was noncommercial. *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 185 (2d Cir. 2024). However, the Second Circuit still found that the IA's digital scans were ultimately not transformative. *Id.* at 181.

110. *Warhol*, 143 S. Ct. at 1273 (citing *Campbell*, 114 S. Ct. at 1172) (emphasis added).

111. *Id.* at 1275.

112. *Id.* at 1276 (citing *Campbell*, 114 S. Ct. at 1172).

113. *Id.* at 1277.

114. Brief for Amici Curiae Copyright Scholars in Support of Defendant-Appellant and Reversal at 11, *Hachette Book Grp. Inc. v. Internet Archive*, No. 23 Civ. 1260 (2d Cir. Dec. 18, 2023); Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant at 27–28, *Hachette Book Grp. Inc. v. Internet Archive*, No. 23 Civ. 1260 (2d Cir. Dec. 21, 2023); Brief for Amicus Curiae HathiTrust in Support

necessary to achieve each of these purposes—the digital scan cannot stand on its own two feet and fulfill its new function without a picture of each page from the original. Like the parodist, the librarian scanning her employer's book must mimic the original to facilitate the new purpose.

The different purposes laid out above represent not only the “subjective intent” or stated goals of libraries in creating these digital scans but also the common-sense approach of a reader making objective decisions on whether to buy or loan a print book, an e-book, or a CDL scan.¹¹⁵ Consider the hypothetical of a law student heading into the last stage of finals before summer break. Likely, they have already spent an exorbitant amount on books that semester, particularly if they purchased any physical textbooks so that they could adorn the pages with four to five different colored highlighters and pencil comments into the margins. They have a research paper due in two weeks, and they would also like to find a novel to read over the summer break.

For the research paper, the student's university libraries, public libraries, and online archives will be indispensable resources, and these institutions' CDL scans provide the ideal method for quickly locating facts and cite-checking references. For the personal novel, the CDL scan is likely the option of last resort—if the student is able, they are more likely to purchase an e-book or print book, or to borrow the same from a library. This would be the likely result because the operational function and aesthetic of a digital scan substantially differs from both the print book *and* the potential derivative of the library-licensed e-book. E-books are more advanced and adaptable, with opportunities to manipulate the pagination, “text size, spacing, and even the color of the text,” and they are often interactive, allowing users to click hyperlinks or jump to other parts of the book.¹¹⁶ The e-book pages easily adjust to fit the frames of a phone, computer, or other e-reader. On the contrary, within a CDL scan, the text often “cannot be magnified without becoming blurry” and cannot be aesthetically manipulated by the user at all.¹¹⁷ For certain purposes, the rudimentary style of the CDL scan is ideal—the law student cite-checking her research paper wants to be able to ensure that the quotation she seeks truly came from one particular page of a particular edition of a physical book, and the scan of the physical page immediately confirms this. The CDL scan of the *entire* book allows for greater certainty and ability to see the surrounding context of a quotation, facilitating more accurate scholarship. The student would presumably check the CDL scan in and out

of Neither Party at 7–8, *Hachette Book Grp. Inc. v. Internet Archive*, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

115. See *Warhol*, 143 S. Ct. at 1284 (“[W]hether a work is transformative cannot turn merely on the stated or perceived intent of the [accused infringer] Whether the purpose and character of a use weighs in favor of fair use is, instead, an objective inquiry into what use was made”) (internal citations omitted).

116. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 25; see also Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant at 16, *Hachette Book Grp. Inc. v. Internet Archive*, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

117. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 26.

quickly to fulfill this purpose; in fact, the IA consistently reports short checkout times in its usage data.¹¹⁸

On the other hand, if the student's eyes are a bit strained from reading too many Federal Courts chapters by summer break, she is likely to opt for the font-enlarging capabilities of an e-book for her novel, which she can either try to borrow from a library or purchase directly. If one of her purposes is to hold onto the novel and pass it around to friends or family, it makes the most sense to invest in a print book—an individual patron cannot lend a library's CDL scan to others because of digital rights management and encryption technology (and each loan is typically very limited in time duration). To put it simply, CDL scans, print books, and e-books all serve different purposes and different functions in the real world.

Clear distinctions also exist between the purposes served by CDL and the realities of e-book licensing practices. The Authors Alliance argues in its amicus brief that CDL scans provide libraries with the necessary freedom to maintain and preserve copies in a way that would be impossible with licensed e-books.¹¹⁹ For e-book licenses, libraries' content preservation practice is completely at the mercy of the publisher's licensing agreement: "Those terms are entirely inadequate for long term preservation and access, especially as formats change rapidly over time and publishers exit the business."¹²⁰ A coalition of librarians' amicus brief echoed the same sentiments: At the time of writing, many major publishers' e-book licenses for public libraries expire either after twenty-four months or twenty-six checkouts.¹²¹ Conversely, CDL scans remain within the libraries' reserves regardless of whether a book is still up for commercial sale by publishers—a licensed e-book that is no longer commercially available would simply vanish from the libraries' digital shelves. Further, libraries can offer their CDL scans to others on interlibrary loans (assuming that they keep both their own scan *and* their physical book out of circulation while doing so), as they regularly do with print books, whereas licensing agreements for e-books typically prevent this practice.¹²² In one dramatic example of how e-book licensing works in reality, Wiley (one of the publisher-plaintiffs in the IA Litigation) decided to remove over 1,300 licensed e-books from academic library collections at the beginning of a school year, leaving countless students relying on library textbooks in the lurch and leaving teachers "scrambling to find new texts to assign, redesign syllabi, and otherwise adopt their courses to a loss of access to the Wiley texts, at a moment when their attention should have been focused on teaching and welcoming students."¹²³ During the COVID-19 pandemic, other examples of the

118. *Id.* at 27.

119. *Id.* at 21.

120. *Id.*

121. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 13.

122. *Id.* at 19–20.

123. *Wiley Removes Over 1,300 Ebooks from Academic Library Collections*, AUTHORS ALL. (Oct. 7, 2022), <https://authorsalliance.org/2022/10/07/wiley-removes-over-1300-ebooks-from-academic-library-collections/> [https://perma.cc/884N-UKY3]

difficult practical nature of licensed e-books abounded: *Charlotte's Web* was entirely unavailable in the state of Rhode Island due to publisher e-book licensing restrictions, and one academic library reported having to pay \$27 per student per year for each student to have a digital copy of Anne Frank's *The Diary of a Young Girl*.¹²⁴ If libraries were instead supported in (or at least not sued for) digitally scanning the print books that they already own and have paid for, they would be able to adapt their collections to changing circumstances, prepare for emergency situations, and ultimately provide access for students to the same extent as they did before being shuttered for the pandemic. This is the type of educational, noncommercial use that broad rulings against tailored CDL would operate to preclude.

Further, to return to the parodist-satirist comparison, it truly matters for the first fair use factor *who* does the copying and *why*. A strictly-controlled digital scan made by a librarian plausibly ensures the following: the scan will be of a print book that the library already owns on its shelves; the scan will be loaned out on a time-limited basis to one corresponding patron at a time; the scan will be subject to DRM encryption technology; the scan will be freely accessible to those who are print-disabled, under-resourced, unable to reach the physical library, or simply unable to find the book elsewhere; and, lastly, the physical book will be out of circulation while the scan is out on digital loan. Surely, the librarian scanned the *entire* book and all of its creative content, and he did not add any new criticism or meaning to its underlying message. However, this surrounding context provides a different justification for the use than if the same scan were made by a publisher, a bookstore owner, or even the good-faith law student who plausibly could not avail herself of all of the above limitations or safeguards.¹²⁵ Whereas *Campbell's* holding was the

[<https://web.archive.org/web/20221124053532/https://authorsalliance.org/2022/10/07/wiley-removes-over-1300-ebooks-from-academic-library-collections/>].

124. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 14. Schools and teachers may be able to claim an education exception to copyright if they can photocopy excerpts of print books and get that scan to their students, but often they still need to get their hands on the material for each student in a specific format or program that will work on students' tablets or devices. Here, the digital version of this book was only offered as a subscription for \$27 per student per year from a private library management system called Destiny. See Maria Bustillos, *Billion-Dollar Book Companies Are Ripping Off Public Schools*, NEW REPUBLIC (Dec. 22, 2020), <https://newrepublic.com/article/160649/book-companies-follett-overcharge-public-schools> [<https://perma.cc/X7EU-4HFL>] [<https://web.archive.org/web/20250109193029/https://newrepublic.com/article/160649/book-companies-follett-overcharge-public-schools>]. Some teachers resorted to other methods to get around such expenses: "One teacher took screenshots of every page of a graphic novel and compiled them into a PDF for his class; another reads just one page of a book each day during virtual story time in order to avoid copyright restrictions. Others have gained access to Learning Ally, which provides e-books for the print-disabled, by claiming learning-disabled status for every student they teach." Jennie Rose Halperin, *Publishers Are Using E-Books To Extort Schools and Libraries*, DAILY BEAST (Apr. 18, 2021), <https://www.thedailybeast.com/publishers-are-using-e-books-to-extort-schools-and-libraries> [<https://web.archive.org/web/20250109181550/https://www.thedailybeast.com/publishers-are-using-e-books-to-extort-schools-and-libraries/>].

125. If sued, that law student could try to claim a fair use defense for her own use of the scan under the education exception of § 107—unless, of course, she has decided to create a black market for textbook

“culmination of a long line of cases and scholarship about parody’s claim to fairness in borrowing,” so too should any case on library CDL be a culmination of a long history of statutory exceptions, scholarship, and common-sense support for libraries’ claim to fairness in lending.¹²⁶

Of course, if a library is stepping out of these bounds—as it seems the IA may have—by not policing any one of the above limitations, the fair use justification diminishes and a court may step in. This could happen if a library lifts the cap on 1:1 physical-digital loans, fails to regulate whether its physical books are taken out of circulation when a scan is loaned, or allows patrons to keep the scans permanently, download the scans, or print them. These limitations matter to an analysis of the first factor of fair use. Libraries using any such system have a responsibility to ensure the limitations are consistently implemented and monitored in practice, and a court can consider these limitations as it assesses the scope of an alleged fair use.

The idea that a court can assess on a case-by-case basis whether a right to intellectual property is time-limited (i.e., a one-week digital loan that immediately returns to the library) and relational (i.e., only between the library and one patron at a time) is not alien to property case law. In the WWI-era case of *International News Service v. Associated Press*, Justice Pitney developed a quasi-property right for breaking news, a right which was relational between two newspaper competitors for an enumerated period of time. International News Service (“INS”) continually took Associated Press (“AP”)’s east coast hot-off-the-press wartime news and telegraphed it to its west coast papers, eventually leading to the contentious lawsuit questioning whether AP had any property interest in the news that it had gathered after the instant of its publication.¹²⁷ Justice Pitney’s equity-tailored remedy decreed that INS was precluded from copying news from AP for twenty-four hours after publication.¹²⁸

One can now respond: Why would this case matter at all for the practice of digital scanning by libraries, when *INS v. AP* (1) seemingly expanded AP’s property right at the expense of another entity engaged in one of § 107’s enumerated fair uses (news reporting); and (2) was explicitly not about copyright because it protected AP’s *facts*, which are typically excluded by the idea-expression dichotomy? It is relevant for two reasons. First, as the Supreme Court balanced considerations of incentive creation, free-riding, free speech, and knowledge dissemination, the Court was able to consider the nuances of the parties’ identities, behavior, and profit motives—as well as the public consequences—in crafting its equitable remedy to a limited period of

scans and sell them to others. *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 525 (2013) (holding that a defendant *could* re-sell physical textbooks that he *lawfully purchased* abroad under the first sale doctrine).

126. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1282 (2023) (citing *Campbell*). I do not mention any long line of cases against libraries—as the American Library Association notes in its amicus brief, “[g]iven libraries’ favored status and conscientious approach to copyright, lawsuits against them are exceedingly rare.” Brief for Amici Curiae American Library Association and Association of Research Libraries in Support of Neither Party at 18, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

127. *Int’l News Serv. v. Associated Press*, 39 S. Ct. 68 (1918).

128. *Id.* at 75.

time between limited parties. Second, the Court cabined this quasi-property right to AP's competitors in order to *protect* the noncommercial news context, arguing that there should be no *in rem* right for AP's breaking news because this could operate as censorship upon public knowledge.¹²⁹ The decision shows both the Supreme Court's capacity to be creative and context-dependent in assessing a property right and its duty to consider noncommercial, public interests in setting the boundaries of that right.

Further, if any of this focus on aesthetic, functional, or operational changes to a book (as opposed to artistic or critical transformation) seems far-fetched, it also has clear roots in the Google Books litigation described *supra*. The district court described the benefits of a "new and efficient way" to find books, to make books searchable, to increase information literacy, to facilitate lending, to increase accessibility for underserved populations and those with disabilities, to increase readership for authors, and even to increase profits for authors through a discovery effect of encouraging purchase after encountering the free version.¹³⁰ In his Second Circuit opinion, Judge Leval also encouraged this form of inquiry into the difference in function between an infringing use and the copyrighted work or its licensed derivatives.¹³¹ Although the district court here, in *Hachette*, rejected a "discovery effect" argument because it did not see clear evidence in the record of benefit causation to authors by the IA's CDL system, an amicus brief by the Authors Alliance responded directly to the argument: "Authors want their books to be read. . . . [CDL] serves the interests of authors who prioritize seeing their works reach readers so that they have the maximum impact on public discourse," particularly where the use was categorically noncommercial.¹³²

Therefore, if a future library's strictly-tailored CDL system is "evaluated in the context of the specific use at issue," as it must be under *Warhol*, a court should find transformative use.¹³³ However, in the end, the district court found that the harms of the IA's CDL practice outweighed the benefits. The court still saw a digital scan and a licensed e-book as one and the same for purposes of copyright liability. It is fair to say that the difference here is less readily apparent than a Google Books search result versus an equivalent e-book. But such a finding still does not end the first factor inquiry after *Warhol*: Justice Sotomayor advised that in a situation of "similar purposes" or a "risk of substitution," the remaining question is the power or persuasiveness of the justification for copying.¹³⁴ For libraries with tailored CDL practices, their fair use justifications are strengthened by the blatant absence of commerciality and the realities of the e-book licensing market as laid out by library and author amici in the IA litigation.

129. *See id.* at 71 ("The question here is not so much the rights of either party as against the public but their rights as between themselves.").

130. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 287–88 (S.D.N.Y. 2013).

131. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207 (2d Cir. 2015).

132. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 16.

133. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1284 (2023).

134. *Id.* at 1277.

2. Commerciality

No court should deem a library's practice of controlled digital lending commercial under the first fair use factor. To begin with the text of the first factor, the statute itself bifurcates commerciality from the type of use at question here: "the purpose and character of the use, *including whether such use is of a commercial or is for nonprofit educational purposes*."¹³⁵ The commerciality element "loom[s] larger" in a case of similar purposes or low transformativeness.¹³⁶ In *Warhol*, the for-profit licensing of the Prince image to Condé Nast played a determinative role in the judicial outcome—it meant that the "copying use [was] of a commercial nature."¹³⁷ On the other hand, Justice Gorsuch made an important point in his concurrence that, though it is dicta, would be relevant for any analysis of library CDL: "If, for example, *the Foundation had sought to display Mr. Warhol's image of Prince in a nonprofit museum* or a for-profit book commenting on twentieth-century art, the purpose and character of that use might well point to fair use."¹³⁸ In a similar fashion to the transformativeness analysis, this example again shows the importance of *who* does the copying and *why*, introducing the element of profit motives.

In its analysis of the matter, the district court espoused a rather expansive interpretation of commercial use to conclude that the IA's CDL system was commercial because the IA "uses its Website to attract new members, solicit donations, and bolster its standing in the library community."¹³⁹ The court asserted that the IA exploited the publishers' works "without paying the customary price" and "gain[ed] an advantage or benefit" from its use of the works without accounting to copyright holders.¹⁴⁰ As will be explored in detail below, if gaining non-monetary benefits, failing to pay licensing prices (which essentially no defendant claiming fair use does, or else they would not be sued), and soliciting donations imputes commerciality, then little, if any, nonprofit activity can be deemed noncommercial.

Within several amicus briefs for the IA's Second Circuit appeal, this language has incited great concern that long-accepted library and nonprofit practices will now be deemed commercial, weighing against a finding of fair use. Recall the nonprofit status of the IA and California's classification of the IA as a library—its mission statement is to "provide Universal Access to All Knowledge."¹⁴¹ Its "donate" button is not hard to find, but one can easily use the website for years without ever being pressured to donate. The Authors Alliance raised the point that "many if not most" nonprofit organizations include donation links on their websites, and law librarians worry that commonplace activities like public read-aloud hours, digital preservation programs, crowd-sourced transcription projects, placements of books on course

135. 17 U.S.C. § 107.

136. *Warhol*, 143 S. Ct. at 1276.

137. *Id.* at 1273.

138. *Id.* at 1291 (emphasis added).

139. *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 383 (S.D.N.Y. 2023).

140. *Id.* at 384.

141. *About the Internet Archive*, *supra* note 39.

reserves, and more could put libraries at risk of liability for copyright infringement as long as they accept donations or paid memberships. To the concerned amici, this interpretation “seemingly renders every would-be fair use ‘commercial’ so long as the user benefits in some way from their use.”¹⁴²

An expansive definition of “commercial” does not square with Second Circuit precedent on the term. In *American Geophysical Union v. Texaco Inc.*, the Court addressed what distinguishes a commercial from a nonprofit use: “The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a *direct consequence* of copying the original work.”¹⁴³ Commercial exploitation encompasses situations in which “the copier directly and exclusively acquires conspicuous financial rewards from its use of copyrighted material,” as opposed to using the same to “produce[] a value that benefits the broader public interest.”¹⁴⁴ The nexus between the copying use and the copier’s private financial reward should therefore be direct and apparent. The *Hachette* district court also described this as a “commercial-noncommercial distinction,”¹⁴⁵ whereas § 107 and *Texaco* emphasize that the distinction is between commercial usage and *nonprofit or educational* usage. In the case of a library, it matters not only that the use is noncommercial but also that it fulfills these particular public, educational purposes.

That the IA did not directly profit from its digital scans is undisputed—the scans were offered for free to anyone with an account (and the account itself is also free to make). As one example of a closer case considering indirect profits, return to the Google Books saga: Judge Leval was not convinced by appeals to Google’s indirect profit from the Library Program, despite Google’s obvious status as a for-profit corporation.¹⁴⁶ In contrast, any library is likely to fall on the opposite side of the spectrum as a nonprofit institution prized for its commitment to accessible education, research, and scholarship. To penalize libraries for seeking voluntary donations or wider membership is to subvert the real focus of “commercial use” as copying for direct financial profit, like the commercial license in *Warhol*.

The Eleventh Circuit case of *Cambridge University Press v. Patton* also provides persuasive precedent for the notion that free educational content is not commercial. In that case, publisher plaintiffs alleged that the unlicensed use of book excerpts in Georgia State University (GSU) course reserves were “for-profit” because GSU “exploited” the works without “paying the customary price”; in *Hachette*, the district court placed a similar emphasis on the notion that the IA has not paid the “customary

142. Brief for Amici Curiae American Library Association and Association of Research Libraries in Support of Neither Party, *supra* note 126, at 3.

143. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d. Cir. 1994) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 105 S. Ct. 2218, 2231 (1985)) (emphasis added).

144. *Id.*

145. *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 384 (S.D.N.Y. 2023).

146. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 219 (2d Cir. 2015).

price” for licensed e-books.¹⁴⁷ The *Cambridge* publishers also alleged a similar construction of indirect profit, arguing that GSU indirectly profited from student tuition and from skirting the customary licensing fees. The Eleventh Circuit rejected the circular argument that a failure to license leads to unacceptable indirect profit, because if any failure to pay a licensing fee (“allowing the user to keep his or her money”) implies commercial benefits, “no use could qualify as ‘nonprofit’ under the first factor.”¹⁴⁸ The Eleventh Circuit then credited GSU’s educational status as a counterweight to the publishers’ allegation of commerciality:

There is no evidence that Defendants capture significant revenues as a direct consequence of copying Plaintiffs’ works. At the same time, the use provides a broader public benefit—furthering the education of students at a public university.

Thus, we find that Defendants’ use of Plaintiffs’ works is of the nonprofit educational nature that Congress intended the fair use defense to allow under certain circumstances.¹⁴⁹

All in all, Congress could not have intended to imbue nonprofit and educational institutions with a presumption of commercial use for simply seeking to fund their own operations through avenues that have no direct nexus to their copying.

An argument that digital lending by libraries is a commercial practice is particularly troubling given the difficult realities that libraries face in buying works in the first place. The amici draw attention to the prohibitive costs of licensed e-books, for which libraries receive no special discount (and, sometimes, libraries are categorically restricted from licensing).¹⁵⁰ Recall the example above that one school library reported having to pay \$27 per student per year to procure a digital copy of *The Diary of a Young Girl* that would work on their students’ tablets during the COVID-19 pandemic, while libraries were shuttered and the physical copies that they owned and paid for (at a one-time price that libraries and schools would not have to re-pay each year) sat untouched on the shelves.¹⁵¹ Big publishers—operating within an industry that has been largely consolidated to a small number of key players—have “virtually no incentive to offer competitive rates and terms to libraries,” and the already-set licensing agreements offer virtually no room for negotiation on price.¹⁵²

147. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1265 (11th Cir. 2014); *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 383 (S.D.N.Y. 2023).

148. *Cambridge Univ. Press*, 769 F.3d at 1265.

149. *Id.* at 1267.

150. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 18; see also Geoffrey A. Fowler, *Want To Borrow that E-book from the Library? Sorry, Amazon Won't Let You.*, WASH. POST (Mar. 10, 2021), <https://www.washingtonpost.com/technology/2021/03/10/amazon-library-ebookmonopoly/> [<https://web.archive.org/web/20250304004514/https://www.washingtonpost.com/technology/2021/03/10/amazon-library-ebook-monopoly/>].

151. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 14.

152. *Id.* at 15.

Therefore, to conclude that libraries and other nonprofit institutions are acting in pursuit of some private financial interest when they seek to fundraise for their own operations and inventories is to add insult to injury.

Ultimately, a determination of commerciality matters towards the final outcome of a fair use case. In *Google LLC v. Oracle America, Inc.*, the Supreme Court explained that commerciality has significant weight in the analysis: "There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use."¹⁵³ The district court's finding that the IA's CDL is commercial raises red flags not only within the facts of the case but also for future liability against libraries and nonprofit organizations writ large. Therefore, even if the IA's copying practices were not sufficiently transformative, the Second Circuit and other future courts should reject the notion that libraries' use of strictly-tailored CDL is indirectly "commercial" and re-clarify the nexus between the alleged copying and a direct financial reward. The capacity for libraries to freely pursue their mission and provide equitable access to educational resources is at stake in this determination, and to penalize their nonprofit activities with infringement liability goes against the purposes of American copyright law.

IV. CONCLUSION: PURPOSES OF COPYRIGHT

The protection of controlled digital lending by libraries is an essential step in supporting and sustaining the viability of libraries in the digital age. The plethora of amicus briefs filed in support of the IA and of libraries writ large demonstrates the urgency of the matter: Concerned librarians, copyright scholars, law professors, think tanks, free speech advocates, and even authors (whom the publisher-plaintiffs purport to speak on behalf of) worried that a sweeping ruling against the IA would generate far-reaching, negative implications for those beyond the parties in front of the Second Circuit. Even if the IA itself went too far with its relatively uncapped CDL schemes, the prospect of opening up any library using CDL to uncertainty and liability is indeed cause for alarm. Beyond the transformativeness and non-commerciality of strictly-tailored CDL by a library, discussed *supra* in Part III, courts addressing their potential liability would do well to look back at how libraries have served the purposes of copyright throughout history and how they continue to do so today.

Libraries serve the public interest; they expand public accessibility without substantially inhibiting authors' incentives to create. For that, our copyright system should operate to protect and reward them, not to inhibit their technological development and ensure their demise. This argument is rooted in the history and purpose of American copyright law, as "early state and federal government actors were concerned that without copyright the public would not have access to authors' writings"; early authors were hesitant to release their books due to common practices

153. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (2021).

of piracy not by libraries but by *publishers*.¹⁵⁴ One prominent author and poet, Joel Barlow, wrote a passionate letter to the Continental Congress addressing why he thought that the states needed legal copyright protection:

I take the liberty of addressing you on a subject in which I conceive the interest & honor of the Public is very much concerned. I mean the embarrassment which bears upon the interests of literature & works of genius in the United States . . . Indeed we are not to expect to see any works of considerable magnitude . . . offered to the Public till [copyright] security be given. There is now a Gentleman in Massachusetts who has written an Epic Poem, entitled “The Conquest of Canaan”, a work of great merit, & will certainly be an honor to his country. It has lain by him, finished, these six years, without seeing the light; because the Author cannot risque [sic] the expences [sic] of the publication, sensible that some ungenerous Printer will immediately sieze [sic] upon his labors, by making a mean & cheap improvision, in order to undersell the Author & defraud him of his property.¹⁵⁵

As a fledgling nation seeking to establish its “literary reputation” and expand its educational system, the United States pursued copyright protection with a core goal of incentivizing the release of new works of great merit, like that of the “Gentleman in Massachusetts,” for public consumption.¹⁵⁶ Private profit was a “by-product”—not the “primary justification”—for the earliest time-limited monopolies that copyright protection conferred on authors.¹⁵⁷ Powerful publishers who now seek to flip the narrative and protect authors from public consumption by library patrons might seem to forget why American authors like Barlow advocated for copyright law in the first place (*see* “ungenerous Printer[s]”).¹⁵⁸ Barlow also worried that *The Conquest of Canaan* would never see the light of day, just as many print titles may gather dust on the shelves and be forgotten today if libraries cannot harness their technological abilities to make all of their owned print books accessible and borrowable through CDL.¹⁵⁹ Ultimately, though, publishers and libraries simply should not be legal adversaries over the issue of controlled digital scans—as I argue

154. Brief for Former and Current Law Library Directors, Professors, and Academics as Amici Curiae in Support of Defendant-Appellant at 14–15, *Hachette Book Grp. Inc. v. Internet Archive*, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

155. *Letter from Joel Barlow to the Continental Congress (1783)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (Lionel Bently & Martin Kretschmer eds.), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783b [<https://perma.cc/8YSY-NSJW>] [https://web.archive.org/web/20240519183012/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783b]. (With all due credit to the law library directors, professors, and academics’ brief for pointing me to this helpful primary source, which I quote in greater detail here.)

156. *Id.*

157. Brief for Former and Current Law Library Directors, Professors, and Academics as Amici Curiae in Support of Defendant-Appellant, *supra* note 154, at 17.

158. Letter from Joel Barlow, *supra* note 155.

159. Indeed, the only way that I could find and access Barlow’s letter was a digital scan (with a typed transcription to help with the cramped eighteenth-century cursive), although I recognize that this centuries-old source is a quintessential public domain work.

above, these scans are more likely to serve different purposes and different markets than to act as market-ruining substitutes for licensed e-books or print books.

Day in and day out, American libraries are indeed developing their CDL programs with successful results. According to prominent library organizations, over 100 libraries across the country now rely on CDL to distribute their legally owned collections—"particularly for out-of-print works, reserves, or for works that are less frequently [commercially] circulated."¹⁶⁰ Numerous state and federal government bodies have listened to libraries' needs and supported the process, just as they listened to authors' concerns over piracy and incentives for public consumption in those early historical years: For example, in 2023, the federal agency in charge of library grants (the Institute for Museum and Library Services) awarded the Boston Library Consortium with a nearly-\$250,000 grant to support the library's "Controlled Digital Lending for Libraries and Library Consortia" project.¹⁶¹ New library organizations supporting CDL have cropped up to run seminars, conduct research, and connect libraries, while vendors and software developers have joined the fray to assist with "writing grants, developing software, and streamlining systems for CDL integration into library work."¹⁶²

In short, the development of productive frameworks and networks supporting CDL—through both public and private avenues—is well underway. Legal rulings should not operate to impede this innovative inertia and halt libraries in their tracks. Doing so would not square with copyright law's core purposes and its long history of exceptions for education, research, and scholarship. By categorically delineating CDL as commercial and non-transformative, the district court's *Hachette* ruling has brought digital lending technology to the legal forefront and raised real questions about publishers' abilities to impose liability on libraries and chill their efforts to stay accessible and relevant in an increasingly digital age. As long as libraries work diligently to maintain procedural and technological safeguards in their CDL programs—capping lending at 1:1 ratios, keeping print copies out of circulation while scans are lent out, maintaining strong DRM technology on their scans, only scanning physical books that they legally own, and more—courts should allow them to operate these programs without liability or fear thereof. We are experiencing a moment in which libraries face many obstacles—both physical (natural disasters, pandemics) and political (book-banning, lack or revocation of funding). Libraries' continued success as an irreplaceable educational institution may well depend on their capacity to transform and innovate without undue liability.

160. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 8.

161. *Id.* at 8–9.

162. *Id.* at 10.

