

THE COLUMBIA JOURNAL OF
LAW *& the* **ARTS**

VOL. 49

NO. 1

Copyright © 2025 by The Trustees of Columbia University in the City of New York

CONTENTS

ARTICLES

Detachable Speech: Artistic Expression, Same-Sex Weddings, and the First Amendment <i>Paul Szynol</i>	1
Them's Fighting Prayers <i>Neal C. Ternes & Joseph Sabin</i>	43
Bridging the Workers' Data Value Gap in the Age of Corporate Automation <i>Mattias Rättzén</i>	71

NOTES

Once Upon an Infringer: What Similarity Analysis Can Learn From Structural Folkloristics <i>Madeline C. Mooney</i>	165
--	-----

*Produced and published by members of the Columbia Journal of Law & the Arts.
All members are students at Columbia Law School.*

Columbia Journal of Law & the Arts (JLA)
Columbia Law School
435 West 116th Street
New York, NY 10027
jla-editor@law.columbia.edu
<http://www.lawandarts.org>

*ISSN (Print): 1544-4848
ISSN (Online): 2161-9271*

Cite this volume: 49 COLUM. J.L. & ARTS.

Typeset in Crimson Text.

Printed in the United States of America.

Printed by Sheridan PA, a CJK Group Company

Sheridan
450 Fame Avenue
Hanover, PA 17331

The views expressed herein are those of the contributors and do not reflect the views of Columbia Law School.

The author of each article in this issue has granted permission for copies of that article to be made for not-for-profit classroom use.

THE COLUMBIA JOURNAL OF **LAW***&the* **ARTS**

VOL. 49

NO. 1

VOL. 49 MASTHEAD (2025–2026)

BOARD OF EDITORS

Kaleigh Q. McCormick
Editor-in-Chief

Bowen Dunnan
Executive Articles Editor

Esmeralda Hernandez
*Executive Production
Editor
& Submissions Editor*

Erika Herrmann
*Executive Managing Editor
& Articles Editor*

Lucia Bautista
Executive Online Editor

Madeline Mooney
*Executive Notes Editor
& Articles Editor*

Emilia Antiglio
*Symposium Editor
& Submission Editor*

Claire Kuo
*Executive Symposium
Editor
& Articles Editor*

Nina Chandra
*Executive Submissions
Editor
& Notes Editor*

Rachel Altemose
Articles Editor

Aman Sankineni
Notes Editor

EDITORIAL STAFF MEMBERS

Paul Akere
Jacob Gibbs
Alexandra Michael
Alex Bigman
Nik Gieler
Katherine Ok
Isabelle Cashe
Jared Harbour

Feiyang Peng
Lydia Kim
Gabrielle Pesantez
Agathe Duriez
Oliver Kneen
Charlotte Rezak
Shenel Ekici-Moling
Lia Lin

Ruth Samuel
Adelle Else
Duncan McCabe
Alexa Shyama
Emanuela Gallo
Micah Mekbib
Samantha To

BOARD OF ADVISORS

Professor Shyamkrishna Balganesh
Professor Jane C. Ginsburg
Trey Hatch, Esq.

Philippa Loengard, Esq.
David Leichtman, Esq.

Detachable Speech: Artistic Expression, Same-Sex Weddings, and the First Amendment

Paul Szynol*

In the last decade, courts have consistently upheld objections to public accommodation laws that would obligate unwilling vendors to provide services for same-sex weddings. At the heart of these disputes is the claim that, when they are required to provide wedding services to same-sex couples, vendors who oppose same-sex marriage are unconstitutionally forced to endorse them. These cases typically classify wedding content, such as photography and wedding cakes, as a form of artistic, personal, and ideological speech that endorses same-sex weddings. In this paper, I argue that wedding content not only isn't a form of endorsement, but that it is altogether devoid of political, religious, and ethical values attributable to the service provider. Rather than personal and ideological speech, wedding content is a form of speech that I call detachable speech—that is, speech which is intentionally designed for adoption by another party, and, conversely, isn't meant to convey the creator's personal ideology. From advertisements and marketing materials to sitcoms and commissioned film screenplays, content generators who work in creative industries routinely and voluntarily create expression that doesn't reflect their personal values. Indeed, in some cases, detachable content—e.g., a greeting card or a sign meant for the front lawn—is fungible and arguably doesn't even become speech until it's adopted by another party. Similarly, wedding content is not designed to convey the service provider's values any more than a greeting card reflects the manufacturer's personal point of view. Wedding content, rather than ideological speech, is a form of speech widget produced to specification. The recognition that wedding content is not an endorsement substantially weakens the First Amendment challenge to public accommodation laws in connection with same-sex weddings.

* Adjunct Professor, University of Michigan Law School. JD, Yale Law School. Sincere thanks to Richard Albert, Kate Andrias, James Elkins, Judge Judith Levy, Jud Mathews, Saira Mohamed, Robert Post, and Elizabeth Sepper for their thoughtful and generous feedback, and the Colum. J.L. & Arts editors for their very helpful input.

© 2025 Szynol. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction, provided the original author and source are credited.

TABLE OF CONTENTS

Introduction.....	3
I.Detachable and Adoptable Speech	6
A. Content Generators.....	6
B. Market Participation and Foreseeable Speech.....	9
II.Value Neutrality.....	13
A. Artistic Expression	13
1. Photographs, Videos, and Personal Narratives	15
2. Invitations, Websites, and Information	19
3. Cakes and Cultural Meanings	19
4. Customization.....	21
B. Speech Widgets	22
III.The Endorsement Fallacy	23
A. The Idiosyncrasy of the Endorsement Question	24
B. The Illusion of Endorsement.....	27
1. Participation versus Proximity	28
2. Mistaken Motivation	30
3. Mistaken Attribution	31
C. The Irony of the Endorsement Argument	38
IV.Judicial Review	39
V.Conclusion.....	41

INTRODUCTION

When Justice Kagan's senior undergraduate thesis, entitled "To The Final Conflict: Socialism in New York City, 1900–1933," came to light shortly after her nomination to the Supreme Court, some opponents of her appointment seized the opportunity to characterize her as a raging and incorrigible socialist unsuitable for the country's highest court.¹ The most pithy objection came from Michael Savage, a radio commentator: "She's a New York City radical, Marxist lawyer through and through."² On the other side of the skin-deep and short-lived debate, a *Los Angeles Times* opinion piece pointed out that Chief Justice Roberts had written a senior thesis entitled "Marxism and Bolshevism: Theory and Practice" without generating any opprobrium.³ More to the point, Professor Sean Wilentz, Justice Kagan's college-thesis advisor at Princeton, clarified for the *New York Times* what pundits chose to ignore, viz., that writing a college paper on a topic is not quite the same thing as embracing it: "She was interested in it," he said. "To study something is not to endorse it."⁴

A parallel failure to differentiate endorsement from other forms of engagement underlies the recent spate of public accommodation cases that have validated some contractors' refusal to provide services to same-sex couples. Parties who challenge public accommodation laws routinely cloak their legal arguments in artistic expression rhetoric. In a recent Second Circuit case, for example, the plaintiff alleged "that the wedding photographs she creates for her customers are

1. See Hendrik Hertzberg, *Elena Kagan's Not-So-Final Conflict*, NEW YORKER (June 3, 2010), <https://www.newyorker.com/news/hendrik-hertzberg/elena-kagans-not-so-final-conflict> [<https://web.archive.org/web/20250918153343/https://www.newyorker.com/news/hendrik-hertzberg/elena-kagans-not-so-final-conflict>]; Andrew Leonard, *Elena Kagan's "Socialist" College Thesis*, SALON (May 17, 2010), https://www.salon.com/2010/05/17/elena_kagan_socialist_college_thesis/ [https://web.archive.org/web/20250918153824/https://www.salon.com/2010/05/17/elena_kagan_socialist_college_thesis/] ("This has led, predictably, to an uproar on right-wing blogs, where it is being argued with great passion that 'To the Final Conflict: Socialism in New York City, 1900–1933' is proof that Elena Kagan is herself a living, breathing socialist.").

2. Robert Farley & Angie Drobnic Holan, *Taking Stock of Elena Kagan's Scholarly Work*, POLITIFACT (May 18, 2010), <https://www.politifact.com/article/2010/may/18/elena-kagan-scholarly-work/> [<https://web.archive.org/web/20250918160053/https://www.politifact.com/article/2010/may/18/elena-kagan-scholarly-work/>].

3. Johanna Neuman, *Socialism and the Supreme Court—Kagan, Roberts, and the Search for College Papers*, L.A. TIMES: VOICES (May 17, 2010), <https://www.latimes.com/archives/blogs/top-of-the-ticket/story/2010-05-17/opinion-socialism-and-the-supreme-court-kagan-roberts-and-the-search-for-college-papers> [<https://web.archive.org/web/20250918160741/https://www.latimes.com/archives/blogs/top-of-the-ticket/story/2010-05-17/opinion-socialism-and-the-supreme-court-kagan-roberts-and-the-search-for-college-papers>].

4. Sheryl Gay Stolberg, Katharine Q. Seelye & Lisa W. Foderaro, *A Climb Marked by Confidence and Canniness*, N.Y. TIMES (May 10, 2010), <https://www.nytimes.com/2010/05/10/us/politics/10kagan.html> [<https://web.archive.org/web/20251004045444/https://www.nytimes.com/2010/05/10/us/politics/10kagan.html>].

customized expressions of her own artistic vision.”⁵ Ostensibly neutral but ideologically allied amicus briefs have followed suit—one, for example, called wedding-cake bakers “cake artists.”⁶

By invoking cultural associations with art and artists, the argument that the disputed content is a work of art emphasizes the personal aspect of the disputed expression—artists speak their minds, after all, and they resent government interference with their message.⁷ The artistic expression classification is not only an effective rhetorical device, however, but also—so far—a winning litigation tactic, for the characterization elevates the nature of the content to expression protected by the First Amendment.

This rhetorical and theoretical maneuver—i.e., the emphasis on the expressive aspect of otherwise commercial services—validates an anxiety that Justice O’Connor voiced many years ago in the context of a freedom-of-association dispute, viz., “that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination.”⁸ The emphasis on artistic expression makes it easier for putative speakers to challenge public accommodation laws, on the theory that public accommodation laws require artists to generate messages that, against their will, suggest an endorsement of same-sex marriage—which, in turn, amounts to compelled speech, and therefore a violation of the First Amendment. According to Judge Tymkovich: “Taken to its logical end, the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government.”⁹

The emphasis on personal and ideological expression has allowed courts to place wedding content squarely in the line of cases that start with *Minersville Sch. Dist. v. Gobitis*¹⁰ and *Barnette*,¹¹ two Supreme Court opinions that, nearly a century ago, turned on the requirement that school children salute the American flag. *Barnette* (which overturned *Minersville* after widespread criticism) provides the clearest—and, arguably, the most egregious—example of speech compulsion, one that not only forces someone to speak against their will in a purely mechanical sense, but also reaches into the depths of one’s belief system. The requirement infringes on personal autonomy, and, when the speech is a forced and false affirmation, compromises freedom of thought and belief.¹²

5. *Emilee Carpenter, LLC v. James*, 107 F.4th 97, 97 (2d Cir. 2024).

6. Brief for Cake Artists as Amici Curiae in Support of Neither Party at 1, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018) (No. 16-111).

7. See, e.g., *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

8. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 632 (1984) (O’Connor, J., concurring).

9. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1204–1205 (10th Cir. 2021) (Tymkovich, J., dissenting), *rev’d*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

10. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

11. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

12. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” (quoting *Barnette*, 319 U.S. at 637)).

Courts have placed same-sex wedding cases in the *Barnette* framework on the grounds that public accommodation laws force service providers to endorse same-sex weddings. Just last year, the Supreme Court reasoned that “Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe.”¹³ Another opinion reasoned that the “[o]rдинance, as applied by the City, compels Plaintiffs to express a message celebrating same-sex marriage that violates their religious belief.”¹⁴ And another concluded that because “the government can’t force” service providers of faith to “create an artistic expression that celebrates a marriage that their conscience doesn’t condone,” we have a First Amendment violation.¹⁵

But placing wedding cases in the *Barnette* framework is predicated on the erroneous view that wedding content is the service provider’s ideological expression. Below, I challenge the notion that wedding content is personal, value-laden, artistic speech that forces some service providers to express their viewpoints against their will.

In Part I, I argue that wedding content, rather than a vehicle for personal expression, is a form of speech which is by design generated for adoption by another party. Creative industries routinely rely on content creators to generate material that doesn’t reflect the creator’s personal values, and, conversely, creators routinely and willingly generate materials that don’t reflect their personal values. Service providers voluntarily enter the open market to generate foreseeable types of content that will subsequently be used by other parties.

In Part II, I argue that wedding content is devoid of the service provider’s personal values. In *Barnette*, the affected parties had “been forced to affirm or reject” a belief.¹⁶ Service providers do neither. Wedding content is closer to what I call a speech widget—a largely generic and fungible speech object designed for adoption by another party rather than for the expression of the service provider’s personal ideology.

In Part III, I address the endorsement argument in particular, and argue that equating wedding content with endorsement is just as exaggerated as the argument that Justice Kagan was a budding socialist because she chose to research the subject. Service providers don’t endorse a wedding simply because they document it through photos of it or because they provide cakes for the event.

In Part IV, I argue that wedding content, as a voluntarily generated, non-ideological speech widget, should be subject to—and survive—intermediate scrutiny.

13. 303 *Creative*, 600 U.S. at 578–79.

14. *Brush & Nib Studios, LC v. City of Phx.*, 247 Ariz. 269, 301 (2019).

15. *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov’t*, 479 F. Supp. 3d 543, 548–49 (W.D. Ky. 2020), *vacated and remanded sub nom. Nelson v. Louisville-Jefferson Cnty. Metro Gov’t*, No. 22-5884, 2024 WL 1638860 (6th Cir. Apr. 16, 2024).

16. *Wooley v. Maynard*, 430 U.S. at 720.

I. DETACHABLE AND ADOPTABLE SPEECH

Two features of wedding content and its production are significant to note at the outset. First, wedding content is deliberately generated on behalf of the commissioning party. Second, service providers who generate wedding content voluntarily participate in the applicable market. Both aspects of wedding content undermine the compelled-speech challenge.

A. CONTENT GENERATORS

When I hold a sign at a parade,¹⁷ or when I put a sign on my front lawn,¹⁸ I am clearly speaking. In contrast, when I make a sign that I know someone else will hold to express an opinion, I am creating content that a third party will use to speak. I myself am not speaking. Instead, I am generating content that will become someone else's speech. I might or might not agree with whatever the sign says, but the sign isn't meant to express my opinion. I create it without adopting it as my own speech. In this sense, my speech is detachable and detached from me.

Moreover, until someone takes up the sign, it's arguably not speech at all, but merely an object with words on it. If I see a sign lying on the ground, I'll assume someone somewhere at some time expressed an opinion, but I won't know *whose* opinion it is. It's speech without a speaker. A birthday card is adopted as speech by the person who buys it, signs it, and gifts it. It becomes the adopting entity's speech. It's my cousin wishing me a happy birthday, not Hallmark. While on the shelf, the greeting card is adoptable speech in search of a speaker.

Viewed this way, detachable speech is a product generated for adoption by another person or entity. From marketing materials to wedding cakes, a whole array of content is routinely generated for someone else's use. The principle can be applied to a whole range of commissioned work.

Of course, it's easy enough to imagine a financial sponsor who allows the creator to exercise unbounded expressive discretion. In that case, however, the generated content is not detachable speech at all, but personal speech facilitated through a grant or private investment—essentially no different than a research grant given to support an academic project. In other words, it's not speech-for-hire, but speech that, while dependent on the sponsor's economic support in the sense of enabling the researcher to generate it, nevertheless remains the speaker's property and essentially a personal project and fully personal expression.

In a commissioned work scenario, moreover, the *carte blanche* arrangement is rare. Whether the detachable speech sees light of day is often decided by the commissioning entity. Studios, for instance, can simply refuse to release a film that's

17. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

18. See, e.g., *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 ("Baldwin and Cannon were supporters of Melvin Kerwin, candidate for the Redwood City Council in the 1974 election, and were prevented by the challenged ordinance from erecting signs of the size and at the locations they desired in support of Kerwin's candidacy.").

finished.¹⁹ (Indeed, film contracts often contain language that makes it clear the production company is under no obligation to use the provided content.) Until such imprimatur, at least vis-à-vis the rest of the world, detachable speech arguably isn't even speech yet, but raw material that might become speech in the future, if and when it is released into the wild.

A recent same-sex wedding case emphasized contractual language that ostensibly granted the service provider absolute artistic freedom: "Although a client may ultimately reject Plaintiffs' work, the contract states that Brush & Nib 'retains complete artistic freedom with respect to every aspect of the design's and artwork's creation.'"²⁰ But the artistic freedom argument is undermined in the same sentence, which acknowledges that the commissioning party holds ultimate veto power. Just as Ford let folks have their cars painted any color they liked as long as it was black, the commissioning party lets the artist speak freely—as long as the speech is in line with the commissioning party's values.

Production companies not only decide whether a film will see the light of day, moreover, but typically retain final cut over the film. In effect, even if other people generate the actual content, the production company decides what the finished work looks like—which may include rejecting raw footage, rejecting works in progress, or combining different edits. Discussing copyright's widely used work-for-hire doctrine,²¹ here is how the president of the Dramatists Guild of America explained the arrangement in the context of theater: "A screenwriter is an employee. The work he does is work for hire. From the beginning, he understands that everything he writes will immediately become the property of the studio which employs him. As legal author of the film, that studio can change the content of the screenwriter's script at will. His pirate captain can become a teenage runaway, his teenage runaway a Cocker Spaniel, his original story, set in Boston during the War of 1812, can be moved to the fifth moon of Jupiter."²²

Courts recognize that commissioned content necessitates leaving room for speech that doesn't reflect the content-generator's views. A state court addressing a workplace harassment claim reasoned that "[w]hen, as here, the workplace product is the creative expression itself, free speech rights are paramount. The *Friends* writers were not renting cars and talking about sex on the side. They were

19. See T.M. Brown, "Want to See This Film? Movie Studios Won't Let You," N.Y. TIMES MAG. (Apr. 9, 2024), <https://www.nytimes.com/2024/04/09/magazine/why-coyote-vs-acme-was-not-released.html> [<https://web.archive.org/web/20251004052411/https://www.nytimes.com/2024/04/09/magazine/why-coyote-vs-acme-was-not-released.html>].

20. Brush & Nib Studios, LC v. City of Phx., 247 Ariz. 269, 276 (2019).

21. The work-for-hire doctrine, via an employment arrangement or written contract, transfers ownership from the creator to the commissioning entity. See U.S. COPYRIGHT OFF., *Circular 30: Works Made for Hire* (Aug. 2024), <https://www.copyright.gov/circs/circ30.pdf> [<https://web.archive.org/web/20251007002418/https://www.copyright.gov/circs/circ30.pdf>].

22. John Weidman, *The Seventh Annual Media and Society Lecture: Protecting the American Playwright*, 72 BROOKLYN L. REV. 639, 641 (2007).

writing adult comedy; sexual repartee was an integral part of the process.”²³ Speech that would be harassment in a workplace if it truly reflected the speaker’s values became tolerable creative fancy—and subject to a different legal standard—when it was generated as part of the creative process. In other words, writers were expected to put their personal values aside precisely to participate in the generation of detachable speech.

The generation of detachable speech is thus predicated on the creator’s willingness to surrender personal values in the service of creating content that the commissioning party requests or approves. The distinction is important, for even if the content of a sign remains the same, the relationship of each entity to the sign’s message is not. It’s the difference between a church posting signs to promote itself and a company creating signs for an organization that supports a political candidate.²⁴ In *Members of City Council v. Taxpayers for Vincent*, the Court addressed the constitutionality of a municipal code that regulated the posting of signs on public property.²⁵ Taxpayers for Vincent, “an unincorporated political association formed to support the candidate,” lost the right to advocate on behalf of a politician whom it endorsed.²⁶ The Candidates’ Outdoor Graphics Service (COGS)—“a political sign service company” that over the years had created signs for hundreds of candidates—lost the right to engage in its sign-manufacturing business.²⁷ While COGS’ business involved speech, it wasn’t speech that reflected COGS’ political position. It was detachable speech generated for another party’s use. Taxpayers for Vincent supported their candidate. COGS, on the other hand, made the sign that Taxpayers for Vincent used to express its viewpoint.²⁸ Arguably, moreover, the signs didn’t become speech until they were used by Taxpayers for Vincent to endorse its candidate.²⁹

Establishment Clause case law provides another useful parallel. Here, for the purposes of sending a message, the government—rather than the content creator—is the speaker. “The purpose prong of the endorsement test focuses on the intent of the government actor in displaying a particular work of art, not on the intent of the artist in creating the work.”³⁰ In other words, the party that displays the content supplants the party that creates the content.

23. *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 297 (2006) (Chin, J., concurring).

24. *See, e.g., Reed v. Town of Gilbert*, Ariz., 576 U.S. 155 (2015).

25. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

26. Brief for Appellee at 4, *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (No. 82-975). .

27. *Id.*

28. *See Candidates’ Outdoor Graphic Serv. v. City & Cnty. of San Francisco*, 574 F. Supp. 1240, 1242 (N.D. Cal. 1983) (After San Francisco “informed COGS that it would remove any signs found to be in violation of the ordinance and would impose civil and criminal sanctions on the individuals responsible for posting such signs,” COGS challenged its inability to distribute the signs, not its inability to endorse specific candidates.).

29. *See, e.g., Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976).

30. *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1225 n.3 (10th Cir. 2005).

It's easy enough to think of other—more banal—examples. Marketing content that extols a product's features reflects the company's marketing preferences rather than the values of the advertising agency's employees or independent contractors. A film editor working on a movie trailer might not agree with the premise, the storyline, the cinematography, or the quality of the acting. But the editor would nevertheless be expected to put those views aside to generate a compelling trailer for the project. There is no expectation or obligation that the editor believe in any aspect of the film, or that the trailer reflect the editor's personal views. The goal is to create the most compelling—and, presumably, marketable—version of the trailer, not to convey the editor's beliefs. In some instances, moreover, the content might have no values at all, such as the design for a bar of soap or a soda bottle.

Detachable speech doesn't mean the creator can't include subjectively satisfying and personal content or personal ideology. "It would be of course ridiculous to suppose that Gogol spent ten years merely in trying to write something that would please the Church. What he was really trying to do was to write something that would please both Gogol the artist and Gogol the monk."³¹ But the content creator, as a condition of engaging in the transaction, voluntarily surrenders its vision to satisfy the commissioning entity's preferences. The final work may contain personal preferences and values, but solely at the commissioning party's pleasure. Despite the inclusion of personal preferences, the speech remains detachable by virtue of the relationship between the parties.

B. MARKET PARTICIPATION AND FORESEEABLE SPEECH

From a robust free speech perspective—i.e., one that maximizes unfettered speech—the idea of detachable speech looks like a compromise, or a mild form of compulsion. After all, I might still be saying something I don't want to say, or not saying everything I want to say, or not saying something in the way I'd like to say it—and the commissioning entity might veto some, most, or all of what I say. But detachable speech is inherently neither compulsion nor compromise. We routinely join organizations—e.g., churches and workplaces—and participate in events—e.g., parades—that either limit what we can say or require us to say some things. In other words, we often voluntarily enter situations where expression is regulated, either negatively (a restriction) or positively (a requirement). Similarly, the generation of speech is a widespread and voluntary form of free market participation. In those scenarios, the speech isn't compelled, since we've chosen to participate in those regulated speech environments. Put another way, while "all speech inherently involves choices of what to say and what to leave unsaid," and while ideally that choice would always be solely ours, periodically we voluntarily choose to say what someone else wants to hear.³²

31. VLADIMIR NABOKOV, *NIKOLAI GOGOL* 114 (Penguin Classics, 2011).

32. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n.*, 475 U.S. 1, 11 (1986).

The production of wedding content therefore differs markedly from the scenario in *Barnette*, which turned, in part, on the fact that the salute was an unavoidable requirement.³³ Participating in the open market for wedding content is entirely elective. A service provider chooses to enter the market for wedding content and, by virtue of such entry, chooses to create content for someone else's use. Since the service provider makes a free choice, there is no infringement on the service provider's personal autonomy. On the contrary, participation in the market is itself an exercise of personal autonomy. It may be true "that the government cannot compel an artist to paint."³⁴ In the context of wedding cases, however, service providers freely choose to engage in that very activity.

Participation in the market, in turn, requires compliance with applicable regulatory frameworks, including "neutral and generally applicable public accommodations law."³⁵ The Supreme Court affirmed almost a century ago that voluntary but conditioned participation is not compulsion, and courts have kept this strand of reasoning alive since then.³⁶ Compliance with public accommodation laws—not unlike, for instance, compliance with financial regulatory requirements³⁷—is simply a condition of participating in the market.

Participation in the wedding content market also means working with foreseeable types of speech. If I elect to make a commissioned documentary about a politician, I will reasonably anticipate the need to address topics relevant to that person's time in office. Whether I agree with the official's policies doesn't matter. I will set aside my personal beliefs so I can cover those foreseeable elements of the story. Similarly, if I elect to enter the wedding content market, I can expect to work with heterosexual couples and same-sex couples, just like I might reasonably expect some couples to want color photographs and some couples to want black and white photographs. This is all, in short, foreseeable speech.

Thomas v. Review Bd. of Ind. Emp. Sec. Div. offers an illustrative counterpoint.³⁸ In *Thomas*, a Jehovah's Witness who had taken a job in a roll foundry was subsequently transferred to a department that produced materials used in

33. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) ("In the present case attendance is not optional.").

34. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019).

35. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n.*, 584 U.S. 617, 631 (2018).

36. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 265 (1934) ("[T]here is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants."); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011) ("ASU has conditioned participation in the clinical practicum and graduation on compliance with the ACA Code of Ethics, and Keeton, having voluntarily enrolled in the program, does not have a constitutional right to refuse to comply with those conditions.").

37. See, e.g., 15 U.S.C. § 78o(a)(1) (making it unlawful for "any broker or dealer . . . to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.").

38. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981).

warfare.³⁹ In other words, there was a material and unexpected pivot in the type of work Thomas was expected to do: He signed up for one thing but ended up doing something else. Courts treat same-sex weddings as if they, too, amounted to a material departure from the type of services that content providers are expected to perform. But wedding content service providers know in advance that same-sex couples may want to hire them. The suggestion that public accommodation laws “compel a business owner to engage in activity she would not otherwise engage in” may be true if service providers hadn’t chosen to participate in the wedding-content market in the first place.⁴⁰ Precisely by virtue of participating in the market, however, providers have voluntarily chosen to engage in this very activity.

Voluntary market participation doesn’t create a limitless obligation to create any requested content. We can reasonably argue there is compulsion if the service provider were asked to create something unlawful.⁴¹ If I demand that a baker make a cake designed to conceal cocaine, for example, the service provider has a reasonable basis for objecting. We can also reasonably argue there is compulsion if the content is clearly beyond expected limits. For example, a doctor might object to speech that requires taking an ethical—rather than purely medical—position on a procedure.⁴² But same-sex weddings are an expected part of the market for wedding content. They are, in other words, well within the scope of foreseeable transactions and foreseeable speech.

Voluntary market participation overrides the arguments that the service provider is forced to talk about something that the service provider considers distasteful,⁴³ or that public accommodation laws violate the service provider’s right

39. *Id.* at 709 (“Thomas terminated his employment in the Blaw-Knox Foundry & Machinery Co. when he was transferred from the roll foundry to a department that produced turrets for military tanks.”).

40. *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 106 (2d Cir. 2024).

41. This issue was raised in passing in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n.*, 584 U.S. 617, 633 (2018) (“Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.”).

42. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014) (“The Requirement is quintessential compelled speech. It forces physicians to say things they otherwise would not say. Moreover, the statement compelled here is ideological; it conveys a particular opinion.”).

43. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023) (“Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require ‘an unwilling Muslim movie director to make a film with a Zionist message,’ or ‘an atheist muralist to accept a commission celebrating Evangelical zeal,’ so long as they would make films or murals for other members of the public with different messages” (quoting *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, J., dissenting)); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (affirming the principle that “the speaker has the right to tailor the speech” isn’t limited to a specific opinion, and “applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid”). Parallel reasoning comes up in same-sex wedding cases. *See, e.g.*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019) (“By treating

to silence.⁴⁴ The First Amendment discretion “to choose when to speak and what to say” includes the discretion to participate in contexts that shape the contours of our speech.⁴⁵ If I choose to teach First Amendment law, I can’t, on the grounds that it’s compelled speech, skip over cases whose content or outcome I don’t like. Voluntary market participation also undermines the argument that public accommodation laws require service providers “to, at the very least, acknowledge that same-sex weddings are ‘weddings’ and suggest that they should be celebrated.”⁴⁶ Acknowledging something is not compulsion. If I work in a car factory and help manufacture airbags, I have to acknowledge that car accidents happen, even if, for obvious reasons, I dislike them. The First Amendment doesn’t sterilize exposure and protect people from unwanted realities, especially those people who voluntarily participate in an open market that generates content connected to those realities. So, that perspective simply doesn’t provide a persuasive theoretical basis for a compulsion argument.

In short, because I, as a wedding vendor, voluntarily participate in the open market for wedding content, I’ve chosen to speak on these foreseeable topics. I am not, as the majority suggested in *303 Creative*, conscripted to convey the government’s message.⁴⁷ I am merely required to comply with the regulatory framework that applies to the market in which I’ve freely chosen to participate. Put another way, there is no infringement on my autonomy. On the contrary, I exercised my autonomy precisely by participating in the market. The generation of wedding content for same-sex weddings is foreseeable speech that the provider elects to produce by virtue of participating in the market in the first place. The fact that a provider dislikes an aspect of a freely chosen vocation is not a cognizable legal harm. The remedy, of course, is not to participate in the market at all. As then-Judge Holmes put it, “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”⁴⁸

the Larsens’ choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages—the MHRA does both at once.”).

44. See *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 538 (1922) (referencing “the general private right of silence”); see also *Est. of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348 (1968) (“The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”).

45. *Telescope Media Grp.*, 936 F.3d at 747.

46. *Masterpiece Cakeshop*, 584 U.S. at 660–61.

47. *303 Creative*, 600 U.S. at 592 (“Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government’s preferred messages. That would not respect the First Amendment; more nearly, it would spell its demise.”)

48. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

II. VALUE NEUTRALITY

Below, I argue that wedding content is devoid of the service provider's personal ideology. Detachable speech may contain creative speech and ideological speech, as in the case of a commissioned film that reflects the filmmaker's personal political and ethical positions on any range of topics. But wedding content doesn't fall into the category of ideological speech. To the extent service providers generate what courts have called artistic expression, such expression is limited to design, aesthetics, and fact, none of which is ideological.

A. ARTISTIC EXPRESSION

The argument that wedding content is a form of artistic expression has been widely embraced by judges and, in some cases, by the plaintiffs and defendants themselves. As the Second Circuit summed up *303 Creative*, "the parties had all but agreed that Smith was an artist and that her websites were her artistic mediums of expression."⁴⁹ Indeed, opinions on both sides of the debate default to the categorization: "florists use artistic skills and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic."⁵⁰

Courts haven't provided a very robust basis for the classification. One opinion asserts that "the First Amendment 'unquestionably' protects art, music, and literature. And among those expressive art forms, long-protected by the First Amendment, is photography."⁵¹ But, of course, the fact that some photography might be art protected by the First Amendment doesn't mean all photographs protected by the First Amendment are art. Something can't be art simply by virtue of its genre. Notably, legislation that looks at photography specifically—viz., the Visual Artists Rights Act—doesn't take such a broad view of photography. On the contrary, VARA limits its reach to photographs "produced for exhibition purposes only."⁵² Wedding photographs are mementos that live in our home archives, not artworks destined for museum walls.

Another opinion makes a weak attempt at providing a basis by referencing the photographer's artistic skill.⁵³ But artistic skill itself is nowhere defined. What is it? How do we identify it in wedding content? Is artistic skill—whatever it is—enough to turn something into art? Yet another opinion bases the categorization partly on the provider's self-perception: "Phillips considers himself an artist. . . . Behind the

49. *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 104 (2d Cir. 2024).

50. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 71 (N.M. 2013).

51. *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't*, 479 F. Supp. 3d 543, 557 (W.D. Ky. 2020), *vacated and remanded sub nom. Nelson v. Louisville-Jefferson Cnty. Metro Gov't*, No. 22-5884, 2024 WL 1638860 (6th Cir. Apr. 16, 2024) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)).

52. 17 U.S.C. § 101.

53. *Chelsey Nelson Photography*, 479 F. Supp. 3d at 549 ("She takes engagement and wedding photos with artistic skill.").

counter Phillips has a picture that depicts him as an artist painting on a canvas.”⁵⁴ Of course, except under the loosest—and therefore meaningless—standard, identifying as an artist doesn’t make you one.

More generally, even if we concede that wedding content requires some creativity, the presence of minimal creative choices doesn’t *ipso facto* convert a work to artistic expression. The distinction between creative content and art has been deeply entrenched in copyright law since, in 1903, Justice Holmes warned against the risks that come with judges having the power to decide whether something qualifies as a work of art.⁵⁵ And, as one court observed, “not everything labeled or hawked as art falls within it.”⁵⁶ Or, as an earlier—and less charitable—opinion framed it, “[t]he commercialized exploiter of cheap, unartistic material can often be found concealed behind a shield of art.”⁵⁷ While it would be unduly harsh to categorize all wedding content as “cheap, unartistic material,” calling it art quickly starts to look like an exaggeration.

And the deeper suggestion that artistic content is inherently ideological expression irrevocably tethered to one’s core values also doesn’t withstand closer scrutiny. Art *may* reflect personal values. Charles Mingus said, “I’m trying to play the truth of what I am. The reason it’s difficult is because I’m changing all the time.”⁵⁸ And in the sense that a photograph I take reflects the way I see something, the image is, of course, personal. Robert Mapplethorpe said, “I’m looking at things the way I look at them, no matter what they are.”⁵⁹ But that doesn’t automatically mean I’m revealing my deepest thoughts or values. When I take a photo of something, I am taking it from my perspective, but I’m not telling you what I think about its content. As someone who studied socialist thought might know, in his 1888 letter to Margaret Harkness (colloquially known as his “realism letter”), Friedrich Engels wrote that “the more the opinions of the author remain hidden, the better for the work of art.”⁶⁰ To sustain realism, Engels reasoned, Balzac “was compelled to go against his own class sympathies and political prejudices,” an aspect of his writing that Engels thought was “one of the greatest triumphs of Realism, and one of the grandest features in old Balzac.”⁶¹ In other words, creators

54. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 584 U.S. 617, 658 (2018).

55. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

56. Mastrovincenzo v. City of N.Y., 313 F. Supp. 2d 280, 287 (S.D.N.Y. 2004), *vacated and remanded*, 435 F.3d 78 (2d Cir. 2006).

57. Commonwealth v. Blumenstein, 153 A.2d 227, 241 (Pa. 1959) (Bell, J., dissenting).

58. NAT HENTOFF, AT THE JAZZ BAND BALL: SIXTY YEARS ON THE JAZZ SCENE 214 (2010).

59. Gary Indiana, *Robert Mapplethorpe: Intimacy, Comfort, and the Erotic in Portrait Photography*, INTERVIEW MAG. (Jan. 1, 1988) <https://bombmagazine.org/articles/1988/01/01/robert-mapplethorpe> [<https://web.archive.org/web/20251004063848/https://bombmagazine.org/articles/1988/01/01/robert-mapplethorpe>].

60. Tony Davies, *Marxist Aesthetics*, in LITERARY THEORY AND CRITICISM: AN OXFORD GUIDE 140, 144 (2006).

61. GEORG LUKÁCS, GERMAN REALISTS IN THE NINETEENTH CENTURY xxv (Jeremy Gaines & Paul Keast trans., Rodney Livingstone & MIT Press eds. 1993).

routinely distance themselves from their personal ideologies in order to generate content that conveys other values or no values at all.

Even if we accept the view that *some* wedding content is a form of artistic self-expression, moreover, for compelled speech purposes the classification is doctrinally irrelevant. To the extent there is any artistic self-expression in wedding content, it occurs at the level of non-ideological design, aesthetics, and fact.⁶² The choices that service providers make are decorative (in connection with cakes), aesthetic (in connection with photographs and videos), decorative and factual (in connection with wedding websites and invitations), and aesthetic and factual (in connection with videography). None of these aspects of wedding content seeks to inform or persuade in connection with “particular views on economic, political, or social issues,”⁶³ which means the service provider isn’t compelled to engage in speech to which the provider ideologically objects.⁶⁴ Of course, the service provider doesn’t like the subject matter, but, as noted earlier, wedding content generators voluntarily choose to provide services that extend to same-sex couples, which undermines the compulsion argument.

1. Photographs, Videos, and Personal Narratives

Photographers and videographers choose what to shoot, how to shoot it, and how to put it all together. “They exercise creative control over the videos they produce and make ‘editorial judgments’ about ‘what events to take on, what video content to use, what audio content to use, what text to use . . . , the order in which to present content, [and] whether to use voiceovers.’”⁶⁵ In other words, putting together a photo edit or a video of a wedding requires a multitude of personal choices. Superficially, wedding photography and videography fit into the same tier as a commissioned film that reflects the filmmaker’s point of view. But that categorization overlooks a critical distinction between them. A film, even a commissioned one, leaves ample room for ideological expression. Indeed, the reason why some directors are hired is precisely because of their ability to bring that unique personal vision. In contrast, while wedding photography (including videos) is personal speech in the sense of aesthetics (i.e., how to frame the images)

62. The Ninth Circuit made the distinction between aesthetics and ethical views as distinct forms of expression in *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (“A painting may express a clear social position, as with Picasso’s condemnation of the horrors of war in *Guernica*, or may express the artist’s vision of movement and color, as with ‘the unquestionably shielded painting of Jackson Pollock’” (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)).). See also *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1040 (9th Cir. 2015) (finding that “some elements in Choudhury’s Sequence may reflect his aesthetic preferences”).

63. See Robert Post, *Public Accommodations and the First Amendment: 303 Creative and “Pure Speech”*, 2024 SUP. CT. REV. 251, 290–300 (2024) (arguing that the wedding website at the heart of the 303 Creative litigation is not designed to contribute to public discourse).

64. See *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (“[I]n order to make out a valid compelled-speech claim, a party must establish (1) speech; (2) to which he objects; that is (3) compelled by some governmental action.”).

65. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 747–48 (8th Cir. 2019).

and presentation (i.e., which images to include and in what order), it's not self-expression that conveys the provider's ideological—i.e., ethical, political, or religious—viewpoints. Wedding images, as noted above, simply document an event.

Indeed, photography as a medium makes it difficult to convey an ethical stance. Consider, for example, a photo of two advertisements in 1920:⁶⁶



Did the photographer like or dislike Coca-Cola? We have no idea. Moreover, how would a photo that disapproves of these two trademarks be different from a photo that approves of them?

66. [Sign by water] (photograph 1920), <https://idn.duke.edu/ark:/87924/r4610xj8g> [<https://web.archive.org/web/20251004103546/https://repository.duke.edu/id/ark:/87924/r4610xj8g>] (last visited Oct. 7, 2025).

In contrast, consider contemporary caricatures of Lincoln, and the variance in northern and southern drawings—for example, his inauguration:⁶⁷



The image from the South was decidedly different from its northern counterpart. What would a comparable shift in perspective look like in the context of wedding images? On what basis could a court differentiate an approving image from one that condemns the event? How could a wedding photo ever approximate the vicious messages in *Snyder v. Phelps*, or convey milder forms of disapproval?⁶⁸

One could argue that these are isolated images, and that a larger edit would convey a larger message and create more room for the provider's views. But that argument goes too far, too. The narrative conveyed by wedding images mirrors the structure of the event. Wedding photographers and videographers don't have the freedom to tell a story that goes beyond industry parameters and the shape of the ceremony. A larger edit might convey more details about the wedding, but it will not convey more—or any—insight about the service provider's own ideology.

Of course, aesthetics can convey a personal and ideological message.⁶⁹ But wedding photography and videography, as a matter of genre, require allegiance to

67. Thomas Nast, *The President's Inaugural* (cartoon, 1861), <https://www.lincolncollection.org/collection/creator-author/item/?cs=T&creator=Thomas+Nast&item=109019> [<https://web.archive.org/web/20251007175527/https://www.lincolncollection.org/collection/creator-author/item/?cs=T&creator=Thomas+Nast&item=109019>] (last visited Oct. 7, 2025).

68. *Snyder v. Phelps*, 562 U.S. 443 (2011) (addressing the right to picket at a U.S. Marine's funeral).

69. See WASSILY KANDINSKY, *CONCERNING THE SPIRITUAL IN ART* 29 (Hilla Rebay ed., Solomon R. Guggenheim Foundation pub. 1946) ("It is never literally true that any form is meaningless and 'says nothing.' Every form in the world says something. But its message often fails to reach us, and even if it does, full understanding is often withheld from us.").

a set of visual industry norms.⁷⁰ Rather than experimenting with aesthetics or challenging established artistic discourse, providers deliberately operate within those industry parameters. If I were to take photos from highly unusual angles or ship wedding photos through x-ray machines around the world—to highlight the fragility of marriage and love, for example, or to suggest that a couple’s marriage is tarnished in some way—most couples would be disappointed in the results. (Indeed, couples have complained about far less; in one instance, a dispute erupted over the photographs’ tint.)⁷¹ Deviation from industry norms would not only be market suicide, moreover, but, if a wedding photographer or videographer were to step outside of industry conventions, the result would arguably no longer be wedding content at all, but, as a genre, something altogether different.

In sum, because of constraints imposed by convention, industry norms, and the event itself, wedding photographers don’t have the discretion to convey a personalized message that reflects approval, disapproval, or any other ideological stance. Judicial suggestions to the contrary notwithstanding, wedding

70. For some examples of what happens when photographers don’t quite meet those standards, see D.L. Cade, *Insurance Company Cites Photography as Most Common Wedding Vendor Issue*, PETAPIXEL (Apr. 18, 2013), <https://petapixel.com/2013/04/18/insurance-company-finds-photography-is-most-common-wedding-vendor-issue> [web.archive.org/web/20250920004743/https://petapixel.com/2013/04/18/insurance-company-finds-photography-is-most-common-wedding-vendor-issue/]; *Are These the Worst Wedding Pictures Ever?*, TELEGRAPH (Apr. 20, 2012), <https://www.telegraph.co.uk/news/picturegalleries/howaboutthat/9216685/Are-these-the-worst-wedding-pictures-ever.html?frame=2198771> [web.archive.org/web/20250920004713/https://www.telegraph.co.uk/news/picturegalleries/howaboutthat/9216685/Are-these-the-worst-wedding-pictures-ever.html?frame=2198771]; Alicia Tan, *Singaporean Bride Posts Terribly Shot Wedding Pictures, Hilarious Memes Ensue*, MASHABLE (Apr. 12, 2016), <https://mashable.com/article/singapore-bad-wedding-pics#x4mxRWCb7uqq> [web.archive.org/web/20250920004655/https://mashable.com/article/singapore-bad-wedding-pics#x4mxRWCb7uqq]; D.L. Cade, *Couple Pays £750 for “The Worst Wedding Photos Ever,”* PETAPIXEL (Apr. 23, 2012) <https://petapixel.com/2012/04/23/couple-pays-750-for-the-worst-wedding-photos-ever> [web.archive.org/web/20250920004720/https://petapixel.com/2012/04/23/couple-pays-750-for-the-worst-wedding-photos-ever/].

71. Amaris Encinas, *“Sepia Bride” Photography Goes Viral on Social Media, Sparks Debate About Wedding Industry*, USA TODAY (Jul 5, 2024) <https://www.usatoday.com/story/life/fashion/2024/07/05/sepia-bride-wedding-photographer-explained/74295124007/> [web.archive.org/web/20250920004220/https://www.usatoday.com/story/life/fashion/2024/07/05/sepia-bride-wedding-photographer-explained/74295124007/]; u/Puzzleheaded-Bid-963, REDDIT (r/photography), *“Sepia” bridal photography drama*, (Jun, 28, 2024 at 13:34 ET), https://www.reddit.com/r/photography/comments/1dqny5x/sepia_bridal_photography_drama/?rdt=46236 [web.archive.org/web/20250920004150/https://www.reddit.com/r/photography/comments/1dqny5x/sepia_bridal_photography_drama/?rdt=46236]; Sophie Sahara, *The Sepia Bride Controversy: A Lesson for Photographers*, NARRATIVE (Aug. 9, 2024) <https://narrative.so/blog/the-sepia-bride-controversy-a-lesson-for-photographers> [https://web.archive.org/web/20250920004043/https://narrative.so/blog/the-sepia-bride-controversy-a-lesson-for-photographers].

photographers and videographers are not auteurs who generate unique and personal narratives.⁷²

2. Invitations, Websites, and Information

Rather than artwork imbued with the service provider's values, invitations and websites are closer to what the Second Circuit called "dry information, devoid of advocacy, political relevance, or artistic expression."⁷³ Invitations and wedding websites might reflect choices about design choices—color scheme, font—but those electives don't rise to the level of personal ideology. Content on wedding websites may be assembled by the service provider, in turn, but the information is factual and doesn't convey the service provider's personal point of view. In that sense, wedding websites are not much different from the *New York Times* wedding announcements—which themselves *are* categorically different from opinion pieces that exist precisely to reveal the writer's ideological stance. Both invitations and wedding websites follow convention by virtue of including categories of information, and neither leaves room for personal ideology. Moreover, no visitor to a wedding website reads about the couple out of curiosity about what the service provider thinks. It's simply detachable speech that, with the couple's imprimatur, will be made public on the couple's behalf.

3. Cakes and Cultural Meanings

In the case of cakes, the informational dimension found in photographs, videos, wedding websites, and invitations is altogether missing. Instead, we are left with pure design choices. In *Masterpiece Cakeshop*, the Court aggressively advanced the argument that wedding cakes are nevertheless primarily expressive because they are dense with symbolism.⁷⁴ The dubious suggestion to the contrary notwithstanding, wedding cakes are designed to be eaten as part of the ceremony.⁷⁵ Even though wedding cakes may be expressive, they are inescapably and primarily functional. As one article put it, "[a] wedding cake should be two

72. See, e.g., *303 Creative LLC v. Elenis*, 600 U.S. 570, 579, (2023) ("All of the text and graphics on these websites will be 'original,' 'customized,' and 'tailored' creations.").

73. *Universal City Studios v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001).

74. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 659 (2018) (Thomas, J., concurring in part) ("[A] wedding cake inherently communicates that 'a wedding has occurred, a marriage has begun, and the couple should be celebrated.' Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, '[w]edding cakes are so packed with symbolism that it is hard to know where to begin.'" (quoting MICHAEL KRONDL, *SWEET INVENTION: A HISTORY OF DESSERT* 321 (2011))).

75. *Id.* at 659 ("Although the cake is eventually eaten, that is not its primary purpose.").

things: delicious *and* beautiful,”⁷⁶ while another listed recommended flavors.⁷⁷ Unlike a painting, no one takes a wedding cake home to display it as an artwork. Of course, some cake might end up in someone’s fridge, but a next-day sugar fix only underscores the fact that cakes are functional objects whose function persists well beyond the day of the celebration. The suggestion that cakes are primarily expressive or works of art is, well, hard to swallow.

Even if we agree with the claim that cakes are more expressive than edible, however, the meaning of wedding cakes is cultural, and something that inheres in the wedding cake by virtue of it being a wedding cake, not something that a service provider creates and adds to the cake along with flour and sugar. In other words, cultural meaning is distinct from personal meaning. The fact that I personally manufacture something with cultural meaning doesn’t mean the meaning is personal or that I embrace whatever values such cultural object contains. Unless altered⁷⁸ or presented in specific contexts,⁷⁹ the American flag symbolizes the nation no matter who stitches it together. Similarly, an engineer who designs an ambulance siren—which has a clear symbolic message, too—is not communicating a personal message, or speaking every time the siren turns on. A bouquet of flowers thrown at a wedding has traditional symbolism, too, but we couldn’t persuasively argue that it’s the florist’s speech. Creating an object that is imbued with cultural meaning is not the same thing as conveying your personal ideology. Because a cake conveys a cultural message rather than the service provider’s own view, it’s not “his message.”⁸⁰

In *Masterpiece Cakeshop*, the Supreme Court noted that “the baker likely found it difficult to find a line where the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message.”⁸¹ Since there is no personal, ideological expression here at all, however, the line simply doesn’t exist—which may account for the difficulty.

76. Gabriella Rello Duffy, *Sixty-five Beautiful Wedding Cake Ideas to Inspire Your Own Big-Day Dessert*, BRIDES (Mar. 28, 2025), <https://www.brides.com/gallery/the-50-most-beautiful-wedding-cakes> [web.archive.org/web/20250920003937/https://www.brides.com/gallery/the-50-most-beautiful-wedding-cakes].

77. Cathryn Haight, *Your Guide to Foolproof Wedding Cake Flavors (and the Best Fillings)*, THE KNOT (Sept. 26, 2025), <https://www.theknot.com/content/wedding-cake-flavors> [https://web.archive.org/web/20251007183019/https://www.theknot.com/content/wedding-cake-flavors].

78. See, e.g., *Spence v. Washington*, 418 U.S. 405, 405 (1974) (“Appellant displayed a United States flag, which he owned, out of the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape.”).

79. See, e.g., Jasper Johns, *Flag* (painting 1954–55), <https://www.moma.org/collection/works/78805> (last visited Oct. 7, 2025).

80. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 660 (Thomas, J., concurring in part).

81. *Id.* at 633.

4. Customization

In *Masterpiece Cakeshop*, the Court noted that the plaintiff “sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it.”⁸² The judicial emphasis on customization superficially sustains the argument that the service provider is endorsing a particular wedding and a particular couple. Indeed, that’s the argument that the Supreme Court embraced in *303 Creative*: “Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create ‘customized and tailored’ expressive speech for each couple.”⁸³ Customization also implies that the content is individualized and therefore personal and artistic speech. As the Second Circuit described *it*, the “factual stipulations confirmed that Smith was not merely selling off-the-shelf commercial products. Instead, she was creating original, tailored, and expressive works that all parties agreed communicated Smith’s particular personal views.”⁸⁴

But the suggestion that customization turns wedding content into personal ideological speech is grossly exaggerated. Speech and objects can be personalized—in the sense of addressing someone’s needs or preferences or in the sense that suits the circumstance—without being personal—in the sense of reflecting someone’s values. Financial advice is personalized, for instance, but, rather than the advisor’s ideology, the personalization reflects the advisee’s priorities, the advisor’s expertise, and market realities.⁸⁵ Similarly, wedding content is personalized in the sense that it refers to a particular couple, but it’s not personalized in the sense that it reflects the provider’s viewpoints. Indeed, customization provides additional support for the view that wedding content reflects the couple’s preferences rather than the provider’s personal ideology.

Customization also points to another, noteworthy feature of wedding content—viz., the reusability of many of its constituent elements. Invitations of necessity include standard types of information—date, time, location—and wedding websites emphasize the same categories of facts—for example, when the couple met. Wedding photography and videos document the same types of content—e.g., a close-up of the wedding rings—and leverage industry standard visuals. Wedding cakes routinely rely on recycled designs and content; indeed, one article identified and recommended eighty common wedding cake phrases.⁸⁶ This practice is no

82. *Id.* at 658 (Thomas, J., concurring in part).

83. *303 Creative LLC v. Elenis*, 600 U.S. 570, 593 (2023).

84. *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 104 (2d Cir. 2024).

85. *See, e.g., CFTC v. Vartuli*, 228 F.3d 94, 107 (2d Cir. 2000) (“The advice was not personal in the sense that the defendants learned about the needs, resources and sophistication of individual clients and gave individualized advice based upon that information.”).

86. Ariel Taranski, *Eighty Wedding Cake Quotes to Make Your Cake Even Sweeter*, THE KNOT (Jan. 2, 2025), <https://www.theknot.com/content/word-cake-toppers> [https://web.archive.org/web/20250919185154/https://www.theknot.com/content/word-cake-toppers].

different than reusable code—an aspect of software that is often captured by “pre-existing technology” clauses in technology services agreements.⁸⁷ Or, to use an example closer to home, it’s no different than lawyers using templates when drafting agreements.⁸⁸

In effect, service providers often simply adjust pre-existing models to generate customized content. Like a personalized Christmas stocking that uses the same design but changes the name stitched on to it, wedding content is routinely (re)created with templates that are tweaked to reflect each couple’s specific details. Even though it is customized for a particular couple, however, wedding content is still a form of generic manufacture. In this sense, wedding content is closer to Levittown than it is to ideological and highly individualized self-expression.

B. SPEECH WIDGETS

If wedding content is neither art nor personal expression, what type of speech is it? It’s not commercial speech, at least in the sense that it’s not an invitation to an economic transaction, or information about a product.⁸⁹ Professional speech—to the extent it’s recognized as a category at all—may be the wrong categorization if professional speech requires the provision of sound advice by a licensed profession.⁹⁰ A commissioned artist is not licensed, and not only doesn’t give advice that has to be sterilized for dangerous misinformation (contrary to bad lawyers and bad doctors).⁹¹ It’s not speech meant to contribute to public discourse and influence public opinion, which would provide a basis for its “pure speech” classification.⁹² Nor is it a question of disclosure, since there is nothing for service

87. See, e.g., *Env’t Tectonics Corp. v. Walt Disney World Co.*, No. 05-6412, 2008 WL 821065, at *10 (E.D. Pa. 2008) (“By suggesting that Article 28 confers ‘unfettered’ ownership rights to Disney, however, defendant ignores the provision in Article 28(e) expressly reserving ownership of pre-existing concepts and technology to ETC.”).

88. See, e.g., *Sullivan as Tr. of Sylvester L. Sullivan Grantor Retained Income Tr. v. Max Spann Real Est. & Auction Co.*, 251 N.J. 45, 53 (2022) (“A blank template of the Contract for Sale of Real Estate included in the Property Information Package reiterates information provided in the Bidder Registration Form.”).

89. See *Zillow, Inc. v. Miller*, 126 F.4th 445, 460 (6th Cir. 2025) (“[W]hen determining whether speech is properly characterized as ‘commercial,’ we consider whether the speech involves an advertisement, whether it references a product, and whether the motivation for speaking is economic.”).

90. See, e.g., *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013) (“[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary.”).

91. See, e.g., *Conant v. McCaffrey*, No. C 97-00139 WHA, 2000 WL 1281174, at *13 (N.D. Cal. Sept. 7, 2000), *aff’d sub nom. Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (“A lawyer, for example, may not counsel a client to violate the law or to commit perjury. The First Amendment would not prohibit the lawyer’s disbarment for doing so. A doctor, to take another example, may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor’s loss of license for doing so.”).

92. See Post, *supra* note 63, at 3.

providers to disclose.⁹³ So, where—if anywhere—in the closed First Amendment universe of speech types does it fit?

In *Stevens*, the Supreme Court expressed a lack of appetite for creating new categories of speech,⁹⁴ but we can fit wedding content into one that's been identified by lower courts, viz., as non-ideological expressive merchandise.⁹⁵ In *Muhammad Temple of Islam-Shreveport v. Shreveport*, the court reasoned that, unlike newspapers, “the sale of fish by plaintiffs is a purely commercial activity, designed to provide a means of support to themselves and to their creed, rather than a religious activity designed only to spread the word of their religion.”⁹⁶ Service providers don't generate wedding content “to spread the word of their religion”⁹⁷ or to promote any point of view—against their will or otherwise. To the extent a speech widget conveys any values at all—e.g., the message on top of a cake or its cultural meaning—it reflects the values of the commissioning couple, not the values of the service provider. Given the nature and means of production, we can think of wedding content as speech widgets—viz., expressive objects that contain fungible elements, are devoid of the service provider's personal ideology, and are designed for (sometimes expressive) use by the adopting party. In other words, despite its expressive dimension, wedding content is quite the “ordinary commercial good” after all.⁹⁸

III. THE ENDORSEMENT FALLACY

The majority of same-sex wedding opinions embrace the view that service providers generate wedding content which celebrates—and therefore endorses—marriage. In *Masterpiece Cakeshop*, the vendor, a cake baker, “explained his belief that ‘to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.’”⁹⁹ In another case, the photographer's “Complaint explains several messages of her wedding photography. For example, she “‘believes that by capturing and conveying engagements, weddings, and marriages between one man and one woman, she can show the beauty and joy of marriage as God intends it and she can convince her clients, their friends, and the public that this type of marriage should be pursued

93. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (describing “a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available”).

94. *United States v. Stevens*, 559 U.S. 460, 465 (2010).

95. *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 85 n.4 (2d Cir. 2006) (“The term ‘expressive merchandise’ was used by the *Bery* Court as a kind of shorthand for the larger First Amendment question presented in that case—namely, whether the sale or dissemination of certain merchandise was predominantly expressive.” (citing *Bery v. City of N.Y.*, 97 F.3d 689, 695 (2d Cir. 1996))).

96. *Muhammad Temple of Islam-Shreveport v. City of Shreveport, La.*, 387 F. Supp. 1129, 1136 (W.D. La. 1974).

97. *Id.*

98. *303 Creative LLC v. Elenis*, 600 U.S. 570, 593 (2023).

99. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 627 (2018).

and valued.”¹⁰⁰ The Eighth Circuit adopted the same argument about narrative endorsement in connection with wedding videos: “The Larsens, who own and operate Telescope Media Group, use their ‘unique skill[s] to identify and tell compelling stories through video,’ including commercials, short films, and live-event productions.”¹⁰¹ And, of course, that’s the sticking point when it comes to same-sex weddings: “It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith.”¹⁰²

These arguments, like the argument that a service provider “exercises artistic license to create customized and original images that express her religious views about marriage,” are exaggerated.¹⁰³ As I argued in Section I, from the voluntary market participation perspective, even if wedding content is an endorsement, it’s an endorsement I’ve agreed to generate, simply by virtue of my market participation. In that sense, there is no compulsion. But, as I argued in Section II, the ideologically empty nature of wedding content is incompatible with the endorsement argument—content that is ideologically neutral *ipso facto* can’t be an endorsement. Below, I look at the endorsement argument from a number of other perspectives, and argue that, in each instance, the equivalency between wedding content and endorsement doesn’t withstand closer scrutiny.

A. THE IDIOSYNCRASY OF THE ENDORSEMENT QUESTION

Art debates typically turn to familiar topics: interpretation and meaning, or the importance of the audience’s interaction with the work. The question of endorsement, in contrast, is not one that attracts much—if any—attention. When, in the 1980s, the Guerrilla Girls challenged the Metropolitan Museum of Art’s gender-biased curation via massive billboards, they asked pointedly whether “women have to be naked to get into the Met. Museum,” not whether the Met endorses female nudity.¹⁰⁴ When David Hammons, also in the 1980s, installed “How Ya Like Me Now?”, an image that showed Rev. Jesse Jackson as a white man, no one asked if Hammons’s art endorsed racism. Indeed, when the Mnuchin Gallery held a five-decade retrospective of his work, the press release mentioned Hammons’s examination of “the role that race plays in American society,” but—conspicuously, from our perspective—said nothing about endorsement.¹⁰⁵

100. Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov’t, 479 F. Supp. 3d 543, 557–58 (W.D. Ky. 2020), *vacated and remanded sub nom.* Nelson v. Louisville-Jefferson Cnty. Metro Gov’t, No. 22-5884, 2024 WL 1638860 (6th Cir. Apr. 16, 2024).

101. Telescope Media Grp. v. Lucero, 936 F.3d 740, 747 (8th Cir. 2019).

102. *Masterpiece Cakeshop*, 584 U.S. at 650.

103. Emilee Carpenter, LLC v. James, 107 F.4th 92, 101 (2d Cir. 2024).

104. See Guerrilla Girls, *Do Women Have to Be Naked to Get into the Met. Museum?* (lithograph 1989), <https://www.metmuseum.org/art/collection/search/849438> [https://web.archive.org/web/20251008014704/https://www.metmuseum.org/art/collection/search/849438] (last visited Oct. 7, 2025).

105. See Press Release, Mnuchin Gallery, David Hammons: Five Decades (March 15, 2016), <https://www.mnuchingallery.com/exhibitions/david-hammons#tab:slideshow;tab-1:slideshow>

Nor do scholars who focus on art look for endorsement. Indeed, long ago Immanuel Kant argued that art as art shouldn't have a function.¹⁰⁶ On this view, to be appreciated as art something must be appreciated for its inherent aesthetic qualities, not for its practical purpose.¹⁰⁷ Art pieces are seen as autonomous aesthetic objects, not as objects that serve a purpose, whether that purpose is to light a room, enhance the flavor of our foods, or, most to the point, endorse an idea or an event.

In short, the question of endorsement, at least in connection with art, is not a question that hangs in the air outside of courtrooms. On the contrary, it's a specifically jurisprudential line of inquiry. Even in the context of legal disputes, moreover, the question of endorsement is rare, and no less so in the context of compelled-speech cases. Endorsement is a key variable in the *Barnette* scheme, where the specific question was whether the government had forced Jehovah's Witnesses to engage in speech that betrayed their core values, in violation of the principle, to use a more-recent formulation, that the government can't "force persons to express a message contrary to their deepest convictions."¹⁰⁸ But the question of endorsement doesn't surface in other compelled-speech cases. Some compulsion cases turn on the requirement to disclose information,¹⁰⁹ for example, or on the question of financial enablement,¹¹⁰ control over property,¹¹¹ or control

[<https://web.archive.org/web/20250919185709/https://www.mnuchingallery.com/exhibitions/david-hammons#tab:slideshow;tab-1:slideshow>].

106. The concept is known as "disinterestedness." Like virtually all else in art theory, this view has been challenged. See, e.g., Nicholas F. Stang, *Artworks Are Not Valuable for Their Own Sake*, 70 J. AESTHETICS & ART CRITICISM 271, 271 (2012).

107. As one commentator summarized Kant's position, "[i]n a judgment about the beauty of a particular rose, for instance, I do not take into consideration its possible usefulness to me." See Jane Kneller, *Kant's Concept of Beauty*, 3 HIST. PHIL. Q. 311, 317 (1986).

108. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 780 (2018) (Kennedy, J., concurring); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

109. See, e.g., *CFTC v. Vartuli*, 228 F.3d 94, 108 (2d Cir. 2000) ("The disclosure requirement at issue here was reasonably related to the government's interest in preventing consumers from being deceived by misleading hypothetical statistical presentations that, as Congress observed, could lead to inefficiencies in the commodities markets that are contrary to the public interest.").

110. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977) ("[E]very employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues."); *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990) ("Petitioners, members of the State Bar of California, sued that body claiming its use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment of the United States Constitution."); *Janus v. AFSCME, Council 31*, 585 U.S. 878, 884–85 (2018) (concerning forced union subsidization by employees "even if they choose not to join and strongly object to the positions the union takes in collective-bargaining and related activities").

111. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 76 (1980) (deciding "whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights").

over an event,¹¹² none of which ask whether the speaker is forced to endorse something.

Legal disputes that do consider the question of endorsement, in turn, whether in compelled speech cases or otherwise, typically don't center on artworks. Endorsement is usually expressed through sponsorships,¹¹³ commentary,¹¹⁴ fundraising,¹¹⁵ signs,¹¹⁶ or campaigns.¹¹⁷ Even when photographs are implicated in some form of endorsement analysis, artworks are not.¹¹⁸ Cases that focus on art *per se* might ask about a work's meaning, as was the case in *Warhol*,¹¹⁹ or on whether something is defamatory or obscene, as was the case with Robert Mapplethorpe's photographs,¹²⁰ but they don't try to determine whether the work itself endorses a particular point of view.

There is one notable exception—viz., cases that center on the Establishment Clause. At least until its official doctrinal funeral in 2022,¹²¹ under the *Lemon* test in general¹²² (and Justice O'Connor's endorsement test in particular)¹²³ courts looked for the government's endorsement of religion, which, in some instances, could be

112. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995) (“Since every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.”).

113. See, e.g., Timothy Karoff, *In “Very Abnormal” Development, Longtime Sponsors Bail on San Francisco Pride*, SFGATE (Mar. 17, 2025), <https://www.sfgate.com/sf-culture/article/longtime-sponsors-bail-on-sf-pride-20226582.php> [<https://web.archive.org/web/20250320220635/https://www.sfgate.com/sf-culture/article/longtime-sponsors-bail-on-sf-pride-20226582.php#expand>].

114. See, e.g., Jordan Valinsky, *Ben & Jerry’s Says Its CEO Was Fired for the Company’s Political Posts*, CNN BUSINESS (Mar. 19, 2025), <https://www.cnn.com/2025/03/19/food/ben-and-jerrys-ceo-lawsuit/index.html> [<https://web.archive.org/web/20250918000034/https://www.cnn.com/2025/03/19/food/ben-and-jerrys-ceo-lawsuit/index.html>].

115. See, e.g., *Protectmarriage.com v. Bowen*, 830 F. Supp. 2d 914, 917 (E.D. Cal. 2011) (“In support of the Proposition 8 campaign, such committees raised in excess of \$42 million from more than 46,000 individual contributors.”).

116. See, e.g., *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

117. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (determining constitutionality of a state law prohibiting candidates for judicial office from announcing views on disputed legal or political issues).

118. See, e.g., *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1008 (9th Cir. 2001) (Abercrombie included in its catalog a photo of two surfers who took issue with the inclusion of their image in the publication. The Ninth Circuit thought that “[a] jury could reasonably find that Abercrombie intended to indicate to consumers that these legendary surfers were endorsing Abercrombie’s merchandise.”).

119. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (deciding whether Andy Warhol’s appropriation of a photograph conveyed new meaning under the fair use doctrine).

120. *City of Cincinnati v. Contemp. Arts Ctr.*, 566 N.E.2d 207 (Ohio Mun. Ct. 1990).

121. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (“[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.”).

122. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

123. See *Lynch v. Donnelly*, 465 U.S. 668 (1984).

through artworks.¹²⁴ Beyond the Establishment Clause cases, however, when the question of endorsement comes up in connection with art, it's usually not a question of whether the artist, work, or owner endorses a particular point of view, but whether someone else endorses the work itself.¹²⁵ If someone's mural is included in a film,¹²⁶ for example, or if someone's name is in a movie's title,¹²⁷ have those individuals endorsed the movie?

By asking whether an artist or artwork endorses a particular viewpoint, same-sex wedding cases ask a unique and odd question. And the odd question has produced odd answers.

B. THE ILLUSION OF ENDORSEMENT

An act which is politically neutral—such as solicitation for political donations¹²⁸—may become politically charged by virtue of its association with political speech. While a signature itself is not ideological, it may become ideological by virtue of being tethered to a political petition.¹²⁹ In *McIntyre v. Ohio Elections Comm'n*, the Supreme Court struck down a requirement to attach one's name to leaflets precisely to avoid linkage between political speech and the speaker's

124. See *Weinbaum v. City of Las Cruces*, N.M., 541 F.3d 1017, 1021 (10th Cir. 2008) (“Paul Weinbaum, a resident of the Las Cruces area, brought two separate suits under 42 U.S.C. § 1983 claiming that Las Cruces, New Mexico (the ‘City’) and the Las Cruces Public School District (the ‘District’) have violated the Establishment Clause of the First Amendment by displaying, in various forms, three crosses on public property.”).

125. See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994, 1001 (2d Cir. 1989) (asking whether the real people named in the title of a film could be understood to endorse the movie); *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 618 (2006) (“[A]ny public confusion that Kirby endorses SC5, based on similarities between her and Ulala, would arise from a false assumption that the game could not contain a character resembling Kirby without her imprimatur.”); *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001) (finding that inclusion of a photograph in a catalogue could lead consumers to believe that the surfers in the image endorsed the clothing line); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (asking whether a university endorsed the artwork, not whether the artwork endorsed a particular point of view); *LMNOPI v. XYZ Films, LLC*, 449 F. Supp. 3d 86, 95 (E.D.N.Y. 2020) (“Plaintiffs have not alleged a single plausible fact that the inclusion of the Mural in the Film would serve to confuse consumers that Plaintiffs sponsored, endorsed, or were otherwise associated with the Film.”).

126. *LMNOPI*, 449 F. Supp. 3d at 95.

127. *Rogers*, 875 F.2d 994.

128. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (“Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.”).

129. *Doe v. Reed*, 561 U.S. 186, 194–95 (2010) (“The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington’s referendum procedure.”).

identity.¹³⁰ Unlike the political leaflets in *McIntyre*, however, same-sex weddings are simply weddings. They are not inherently political or controversial. But they can be—and, of course, have been—politicized. So much so, in fact, that, to some observers, any engagement short of express disapproval appears to be implicit approval. Below, I offer two arguments against the suggestion that providing services in connection with a wedding amounts to endorsement.

1. Participation versus Proximity

Does the fact that I'm at a wedding taking photos of the wedding or making a cake for the wedding mean that I like and support the couple? In other words, does my apparent immersion in the event make a doctrinal difference? The Supreme Court thought that might be the case, at least in some instances. In *Masterpiece Cakeshop*, the Court reasoned that the cake baker "is an active participant in the wedding celebration," and that "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion."¹³¹ Other plaintiffs have expressed a reluctance to attend a same-sex wedding: "Carpenter also alleges that the challenged laws violate the Establishment Clause by forcing her to attend and participate in religious ceremonies to which she objects."¹³²

But the generation of wedding content is not participatory in the same sense that presiding over a wedding is participatory. A member of the clergy is an indispensable part of a traditional Christian wedding. The priest's speech act—i.e., the pronouncement that the couple are now married—is what J.L. Austin categorized as an illocutionary act, or speech that generates a practical result.¹³³ Indeed, Austin himself uses wedding vows as an example of an illocutionary act.¹³⁴ The priest is essential to the ceremony, much as signatures on a marriage license are necessary for legal recognition of a marriage. In contrast, nothing that service providers do is essential to the outcome or validity of a wedding.¹³⁵

A photographer's presence at the wedding is proximity, not participation, and the provider's service is an ancillary activity rather than an act integral to the event.

130. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

131. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 632, 658 (2018).

132. *Emilee Carpenter, LLC v. James*, 107 F.4th 92, 111 (2d Cir. 2024).

133. See generally, J.L. AUSTIN, *Lecture VIII*, in *HOW TO DO THINGS WITH WORDS: THE WILLIAM JAMES LECTURES DELIVERED AT HARVARD UNIVERSITY IN 1955*, at 94 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (ebook).

134. *Id.* at 12–13 (*Lecture II*) ("One of our examples was, for instance, the utterance 'I do' (take this woman to be my lawful wedded wife), as uttered in the course of a marriage ceremony. Here we should say that in saying these words we are *doing* something—namely, marrying, rather than *reporting* something, namely *that* we are marrying.").

135. It's important to note, too, that, despite being central to the wedding, a priest need not actually endorse the couple by virtue of marrying them. Refusing to do so may be a form of disapproval, but the converse is not necessarily true; a priest marrying the couple may not object to the wedding, but it would be a leap to say that the priest *ipso facto* endorses the couple or any aspect of their relationship.

In *Masterpiece Cakeshop*, the Court tried to fuse the two by noting that in “addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding.”¹³⁶ But hanging out with the cast after a play doesn’t make you part of the show or a Broadway star. Proximity—i.e., photographing a wedding in person—and manufacture—i.e., making cakes or invitations—are not participation or, by vague implication, a form of endorsement.

The fundamentally non-participatory aspect of wedding services is clear when we compare wedding photography to pornography and crush videos.¹³⁷ In the case of the last two examples, the goal of production is to generate a specific type of content; the videographer is part of the group of people who orchestrate a production scenario precisely to generate pornographic or abusive material. The generation of specific content requires the videographer’s participation. (Whether such participation is endorsement is a separate question; one might simply do it for the commercial gain, or some other reason that is not endorsement *per se*.) The purpose of a wedding, in contrast, isn’t to generate content—be it photographs or wedding cakes—but to achieve a specific outcome, i.e., to marry two people. And that result does not in any way depend on the presence or participation of a wedding photographer or any other service provider. If a wedding cake is destroyed, after all, the wedding can—and likely will—go on.¹³⁸ And while it is self-evident that a wedding “cake’s purpose is to mark the beginning of a new marriage and to celebrate the couple,” it’s not the service provider celebrating the couple.¹³⁹ The couple, their friends, and their family are using the service provider’s detachable speech to communicate their own celebratory message. It’s thus inaccurate to say that “creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.”¹⁴⁰

Put yet another way, service providers are not participating in the causal chain that leads to a specific outcome, which distinguishes wedding services from cases like *Thomas*, *Hobby Lobby*, and *Janus*, where the compulsion turned on the requirement to support—practically or financially—a contested issue or result.¹⁴¹

136. *Masterpiece*, 584 U.S. at 658 (Thomas, J., concurring in part).

137. *United States v. Stevens*, 559 U.S. 460 (2010). Crush videos, which are films of extreme animal abuse, depict women in stilettos crushing small animals to death in order to satisfy the viewer’s sexual fetish.

138. See [u/Plastic-Tension-8973, REDDIT \(r/cakedecorating\), I destroyed a wedding cake](https://www.reddit.com/r/cakedecorating/), (Sep. 1, 2024), https://www.reddit.com/r/cakedecorating/comments/1f6g0xn/i_destroyed_a_wedding_cake/ [https://web.archive.org/web/20240929132753/https://www.reddit.com/r/cakedecorating/comment/s/1f6g0xn/i_destroyed_a_wedding_cake/].

139. *Masterpiece*, 584 U.S. at 659 (Thomas, J., concurring in part).

140. *Id.* at 626.

141. *Thomas v. Rev. Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 709 (1981) (manufacture of items used in warfare); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 689–90 (2014) (provision of “health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners”); *Janus v. AFSCME, Council 31*, 585 U.S. 878, 884–85 (2018) (union subsidization by

In a word, there is no enablement. Unlike the couple and the clergy, who are integral parts of the event and necessary to the success of the intended outcome, the photographer and the baker are conceptually and practically outside the ceremony.¹⁴²

2. Mistaken Motivation

Courts overlook the simple fact that the couple selects the content creator rather than the other way around. On that basis alone, it would make sense to say that the couple endorses the provider. The converse, however, is an illogical leap. Similarly, courts overlook the primary purpose of wedding services. While “the degree of First Amendment protection is not diminished merely because . . . speech is sold rather than given away,” for compelled-speech analysis the purpose of the speech is significant.¹⁴³ The provider’s personal ideology simply isn’t part of the commercial arrangement. Service providers generate content which is meant for adoption by the commissioning party not only in the purely mechanical sense—e.g., I pick up the sign that I find lying on the ground—but also in the deeper sense that it’s meant to convey the adopting party’s values—i.e., I pick up the sign because I believe in what the sign says and I want everyone to know it. Conversely, couples don’t engage the service provider for the provider’s endorsement or expression of personal views. Indeed, it’s unlikely that any couple would give a baker the discretion to decide what message to include on the wedding cake. The suggestion that service providers generate wedding content as a form of endorsement thus places wedding content entirely outside its intended purpose and ignores its commercial context.

The incongruity of framing a primarily commercial transaction as an exercise in self-expression is underscored when, if only as a thought exercise, we look at weddings from a freedom of association perspective. In *Roberts v. U.S. Jaycees*, the Court noted that family relationships receive a higher degree of constitutional protection because of their unique relational aspects: “Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”¹⁴⁴ Professional relationships, in contrast, receive a much lower degree of

employees, “even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities”).

142. Courts have largely and inexplicably overlooked this line of argument, even though a New Mexico district court made a similar distinction years ago, in *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805, at *8 (N.M. Dist. Dec. 11, 2009) (“Plaintiff and its owner-operator is not being forced to participate in any ceremony or ritual; the only requirement is that she photograph the event. This is no different from the caterer or florist attending the ceremony in order to provide its commercial service; they attend it, not participate in it.”).

143. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988).

144. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984).

constitutional deference precisely by virtue of those aspects' absence.¹⁴⁵ Unlike the local chapters in *Jaycees*, which had virtually no selection criteria,¹⁴⁶ wedding events are generally selective, and, more to the point, based on personal relationships. The couple and their guests are part of the "special community of thoughts, experiences, and beliefs," albeit one that is wider than the immediate family circle.¹⁴⁷ Service providers, on the other hand, don't attend weddings or generate wedding content for personal reasons. They provide an ancillary service—either directly and in real time (as with photography), or indirectly by providing accessories for use in and in connection with the wedding (as with invitations and cakes).

3. Mistaken Attribution

In connection with images, the endorsement argument is fundamentally predicated on the idea that documenting a same-sex wedding is tantamount to its endorsement. But the view that content aligns with the author's personal belief, even if that content is a work of art, is misplaced. The fundamental message of Magritte's *The Treachery of Images* is that art can't be trusted, after all, and Jean-Jacques Rousseau famously complained precisely about this aspect of theater: "What is the talent of the actor? It is the art of counterfeiting himself, or putting on another character than his own, of appearing different than he is, of becoming passion in cold blood, of saying what he does not think as naturally as if he really did think it, and, finally, of forgetting his own place by dint of taking another's."¹⁴⁸

None of that means art doesn't reveal deeper truths about the proverbial human condition, about politics, and so on. "Seriously, the theater is a most useful political tool; it's a place where we go to hear the truth."¹⁴⁹ Even if the ultimate message reveals something about society, however, we can't be sure that it reflects the artist's personal viewpoint. Levin may or may not represent Tolstoy's views—there is no way for us to know.¹⁵⁰ The author of *Anne of Green Gables* complained that

145. *Id.* at 620 ("Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection. . . . Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.").

146. *Id.* at 621 ("[T]he local chapters of the Jaycees are neither small nor selective.").

147. *Id.* at 620.

148. René Magritte, *La trahison des images* [*The Treachery of Images*] (painting, 1929), <https://collections.lacma.org/node/239578> [<https://web.archive.org/web/20251008141332/https://collections.lacma.org/node/239578>] (last visited Oct. 8, 2025); JEAN-JACQUES ROUSSEAU & JEAN LE ROND D'ALEMBERT, LETTER TO D'ALEMBERT AND WRITINGS FOR THE THEATER 309 (DARTMOUTH COLL. 2004).

149. Steven Dzielak, *I Just Kept Writing*, in DAVID MAMET IN CONVERSATION 33 (Leslie Kane, ed., UNIV. OF MICH. PRESS 2001).

150. LEO TOLSTOY, *ANNA KARENINA* (Richard Pevear & Larissa Volokhonsky trans., Penguin Books ed. 2001).

readers equated her with the character. “People were never right in saying I was ‘Anne,’” she told a fellow writer, Ephraim Weber, in a 1921 letter, “but, *in some respects*, they will be right if they write me down as *Emily*,” referring to *Emily of New Moon*, a later novel.¹⁵¹ In other words, the content of a work and the author’s actual ideology are distinct and independent of one another.

A handful of images illustrate this distinction and underscore the analytical frailty of equating the portrayal of something with the author’s endorsement. When the Brooklyn Bridge opened to the public in 1883, New York City celebrated the event with a massive display of fireworks. Currier & Ives, the company behind countless images of early United States, issued a chromolithograph of the event:¹⁵²



The image is replete with fireworks and festivity, and the chromolithograph appears to be a celebration of the celebration. But is this a fair reading? The opening itself was not without controversy. The bridge opened on Queen Victoria’s birthday, and, in protest, New York City’s sizable Irish, working-class population—responsible for the lion’s share of construction—refused to attend.¹⁵³ Refusal to attend—as the

151. V.M. Braganza, *The Author of “Anne of Green Gables” Lived a Far Less Charmed Life than Her Beloved Heroine*, SMITHSONIAN MAG. (Apr./May 2023), <https://www.smithsonianmag.com/arts-culture/lm-montgomery-anne-green-gables-life-180981839> [<https://web.archive.org/web/20250919014054/https://www.smithsonianmag.com/arts-culture/lm-montgomery-anne-green-gables-life-180981839/>].

152. Currier & Ives, *The Grand Display of Fireworks and Illuminations at the Opening of the Great Suspension Bridge between New York and Brooklyn on the Evening of May 24, 1883* (color lithograph, 1883), <https://www.metmuseum.org/art/collection/search/341752> [<https://web.archive.org/web/20251008142850/https://www.metmuseum.org/art/collection/search/341752>] (last visited Oct. 8, 2025).

153. See Richard Haw, *The Opening of the Brooklyn Bridge: Consensus or Exclusion?*, 84 N.Y. HIST. 152, 159 (2003) (“The trustees . . . believed that the conflict in dates was unimportant and declared

refusal to provide services—is a clear message of disapproval. But does merely portraying the event send a message of endorsement or any other ideology? Is it fair to assume that just because the image is celebratory the people behind it endorsed the event, the bridge, or the fireworks? Or is this an unjustified analytical leap?

Let's consider a less happy event. Jacques-Louis David drew this image of Marie Antoinette on October 16, 1793:¹⁵⁴



themselves happy with their original decision. In protest, New York's Irish population staged a boycott and did not attend the bridge's opening.").

154. Jacques-Louis David, *Marie Antoinette on Her Way to the Guillotine* (drawing, 1793), https://commons.wikimedia.org/wiki/File:Jacques-Louis_David_-_Marie_Antoinette_on_the_Way_to_the_Guillotine.jpg [https://web.archive.org/web/20251008143123/https://commons.wikimedia.org/wiki/File:Jacques-Louis_David_-_Marie_Antoinette_on_the_Way_to_the_Guillotine.jpg] (last visited Oct. 8, 2025).

The image shows the queen of France in plain garb with her hands behind her back. It's a somber moment; she is on her way to the guillotine. But it's not something we'd know from the image, which shows her in a decontextualized vacuum. More to the point, we can't, simply from looking at the image, determine David's opinion about the queen, the trial, the execution, or the French Revolution. The image, in other words, reveals nothing about the artist's ethical position.

Since the queen has been sent to her death, though, should we assume that the image condemns the event? Can we automatically assume that something is not an endorsement simply because the imagery depicts unethical, ugly, unhappy, or controversial content? Conversely, should we assume something is an endorsement because it is a happy event?

The opacity of the photographer's ideology is highlighted by the well-known Alfred Eisenstaedt photograph taken on V-J Day in Times Square:¹⁵⁵



155. Alfred Eisenstaedt, *V-J Day in Times Square* (photograph, 1945), <https://www.life.com/history/v-j-day-kiss-times-square/>

We can be sure that Eisenstaedt documented a simple fact: a man dressed as a sailor kissing a woman dressed as a nurse as they appear to celebrate America's victory over Japan in New York. But we can't be sure that he, too, was celebrating. The precariousness of any interpretation is further underscored by the fact that, contrary to longstanding narratives, not only was the woman in the photograph *not* a nurse (she was a dental assistant wearing a nurse's outfit), but, according to some, she was an unwilling participant in the moment.¹⁵⁶

Abraham Zapruder's film of John F. Kennedy's assassination in Dallas brutally highlights the incongruity of the endorsement equivalency. The film was meant to be a memento, something for his family to cherish.¹⁵⁷ It would be nonsense on stilts to assume that he endorsed Kennedy's assassination. If filming or photographing something were inherently its endorsement, undercover images of agricultural facilities would have to be categorized that way, too—which, of course, would be contrary to their purpose of exposing animal abuse.¹⁵⁸

It's easy enough to think of other examples. Is Warhol's *White Disaster (White Car Crash 19 Times)* an endorsement of the car accident?¹⁵⁹ If I took photos of signs in the parade contested in *Hurley*, would I be endorsing their messages?¹⁶⁰ Did WeeGee approve of the crimes he documented?¹⁶¹ Did Donna Ferrato, who

[<https://web.archive.org/web/20251008143703/https://www.life.com/history/v-j-day-kiss-times-square/>] (last visited Oct. 8, 2025).

156. See Eli Rosenberg, *Greta Friedman, Who Claimed to Be Nurse in V-J Day Photo, Dies at 92*, N.Y. TIMES (Sep. 10, 2016) (discussing the view that the kiss was actually an assault), <https://www.nytimes.com/2016/09/11/nyregion/greta-friedman-who-claimed-to-be-the-nurse-in-a-famous-v-j-day-photo-dies-at-92.html> [https://web.archive.org/web/20250911112649/http://www.nytimes.com/2016/09/11/nyregion/gret-a-friedman-who-claimed-to-be-the-nurse-in-a-famous-v-j-day-photo-dies-at-92.html?_r=0]; Brooke L. Blower, *WWII's Most Iconic Kiss Wasn't Romantic—It Was Terrifying*, WASH. POST (Feb. 22, 2019), <https://www.washingtonpost.com/outlook/2019/02/22/wwiis-most-iconic-kiss-wasnt-romantic-it-was-assault> [<https://web.archive.org/web/20250919020221/https://www.washingtonpost.com/outlook/2019/02/22/wwiis-most-iconic-kiss-wasnt-romantic-it-was-assault/>]; Eliza Berman, *More from the Scene of That Famous V-J Day Kiss in Times Square*, LIFE (<https://www.life.com/history/v-j-day-kiss-times-square/>) [<https://web.archive.org/web/20251008143703/https://www.life.com/history/v-j-day-kiss-times-square/>] (last visited Oct. 8, 2025).

157. See A.O. Scott, *Footage of Death Plays on in Memory*, N.Y. TIMES (Nov. 15, 2013) <https://www.nytimes.com/2013/11/17/movies/abraham-zapruder-and-the-evolution-of-film.html> [<https://web.archive.org/web/20251008145458/https://www.nytimes.com/2013/11/17/movies/abraham-zapruder-and-the-evolution-of-film.html>].

158. See *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017).

159. Molly Enking, *Andy Warhol's Twelve-Foot-Tall "White Disaster" Could Sell for \$80 Million*, SMITHSONIAN MAG. (Nov. 2, 2022), <https://www.smithsonianmag.com/smart-news/andy-warhols-white-disaster-not-seen-in-15-years-is-now-on-auctionand-could-go-for-more-than-80-million-180981056> [<https://web.archive.org/web/20250714192933/https://www.smithsonianmag.com/smart-news/andy-warhols-white-disaster-not-seen-in-15-years-is-now-on-auctionand-could-go-for-more-than-80-million-180981056/>].

160. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

161. See *WeeGee*, INT'L CTR. OF PHOTOGRAPHY, <https://www.icp.org/browse/archive/constituents/weegees>

extensively documented domestic violence, endorse abuse?¹⁶² These are rhetorical questions, of course. Photographers consistently cover materials they find to be “repugnant to their moral, religious, and political beliefs.”¹⁶³ Finding endorsement in those photos would be illogical.

Consider these two examples from case law.

In the course of the investigation following the events of June 11, 2001, it was determined that the defendants’ mobile home was maintained in a deplorable condition. Garbage and clothes, including dirty diapers, were strewn throughout the home. Animal feces were in the living area. Broken glass and numerous small items were all over the floor. Dirty dishes were piled up and the floor was filthy. Photographs were taken depicting the residence in this appalling condition.¹⁶⁴

Women in the mental health pods have been excluded, due to their disabilities, from programs and services that are generally available to nondisabled women, and, as such, have nothing to occupy their time . . . As a consequence, women with serious mental illness languished inside empty isolation cells, day after day, with nothing to do but stare at the cinderblock walls. As reflected in photographs taken during recent visits conducted in the middle of the day, person after person in the mental health pods can be observed lying prone and motionless on her bed or on the floor.¹⁶⁵

Would it be fair to argue that the person who took the photos endorsed the living conditions? The more reasonable view is that the images are documents rather than endorsements. Similarly, photographing a wedding is not an endorsement any more than taking photos of deplorable prison conditions is an endorsement. As David Goldblatt, a South African photographer, noted, “photographers, by virtue of being there and ‘recording’ the scene, are witnesses and their work becomes evidence in an almost forensic sense.”¹⁶⁶ Wedding photographs appear celebratory because the event is celebratory and because of industry standards that dictate common stylistic forms. But in themselves wedding photographs are nevertheless value-neutral documents rather than personal, ideological expression.

In short, the endorsement equivalency—i.e., the suggestion that documenting a wedding is endorsing it—is erroneous. The photographer is not communicating an endorsement by virtue of documenting an event—whatever that event may be. Fundamentally, a photographer documenting a wedding is no different than a

[<https://web.archive.org/web/20251008150306/https://www.icp.org/browse/archive/constituents/w eegee>] (last visited Oct. 8, 2025).

162. See *Donna Ferrato—Living with the Enemy*, INT’L CTR. OF PHOTOGRAPHY, <https://www.icp.org/browse/archive/collections/donna-ferrato-living-with-the-enemy> [<https://web.archive.org/web/20251008150727/https://www.icp.org/browse/archive/collections/donna-ferrato-living-with-the-enemy>] (last visited Oct. 8, 2025).

163. *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

164. *Grammer v. Commonwealth*, No. 2002-CA-000530-MR, 2003 Ky. App. Unpub. LEXIS 1150, at *2 (Ct. App. Aug. 8, 2003).

165. *Ga. Advoc. Off. v. Jackson*, No. 1:19-CV-1634-WMR-JFK, 2019 U.S. Dist. LEXIS 238805, at *11–12 (N.D. Ga. Sep. 23, 2019).

166. David Goldblatt, *Interview with Mark Haworth-Booth*, in *DOCUMENTARY 49* (Julian Stallabrass, ed., WHITECHAPEL GALLERY & MIT PRESS 2013).

police officer writing an accident report. It may be unpleasant to some, but it's not advocacy. In effect, then, the endorsement argument is not predicated on photographic practice (since it's not inherently an endorsement) or on authorial intent (since photographers, even those who aren't opposed to same-sex marriage, are simply documenting rather than endorsing the wedding). Which leaves only one other basis for finding endorsement—i.e., audience interpretation. If, in other words, photographing an event is not endorsement, and if the photographer doesn't intend to endorse the event, the only other basis for finding endorsement is the appearance of endorsement.

For compelled speech purposes, however, audience perception is irrelevant. In the context of trademark law, Establishment Clause case law, and defamation jurisprudence, confusion about the message is important because of the message's impact on the audience. In the case of trademark law, the customer is confused and misled, which itself is a cognizable harm.¹⁶⁷ In the context of the Establishment Clause, the nonadherent is made to feel left out of the wider community.¹⁶⁸ In the case of defamation, the audience believes a falsehood about someone, and that person's reputation suffers as a result.¹⁶⁹ In those situations, what the speaker believes doesn't much matter because the harm results from what the audience (wrongly) believes.¹⁷⁰ In the case of compelled speech, however, the antipodes are reversed. In the paradigm compelled-speech scenario, the harm flows from the speaker's forced speech, not from the audience's lack of comprehension or misunderstanding. It's the forced salute to the flag rather than the perception of the salute that matters. If a bystander misunderstands the salute (maybe I am being ironic, for instance), I haven't been compelled to speak—I've just been misunderstood. Audience perception, in other words, can't be the basis of an endorsement claim. If it were, my speech would be compelled whenever someone misunderstood me.

As a doctrinal matter, *Wooley* appears to provide a counterargument.¹⁷¹ After all, in that case George and Maxine didn't agree with the message, but the fact that they were effectively broadcasting it to the world created the impression that they did.¹⁷² *Wooley* is open to the same criticism as the wedding endorsement argument—viz., the fact that some people may have attributed that meaning to the Maynards isn't tantamount to compelled speech. But, in addition, there are two critical differences between the license plate scenario and wedding photos. First,

167. See 15 U.S.C. § 1125.

168. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

169. See, e.g., *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000).

170. Actual malice requires an assessment of the speaker's state of mind, but the harm itself flows from the reader's interpretation. See *id.* at 334.

171. *Wooley v. Maynard*, 430 U.S. 705 (1977).

172. *Id.* at 715 ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty.").

unlike the New Hampshire imperative to “Live Free or Die,” a wedding photograph is not an expression of an ideology. It’s a value-neutral document rather than the expression of a moral position. Second, unlike Maxine and George, who were obligated to carry the message around with them whenever they drove their car, the photographer isn’t required to broadcast the photos to the public. On the contrary, the detachable photographic message is created for the couple, who, like the front lawn sign, may then elect to broadcast it themselves—on behalf of themselves, not the photographer.

The argument that wedding photographs are an endorsement is thus predicated on an illusion. First, photos are not inherently (or at all) an endorsement or expression of an ideology. Second, a photographer isn’t forced to display the photos with apparent approval (or at all). Third, audience perception and misunderstanding of the photos is immaterial. By any relevant measure, there is no endorsement in wedding photographs. And since there is no endorsement, there is no compulsion to endorse.

C. THE IRONY OF THE ENDORSEMENT ARGUMENT

In *303 Creative*, the plaintiff “alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse.”¹⁷³ This way of framing the dispute assumes the very thing that courts have yet to prove—i.e., that documenting an event or providing content for the event is the same thing as endorsement. The illusion of endorsement is substantively sustained only if courts create room for discretion in the first place—i.e., if they allow service providers to pick and choose the couples that they deem acceptable.

Put another way, the argument that providing wedding services is an expression of a political view becomes feasible only if courts allow service providers to pick and choose their clients in the first place. If service providers don’t have the option to pick and choose, however, they’re merely following the law, much as I’m just following the law—rather than endorsing it—when I drive the speed limit on a highway. In other words, it’s precisely by allowing service providers to select their favorite couples that courts have created space for the very endorsement the opinions erroneously suggest is already present in the images themselves.

The illusion of endorsement argument evaporates if the discretion to choose clientele is removed. If I drive 55 miles per hour, do I endorse the speed limit? Maybe, if—as was the case before the 1960s—the speed limit is “reasonable and proper,” and I have the option of choosing how fast to drive.¹⁷⁴ Once there are

173. *303 Creative LLC v. Elenis*, 600 U.S. 570, 581 (2023).

174. See, e.g., *Iowa Used to Have No Limit on Highway Speed*, RADIO IOWA (July 1, 2005), <https://www.radioiowa.com/2005/07/01/iowa-used-to-have-no-limit-on-highway-speed/> [<https://web.archive.org/web/20251104175747/https://www.radioiowa.com/2005/07/01/iowa-used-to-have-no-limit-on-highway-speed/>].

mandated speed limits, however, the most that can be said is that I am staying within the bounds of the law—not that I endorse the law in any way by virtue of complying with it. In *Lehman v. Shaker*, the Supreme Court worried that, if a city were allowed the discretion to permit advertising by some political candidates but not by others, it could be accused of favoritism.¹⁷⁵ The city’s option to pick and choose created the illusion of endorsement. But a service provider who is obligated to treat all clients equally *ipso facto* can’t approve or disapprove specific cultural praxes any more than a public transport agency can approve certain candidates and reject others. Endorsement—actual or imagined—simply doesn’t enter the picture.

Once the false equivalency is dismantled and the endorsement variable is removed, we end up largely in the theoretical space that the Supreme Court identified in 2006 in connection with the Solomon Amendment, which denied certain federal funds to universities whose law schools prohibited military on-campus recruiting “because of [their] disagreement with the Government’s policy on homosexuals in the military.”¹⁷⁶ In that opinion, the Court reasoned that “[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military’s policies.”¹⁷⁷ We can persuasively make the parallel argument that nothing in standard wedding content suggests that wedding service providers agree with or otherwise endorse the couple or the marriage.

IV. JUDICIAL REVIEW

As a genre, wedding content is not artwork, an op-ed piece, creative fiction, or any other content designed “to editorialize on any subject, cultural, philosophical, or political.”¹⁷⁸ Wedding content is not “persuasive speech” that aims to convince the reader of something or to convey the service provider’s “opinion and political attitude.”¹⁷⁹ Vendors do not communicate personal ideological beliefs, aim to “inform the public about [their] beliefs,” or set out to “inform individuals of their causes through distributing their literature, engaging in persuasive speech, and selling merchandise with messages affixed to the product.”¹⁸⁰ In *Emilee*, the Second Circuit asked whose speech is implicated in wedding content.¹⁸¹ “To state a compelled speech claim, it is not enough for a plaintiff to show that the service at

175. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (“There could be lurking doubts about favoritism.”).

176. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 51 (2006).

177. *Id.* at 65.

178. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

179. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (“persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues”); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (“They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636 (1943).

180. *Gaudiya Vaishnava Soc’y v. City & Cnty. of S.F.*, 952 F.2d 1059, 1060, 1064 (9th Cir. 1990).

181. *Emilee Carpenter, LLC v. James*, 107 F.4th 92 (2d Cir. 2024).

issue involves a medium of expression. The plaintiff must also demonstrate that the expressive activity is her own—that is, she created the expressive content herself or, by compiling or curating third-party content in some forum, she is also engaged in her own expressive activity.”¹⁸² Since wedding content is not ideological, personal speech but made-to-order detachable speech, however, for compelled speech purposes the answer doesn’t much matter. We could argue that the service provider is “really a conduit or an agent for its clients,” as a New Mexico court did in 2009.¹⁸³ Even if we accept that wedding content is the service provider’s speech, however, because it’s detachable speech that doesn’t communicate the provider’s personal views, it doesn’t convey endorsement or any other ethical position. Wedding content is ideologically neutral speech generated for commercial reasons rather than as a means of self-expression. And since there is no requirement to express values in violation of the First Amendment “principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence,” there is no compulsion to betray one’s personal values.¹⁸⁴

Public accommodation laws, in turn, in no way interfere with a provider’s discretionary creation of wedding content. They don’t require service providers to portray one group one way and another group another way,¹⁸⁵ or, indeed, to portray couples in any particular way. Instead, they simply demand equal treatment¹⁸⁶—not with regard to content, but with regard to the provider’s client base. Rather than a content-based compulsion to speak, public accommodation laws regulate an economic activity—i.e., the selection of clientele. The claim the public accommodation laws regulate speech at all is erroneous.¹⁸⁷

In effect, public accommodation laws—because they regulate conduct rather than speech, and because the type of speech they impact is non-ideological—don’t require vendors to endorse or communicate any values. And once we do away with the artificial elevation of wedding content to the status of ideological artistic expression and personal speech, the compulsion argument disappears. In its wake, we are left with laws whose incidental impact on speech touches genres of content that have—uncontroversially—survived lower levels of review. Invitations may be

182. *Id.* at 104.

183. *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Dec. 11, 2009).

184. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

185. *Reed v. Town of Gilbert, Az.*, 576 U.S. 155, 156 (2015) (“The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.”).

186. *See, e.g., Zillow, Inc. v. Miller*, 460 (6th Cir. 2025) (“KORA’s differential treatment does not reflect favor or disfavor toward the content of a requestor’s message . . . The distinction drawn has nothing to do with the actual content created by the requestor.”).

187. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting) (finding that “the law in question targets conduct, not speech.”). With some variation, the Second Circuit picked up this thread last year. *See Emilee Carpenter, LLC v. James*, 107 F.4th 92, 104 (2d Cir. 2024) (“[W]hether Carpenter’s actual wedding photography services constitute expressive conduct is an open threshold question.”).

more aesthetically appealing than signage above a moving company's front,¹⁸⁸ for instance, but they both convey the same basic types of information—and signage regulations routinely survive intermediate scrutiny.¹⁸⁹ Cakes might be expressive, but, contrary to the *303 Creative* majority's dubious attempt to say otherwise, they are primarily functional. In *Kleinman*, the Fifth Circuit ruled that a junked car that was turned into a painted planter was nevertheless subject to reasonable state regulation precisely because it was primarily functional rather than expressive.¹⁹⁰ Drone photography and videography, too, have been subordinated to significant state interests.¹⁹¹

In sum, the “seriousness of the actual burden on First Amendment rights” in same-sex wedding cases is much weaker than courts have suggested.¹⁹² Public accommodation laws don't target speech, and public accommodation law's incidental impact on speech affects content that is non-ideological and doesn't endorse couples, weddings, or marriage in general. In effect, there is no compulsion to say anything at all, much less to say something that endorses false values. As content-neutral laws, in turn, public accommodation requirements should be subject to intermediate rather than strict scrutiny, and they should easily withstand a First Amendment challenge. The significant governmental interest in preventing “the evil of private prejudice”¹⁹³ outweighs the incidental speech burden on reusable content that barely, if at all, rises above the status of “an ordinary commercial product.”¹⁹⁴

V. CONCLUSION

The speech–commercial product dichotomy tilts toward speech when we assume the speech is artistic expression imbued with personal ideology.¹⁹⁵ While it

188. See *Peterson v. Vill. of Downers Grove*, 150 F. Supp. 3d 910 (N.D. Ill. 2015).

189. See, e.g., *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 64 (2022) (“[T]he City of Austin, Texas (City), regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. These are known as off-premises signs, and they include, most notably, billboards. The question presented is whether, under this Court's precedents interpreting the Free Speech Clause of the First Amendment, the City's regulation is subject to strict scrutiny. We hold that it is not.”).

190. *Kleinman v. City of San Marcos*, 597 F.3d 323, 327–28 (5th Cir. 2010) (“When the ‘expressive’ component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation.”).

191. See, e.g., *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 280 (4th Cir. 2024) (holding that a state agency's requirement that surveyors be licensed did not violate a drone operator's free speech rights).

192. *Davis v. FEC*, 554 U.S. 724, 744 (2008).

193. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). For more about the impact of such discriminatory practices, see Craig Konnoth, *Discrimination Denials: Are Same-Sex Wedding Service Refusals Discriminatory?*, 124 COLUM. L. REV. 2003 (2024).

194. *303 Creative LLC v. Elenis*, 600 U.S. 570, 593 (2023).

195. *Id.* (“Instead, Colorado says, this case involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely ‘incidental.’ On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny . . . This alternative

may be expressive, however, wedding content does not convey the service provider's personal ideology. As shown above, photographers and videographers, rather than expressing personal points of view, document wedding ceremonies. Invitations and wedding websites, rather than personal viewpoints, communicate standard categories of information about the wedding and about the couple. And even if we agree with the Supreme Court's dubious claim that wedding cakes are primarily expressive, cakes, like the other categories of wedding content, are not personal ideological speech—they simply leverage traditional symbolism to convey cultural rather than personal meaning. Nor do aesthetic choices that providers make when assembling wedding content translate to ideology. Finally, wedding content, rather than being a unique artwork created *ex nihilo*, is routinely assembled through the reuse of templates that reflect industry norms. In short, wedding content is devoid of personal ideology and manufactured in line with market standards and according to specifications dictated by the commissioning entity. Wedding content may be protected speech by virtue of communicating an idea, but it is not a vehicle for the provider's personal viewpoints. The claim that service providers are forced to endorse same-sex weddings by virtue of providing services is therefore inaccurate. As Professor Elizabeth Sepper has noted, engaging in an economic activity is not tantamount to endorsement or disapproval.¹⁹⁶ And being part of an event or creating content for that event doesn't amount to endorsement, either. Just as you can photograph a political rally without supporting the candidate or cater a party you dislike, you can provide wedding services without taking—or communicating—an ethical position on the wedding.

theory, however, is difficult to square with the parties' stipulations. As we have seen, the State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple.").

196. For more about this point, see Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 290 ("The fact that a business sells an item to someone does not imply its endorsement.").

Them's Fighting Prayers

Neal C. Ternes* & Joseph Sabin**

© 2025 Ternes & Sabin. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction, provided the original author and source are credited.

TABLE OF CONTENTS

Introduction.....	45
I.Iowa’s Restriction of Nebraska’s Prayer	48
II.Kennedy v. Bremerton School District (2022)	50
III.Was Nebraska’s Prayer Religious Speech?	55
IV.Was Iowa’s Restriction Viewpoint-Neutral?	59
V.Are “Fighting Prayers” A Reasonable Enough Concern to Restrict Speech?	65
VI.Conclusion: Clearer, Consistent Policy is Needed	68

INTRODUCTION

Disrespect. That was the word that defined the day after a series of incidents preceding and following the University of Iowa Hawkeyes' (UI) football victory over the University of Nebraska Cornhuskers (NU) on November 29, 2024. Verbal jabs and taunting were certainly familiar to the series prior to the 2024 contest.¹ But that year, Iowa officials may have had reason to believe that hostilities would escalate due to NU's pregame prayer, which other teams and fanbases had described as an attempt to intimidate and disrespect their opponents.² Allowing the NU team to pray on top of the midfield logo could spark a violent confrontation, as it had in two previous games. Iowa directed Nebraska to pray in the end zone instead and deployed seven-armed state troopers to the midfield logo.³ These weren't just prayers; they were fighting prayers.

For those less acquainted with the idiosyncrasies of sports, the consternation over a midfield logo may seem absurd. While midfield logos are part of the playing

* Neal C. Ternes, Ph.D., Assistant Professor, Northern Illinois University Department of Kinesiology and Physical Education. Dr. Ternes would like to disclose that he received his undergraduate degree from the University of Iowa.

** Joe Sabin, Esq., Associate Professor, Southeastern Louisiana University, Department of Kinesiology and Health Studies.

1. Iowa and Nebraska only played sparingly prior to NU joining the Big Ten conference in 2011. The league designated Iowa, the school in closest geographic proximity to Nebraska, as its rival and scheduled their series as the annual season finale each year, with games played on Black Friday during what is colloquially known in college football as "Rivalry Week." The teams and fanbases did not show significant animosity towards one another until, following a Huskers victory in 2014, then Nebraska Athletic Director Shawn Eichorst fired the NU head football coach, stating that, while it was good for his team to end the season with a victory, he "had to evaluate where Iowa was." The comments particularly irritated Iowa, whose team and fans felt the comments demonstrated that Nebraska thought itself plainly superior. Subsequently, Iowa won nine of the next ten games against NU, including the 2024 contest, with several games decided in the final moments and including instances of Iowa players making fun of Nebraska's team—including a kicker blowing kisses at the NU sideline following a game winning field goal, and Iowa players wishing Husker players "Merry Christmas" in 2023 when the loss to Iowa guaranteed that NU would be ineligible for a bowl game during the holidays. See, e.g., Scott Dochterman, *Iowa's Torment of Nebraska Continues, Ten Years After the Words that Planted the Rivalry's Seed*, THE ATHLETIC (Nov. 30, 2024), <https://www.nytimes.com/athletic/5958432/2024/11/30/iowa-nebraska-rivalry-history-shawn-eichorst/> [<https://web.archive.org/web/20250919141748/https://www.nytimes.com/athletic/5958432/2024/11/30/iowa-nebraska-rivalry-history-shawn-eichorst/>]; Mitch Sherman, *Nebraska Repaid the Disrespect Against Iowa. Spare Us the Insincere Audacity*, THE ATHLETIC (Nov. 30, 2024), <https://www.nytimes.com/athletic/5958215/2024/11/30/nebraska-iowa-college-football-hand-shake/> [<https://web.archive.org/web/20251004120239/https://www.nytimes.com/athletic/5958215/2024/11/30/nebraska-iowa-college-football-hand-shake/>].

2. Josh Tolle, *Matt Rhule Lied About Nebraska Trying to Pray with Shedeur Sanders*, SPORTS ILLUSTRATED (Sep. 12, 2023), <https://www.si.com/college/colorado/buffs-stuff/matt-rhule-lied-about-nebraska-trying-to-pray-with-shedeur-sanders> [<https://perma.cc/3EKH-JEUK?type=image>].

3. McKenzie Parsons, *Iowa Defeats Nebraska in Last Seconds of Game to Keep the Heroes Trophy*, KETV 7 OMAHA (Nov. 29, 2024), <https://www.ketv.com/article/iowa-defeats-nebraska/63055108> [<https://web.archive.org/web/20251103172628/https://www.ketv.com/article/iowa-defeats-nebraska/63055108>] ("The Huskers tried to meet in the middle of the field, but police kept them off the Hawkeye logo.").

surface and thus are regularly trampled over the course of any game, they are often utilized as props for visiting teams to demonstrate disrespect and/or domination of their opponent. In 2018, a pregame altercation between the University of Michigan and Michigan State University ended with University of Michigan running back Devin Bush using his cleats to dig divots in the Michigan State midfield logo.⁴ Pregame logo incidents have also caused controversy in the NFL, where in 2020 the Tennessee Titans held a pregame meeting on the Baltimore Ravens logo,⁵ and in 2021, the Las Vegas Raiders held a team meeting at midfield prior to their game against the Kansas City Chiefs.⁶ In college football, displays on midfield logos are more common after games, and often escalate into violence. In fact, the day after Iowa prevented Nebraska from performing their prayer at midfield, at least four postgame brawls resulted from visiting teams celebrating on the opponent's midfield logo.⁷ In one of those, a fight beginning after Michigan players planted a flag in Ohio State's logo, the brawl became so intense that police deployed pepper spray against the two teams.⁸

The restriction of players' and coaches' prayer at midfield of a football stadium bears similarities to the facts of the now infamous *Kennedy v. Bremerton School District*, which was decided by the Supreme Court in 2022.⁹ In *Kennedy*, a high school football coach began praying at midfield following home football games. Over time, players joined the coach's prayer and the prayers morphed into

4. Phil Friend, *Devin Bush, Jim Harbaugh Get Under Michigan State's Skin with "Childish" Antics*, DETROIT FREE PRESS (Oct. 20, 2018), <https://www.freep.com/story/sports/college/msu/football/2018/10/20/michigan-state-michigan-mark-dantonio-jim-harbaugh-devin-bush/1686584002/> [<https://web.archive.org/web/20250919151335/https://www.freep.com/story/sports/college/msu/football/2018/10/20/michigan-state-michigan-mark-dantonio-jim-harbaugh-devin-bush/1686584002/>].

5. Adam Mays, *John Harbaugh, Mike Vrabel Exchange Words After Titans Gather at Ravens Logo*, NFL.COM (Nov. 22, 2020), <https://www.nfl.com/news/john-harbaugh-mike-vrabel-exchange-words-after-titans-gather-at-ravens-logo> [<https://web.archive.org/web/20250919154507/https://www.nfl.com/news/john-harbaugh-mike-vrabel-exchange-words-after-titans-gather-at-ravens-logo>].

6. Randy Oliver, *Raiders Hold Disrespectful Team Meeting on Chiefs Logo Pregame, Promptly Lose 48–9*, DAILY SNARK (Dec. 12, 2021), <https://dailysnark.com/2021/12/12/raiders-hold-disrespectful-team-meeting-on-chiefs-logo-pregame-promptly-lose-48-9/> [<https://web.archive.org/web/20250919155426/https://dailysnark.com/2021/12/12/raiders-hold-disrespectful-team-meeting-on-chiefs-logo-pregame-promptly-lose-48-9/>].

7. David K. Li & Carla Kakouris, *Ohio State, Michigan, North Carolina, and N.C. State Among Schools Fined After Rash of Football Brawls*, NBC NEWS (Dec. 2, 2024), <https://www.nbcnews.com/sports/college-football/big-ten-fines-michigan-ohio-state-wake-wild-brawl-scuffles-erupt-colle-rcna182454> [<https://web.archive.org/web/20250919155809/https://www.nbcnews.com/sports/college-football/big-ten-fines-michigan-ohio-state-wake-wild-brawl-scuffles-erupt-colle-rcna182454>].

8. Nick Bromberg, *Michigan Stuns No. 2 Ohio State 13–10 Before a Massive Postgame Brawl at Midfield*, YAHOO! SPORTS (Nov. 30, 2024), <https://sports.yahoo.com/michigan-stuns-no-2-ohio-state-13-10-before-a-massive-postgame-brawl-at-midfield-202748205.html> [<https://web.archive.org/web/20251004165934/https://sports.yahoo.com/michigan-stuns-no-2-ohio-state-13-10-before-a-massive-postgame-brawl-at-midfield-202748205.html>].

9. 597 U.S. 507 (2022).

motivational speeches which often included religious rhetoric.¹⁰ When the school district, concerned that these speeches may represent an Establishment Clause violation, demanded the coach cease his midfield prayers, he filed suit.¹¹ The Court ruled that the school had violated the coach's First Amendment rights by prohibiting his postgame prayer.¹² Similarly, the Court has previously ruled that collective prayer and religious worship are forms of both speech and association, making them protected under the Free Speech and Free Exercise Clauses of the First Amendment.¹³ This has widely been interpreted to extend to the public religious expression of athletes at the sports facilities of public educational institutions.¹⁴ However, unlike the coach's prayer in *Kennedy*, the restrictions by Iowa were not related to concerns about the Establishment Clause, but rather fear that the Cornhuskers' prayer would cause a violent altercation between the two teams as it had twice before.

In this article we seek to address the unusual combination of concerns highlighted by Nebraska's use of an opponent's midfield logo for its pregame prayer ritual and Iowa's deployment of state police to stop that prayer. This is not to say we know that UI officials' rationale for limiting the NU prayer was necessarily related to its history and concerns over violence. Rather, our objective is to explore how sportsmanship, field security, and free exercise may coalesce in a legal setting for the purpose of understanding how policies may better balance those three concerns. In so doing, we revisit the *Kennedy* decision to examine how the ruling may impact speech restrictions in public sports facilities more broadly, with the intent of providing general policy recommendations for operators of those public facilities. We begin by reviewing the details of the events leading up to and resulting from UI officials restricting the NU prayer. Next, we review the Supreme Court's ruling in *Kennedy*, focusing our analysis on the factual parallels between that case and the conflict between Iowa and Nebraska. In our analysis, we identify and evaluate three key questions in determining whether Iowa violated the Constitutional rights of the NU team if it had prohibited the prayer based on concerns that it may have caused violence. Was Iowa's restriction on the Nebraska team's speech viewpoint- and/or content-neutral? Is Nebraska's prayer protected under the Establishment Clause, and how might that impact the standard of review for a court considering Iowa's restriction? And finally, is the concern that NU's prayer may instigate a violent exchange sufficient reason for suppression of that

10. *Id.* at 515.

11. *Id.* at 518–520.

12. *Id.* at 514.

13. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding that a state university policy prohibiting its facilities from being used for religious worship violated the First Amendment rights of students); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (finding that a permit ordinance that was used to bar a group of Jehovah's Witnesses from holding a Bible talk at a local park created a regime of prior restraint that violated the group's freedoms of speech, press, and religion).

14. See, e.g., *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 313 (2000) (“[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.”).

speech? We conclude with a brief discussion of policy remedies that may mitigate future concerns while still preserving the free speech and exercise rights of participants at public athletic facilities.

I. Iowa's Restriction of Nebraska's Prayer

Since his hiring in 2023, Nebraska coach Matt Rhule has made it a tradition for his team to gather at the midfield logo of the stadium they were visiting to hold a short team prayer. This ritual typically takes place hours before the start of the game and before fans are allowed in, usually when the team initially arrived at the venue.¹⁵

The prayer sparked controversy from the beginning. In 2023, the NU prayer prior to the Cornhuskers' contest against the University of Colorado was interrupted when Colorado quarterback Shedeur Sanders walked into the middle of the gathering and broke it up.¹⁶ After the game, Sanders referred to the Nebraska traditions as "extreme disrespect," while the Huskers coach Matt Rhule stated that he invited Sanders to pray with his team.¹⁷ In 2024, only two weeks before the Iowa game, NU's prayer tradition again caused an issue when they played at the University of Southern California (USC).¹⁸ The prayer ritual turned into a brawl

15. David Ubben & Mitch Sherman, *Matt Rhule: Nebraska Meant No Disrespect by Pregame Huddle on Colorado Logo*, THE ATHLETIC (Sep. 11, 2023), <https://www.nytimes.com/athletic/4853335/2023/09/11/matt-rhule-nebraska-colorado/> [https://web.archive.org/web/20251002193533/https://www.nytimes.com/athletic/4853335/2023/09/11/matt-rhule-nebraska-colorado/]. It is also worth noting that football players at NU have previously had pregame prayers on the field sporadically throughout their history, notably including a 1986 game against Oklahoma where former offensive lineman Stan Parker and University of Oklahoma running back Spencer Tillman organized a pregame prayer on the field between players prior to their game. See Randy York, *Parker Brought Pregame Prayer to the Field*, N-SIDER (Dec. 25, 2012), <https://huskers.com/news/2012/12/26/parker-brought-pregame-prayer-to-the-field> [https://web.archive.org/web/20251103173312/https://huskers.com/news/2012/12/26/parker-brought-pregame-prayer-to-the-field].

16. Nick Kosko, *Matt Rhule Says He Never Disrespected Colorado, Invited Shedeur Sanders to Join Prayer*, THE ATHLETIC (Sep. 11, 2023), <https://www.nytimes.com/athletic/4853335/2023/09/11/matt-rhule-nebraska-colorado/> [https://web.archive.org/web/20250919165615/https://www.nytimes.com/athletic/4853335/2023/09/11/matt-rhule-nebraska-colorado/].

17. *Id.* Shedeur Sanders was quoted after the game as saying, "We go out there and warm up, you've got the head coach of the other team trying to stand out in the middle of the Buff. It's okay if, like, a couple players do it, it's fine. Like, just enjoy the scenery. But when you've got the whole team trying to disrespect it, I'm not going for that at all. I went in there and disrupted it. So, they knew I'm for real. The Buffaloes mean a lot to me. Personally, that's what I was saying pregame and that's when I knew it was just extreme disrespect."

18. Andrew Hughes, *Fight Breaks Out at Midfield Before Nebraska-USC During Cornhuskers' Pregame Ritual in Week 12 of College Football*, SPORTING NEWS (Nov 16, 2024), <https://www.sportingnews.com/us/ncaa-football/news/fight-breaks-out-midfield-nebraska-usc-cornhuskers-midfield-pregame-ritual-week-12-college-football/f2311f459d08fa8dcfd49902> [https://web.archive.org/web/20250919170125/https://www.sportingnews.com/us/ncaa-football/news/fight-breaks-out-midfield-nebraska-usc-cornhuskers-midfield-pregame-ritual-week-12-college-football/f2311f459d08fa8dcfd49902].

between the two teams when USC players tried to break up the Nebraska players gathered on their midfield logo. The skirmish lasted roughly ten minutes, with a few team staff members exchanging some sharp words after.¹⁹

Nebraska opponents also questioned the religious bona fides of the Huskers' pregame ritual, arguing instead that it is meant to intimidate and disrespect the hosting school. Following the 2023 incident at Colorado where the NU ritual caused a conflict with Buffaloes quarterback Shedeur Sanders, a few reporters covering CU football opined that there was no faith-based purpose to Nebraska's midfield prayer. Writing for *Sports Illustrated*, Josh Tolle described the NU action as an "intimidation tactic," stating that a "video from Denver 7's Nick Rothschild shows the Nebraska players spread out on the field trying to interrupt Sanders and others in pregame warm-ups."²⁰ Another Colorado writer who was present for the incident wrote that Nebraska head coach Matt Rhule gathered his players at the midfield logo two hours prior to game time for two to three minutes, where they stood in a circle while Rhule gave a speech in the center.²¹ Following the Colorado game, Rhule insisted that Nebraska's ritual was indeed a form of team prayer, that his team did that at every stadium, and that they had even invited Sanders to join them in their prayer before hostilities between the two sides began.²²

Prior to their November 2024 game, Iowa officials requested that the Nebraska team forgo its pregame prayer at midfield, suggesting instead that the ritual be performed in the endzone.²³ When Nebraska players came to the field before the game, Iowa had several armed state police officers formed a loose circle around the

19. *Id.*

20. See Tolle, *supra* note 2.

21. Ryland Scholes, *Is Matt Rhule Lying About the Incident at Midfield?*, SBATION (Sep. 12, 2023), <https://www.ralphiereport.com/2023/9/12/23870390/nebraska-coach-matt-rhule-is-lying-about-the-shedeur-sanders-incident> [<https://web.archive.org/web/20250919180317/https://www.ralphiereport.com/2023/9/12/23870390/nebraska-coach-matt-rhule-is-lying-about-the-shedeur-sanders-incident>]. The author openly questions that the incident was in fact a prayer, writing that, "[t]ypically during a team prayer, at least a couple players will kneel down, close their eyes, or gesture to the sky after the prayer is finished. None of these things happened during Rhule's speech, which seems a bit odd for an alleged team prayer. Rhule's speech looked more like some sort of pump up speech than a team prayer." However, the author also notes that they were not close enough to the incident to hear any of the words that were exchanged.

22. Rhule was quoted at his postgame press conference stating "We do that at every stadium . . . We go there. We pray for blessings. When they came in, I asked them, I asked . . . Shedeur . . . if he wanted to pray with us. I pray over everything. I'm a public official, but I can have my own faith. I say pray; it's not [secular]. We take a moment as a team. I want that field to be safe for everybody." Ubben & Sherman, *supra* note 15.

23. Mitch Sherman, *Matt Rhule on Nebraska Captains Not Shaking Hands with Iowa: "That's Not What We Want to Do"*, THE ATHLETIC (Dec. 4, 2024), <https://www.nytimes.com/athletic/5970577/2024/12/04/nebraska-iowa-handshake-matt-rhule/> [<https://web.archive.org/web/20250919183914/https://www.nytimes.com/athletic/5970577/2024/12/04/nebraska-iowa-handshake-matt-rhule/>] (quoting Nebraska coach Matt Rhule stating, "Iowa didn't want us to do it before the game," and "They told us we had to go to the end zone. When we came out to walk to the end zone, there were seven armed state troopers standing on the logo.").

midfield logo.²⁴ The Nebraska team ultimately held their pregame ritual in the endzone on the opposite side of their field from their locker room without issue. But, according to Rhule, Nebraska's players felt particularly miffed by the incident, leading to NU team captains refusing to shake hands with the UI players prior to the game.²⁵ Following the game, a 13–10 Iowa victory, fans and writers from both teams took to the internet to debate the various examples of perceived disrespect provided from both programs, but no litigation has been filed on the matter.²⁶

II. Kennedy v. Bremerton School District (2022)

Kennedy, a football coach at the public Bremerton High School, would regularly kneel and pray in the middle of the field following each game. Players asked Kennedy to join in his prayers, and he allowed them to do so such that, over time, most of the Bremerton players and even members of the opposing team would participate.²⁷ Eventually, Kennedy's prayers started to take the form of motivational speeches, wherein players and coaches would kneel around him while he spoke—often using religious invocations and while waving a football helmet.²⁸

24. *Id.* See also Andy Ketterson, *Huskers v. Malodorous, Sacrilegious Iowa Pre-Game Vibes: Unleash the Fury*, CORN NATION (Nov. 29, 2024), <https://www.cornnation.com/2024/11/29/24309173/huskers-vs-malodorous-sacrilegious-iowa-pre-game-vibes-unleash-the-fury-nebraska-matt-rhule-raiola> [<https://web.archive.org/web/20250919184358/https://www.cornnation.com/2024/11/29/24309173/huskers-vs-malodorous-sacrilegious-iowa-pre-game-vibes-unleash-the-fury-nebraska-matt-rhule-raiola>]; Luke Mullin, (@LjsLuke), X (Nov. 29, 2024, 4:19 PM), <https://x.com/LjsLuke/status/1862622394642272677> [<https://perma.cc/MCA2-CHP7>] (Post includes a photo of Nebraska players gathering in a group on the edge of the Iowa midfield logo. The text of the post reads, “Perhaps motivated by a midfield clash against USC in its last road game, Nebraska football’s pregame meeting took place just to the side of the Iowa logo.”).

25. See Sherman, *supra* note 23. Quoting Rhule, the article states that “Nebraska players ‘felt some type of way’ about Iowa’s decision to protect the logo.” For their part, Iowa players cited the lack of pregame handshake and NU coach Matt Rhule disrupting their pregame warmups by walking through them as examples of perceived signs of disrespect from Nebraska. See also Blake Silverman, *Iowa Players Call Out Nebraska, Matt Rhule for Pregame Disrespect After Win*, SPORTS ILLUSTRATED (Nov. 30, 2024), <https://www.si.com/college-football/iowa-players-call-out-nebraska-matt-rhule-pregame-disrespect> [<https://web.archive.org/web/20250919185501/https://www.si.com/college-football/iowa-players-call-out-nebraska-matt-rhule-pregame-disrespect>] (quoting Iowa team captain Jay Higgins, who said that he told Nebraska’s head coach during the game, “It probably wasn’t a good idea to not shake our hands,” to which Rhule allegedly responded, “Who are you?” Following the game, Higgins claims he sought out Rhule to collect the handshake he didn’t receive prior to kickoff.).

26. See, e.g., Chris Rosvoglou, *Matt Rhule, Nebraska Football Players Taking Heat for Classless Behavior vs. Iowa*, THE SPUN (Nov. 30, 2024), <https://thespun.com/college-football/matt-rhule-nebraska-football-players-taking-heat-for-classless-behavior-vs-iowa> [<https://web.archive.org/web/20250919185958/https://thespun.com/college-football/matt-rhule-nebraska-football-players-taking-heat-for-classless-behavior-vs-iowa>].

27. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 515 (2022).

28. *Id.* at 549 (Sotomayor, J., dissenting). The dissent, and lower court decisions, also note that Kennedy’s actions alerted the school district after another team’s coach told district officials that Kennedy had invited his team to pray with him and the Bremerton football players at midfield following their game. A letter sent to Kennedy by the school district also noted that he had invited others to pray with him on multiple occasions. *Id.* at 552. This is not mentioned in the majority’s decision. It has been

This took place over seven years before officials at the Bremerton School District were alerted to the practice by an official at another school district who spoke in favor of Kennedy's religious speeches.²⁹

District officials, concerned that the postgame prayers could represent a violation of the Establishment Clause's prohibition on state endorsement of religion, asked Kennedy to cease. The coach initially complied, agreeing to pray alone in the middle of the field after the stadium emptied.³⁰ After a few weeks, however, Kennedy sent the school district a letter requesting accommodation to resume his "private, personal prayer" on the field immediately after the game.³¹ Kennedy resumed his postgame prayer, without authorization, two days later, albeit this time simply by kneeling and praying quietly at midfield.³² He was joined by members of the other team and the community who entered the field from the stands.³³ Kennedy prayed in this manner at two more games, and received two more letters from his employer asking that he stop, before he was placed on administrative leave.³⁴ Following the season, the athletic director recommended

widely noted that the presentation of the facts in this case differs substantially between those given by the Supreme Court's majority and those provided by the dissent and the lower courts. We have and continue to make some note of this in the footnotes of our review of the case here where relevant, but the discrepancies are not as impactful to the analysis of our facts as they would be in other situations, so we only mention them minimally. For readers interested in those discrepancies, we strongly recommend reviewing some of the many other scholarly opinions focusing more exclusively on the decision. *See, e.g.,* Steven K. Green, *First Amendment Imbalance: Kennedy v. Bremerton School Dist.*, 99 NOTRE DAME L. REV. REFLECTION 269 (2024); J. Israel Balderas, *Beyond Prayer: How Kennedy v. Bremerton Reshapes First Amendment Protections for Public Employee Speech*, 23 FIRST AMEND. L. REV. 203 (2024); Maya Gardner, Note, *Establishment Clause Jurisprudence and the Constitutional Limits on Religion in Public Schools*, 76 S.C. L. REV. 587 (2025); Aislinn Comiskey, *Kennedy v. Bremerton School District: A Touchdown and a Victory for Establishment Clause Jurisprudence*, 31 JEFFREY S. MOORAD SPORTS L.J. 67 (2024); Jason T. Hanselman, *Religious Coercion and Kennedy v. Bremerton School District*, U. CHI. L. REV. ONLINE, <https://lawreview.uchicago.edu/online-archive/religious-coercion-and-kennedy-v-bremerton-school-district> [<https://web.archive.org/web/20251002203630/https://lawreview.uchicago.edu/online-archive/religious-coercion-and-kennedy-v-bremerton-school-district>] (last visited Sep. 26, 2025); Emily C. Neely, Note, *Kennedy v. Bremerton School District: A Fumble the Supreme Court Needs to Recover*, 11 N. ILL. L. REV. SUPPLEMENT 38 (2019).

29. *Kennedy*, 597 U.S. at 515.

30. *Id.* at 517.

31. *Id.*

32. *Id.* at 518.

33. *Id.* The dissent and earlier court decisions add significant detail to this point, noting that prior to returning to his prayer, Kennedy publicized his return to prayer with appearances in local media. *Id.* at 551 (Sotomayor, J., dissenting). As a result, his return to prayer was joined not only by coaches and players from the other team, but television news cameras and people in the stands who rushed the field to pray with Kennedy. *Id.* at 552–53. The incident resulted in several band members being knocked over and struck as patrons jumped the fence and ran onto the field. *Id.* at 553. The school district subsequently increased police presence and posted signs near the field to emphasize that it was not open to the public. *Id.* at 518, 553.

34. *Id.* at 518–19. The letter sent by the school district following Kennedy's return to prayer noted that he still was required to supervise students in the locker room following the game and that his conduct raised Establishment Clause concerns because he was only allowed on the field because of his position and was praying in front of an audience wearing the school's logo. *Id.* at 554 (Sotomayor, J.,

that Kennedy not be rehired since he had refused to cooperate with the school district's policies. Kennedy filed suit in response.

Both the district and circuit courts sided with the school district, reasoning that Kennedy's prayers occurred in a location where he only had access by virtue of his employment with the school and were conducted while he was wearing the school logo and had a responsibility to supervise students. Moreover, both courts reasoned that Kennedy's prayer could have a coercive effect on students, thus violating their First Amendment rights.³⁵ The Supreme Court majority disagreed, deciding that Kennedy's prayers did not occur at a time when he was acting in his role as a coach because the school district "permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls."³⁶ The majority did not agree with the school district's contention that Kennedy's presence on the field, which was otherwise closed to the public, the fact that the coach was wearing his school's logo, and prayed "under the bright lights of the stadium"³⁷ at midfield in front of an audience diminished the coach's right to pray on his own.³⁸ Relying on previous decisions in *Pickering v. Board of Education*, *Garcetti v. Ceballos*, and *Lane v. Franks*, the Court determined that Kennedy's speech reflected a matter of public concern and occurred outside the scope of his employment because it was not timed during his supervision of students.³⁹ Moreover, the majority notes that a lack of evidence

dissenting). The majority includes the same general details but also points out that the district's letter admits that the students Kennedy was required to supervise were "otherwise engaged and not praying with him" when he returned to prayer—they were in fact engaged in a tradition of singing the school fight song when Kennedy was praying. *Id.* at 519.

35. The district court reported that players and their parents had complained that the prayers felt necessary for them to stay connected to the team or to ensure that they would be able to play in games in addition to pointing out that players did not lead prayers independently when Kennedy was not on the field. *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1229 (W.D. Wash. 2020). The appellate court did not include this information in its decision. *See Kennedy v. Bremerton Sch. Dist.*, 991 F. 3d 1004 (9th Cir. 2021).

36. *Kennedy*, 597 U.S. at 527.

37. *Id.* at 554 (Justice Sotomayor quoting the school district's letter in her dissent).

38. Importantly, this discrepancy highlights a significant discrepancy between the majority's opinion of the facts and the considerations by the lower courts and the dissenting justices. The majority decision primarily focuses on Kennedy's behavior after the first letter was sent from the school district asking him to cease his prayers. At this point Kennedy ceased leading locker room prayers with his players and his subsequent prayers at midfield were not the religious speeches he gave prior to the letter. *Id.* at 525. The lower courts and the dissent take a wider view of the facts of the case, arguing that the midfield prayers Kennedy performed after the school district's initial letter were still connected to both his previous history of midfield prayers and his media promotions of his prayer upon his return. *See id.* at 557–58 (Sotomayor, J., dissenting).

39. *Id.* at 527–30 (applying *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 574 (1968) (ruling that a schoolteacher's letter to a local newspaper criticizing the local school board was protected under the First Amendment as it represented commentary on a public concern), *Garcetti v. Seballos*, 547 U.S. 410, 421 (2006) (determining that the speech of an employee of the Los Angeles District Attorney's office who told defense attorneys about factual discrepancies in a search warrant and testified for the defense was not protected even though it touched on a matter of public concern because it occurred purely within the scope of their employment), and *Lane v. Franks*, 573 U.S. 228, 238 (2014) (finding that the court testimony of a public employee who testified against another

of coercion, including multiple communications by the school district to both Kennedy and parents stating that there was no evidence of coercion, irreparably undermined the Establishment Clause concerns used by the school district to support terminating Kennedy's employment. Therefore, the majority declared that the district's removal of Kennedy constituted a content-specific restriction targeting an employee's speech outside the scope of his employment and thus violating the coach's First Amendment rights.⁴⁰

While there are many similarities between the NU controversy and the facts in *Kennedy*, there is also a significant difference: Kennedy was punished by his own employer rather than a rival school, and the employer's rationale was based on a fear that allowing the coach to continue would violate the Establishment Clause by potentially coercing students into a religious exercise. Coercion is not at issue when discussing Iowa's restrictions, but it is something that NU administrators may consider in their own evaluation of the pregame prayer. Nebraska's coach Rhule has stated that his religious pregame prayer is a "team" prayer and observers have generally noted that the entire Nebraska football team takes part.⁴¹ That description and the related photos certainly draw parallels to the types of prayers Kennedy led prior to the initial letter from the school district that he voluntarily ceased. Notably, those earlier prayers were not considered in the majority's opinion when determining that Kennedy's actions were protected speech, because they had been voluntarily ended.⁴² This does not necessarily mean that Rhule's team prayers are coercive. For starters, we do not know the content of Rhule's prayer and in what way or through what language Rhule's speech is "not secular."⁴³ We also do not know the extent to which the prayers are compulsory.⁴⁴

Yet the fact that NU's coach is leading players—allegedly the entire team—in a non-secular prayer is highly concerning and could very well be an Establishment

former employee convicted of mail fraud and theft was protected under the First Amendment, as it was given outside the scope of his employment and spoke to a matter of public concern. However, the employee's termination for that speech was upheld under qualified immunity.)).

40. *Id.* at 543. Writing for the majority, Justice Gorsuch concludes, "Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination."

41. See Kosko, *supra* note 16 (Colorado quarterback Shedeur Sanders commenting that the whole Nebraska team was on their midfield logo prior to the game); see also Nick Kosko, *USC Players Take Exception to Nebraska Players on Midfield Logo in Pregame*, ON3 (Nov. 16, 2024), <https://www.on3.com/news/usc-players-take-exception-to-nebraska-players-on-midfield-logo-in-pregame/> [<https://web.archive.org/web/20251002205531/https://www.on3.com/news/usc-players-take-exception-to-nebraska-players-on-midfield-logo-in-pregame/>] (including photos and videos showing approximately fifty NU players and staff gathered on the pregame field at USC).

42. See *Kennedy*, 597 U.S. at 538.

43. See Ubben & Sherman, *supra* note 15.

44. Any requirement that Nebraska players participate in a pregame prayer would be facially unconstitutional. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Clause violation. Coaches, even at the collegiate level, wield significant power over the lives of athletes, with the authority to control scholarships, playing time, and, more recently, financial payments from the university and boosters.⁴⁵ The Court's ruling in *Kennedy* envisions the standard for finding coercion to be quite significant, as the majority found that the fact that Kennedy was a school official with authority over students was insufficient evidence for coercion since the coach never required or asked that players pray with him.⁴⁶ Given the *Kennedy* majority strongly rejected attempts to limit free exercise of a person's religion on the suggestion that a coach's behavior might cause coercion,⁴⁷ it is arguably safe to assume that a successful action by Nebraska to limit the team pregame prayer would likely require affirmation from a member of the team or coaching staff to establish that their status on the team was contingent on participation in the prayer.⁴⁸ More information is needed to truly determine if there is a coercive element to NU's prayer, but given the circumstances it would be wise for Nebraska officials to gather more evidence on the matter.

45. The NCAA and its member institutions maintain the façade that college athletics are an amateur endeavor and that athletes are not employees despite recent developments that have allowed players to receive payments for their name, image, and likeness (NIL) from sponsors, booster organizations described as "collectives," and a direct share in television revenue from the schools themselves, typically with the direct input of coaches. See, e.g., Jeff Borzello, *How the Rev-Share Era Is Squeezing the College Basketball Recruiting Cycle*, ESPN (Aug. 1, 2025), https://www.espn.com/mens-college-basketball/story/_/id/45873955/college-sports-revenue-sharing-shaping-high-school-basketball-recruiting-class-2026 [https://web.archive.org/web/20251002210153/https://www.espn.com/mens-college-basketball/story/_/id/45873955/college-sports-revenue-sharing-shaping-high-school-basketball-recruiting-class-2026] (providing some examples of coaches' perspectives on the valuation of athletes and how they might work within their institutional budgets to provide payouts). See also Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J.L. & ARTS 47 (2021) (noting that athlete NIL deals are a form of speech protected by the First Amendment); Sam C. Ehrlich, Joe Sabin & Neal C. Ternes, *With Name, Image, and Likeness, College Sports Enters the Gig Economy*, 37 J. SPORT MGMT. 31 (2023) (explaining the precarious status of college athlete labor in relation to NIL and the continued control the NCAA and its member institutions preserve over athletes); Marc Edelman & Michael A. Carrier, *Of Labor, Antitrust, and Why the Proposed House Settlement Will Not Solve the NCAA's Problem*, 93 FORDHAM L. REV. 1603 (2025) (reviewing recent NCAA settlements to athlete-led antitrust litigation and noting that the league, its member schools, and coaches still hold a significant amount of financial power over college athletes that is not protected from additional antitrust scrutiny).

46. *Kennedy*, 597 U.S. at 537, 539–40.

47. *Id.* at 540. The majority's decision in *Kennedy* represented a very significant shift in precedent on this issue that is generally beyond the scope of our primary inquiry here. For more information on the Court's decision relative to precedent on this issue, we strongly recommend the myriad pieces of legal scholarship on this issue we have previously cited. See references cited, *supra* note 28.

48. For both staff members and, potentially, the athletes, pressure to participate in the prayer could also put the university in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e–2000e17 (as amended), which prohibits religious harassment of employees.

III. Was Nebraska's Prayer Religious Speech?

We must begin this section by emphasizing that there is no specific documentation of what has been said during the NU pregame ritual, and Nebraska's coach Matt Rhule has repeatedly emphasized that the prayer is religious in nature.⁴⁹ As such, while speculation exists as to the religiosity of NU's pregame prayer, we do not attempt here to establish or dispel with any certainty the religiosity of the ritual or the beliefs of its participants. Instead, our discussion in this section focuses on how a court might investigate such claims and the potential implications for Rhule and Nebraska in a court's determination of whether the midfield prayer represents a religious or secular activity. Historically, the courts have utilized a "hands off" approach to religious doctrine, meaning that questions of religious truth are not typically at issue in legal decisions.⁵⁰ Generally, government entities are restricted from compelling an individual's beliefs or barring them for the religious views they hold.⁵¹ Rather, the Free Exercise Clause has been viewed in the relevant jurisprudence as an absolute right for an individual to believe what they choose without government interference, and a slightly more limited right to act on one's personal beliefs.⁵² Consideration is given to the state to restrict religious action only under circumstances where the government meets a strict scrutiny standard,⁵³ or,

49. See Ubben & Sherman, *supra* note 15.

50. See, e.g., *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevic*, 426 U.S. 696, 720 (1976) (holding that the courts did not have the jurisdiction to rule in an ecclesiastical matter when a former bishop sued his church after being defrocked); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 34–35 (D.D.C. 1990) (Plaintiff sued her former church after her membership was terminated, seeking acknowledgement that she was a member in good standing as well as damages related to intentional infliction of emotional distress. The court granted summary judgement in favor of the defendant, citing that the First Amendment precluded their involvement in religious affairs.); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009).

51. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961) (ruling that denying a man who was appointed as Notary Public by the Governor of Maryland his position when he would not declare a personal belief in God was a violation of his First Amendment rights); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (ruling that jury could not be expected to determine that a family charged with mail fraud after soliciting donations was sincere in their stated religious convictions. Writing for the majority, Justice Douglas concluded that "men may believe what they cannot prove.").

52. See *Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (1940) (finding that a solicitation statute which empowered officials to determine which causes could be considered religious for the purpose of permitting solicitation was unconstitutional. Writing for the court, Justice Roberts stated, "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.").

53. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (ruling that a person whose religion prohibited them from working on Saturdays could not be denied unemployment benefits because employment opportunities were available on a day when their faith prohibited them from working); see also *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (finding that laws mandating attendance at public schools until the age of sixteen violated the free exercise rights of Amish families). In these cases, the court establishes a "compelling state interest" test wherein the government could only defeat a free

for non-federal cases, instances where the free expression claim is not attached to a violation of another right.⁵⁴

Furthermore, free exercise claims need not be based on a belief in the divine or even one specific formal code of ethics⁵⁵ nor must an individual's beliefs be consistent with the beliefs of other individuals who operate under the umbrella of the same religious denomination.⁵⁶ A person may claim that their rights to freely

exercise claim by demonstrating that the restriction constituted the least restrictive means of a compelling state interest. *See id.* at 215.

54. These so-called purely religious cases are distinguishable in that they only rely upon the Free Exercise Clause in their claim and not additional protections, including free speech claims. Purely religious claims have a lengthy history within American jurisprudence in instances where free exercise claims challenge general statutes that seek to create a general prohibition on a specific form of conduct. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 166 (1879) (ruling in part that freedom of expression under the First Amendment did not preclude a devout Mormon from following laws that forbade polygamy. The court reasoned, "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"); *Davis v. Beason*, 133 U.S. 333 (1890) (also ruling that a person accused of polygamy could not be exempted under the First Amendment from laws that made the practice illegal).

More recent cases have further clarified this distinction by noting that purely religious cases only require that the government demonstrate a legitimate interest that is neutrally applied to comply with the First Amendment. *See, e.g., Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) (upholding the denial of unemployment benefits to a person fired after it was discovered that they had consumed peyote as part of a religious ceremony, because the government had a legitimate interest in limiting drug use and the statute banning peyote was generally applied to all citizens); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (finding that a mother could be prosecuted for violating labor laws when she conscripted her nine-year-old daughter to sell religious publications with her on a public sidewalk); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (finding that the standard established in *Smith* did not apply to a state standard requiring a foster care organization to provide services for same sex couples because it was not neutral or generally applicable).

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), requiring that courts defer to the strict scrutiny standard administered in all cases that involved free exercise claims: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless it satisfies a strict scrutiny test]." 42 U.S.C. § 2000bb-1(a)–(b). The Supreme Court ruled the law unconstitutional as it applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding the RFRA over-extended Congress' Enforcement Clause powers and deferring to the standard in *Smith* when adjudicating a zoning dispute involving a church). However, the applicability of the RFRA to the federal government was affirmed in *Gonzales v. O Centro Espirita Beneficente União de Vegetal*, 546 U.S. 418 (2006) (finding that the federal government could not restrict a group from consuming a tea containing a hallucinogen as part of its religious practices).

Congress later passed the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a), which utilizes congressional authority under the Spending and Commerce Clauses to extend the compelling state interest test (*id.*) to state activities related to the regulation of land use and prison policies.

55. *See, e.g., Peterson v. Wilmar Commc'ns, Inc.*, 205 F. Supp. 2d 1014 (ED Wis., 2002) (ruling that "Creativity"—a general belief system rejecting the notion of the divine in favor of a "natural order" defined by white supremacy—was a religion for the purposes of a Title VII claim).

56. *See, e.g., Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989) (ruling in favor of a man seeking unemployment benefits who said that his Christian faith precluded him from working on Sundays); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) (determining that a man claiming

exercise their personally held religious beliefs are being violated provided that their beliefs are merely “religious in nature.”⁵⁷ Writing for a unanimous court in *United States v. Seeger*, Justice Clark writes that courts and local boards “are not free to reject beliefs because they consider them ‘incomprehensible.’ Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.”⁵⁸ Perhaps two of the most prominent examples of successful arguments for free exercise protections involved beliefs based on the work of philosophers such as Aristotle and Plato and a personal study of sociology and history.⁵⁹ This is not to say that religious protections are limitless, as courts have notably rejected claims of beliefs that merely constituted a personal preference rather than a comprehensive system of beliefs, or that did not address fundamental questions of meaning.⁶⁰ But, generally speaking, belief systems that function similar to traditional religious frameworks are unlikely to be significantly questioned by the courts.

Regarding NU’s prayer, Nebraska’s coach has previously described the ritual as a prayer for blessings, and prayer at the center of a playing area or before a sporting event is hardly an unparalleled practice.⁶¹ Nor does the potential ulterior motive of intimidation preclude the ritual from being religious. New Zealand’s national rugby team has historically performed a version of a traditional Māori ritual called the Haka with rhythmic chanting and clapping that is designed to challenge and intimidate opponents, a practice that several American college football teams with Polynesian athletes have occasionally adopted.⁶² In *Kennedy*, the Court noted that the presence of religious speech that offended sensibilities or made others feel uncomfortable was an insufficient justification for restricting that speech.⁶³ As such, it is unlikely that the question of whether NU’s ritual was religious in some way

unemployment benefits after his employer reassigned him to manufacture tank turrets was protected by the Free Exercise Clause, even though his friend who was involved in the same religion willingly accepted the new role).

57. *Africa v. Pennsylvania*, 662 F. 2d 1025, 1030 (3d Cir. 1981).

58. 380 U.S. 163, 184–185 (1965).

59. *See id.*; *Welsh v. United States*, 398 U.S. 333 (1970). Notably, both *Seeger* and *Welsh* dealt with conscientious objectors.

60. *See Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977) (rejecting a religious discrimination claim because petitioner’s belief that eating cat food significantly contributed to their well-being and work performance was not a religious belief); *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39 (2002) (ruling that veganism is not a religion).

61. *See Ubben & Sherman, supra* note 15.

62. *See, e.g.,* Peggy Fletcher Stack, *Haka: A Dance of Diversity or Ignorance?*, SALT LAKE TRIB. (Aug. 3, 2017) <https://www.sltrib.com/news/mormon/2017/03/05/haka-a-dance-of-diversity-or-ignorance/> [<https://web.archive.org/web/20250926223727/https://www.sltrib.com/news/mormon/2017/03/05/haka-a-dance-of-diversity-or-ignorance/>]; Associated Press, *Hawaii Must Not Perform “Haka” with Other Team on Field*, ESPN (Sep. 10, 2007) <https://web.archive.org/web/20220406235836/https://espn.com/college-football/news/story?id=3013668>. Notably, Hawaii’s team was penalized for performing the Haka under league taunting rules, but only when they performed the ritual when the opposing team was present, as it was viewed as a form of taunting.

63. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 538–539 (2022).

would invite significant judicial scrutiny despite the speculation of opposing fans. The more likely line of question would be whether the beliefs compelling NU's ritual are sincerely held and thus merit protection under the free exercise clause.

Whether an individual is sincere in their stated religious beliefs is a factual question, one which predominately asks whether the claimant is credible.⁶⁴ Some forms of extrinsic evidence which have been used to support determinations of sincerity include identifying motivations for the claimant to be insincere about their motives and behavioral inconsistencies. Motivation for insincerity refers to any evidence that claims of religious doctrine may be attempting to obscure some type of secular benefit.⁶⁵ Behavioral inconsistencies refers to instances where their own history of action belies their stated religious beliefs, such as when one adherent to the Jewish faith claimed they could not appear in court on the Sabbath despite regularly working on Saturdays.⁶⁶ Whether other people identifying with the same religion hold the same beliefs or whether a person's beliefs conform to written codes of their stated religion are typically excluded from determining sincerity, as these questions direct state officials to determine whether the content of a person's beliefs constitute religion.⁶⁷

It does not seem likely that the Nebraska football team gains any significant material benefit from their pregame prayer ritual. The Cornhuskers' record in road stadiums since Matt Rhule became the head coach and instituted the prayer in 2023 has been an abysmal two wins and eight losses, including losses in the three games where the pregame ritual generated controversy.⁶⁸ These prayers also happen hours before games start, well before fans are in the stands or cameras are rolling, so the only media comments on these events have been in the rare instances where the other school attempts to disrupt the ritual, and even then, those stories have hardly gained Rhule or his players any notable benefits. While it is not clear whether the Nebraska team performs this ritual at home games, that inconsistency is very unlikely to be significant when the NU players and coaches have made it a point of consistently performing their prayer at midfield before all road games. Absent

64. See *United States v. Ballard*, 322 U.S. 78, 86–88 (1944).

65. *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (“[A]n adherent's belief would not be ‘sincere’ if he acts in a manner inconsistent with that belief . . . or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.” (internal citations omitted)).

66. *Dobkin v. District of Columbia*, 194 A.2d 657 (D.C. 1963).

67. This does not mean that such inquiries are non-existent, as there is a history of their use against religious minorities in some instances. See, e.g., Adeel Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836 (2020).

68. NU lost the 2023 game against Colorado 36–14, the 2024 game against USC 28–20, and the 2024 game to Iowa 13–10. See *Nebraska Cornhuskers Schedule 2023*, ESPN https://www.espn.com/college-football/team/schedule/_id/158/season/2023 [https://web.archive.org/web/20251103175438/https://www.espn.com/college-football/team/schedule/_id/158/season/2023] (last visited Nov. 3, 2025); *Nebraska Cornhuskers Schedule 2024*, ESPN, https://www.espn.com/college-football/team/schedule/_id/158/season/2024 [https://web.archive.org/web/20251103175557/https://www.espn.com/college-football/team/schedule/_id/158/season/2024] (last visited Nov. 3, 2025).

motivation to falsify their religious claims and inconsistencies in the team's behavior, it would be very unlikely that opposing schools could prove that the NU team's prayer was not a sincerely held religious belief and thus subject to protection under the free exercise clause, regardless of whether it may also be considered disrespectful or an attempt to intimidate.

Iowa's defense to a free exercise claim would be to demonstrate that its denial of access to the midfield logo was part of a generally applicable, neutral policy and, as we discussed in the previous section, it is unclear whether that is the case.⁶⁹ Moreover, even if the prayer was a secular activity, and NU's coach has explicitly said that it is not, it is still speech and thus the issue for UI officials remains the same.⁷⁰ Iowa would still need to demonstrate that it had a reasonable rationale for restricting the NU team's speech.

IV. Was Iowa's Restriction Viewpoint-Neutral?

As different publicly-owned spaces allow for different types of speech regulation based on the nature and function of the property, we must determine the type of public forum that Iowa's football field represents to determine whether Iowa's restriction fits. Once we have identified the forum, we can begin to answer the question of whether the restriction was content neutral and, if not, whether it was a bespoke attempt to restrict the NU prayer or a more generally applicable rule.

In First Amendment jurisprudence, forum analysis is the judicial evaluation of the extent to which speech is protected in a specific public space.⁷¹ There are primarily four types of public fora:⁷² traditional public fora such as parks or sidewalks, which have traditionally been open to the free exchange of ideas and where the government may only pose reasonable restrictions based on the time, place, and manner of speech;⁷³ designated public fora such as public theaters, which are venues created by the state and where restrictions on speech are also limited to only time, place, and manner concerns as long as the space is open to the public;⁷⁴ limited public fora where the government limits the use of the forum to certain groups and specific topics and may impose content-specific, but not viewpoint-specific, restrictions on speech to preserve the intended purpose of the

69. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (stating that a Florida law prohibiting keeping animals for sacrifice was not neutral or generally applicable as it only burdened the conduct of residents practicing the Santeria faith).

70. See *Ubben & Sherman*, *supra* note 15.

71. See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983).

72. *Id.* at 45–46.

73. See *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (determining that restrictions based on the volume of a rock concert in a public park were narrowly content-neutral restrictions tailored to serve a substantial government interest, making them permissible under the First Amendment); *Brown v. Louisiana*, 383 U.S. 131 (1966) (holding that an African American could not be restricted from entering a segregated reading room at a public library without violating their rights to freedom of speech and assembly).

74. See *e.g.*, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (finding that a public theater could not prohibit the production of a musical based on its content).

forum;⁷⁵ and nonpublic fora such as military bases that are publicly owned but are not intended for free speech, meaning the government has greater authority to impose content-specific restrictions to speech in order to preserve the essential functions of the forum.⁷⁶ In all of these, the government is generally expected to maintain viewpoint neutrality, meaning that even in limited or non-public fora where speech may be restricted based on content, it cannot be restricted based on viewpoint if the speech is otherwise permissible.⁷⁷ Generally speaking, if a forum is a traditional or designated public forum, then the level of scrutiny on restrictions to speech is determined by the availability of alternative channels.⁷⁸ Limited public fora function effectively the same as designated public fora, but the government has a reasonable scrutiny standard for setting parameters on the speakers and content of the speech in the forum.⁷⁹ Finally, nonpublic fora face the lowest level of scrutiny because they are not designed to be venues of free expression, meaning speech restrictions only need to reasonably fit the government's purpose for the forum and be viewpoint neutral.⁸⁰

In sports stadiums, spectator seating areas have been considered public fora,⁸¹ but the courts have not weighed in on the question of whether the playing field is similarly constituted. Playing fields are uniquely challenging to classify as they are generally restricted to the public, and *Kennedy* is sadly devoid of forum analysis so there is still a general question of the extent to which a government entity may restrict the speech of those on the field. Both the majority decision and dissent briefly reference the standard in *Tinker v. Des Moines Independent Community School Dist.* that teachers and students at public schools do not shed their First Amendment rights.⁸² Public schools and their related activities that are intended to fit within the educational curriculum are typically considered nonpublic fora for First Amendment analysis, meaning that school officials may reasonably restrain

75. See e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (ruling that a public university could not prohibit religious student groups from renting meeting spaces available to other student groups).

76. See e.g., *Greer v. Spock*, 424 U.S. 828 (1976) (ruling that military officials could regulate distribution of political material on a military base, as it is not a public forum for the purpose of First Amendment activity).

77. See e.g., *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (noting that nondisruptive speech is protected in a nonpublic forum even if it is not related to the specific activities of the forum).

78. See e.g., *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147 (1939) (concluding that a series of ordinances across several major cities prohibiting the distribution of handbills on public sidewalks was a violation of the First Amendment as there was no comparable alternative).

79. See e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (finding that a school district's prohibition on a religious club using its meeting rooms because of its spiritual focus was a violation of the club's First Amendment rights).

80. See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983).

81. See e.g., *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013 (D.C. Cir. 1988) (ruling that RFK Stadium was a public forum, and even the fact that the government did not intend to create a public forum when it created the stadium was not dispositive of its obligations under the First Amendment).

82. 393 U.S. 503 at 506 (1969). Referenced in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022) by the majority at 527 and the dissent at 564.

speech based on content to further the educational mission of the institution.⁸³ Thus, we might assume that the Court would generally consider the football field a nonpublic forum where the school's limitation on Kennedy's prayer was unconstitutional because it restricted speech based on content that was not disruptive to the forum's intended purpose.⁸⁴

Spaces on college campuses are more diverse, including all three types of public fora and nonpublic fora, because colleges, by their nature, are designed to be more reflective of the marketplace of ideas within the community at large and thus require additional flexibility for speech.⁸⁵ The relationship between institution and student is also distinguishable from high schools or other public schools as college students are young adults and more mature, meaning that university administrators do not need, and do not have, the general authority to act *in loco parentis* that is present in K-12 schools.⁸⁶ For example, green spaces and plazas on college campuses have been deemed traditional public fora,⁸⁷ public speaker events and registration of student organizations have been viewed as limited public fora,⁸⁸ and both email systems and college classrooms, when used for their primary function of hosting classes, have been designated as nonpublic fora.⁸⁹

Since spaces on college campuses are far less likely to be considered nonpublic fora, we must examine the characteristics of Iowa's football field to determine the level of scrutiny given to speech restrictions there. Unlike other meeting areas on the university campus, a football field is not generally open to the public and therefore is not a traditional or designated public forum. The field itself is home to multiple expressive activities during a typical football game, from the players themselves to marching bands to cheerleaders. However, none of these roles are

83. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that a public school could restrict the content of a student newspaper because the paper was part of the school's academic curriculum and not a designated public forum); *Hedges v. Wauconda Cmty. Unit Sch. Dist.* No. 118, 9 F.3d 1295 (7th Cir. 1993) (determining that a junior high school was not a public forum for the distribution of religious material); *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (reasoning that the schools in a public school district were nonpublic fora); *M.A.L. ex rel. M.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008) (finding that a middle school was a nonpublic forum); *Planned Parenthood of S. Nevada v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1991) (ruling that a school's newspapers, yearbooks, and athletic programs were nonpublic fora).

84. This is also reflected in the dissent and lower court rulings, though their opinion differed on whether Kennedy's prayer was disruptive to the intended function of the football field. See *Kennedy*, 597 U.S. at 522, for a summary of the Ninth Circuit's ruling. See also *id.* at 546 (Sotomayor, J., dissenting).

85. See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."); ERWIN CHERMERINSKY & HOWARD GILMAN, *FREE SPEECH ON CAMPUS* 72–75 (2017).

86. See, e.g., *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981).

87. See, e.g., *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992); *Pro-Life Cougars v. Univ. of Hou.*, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003).

88. See, e.g., *Widmar*, 454 U.S. at 265, 272 (1981); *Hickock v. Orange Cnty. Cmty. Coll.*, 472 F. Supp. 2d 469, 474–475 (S.D.N.Y. 2006).

89. See, e.g., *Smith v. Tarrant Cnty. Coll. Dist.*, 670 F. Supp. 2d 534, 539 (N.D. Tex. 2009); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991).

intended to be open to the public, and the University, like most other institutions, does not generally allow qualified football players, marching bands, or cheerleaders to participate unless they are specifically affiliated with the two participating schools. This precludes the field from being designated a limited public forum, as it would require public access to the forum based on the specific categories. Therefore we conclude that Iowa's football field is, just as we assume the field in *Kennedy* to be, a nonpublic forum, meaning that UI officials would only need to demonstrate that restrictions on the NU prayer were reasonably tailored to fit the purpose of the facility and viewpoint neutral, so we must next investigate the nature of Iowa's restriction to determine whether it meets this standard. There are two primary concerns we must address: whether the restriction Iowa imposed was viewpoint-neutral and whether it was reasonable.

To determine Iowa's rationale for its restriction we must engage in some speculation since, currently, the only information we have regarding Iowa's restriction on the NU prayer is the images of the police guarding the midfield logo prior to the game which were taken by reporters and a comment from coach Matt Rhule following the game: "They told us we had to go to the end zone. When we came out to walk to the end zone, there were seven armed troopers standing on the logo."⁹⁰ Simply put, all we know is that Iowa wanted NU to stay off the midfield logo for its ritual and was willing to accommodate it being performed at the same time in a different part of the stadium. This is important as, while Iowa's stadium may only have to adhere to the former, less restrictive standard in most cases, it is irreconcilable with the First Amendment's Free Exercise Clause to prohibit prayer as a class of speech, even in a nonpublic forum as the Court demonstrated in *Kennedy*. Thus, limiting NU's prayer without inhibiting other forms of prayer would trigger a significantly higher strict scrutiny standard, but if the restriction were merely content specific or content neutral such that applied to all forms of speech, then it would only need to be reasonable to preserve the function of the field as a nonpublic forum.

To defend against an NU free exercise claim, Iowa officials may assert that their prohibition was actually a general prohibition of demonstrations or team meetings on the midfield logo prior to games to prevent confrontations between the two teams, making it merely a content-neutral restriction on a specific part of the playing surface.⁹¹ Content-neutral restrictions are permitted even in public fora provided that they are narrowly tailored to achieve a specific government interest, only limit speech based on its time, place, and manner, and provide a viable

90. Sherman, *supra* note 23.

91. Iowa's rationale could also potentially be related to specific concerns about maintaining the playing surface around the logo. Midfield logos are either painted onto the artificial turf or sewn into the field itself. It is unclear which category fits Iowa's midfield logo, but there are some conceivable scenarios where Iowa might have been concerned about maintaining the visual appearance of the logo prior to the game if it was painted.

alternative for speech.⁹² In Rhule's own comments he noted that UI officials allowed his team to perform their pregame prayer in the endzone of the football stadium as an alternative to using the midfield logo, which is what they did.⁹³

Restricting the midfield logo could also be portrayed as an attempt by UI officials to restrict the field based on NCAA guidelines. According to the 2024 NCAA football rulebook, game officials take jurisdiction of the playing field ninety minutes prior to the start of a game, at which point all players practicing or warming up on the field must be wearing their jersey with their number on it and must be supervised by a coach.⁹⁴ At this point, the field is divided into two parts in connecting "L" shapes (see Figure 1) with each team effectively controlling half of the midfield logo.⁹⁵ With forty minutes remaining until kickoff, the field is reconfigured such that both teams control half the field, with the ten yards in the middle of the field acting as a neutral buffer zone between the two teams (see Figure 2).⁹⁶ At no point in the NCAA's pregame warm-up period does either team have full control over the area occupied by the midfield logo.

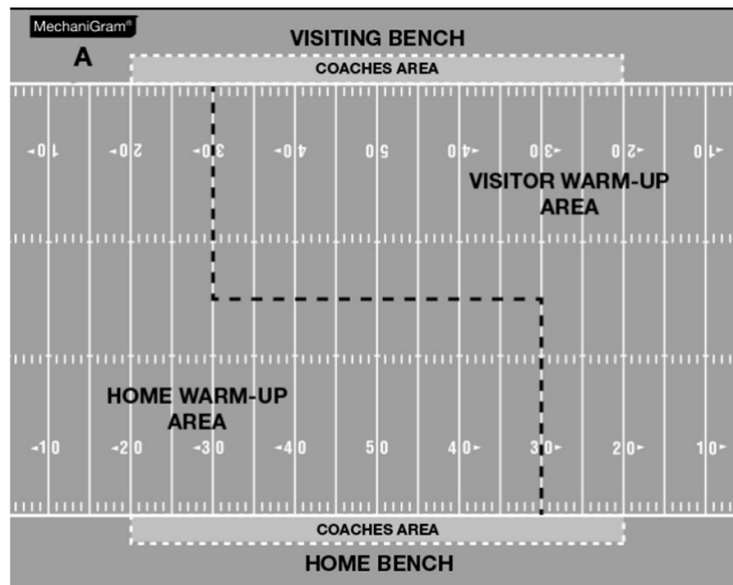


Figure 1⁹⁷

92. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 821 (1984)).

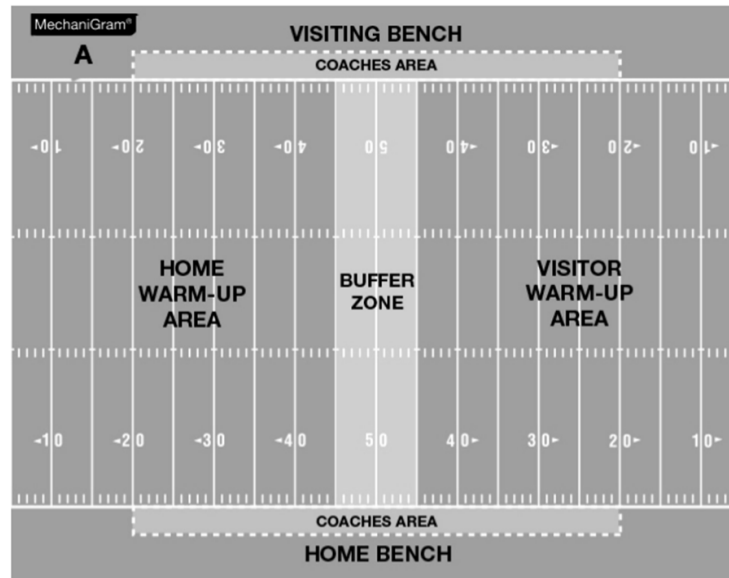
93. Ubben & Sherman, *supra* note 15.

94. NCAA FOOTBALL RULES BOOK, Rule 11 § 1, Art. 1 (2024), <https://www.ncaapublications.com/p-4705-2024-ncaa-football-rules-book-online-only.aspx> [<https://web.archive.org/web/20250916152807/https://www.ncaapublications.com/p-4705-2024-ncaa-football-rules-book-online-only.aspx>].

95. *Id.* at Rule 11 § 1 Art. 2.

96. *Id.*

97. *Id.* at Appendix D (Field Diagrams).

Figure 2⁹⁸

However, NU's pregame prayer ritual took place roughly two hours prior to the start of the game, before the game officials took jurisdiction of the field, and with none of the players dressed in uniform.⁹⁹ This timing was consistent with the two other incidents sparked by NU's prayer, and in both of those incidents players for the other team were also on the field and not wearing jerseys. According to the Big Ten conference's vice president overseeing football operations, the conference in which Iowa and Nebraska are both members, the 2024 league rules required both teams to have shared access to the field beginning no later than two hours before kickoff, but players from both teams may access the field even earlier provided they are accompanied by coaches.¹⁰⁰ The official did not specify whether the field was necessarily divided in the same manner it would be ninety minutes prior to the start of the game when the NCAA referees took jurisdiction of the field. That NU's pregame prayer took place at a consistent time or place in opposing league stadiums for two years without any reprimand from the Big Ten indicates that the NU's prayer at midfield is within the league's policies.

It is worth returning to our comparison with *Kennedy* here, as in that case the school district offered what it argued was a reasonable time, place, and manner

98. *Id.*

99. See Ketterson, *supra* note 24, for a photo taken of NU players navigating around police on Iowa's field and attempting to pray.

100. Personal Communication with AJ Edds (Apr. 2, 2025). The Big Ten declined to provide copies of its pregame policy for this article.

alternative for their coach's prayer—allowing him to pray in private on the field after the stadium had emptied and players had gone home.¹⁰¹ The Court likely did not consider this in its decision because the restriction imposed by the school district was viewpoint-based rather than content-based, being that it specifically targeted Kennedy's prayer at midfield and not all forms of prayer.¹⁰² Iowa's restriction could be seen as equally targeting the Nebraska team prayer because, as far as we have found, Iowa typically does not deploy several state police officers to guard the midfield logo prior to most games. It may very well be that Iowa has a standing policy limiting access to the midfield logo prior to games and increased security against Nebraska because of a reasonable concern that NU players and coaches might attempt to perform their pregame ritual regardless. If that is the case, then the restriction on the NU prayer would be viewpoint-neutral, and the only question would be whether that restriction reasonably fits the purpose of the football field for Iowa to impose at its home games. However, it is also plausible that Iowa's restriction of the midfield logo was implemented to specifically restrict NU's pregame prayer and was therefore a form of viewpoint discrimination. We cannot say for certain which it is.

V. Are "Fighting Prayers" A Reasonable Enough Concern to Restrict Speech?

The concern that NU's prayer may spark a violent conflict does not meet the standard of being reasonable for restricting speech, nor would UI's decision to limit access to midfield be a reasonable solution to that concern. Our conclusion here is based on the existing case literature indicating that NU's speech does not fall within the definition of "fighting words" that are not protected speech, further jurisprudence highlighting that the potential for conflict or offense resulting from speech is a grossly insufficient pretext for its restriction, and finally the observation that UI could have mitigated its concern over potential violence by attempting to limit the violence rather than the Nebraska team's expressive activities.

Fighting words are utterances that, "by their very utterance, inflict injury or tend to incite an immediate breach of the peace," and that, "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."¹⁰³ While fighting words are not protected under the First Amendment, the category of expressions is extremely narrow. For speech to be classified as fighting words it must "naturally tend to provoke violent resentment,"¹⁰⁴ must also be "directed to the person of the hearer,"¹⁰⁵ and, most importantly, the speech

101. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 552 (2022) (Sotomayor, J., dissenting) (describing the district's alternative option for Kennedy).

102. This was largely due to Kennedy's previous demonstrative religious invocations which the school district believed were invocative in Kennedy's decision to publicize his quiet prayer at midfield. *See id.*

103. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

104. Gooding v. Wilson, 405 U.S. 518, 525 (1972).

105. Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).

must tend to incite a breach of the peace.¹⁰⁶ The third element is the most crucial and most difficult, as it requires real evidence that speech is likely to cause violence.¹⁰⁷ Among other things, the Court has determined that members of the Ku Klux Klan burning crosses,¹⁰⁸ individuals shouting expletives at police officers,¹⁰⁹ and protestors burning the American flag¹¹⁰ are examples of speech that did not fit within the definition of fighting words. Restricting speech as fighting words is also impermissible when the restriction is targeted towards a specific viewpoint.¹¹¹

While actions at the midfield logo may carry an implication of a derogatory message directed at the opposing team, it is not necessarily clear how Nebraska's team prayer is an action that would automatically promote violent resentment or tend to incite a breach of the peace. Prayer at midfield prior to a football game certainly has precedent as more than NU's alleged display of disrespect. For example, in 2011, both the Nebraska and Penn State teams gathered together at midfield to say a prayer for the victims of Jerry Sandusky, a former Penn State football coach who was convicted of molesting children days before the game.¹¹² In 2023, members of the NFL's Jacksonville Jaguars and Tennessee Titans came together at midfield to pray for the health of Buffalo Bills safety Damar Hamlin, who was critically injured in a previous game.¹¹³ While a team's presence on an opponent's midfield logo has, in some circumstances, been intended as a sign of disrespect, there is no reason for players to assume NU's prayer carries that intent. Furthermore, the fact that two confrontations have occurred on the field is likely insufficient to demonstrate an imminent threat of violence inherent to the Huskers' prayer.

106. UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1169 (E.D. Wis. 1991).

107. While some lower courts have continued to uphold convictions under the fighting words doctrine, the precedent has been substantively diminished to the point where convictions under statutes written to limit fighting words are increasingly rare. See, e.g., Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L.R. 441 (2004).

108. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

109. See, e.g., Lewis v. New Orleans, 415 U.S. 130 (1974); City of Houston, Tex. v. Hill, 482 U.S. 451 (1987).

110. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989).

111. See, e.g., R.A.V., 505 U.S. 377 at 392 (holding that government entities have "no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

112. Alexander Angert, *Pregame Prayer Puts Things into Perspective for Penn State and Nebraska Football Teams*, PENN LIVE (Nov. 12, 2011), https://www.pennlive.com/patriotnewssports/2011/11/pregame_prayer_puts_things_int.html [https://web.archive.org/web/20250916225024/https://www.pennlive.com/patriotnewssports/2011/11/pregame_prayer_puts_things_int.html].

113. Nick Gray, *Titans and Jaguars Players Come Together for Pregame Prayer in Support of Damar Hamlin*, TENNESSEAN (Jan. 7, 2023), <https://www.tennessean.com/story/sports/nfl/titans/2023/01/08/damar-hamlin-tennessee-titans-jacksonville-jaguars-prayer-pregame/69787858007/> [<https://perma.cc/C6TC-J427>].

Restricting NU's speech because it might be deemed offensive by players on the opposing team is also unlikely to survive even the modest standard of review afforded to nonpublic fora. A reasonableness standard does not require that a regulation on speech be narrowly tailored, but it must have a sensible rationale for determining what speech is included or excluded.¹¹⁴ For example, a Minnesota law prohibiting political attire in polling places was deemed unconstitutionally overbroad because the definition the state used for political attire was vague and allowed election judges to decide at the door what messages constituted political speech.¹¹⁵ While it could be argued that Iowa restricting access to its midfield logo is an effort to promote sportsmanship, a quality that is generally an important element of the football field, it would be very difficult for Iowa to define sportsmanship in such a way that wouldn't run into a similar issue of overbreadth. Not all gatherings of players and coaches at midfield are inherently unsportsmanlike, so a policy that restricted access to the logo would have to be more narrowly tailored. However, narrowing the definition of sportsmanship to only certain behaviors at midfield would require a policy so narrowly tailored that it would not be considered generally applicable for the purpose of a free exercise claim. To this point, the Court wrote in *Kennedy* that "some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection," but that is not enough to justify restriction on individual expression.¹¹⁶ While some individuals may take offense to the sight of players kneeling in prayer on another team's field logo, it simply does not make sense to limit the ritual because it may cause bad feelings from the opposing team.

Finally, even if we accept that the concern of UI officials in our scenario about promoting sportsmanship and avoiding potential conflicts between participating teams is valid, the solution of prohibiting the NU team from accessing the midfield logo and deployment of state police to guard the logo is not a reasonable solution. The reasonableness standard requires that a regulation further the government interest of the nonpublic forum where it is deployed.¹¹⁷ On sportsmanship, the NCAA states that "values such as respect, caring, fairness, civility, honesty, integrity and responsibility are key to creating a positive competitive environment."¹¹⁸ It strains credulity that any of the words used by the NCAA to describe the values inherent in sportsmanship are furthered by denying access to the midfield logo for a pregame prayer. Nor does it logically follow that deploying police to guard the

114. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 16 (2018).

115. *Id.* at 21–22.

116. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 539 (2022).

117. See, e.g., *Price v. Garland*, 45 F. 4th 1059, 1071–1072 (D.C. Cir. 2022) (holding that regulation of filmmaking in public fora need only meet the reasonableness standard used to regulate speech in nonpublic fora).

118. NCAA: SPORTSMANSHIP,
[https://web.archive.org/web/20250522212704/https://www.ncaa.org/sports/2021/6/18/sportsmansh
ip.aspx](https://web.archive.org/web/20250522212704/https://www.ncaa.org/sports/2021/6/18/sportsmansh
ip.aspx)
(last visited May. 22, 2025).

logo would de-escalate a situation and prevent player passions from erupting into violence. The evidence bears out that the policy decision made by UI officials to restrict the logo and the tactics used to enforce that policy enflamed the situation rather than defused tensions. NU players and coaches cited the police presence as the reason why the NU team captains refused to shake hands with the UI players at the beginning of the game, resulting in at least one Iowa player retaliating with mocking comments during and after the game to the NU coaching staff.¹¹⁹

Though a reasonableness standard does not mean that a restriction on speech be the most obvious or least restrictive option available, we must point out that UI officials had far more reasonable options to promote safety and sportsmanship than the avenue that they chose. Given their previous knowledge of NU's prayer ritual, Iowa officials could have very easily kept their players in the locker room when it knew the NU team was going to perform its pregame prayer, thus depriving NU of an audience that could potentially have a violent reaction. If that was somehow not possible, Iowa could also have used the same police officers it deployed to protect the field logo to protect NU's prayer from any UI players simultaneously on the field. Even if we accept the premise that NU's pregame prayer is designed to intimidate and disrespect the opponent, it is difficult to see how responding with an intimidating police presence is a logical conclusion.

VI. Conclusion: Clearer, Consistent Policy is Needed

Our analysis demonstrates that claims that religious rituals may be used as attempts to intimidate or disrespect opponents and possibly provoke hostile responses are not rational explanations for trampling religious liberty. While there are many elements of what happened regarding the NU prayer at Iowa that we still do not know, it is clear that what happened cannot be justified under a framework of limiting violence or promoting sportsmanship. Our review of what facts we do know about the pregame prayer conflict demonstrates several opportunities for rethinking policies at public sports facilities to better balance concerns over player safety and mitigating potential conflict with First Amendment freedoms.

Perhaps the most prominent issue is the lack of clear and consistent policies. The fact that NU's prayer takes place at a point when control over space on the playing field is not generally defined and referees who can enforce codes of sportsmanship are not present is an issue that has previously and will likely continue to cause issues like the one discussed here. Teams could restrict player warm-up periods to only the ninety-minute window when the NCAA referees have jurisdiction of the field,

119. Tyler Tachman, *Iowa Football: How Disrespect Fueled Jay Higgins, Hawkeyes to Dramatic Win over Nebraska*, DES MOINES REGISTER (Nov. 30, 2024), <https://www.hawkecentral.com/story/sports/college/iowa/football/2024/11/30/iowa-football-jay-higgins-kaleb-johnson-drew-stevens-matt-rhule-nebraska-hawkeyes-big-ten/76566742007/> [https://web.archive.org/web/20250916231018/https://www.hawkecentral.com/story/sports/college/iowa/football/2024/11/30/iowa-football-jay-higgins-kaleb-johnson-drew-stevens-matt-rhule-nebraska-hawkeyes-big-ten/76566742007/].

or extend the time that officials are asked to monitor the field for potential sportsmanship violations. Leagues like the Big Ten that require that players be given access to the playing field prior to the NCAA window could also implement policies that clearly define the dimensions of the field that each team has access to during the time before the NCAA officials take jurisdiction of the field. Because they are not state actors, neither the Big Ten nor the NCAA would face First Amendment scrutiny in restricting speech for the reasons we attributed to Iowa in our discussion. This is not to say that the NU prayer is problematic and warrants such restrictions—the responses by other schools thus far have caused more harm than the NU prayers themselves—but to say that action could be taken to craft policies that limit truly problematic behavior in the future before it becomes a problem.

Finally, while we do have modest concerns about the potential for coercion as it relates to the prayer, that is not an issue which opponents are positioned to address. Nothing in our review of the NU prayer would seem to indicate that it is used to intimidate or disrespect opponents, nor have we found any reason to believe that it is not a sincere religious practice. As such, we would advise schools to focus more on beating Nebraska during the game rather than regulating their team's prayer before it begins.¹²⁰

120. As of this writing, Iowa has won nine of its last ten games against Nebraska.

Bridging the Workers' Data Value Gap in the Age of Corporate Automation

Mattias Rättzén*

© 2025 Rättzén. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction, provided the original author and source are credited.

TABLE OF CONTENTS

Abstract	74
Introduction.....	75
I. Defining Workers' Data	77
II. How Companies Are Using Workers' Data for Automation Purposes ...	78
III. Who Owns the Copyright of Workers' Data?	80
IV. Restrictions on Using Workers' Data	83
A. The Personal Data Clawback	83
B. Contract Law Restrictions on Using Workers' Data	85
C. Whether Companies Are Unjustly Enriched by Their Workers' Data	88
D. Employment Law Restrictions of Redundancies and Using Workers' Data	89
E. What AI Regulations Say About Using Workers' Data	91
V. The Case for Companies' Right to Use Workers' Data	93
VI. The Case for Workers' Right to Redress	94
VII. The European "Best-Seller" Rule and Fair Remuneration for Copyright Assignments	95
A. The "Real" Value Gap in the DSM Directive	95
B. Fair Remuneration for Workers' Data	100
C. A Contract Adjustment Only, Not Law Adjustment	103
D. Extraterritoriality and Choice of Law Implications	104
VIII. Is There a Workers' Data Value Gap?	106
A. An Economics Primer of the Valuation of Data in AI	106
B. What Makes the Valuation of Workers' Data Unique	112
C. Whether Workers Should be Compensated for the Use of Their Data	115
IX. Bridging the Workers' Data Value Gap	120
A. Existing Contract and Employment Remedies Inadequately Protect Workers' Data Rights	120
B. What Lessons Can Be Learned From Patent Law for Compensation for Employee-Inventions?	122
C. Towards a Contract Adjustment Mechanism for the Use of Workers' Data	124
D. A Contract Adjustment Roadmap for Workers' Data	127
1. Does the text and data mining exception exempt organizations from the contract adjustment mechanism?	127
2. Is an infringing act carried out in the EU in respect of workers' data?	128

3. Are all employment and contractor agreements exploitation contracts?	132
4. When will workers' data yield a significantly higher economic value than their underlying work products?	133
5. How should the relative share of the economic value be apportioned to the use of work products as data?	139
6. How should previously paid compensation to workers be factored in?	143
7. Should workers or organizations reap the rewards for the higher economic value derived from their work products when transposed into data?	144
8. How should the economic value of accumulated workers' data be assessed in relation to other data sources?	145
9. How should workers' redundancies be considered?	149
10. Should different types of workers be remunerated differently for the exploitation of their work products? ..	149
11. How should the worker be compensated for the future use of their data?	151
12. How should the economic value of the EU-specific copyright portfolio and EU-specific acts be assessed when workers' data are used outside the EU?	152
E. Should Workers' Prior Consent be Required or an Opt-Out Mechanism be Introduced for the Use of Workers' Data?	154
F. Should a Workers' Data Exception and Limitation Be Introduced?	156
X. What Can Workers Do To Realize the Value of Their Data?	158
XI. What Can Companies Do To Protect Their Interests?	160
XII. Last Words to Regulators	161
XIII. Conclusion	163

ABSTRACT

The rapid advancement of artificial intelligence (“AI”) is transforming corporate innovation, enabling the automation of work traditionally performed by humans. Companies increasingly rely on internal data to develop and train AI systems, much of which originates from their own workforces. This includes work products created by employees or contractors in the course of their duties, here referred to as “workers’ data.” Workers’ data may hold significant value as it is often of high quality, high quantity and of high relevance. Yet, ironically, if workers’ data is used for automation purposes, it could displace the very employees who were responsible for generating the data in the first place. The risk of a “job apocalypse,” where hundreds of millions of jobs could be replaced by AI in the coming years, becomes increasingly real as more companies push towards automating parts of their workforces.

Work products used to generate workers’ data will often qualify as copyright-protected works. The workers, who are authors in copyright law, will often have assigned their copyright to their respective employers or contractees, whether by statute or by contract. However, that companies may own the copyright for the work products, including the data, does not necessarily confer unlimited freedom of use. This Article critically examines the legal boundaries on the use of workers’ data for AI and automation purposes, focusing on the European Union (EU), the United Kingdom (UK), and the United States. Overall, the current legal framework largely falls short of adequately protecting workers’ rights when it comes to use of their data by employers, with one important exception. In the EU, the DSM Directive introduces a right for authors to claim additional remuneration where the economic value derived from their works is significantly greater than what they were originally paid. This right to contract adjustment, commonly referred to as the “best-seller” rule, may, in certain cases, help workers whose data are being used without fair remuneration, bridging what is coined as the “workers’ data value gap.” Whether workers are entitled to further remuneration will depend on highly fact-specific circumstances, and outcomes are likely to vary from case to case.

The urgency of addressing these issues cannot be overstated. Workers’ data is expected to play an increasingly central role in corporate automation projects worldwide, with consequences that extend far beyond the EU. Without a clear and coherent legal framework, there is a dual risk. On the one hand, companies may undervalue or fail to properly compensate for the human contributions that make automation possible; on the other hand, legal uncertainty or excessive compensation claims could deter or slow down automation initiatives. This Article calls for economic, policy, and legal research to explore these questions in greater detail, and to develop balanced solutions that both protect workers’ rights and foster innovation in the coming age of corporate automation.

INTRODUCTION

Imagine that you have been working for a company for a decade. Over the years, you have dedicated countless hours to creating reports, strategies, media, and other creative or proprietary content. All of this work, as per the terms of your contract for employment or independent contractorship, or by default under applicable law, belongs to the company. One day, your company decides to take all this work and feed it as data into a generative artificial intelligence (“AI”) model or system. The model or system will be trained on the unique characteristics of your contributions, making it capable of replicating, or even surpassing, your own work. Soon after, you are handed your termination notice. AI has replaced you.

This hypothetical scenario is increasingly becoming a reality for many workers. For example, IBM recently made plans to replace up to 30% of its back-office roles with AI over the next five years, potentially impacting close to 7,800 jobs.¹ Similarly, BT Group aims to cut up to 55,000 jobs by 2030, approximately 40% of its workforce, with 10,000 of those positions expected to be replaced by AI.² Other companies have already started their AI transition journey. In 2023, the Indian e-commerce company Dukaan replaced 90% of its customer support staff with an AI chatbot.³ The Institute for Public Policy Research has estimated that up to 8 million jobs would be lost in the UK alone due to AI, without government intervention.⁴ Another report

* LL.M. (Harvard), PGDip (Oxford), LL.M. (Lund). Mattias Rättzén is an intellectual property and artificial intelligence attorney admitted in New York, England and Wales, and Sweden, and is the author of multiple published articles. In addition to working in private practice in London and Stockholm, he has been a member of the Swedish SCCR delegation at WIPO in Geneva. The author hereby reserves his rights from this Article and its contents to be reproduced for text and data mining purposes under Article 4(3) of Directive (EU) 2019/790, and under any other relevant laws that may apply in any jurisdiction, except where the text and data mining is meant to facilitate the findability or searchability of this Article or where any generated content cites this Article as its source. The views in this Article are the author's own.

1. Brody Ford, *IBM's CEO Expects A.I. to Be so Good at Back Office Work that He Plans to Pause Hiring Humans for Those Jobs*, FORTUNE (May 1, 2023), <https://fortune.com/2023/05/01/ibm-ceo-ai-artificial-intelligence-back-office-jobs-pause-hiring/> [<https://web.archive.org/web/20250918150440/https://fortune.com/2023/05/01/ibm-ceo-ai-artificial-intelligence-back-office-jobs-pause-hiring/>].

2. Mark Sweney, *BT to Axe Up to 55,000 Jobs by 2030 as it Pushes into AI*, GUARDIAN (May 13, 2023), <https://www.theguardian.com/business/2023/may/18/bt-cut-jobs-telecoms-group-workforce> [<https://web.archive.org/web/20250918150959/https://www.theguardian.com/business/2023/may/18/bt-cut-jobs-telecoms-group-workforce>].

3. Anna Cooban, *This CEO Replaced 90% of Support Staff with an AI Chatbot*, CNN (July 12, 2023), <https://edition.cnn.com/2023/07/12/business/dukaan-ceo-layoffs-ai-chatbot/index.html> [<https://web.archive.org/web/20250918151650/https://edition.cnn.com/2023/07/12/business/dukaan-ceo-layoffs-ai-chatbot/index.html>].

4. Carsten Jung & Bhargav Srinivasa Desikan, *Transformed by AI: How Generative Artificial Intelligence Could Affect Work in the UK—and How to Manage it*, INST. PUB. POL'Y RSCH. (Mar. 2024), https://ippr-org.files.svdcdn.com/production/Downloads/Transformed_by_AI_March24_2024-03-27-121003_kxis.pdf

from Goldman Sachs has estimated that AI could replace the equivalent of 300 million full-time jobs worldwide.⁵ The World Economic Forum has forecasted the same, surveying that a staggering 41% of employers worldwide intend to downsize their workforces by 2030 due to AI.⁶ Employees themselves have also admitted that up to 31% of their work tasks are replaceable by AI, project management and collaboration software.⁷

This job apocalypse, although devastating for many workers, will result in significant efficiency gains and cost savings for companies, which have a legitimate interest in improving and streamlining their operations. There is currently no general prohibition against using AI to replace workers, which merely reflects the continuation of patterns seen in labor markets for many decades. Historically, advancements in new technologies have led to the displacement of human workers, particularly in roles which have been repetitive in nature or of less value, but have also created new opportunities for those displaced. But what makes the present situation different from the past, however, is that workers' data is being used against them. Data is the new gold in the fourth industrial revolution.⁸ AI systems and models often require vast amounts of data to learn and perform their tasks, and it is the quality, quantity, and diversity of that data which determine their performance and accuracy.⁹ The data produced by workers, originating from their work products, will be especially valuable to companies as it is often of high

[https://web.archive.org/web/20250918151907/https://ippr-org.files.svcdn.com/production/Downloads/Transformed_by_AI_March24_2024-03-27-121003_kxis.pdf].

5. GOLDMAN SACHS, *Generative AI Could Raise Global GDP by 7%*, ARTIFICIAL INTELLIGENCE (Apr. 5, 2023), <https://www.goldmansachs.com/insights/articles/generative-ai-could-raise-global-gdp-by-7-percent>

[<https://web.archive.org/web/20250918152304/https://www.goldmansachs.com/insights/articles/generative-ai-could-raise-global-gdp-by-7-percent>].

6. WORLD ECON. FORUM, INSIGHT REPORT: FUTURE OF JOBS REPORT 63 (Jan. 2025), https://reports.weforum.org/docs/WEF_Future_of_Jobs_Report_2025.pdf

[https://web.archive.org/web/20251003183637/https://reports.weforum.org/docs/WEF_Future_of_Jobs_Report_2025.pdf].

7. ASANA, *The State of AI at Work* 7 (2024), https://assets.asana.biz/m/25388d9dbeadd06e/original/FY25_Q2_State-of-AI-at-Work-Anthropic.pdf

[https://web.archive.org/web/20250918152926/https://assets.asana.biz/m/25388d9dbeadd06e/original/FY25_Q2_State-of-AI-at-Work-Anthropic.pdf] (a survey consisting of more than 5,000 knowledge workers in the UK and the United States).

8. See, e.g., Ding Wang, Shantanu Prabhat & Nithya Sambasivan, *Whose AI Dream? In Search of the Aspiration in Data Annotation*, ARXIV 1 (Mar. 21, 2022) ("Data is fundamental to AI/ML Models."); Laura Galindo, Karine Perset & Francesca Sheeka, *OECD Going Digital Toolkit: An Overview of National AI Strategies and Policies*, OECD 10–11 (2021), www.oecd.org/content/dam/oecd/en/publications/reports/2021/08/an-overview-of-national-ai-strategies-and-policies_913b6e4b/c05140d9-en.pdf

[https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/08/an-overview-of-national-ai-strategies-and-policies_913b6e4b/c05140d9-en.pdf] ("Data access and sharing are key to accelerating AI uptake.").

9. For a more detailed description of how generative AI technologies use training data, see Mattias Rättzén, *Location Is All You Need: Copyright Extraterritoriality and Where to Train Your AI*, 26 COLUM. SCI. & TECH. L. REV. 175, 182–91 (2024).

relevance to the organization and of high quality. In the years to come, workers' data could become one of the most valuable assets for many companies as they are rolling out more AI systems, some of which may well be used to make certain human tasks redundant. Yet workers are so far not realizing any of this increased economic value, which suggests that there could potentially be, in some circumstances, a so-called "value gap" for workers' data.

The use of workers' data for corporate automation purposes raises complex legal questions that require urgent attention. This Article critically discusses to what extent companies may lawfully use workers' data and the consequences of doing so. Focusing on the legal situation in the EU, UK, and the United States, it explores whether there are any restrictions for such use, notwithstanding that the copyright for any work products, and any data contained therein, has been assigned to the company by statute or contract. The most important of these restrictions is the so-called "best-seller" rule in the EU DSM Directive, which entitles authors, including workers, to adjust contracts previously entered into for the exploitation of their copyrighted works.¹⁰ The trigger in these circumstances will be if there is a significant discrepancy between the received and realized economic value of those works. This Article discusses to what extent there is a workers' data value gap, which has not been bridged, and whether workers could claim further remuneration for the exploitation of their works as data. The need to address these questions and provide clarity could not be more pressing, as workers' data is expected to be used to a considerable extent in the coming years for corporate automation purposes, potentially resulting in many millions losing their jobs. The impact of this discussion will extend far beyond workers and companies based in the EU, but also elsewhere in the world. A balanced approach will be essential in this regard to ensure that both workers and companies benefit fairly from the economic value derived from workers' data in the age of corporate automation.

I. DEFINING WORKERS' DATA

Whether as employees or independent contractors, the role of many workers is to produce various forms of content, manage and organize projects, or to communicate matters, resulting in proprietary work products and information.¹¹ This output can be classified into several categories, by way of example:

1. documents: written materials, in any format;
2. designs: graphic designs, schematics, and other visual or structural plans;
3. code: computer programs, scripts, and algorithms;

10. 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, the "DSM Directive"].

11. The term "workers" in this Article is used to encompass both employees and independent contractors.

4. databases: documents or information collected and arranged in a systematic or methodical way;
5. marketing: brochures, website and social media content, or advertisements;
6. spreadsheets: financial forecasts, market analyses, or similar content for other purposes;
7. communications: emails, letters, instant messages, calls, and other forms of workplace communication, whether internal or external; and
8. media: music, audiovisuals, recordings, and photographs.

These tangible work products will be created by workers in the course of carrying out their regular work duties. The output is typically the direct result of the worker's intellectual or creative efforts and is often subject to copyright or related rights protection as literary, dramatic, musical, or artistic works, or as recordings, broadcasts, and databases. Although the work products as such will have tangible value, companies are increasingly recognizing work products as important data assets, which are of high quality, relevant, and which are exclusive to the organization. All work products will be composed of some form of data, or here referred to as "workers' data," which can be sourced, organized, analyzed, and used for various purposes, including corporate automation.

II. HOW COMPANIES ARE USING WORKERS' DATA FOR AUTOMATION PURPOSES

Companies are increasingly leveraging the vast amounts of data produced by their workers to drive corporate automation efforts. This trend is particularly evident in industries where repetitive workers' tasks can be easily automated through AI and machine learning, such as administration and project management, but also for areas such as marketing, sales, and customer service.

Companies have so far been adopting a mix of third party and in-house solutions when it comes to AI deployment. According to an executive survey conducted in 2023 by MIT Sloan Management Review and Boston Consulting Group, consisting of more than 1,240 respondents representing companies in fifty-nine industries and eighty-seven countries, 78% of organizations use third party AI tools, a figure that is likely to be even higher today.¹² More than half of the responding organizations used third party tools exclusively, having no internally designed or developed AI technologies.¹³ Yet an increasing number of companies that have the resources to

12. Elizabeth M. Renieris, David Kiron & Steven Mills, *Building Robust RAI Programs as Third-Party AI Tools Proliferate*, MIT SLOAN MGMT. R. 1, 4 (2023), <https://sloanreview.mit.edu/projects/building-robust-rai-programs-as-third-party-ai-tools-proliferate/> [<https://web.archive.org/web/20250927022926/https://web-assets.bcg.com/1b/18/c684f0174e088e068efc4c62c942/building-robust-rai-programs-as-third-party-ai-tools-proliferate.pdf>].

13. *Id.* at 4.

build their own AI tools are also doing so. For example, Bank of America informed investors on an earnings call in 2023 that they are using internal AI tools to leverage a proprietary predictive language program tailored specifically to the bank's unique data sets.¹⁴ Meta has also rolled out their own chatbot, called Metamate, to its employees, which was trained on internal data and uses such data to assist employees in summarizing meetings, writing code, and debugging features.¹⁵ PwC has similarly developed its own internal chatbot.¹⁶ While many of these tools are so far being used to improve business operations, companies are increasingly also using AI to replace human tasks. A study from October 2022 estimated that 14% of workers had, at that time, experienced job displacement due to automation or AI.¹⁷ Another report estimated that, from more than 80,000 job losses in the United States in May 2023, approximately 5% could be directly attributed to AI.¹⁸ For example, the Swedish fintech company Klarna has reduced its workforce from 5,000 to 3,800 in the past year, partly due to AI.¹⁹ Klarna recently stated that "[o]ur AI assistant now performs the work of 700 employees, reducing average resolution time from eleven minutes to just two, while maintaining the same customer satisfaction scores as human agents."²⁰ Meanwhile, Klarna managed to increase its annual revenue by 27% to \$1.3 billion.²¹

How companies use worker-produced content as a data source for AI depends on context. Many now integrate third party AI solutions into their businesses, but this does not mean they rely solely on off-the-shelf data. For example, fine-tuning

14. *Companies Tap Their Own Data to Drive Efficiencies with AI*, PYMNTS (Apr. 26, 2023), <https://www.pymnts.com/news/artificial-intelligence/2023/companies-tap-their-own-data-drive-efficiencies-with-ai/> [https://perma.cc/ATZ5-LVFA].

15. ABP NEWS BUREAU, *Meta's AI Chatbot Is Here and It's Called Metamate*, ABP: TECHNOLOGY (June 13, 2023), <https://news.abplive.com/technology/meta-ai-chatbot-metamate-launch-mark-zuckerberg-internal-data-verge-1608614> [https://web.archive.org/web/20251003194037/https://news.abplive.com/technology/meta-ai-chatbot-metamate-launch-mark-zuckerberg-internal-data-verge-1608614].

16. Tess Bennett, *Meet ChatPwC, the Custom-Built AI Tool Being Rolled Out at the Firm*, FIN. R. (Feb. 6, 2024), <https://www.afr.com/companies/professional-services/meet-chatpwc-the-custom-built-ai-tool-being-rolled-out-at-the-firm-20240202-p5f21q> [https://web.archive.org/web/20251003194818/https://www.afr.com/companies/professional-services/meet-chatpwc-the-custom-built-ai-tool-being-rolled-out-at-the-firm-20240202-p5f21q].

17. Eric Dahlin, *Are Robots Really Stealing Our Jobs? Perception Versus Experience*, 8 SOCIUS (2022).

18. *Challenger Report: Layoffs Jump on Tech, Retail, Auto; YTD Hiring Lowest Since 2016*, CHALLENGER, GRAY & CHRISTMAS (Jun. 1, 2023), <https://omscgcinc.wpenginepowered.com/wp-content/uploads/2023/06/The-Challenger-Report-May23.pdf>.

19. Tom Gerken, *Klarna: AI Lets Us Cut Thousands of Jobs—But Pay More*, BBC (Aug. 28, 2024), <https://www.bbc.co.uk/news/articles/c80e1gp9m9zo> [https://web.archive.org/web/20251105171308/https://www.bbc.com/news/articles/c80e1gp9m9zo].

20. Press Release, Klarna, *Klarna AI Assistant Handles Two-thirds of Customer Service Chats in Its First Month* (Feb. 27, 2024), <https://www.klarna.com/international/press/klarna-ai-assistant-handles-two-thirds-of-customer-service-chats-in-its-first-month> [https://web.archive.org/web/20251105172044/https://www.klarna.com/international/press/klarna-ai-assistant-handles-two-thirds-of-customer-service-chats-in-its-first-month/].

21. Gerken, *supra* note 19.

often requires specialized training data to improve performance in a given field.²² The prospect for many AI systems lies in the data, and internal company data will be particularly valuable.²³ A recent Harvard Business Review article explained that turning third party AI into competitive advantage ultimately depends on powering it with unique, internal data.²⁴ Such data is highly relevant, high-quality, and produced by experienced staff. Because no other firm has access to it, the data is exclusive and, when accumulated over time, also abundant. Companies are therefore expected to increasingly treat workers' data as a core corporate asset for AI development and deployment.

There is limited public disclosure of how companies use workers' data in AI systems, or how this affects employment, including whether it prompts redundancies or restructuring. Yet lack of transparency does not mean it is not occurring. For example, a graphic designer who lost his job stated in a YouTube video in May 2024, that "[b]asically, all of the material that I have provided over the past six years is now being fed to AI and templated. [. . .] A design that takes me thirty minutes now takes the AI thirty seconds, as it has been trained on all my templates. Essentially, I think it literally reuses my templates."²⁵ After being made redundant, he found competitors doing the same, some even advertising it. One example is not conclusive, but similar accounts abound.²⁶ Workers' data is increasingly used to train AI systems, sometimes making the very workers who produced it redundant.

III. WHO OWNS THE COPYRIGHT OF WORKERS' DATA?

A fundamental question is who owns the data produced by workers, whether employees or independent contractors. Because data is, as discussed above, a byproduct of the work products themselves, the ownership of the latter determines the former. Work products are often protected by copyright as forms of literary, dramatic, musical, or artistic works. Databases, which are systematic collections of independent works, data, or other materials, may also be protected by copyright or

22. Jiawei Zheng et al., *Fine-tuning Large Language Models for Domain-specific Machine Translation*, ARXIV 1, 2 (Feb. 23, 2024), <https://arxiv.org/abs/2402.15061v1> [<https://web.archive.org/web/20250918155658/https://arxiv.org/abs/2402.15061v1>].

23. See Wang, Prabhat & Sambasivan, *supra* note 8.

24. Scott Cook, Andrei Hagiu & Julian Wright, *Turn Generative AI from an Existential Threat into a Competitive Advantage*, HARV. BUS. R. (Jan. 2024), <https://hbr.org/2024/01/turn-generative-ai-from-an-existential-threat-into-a-competitive-advantage> [<https://web.archive.org/web/20251105172941/https://hbr.org/2024/01/turn-generative-ai-from-an-existential-threat-into-a-competitive-advantage>].

25. NADESTRAIGHT, *I Lost My Job This Week Because of AI*, at 2:16 (YouTube, May 3, 2024) <https://www.youtube.com/watch?v=U2vq9LUbDGs> [<https://web.archive.org/web/20250927023929/https://www.youtube.com/watch?v=U2vq9LUbDGs>].

26. See, e.g., Mark Pesce, *AI Stole My Job and My Work, and The Boss Didn't Know—or Care*, REGISTER (Aug. 15, 2024), https://www.theregister.com/2024/08/15/robot_took_my_job/ [https://web.archive.org/web/20250918182832/https://www.theregister.com/2024/08/15/robot_took_my_job/].

separately as a related or *sui generis* right. There is, therefore, no such thing as copyright ownership over “data” as such, but only protected works which may comprise data.²⁷ Employment and contractor agreements typically allocate copyright ownership in any work products. If the contract is silent on the issue, ownership may arise as an implied term, or copyright laws will set out what is the default statutory rule.

Copyright laws tend to favor employers in this regard. In the UK and the United States, works created by employees in the course of employment belong to the employer under the “work-for-hire” doctrine, unless parties agree otherwise.²⁸ In the United States, contractees may also own works commissioned from contractors if they fall into certain narrowly defined statutory categories, such as collective works, films, and compilations.²⁹ In the UK, contractors remain default owners unless the contract assigns the copyright.³⁰ What complicates this picture is that copyright is a territorial right. There is no such thing as international copyright, which means that, where an employee or contractor produces a work, there will be a bundle of territorially distinct rights in each country where the work is capable of being protected.³¹ Therefore, even if an employee creates a work when residing in the United States or the UK, where copyright will transfer automatically to the employer by way of statute, the employee will simultaneously and independently be afforded copyright under any foreign statutes, unless the worldwide copyright portfolio is contractually assigned.

Copyright ownership in the course of employment is not harmonized in the EU, and differs substantially compared to the Anglo-American approach.³² Continental European copyright law, although the subject of each Member State, generally does

27. See Lothar Determann, *No One Owns Data*, 70 HASTINGS L.J. 1, 18–19 (2019) (discussing that copyright laws do not provide protection to the underlying data itself). Similarly, the U.S. Supreme Court explained in *Feist Publications, Inc. v. Rural Telephone Service Co.* that, “raw data does not satisfy the originality requirement.” 499 U.S. 340, 361 (1991).

28. Copyright, Designs and Patents Act 1988, c. 48, §11 (UK) (“Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.”); 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

29. 17 U.S.C. § 101 (defining “work made for hire”).

30. See *Griggs Group Ltd & Others v. Evans & Others* [2003] EWHC (Ch) 2914 (UK).

31. See, e.g., Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC’Y U.S.A. 265, 266 (2000). This fundamental principle of national interdependence is confirmed in Article 5 of the Berne Convention for the Protection of Literary and Artistic Works. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris, July 24, 1971, and as amended on Sept. 28, 1979, S. Treaty Doc. No. 99–27, 1161 U.N.T.S. 3 [hereinafter, the “Berne Convention”]. Specifically, Article 5(2) provides that authors shall enjoy and exercise their rights in all signatory states, independently of the existence of protection in the country of origin of the work. *Id.* at art. 5(2).

32. Dénes Legeza, *Employer as Copyright Owner from a European Perspective*, SERCI ANNUAL CONGRESS 3 (Working Paper, Sept. 2015), http://www.serci.org/congress_documents/2015/Legeza.pdf [https://web.archive.org/web/20250927060411/http://www.serci.org/congress_documents/2015/Legeza.pdf] (discussing the interface between employment and copyright in Europe).

not recognize a work-for-hire doctrine, meaning that copyright will originally belong to the author who initially created the work.³³ In Germany, for example, employers do not acquire copyright even when works are created in the course of employment, though employees may grant exploitation rights to fulfill contractual duties.³⁴ Similarly, in France³⁵, Belgium³⁶ and Sweden³⁷ the default rule is that the employee, as the author, is presumed to be the copyright owner, unless assigned. The situation will be the opposite where assignment is an express or implied term in the employment contract, which will ultimately be a question of interpreting the contract.³⁸ The position will be the same for independent contractors as for employees. In other European countries, like Spain, the Netherlands, Poland, and Hungary, the default beneficiary of copyrighted works in employment relationships will be the employer.³⁹

Unlike other types of works, authorship of computer programs and rights exercised in respect of such works is harmonized within the EU as part of the Computer Programs Directive 2009/24/EC.⁴⁰ Computer programs are defined as programs in any form, including preparatory design work.⁴¹ While authorship vests in the natural person(s) “creating” the program, Article 2(3) of the Directive provides that, where created by an employee in the course of employment, the employer exclusively enjoys the economic rights, unless the contract provides otherwise.⁴² Though framed as economic rights rather than ownership, employers

33. Legeza, *supra* note 32, at 23 (concluding that there is not a work-for-hire copyright doctrine in most European countries, with the exception of the Netherlands).

34. See PREU BOHLIG, IP ASSIGNMENT CLAUSES IN GERMAN EMPLOYMENT CONTRACTS (2019), <https://preubohlig.de/wp-content/uploads/2019/07/IP-Assignment-Clauses-in-International-Employment-Contracts.pdf> [<https://web.archive.org/web/20250919130708/https://preubohlig.de/wp-content/uploads/2019/07/IP-Assignment-Clauses-in-International-Employment-Contracts.pdf>].

35. See Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 577 (2006).

36. See SÉVERINE DUSOLLIER ET AL. (EUR. PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES), CONTRACTUAL ARRANGEMENTS APPLICABLE TO CREATORS: LAW AND PRACTICE OF SELECTED MEMBER STATES 44 (2014).

37. See MATS GLAVÅ, ARBETSRÄTT 435 (4th ed. 2020).

38. See Piotraut, *supra* note 35 at 577 n.214; Upphovsrätten på den digitala inre marknaden, prop. 2021/22:278 [Copyright in the Single Digital Market Bill] (Swed.) [hereinafter “prop. 2021/22:278”].

39. See DUSOLLIER ET AL., *supra* note 36, at 44–45. Regarding the Netherlands, see Auteurswet van 1912 [Copyright Act of 1912] art. 7 (Neth.), as amended Stb. 2021, 248. For an unofficial English translation, see THE DUTCH COPYRIGHT ACT 2021–2022: AUTEURSWET 2021–2022 (Visser, Schaap & Kreijger eds., Hendriks & James Legal Translations trans., 2021) (ebook) [hereinafter “Dutch Copyright Act”]. Recently, the European Court of Justice ruled in *Orchestre national de Belgique* that national legislation that automatically assigns performers’ rights to their employers, without prior consent from those performers, is not permitted under Directive 2001/29/EC. See Case C-575/23, FT v. Belgian State, ECLI:EU:C:2025:141, ¶ 128 (Mar. 6, 2025). Although that case concerned performers’ rights, it is possible that a similar position may also be taken for copyright.

40. Directive 2009/24/EC, of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L 111) 16.

41. *Id.* at recital 7.

42. *Id.* at art. 2(1), art. 2(3).

are effectively granted full control over any reproduction, adaptation, translation, and exploitation.⁴³

In practice, default statutory copyright rules matter little when contracts address ownership. Employment and contractor agreements routinely assign copyright to the employer or contractee, and has become “boilerplate” in many industries.⁴⁴ In such cases, employees or contractors generally cannot claim further compensation for later use of their works. For companies, assigning copyright ownership is in fact important to protect themselves against such claims.

Not all work products will attract copyright. Protection extends only to original expressions fixed in a tangible medium,⁴⁵ and mere facts, data, and abstract ideas fall outside its scope.⁴⁶ Blank templates and forms that merely record information are similarly unprotected. However, contracts can, and frequently do, govern to what extent the employer or contractee is afforded *commercial ownership*, or may exercise any contractual rights, over any work product, in any form, whether or not such work products are protected by copyright.⁴⁷ The freedom of contract will trump in this regard in the absence of any statutory rights to the contrary.

IV. RESTRICTIONS ON USING WORKERS' DATA

A. THE PERSONAL DATA CLAWBACK

Data privacy laws regulate the processing of personal data. Personal data is broadly defined as any information relating to an identified or identifiable natural person, also known as a “data subject.”⁴⁸ This includes information enabling direct

43. *Id.* at art. 4(1).

44. Elizabeth Knuppel, “A Mortgage on a Man’s Brain”: The Unconscionability of Overly Broad Intellectual Property Assignment Clauses in Employment Contracts, 100 TEX. L. REV. 971 (2022) (discussing the pervasiveness of intellectual property assignments in employment contracts and to what extent these could be considered unconscionable).

45. 17 U.S.C. § 102(a); Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH*, ECLI:EU:C:2011:798, ¶ 89 (Dec. 1, 2011); Case C-604/10, *Football Dataco Ltd v. Yahoo! UK Ltd*, ECLI:EU:C:2012:115, ¶ 38 (Mar. 1, 2012) (holding that, with respect to databases, the “criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices . . . and thus stamps his ‘personal touch’”).

46. *See, e.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

47. The significance of contracts for protecting data, in the absence of copyright protection, has been highlighted by the European Commission and in European studies on several occasions. *See, e.g.*, *Building a European Data Economy*, at 10, COM (2017) 9 final (Jan. 10, 2017) (considering that contracts “might be a sufficient response” to address the absence of statutory protection for data); *Study on Model Contract Terms and Fairness Control in Data Sharing and in Cloud Contracts and on Data Access Rights: Final Report*, EUR. COMM’N (Apr. 2022), <https://op.europa.eu/publication-detail/-/publication/dfb3a486-e6d4-11ec-a534-01aa75ed71a1> [<https://web.archive.org/web/20251010113556/https://op.europa.eu/en/publication-detail/-/publication/dfb3a486-e6d4-11ec-a534-01aa75ed71a1>].

48. Regulation (EU) 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

or indirect identification, such as names, location data, online identifiers, or attributes tied to physical, physiological, genetic, mental, economic, cultural, or social identity.⁴⁹ Work products such as documents and correspondence will frequently contain workers' personal data.

Data privacy laws do not create ownership rights over personal data, but grant data subjects certain control rights resembling ownership.⁵⁰ Processing of personal data is only permissible if there is a lawful basis. In the EU, the GDPR sets out, among others, the data subject's consent and legitimate interests as two such bases.⁵¹ Recital 47 further explains that a legitimate interest may exist where there is a relevant relationship between controller and data subject, such as employment.⁵² Employers and contractees may claim they have a legitimate interest in processing workers' data in any produced works, though whether this extends to processing for automation is less clear. In practice, employment and contractor agreements routinely secure consent for broad processing purposes. If that includes automation, then employers or contractees will be in a position to rely on such consent, if it is freely given. Employers and contractees may also rely on the necessity of processing for performance of the contract where workers' personal data is embedded in work products, though this will depend on the particular circumstances.⁵³

The GDPR famously extends its scope extraterritorially, which has led to the globalization of European data privacy standards.⁵⁴ It applies to the processing of data subjects in the Union, regardless of the controller's or processor's location, where processing relates to the offering of goods or services to EU subjects or to activities of an EU establishment.⁵⁵ Accordingly, it applies both to workers in the EU and to controllers or processors established there.

The GDPR also grants a right to erasure, or "right to be forgotten," which is triggered at least when consent is withdrawn or there is no other lawful ground for the processing.⁵⁶ Consent may be freely withdrawn at any time, which is a statutory

Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, at art. 4(1) [hereinafter, the "GDPR"].

49. *Id.*

50. Lothar Determann, *No One Owns Data*, 70 HASTINGS L.J. 1, 26-27 (2018).

51. GDPR, *supra* note 48, at art. 6(1). Unlike the GDPR, the California Consumer Privacy Act [hereinafter, the "CCPA"], which is the most far-reaching data privacy law enacted in the United States, mainly focuses on effectuating data privacy rights by requiring companies to inform consumers when their personal data is collected, as opposed to only permitting such processing where there is a legal basis. See Cal. Civ. Code § 1798.100–1798.199.100 (2018). The CCPA also applies to "consumers," which is defined to include California-based employees.

52. GDPR, *supra* note 48, at recital 47.

53. *Id.* at art. 6(1)(b).

54. For a more detailed discussion on the globalization of the GDPR, see Simon Gunst & Ferdi De Ville, *The Brussels Effect: How the GDPR Conquered Silicon Valley*, 26 EUR. FOREIGN AFF. REV. 437 (2021).

55. GDPR, *supra* note 48, at art. 3(1)–(2).

56. *Id.* at art. 17(1)(b). Another triggering ground for the right to be forgotten is where the data subject objects to the processing, however this is only available where there are no overriding legitimate grounds for the processing. See art. 17(1)(c), which refers to art. 21.

right that cannot be waived by contract.⁵⁷ If consent is waived, the lawfulness of any prior processing remains unaffected.⁵⁸ Employers' or contractees' fallback is to identify another legal ground for processing, or to anonymize the personal data, such that it no longer qualifies as personal data.⁵⁹ Anonymization is increasingly used to address privacy concerns, including in AI contexts, but data privacy laws such as the GDPR may still apply if re-identification remains possible, in which case the anonymization was never fully effective to begin with.⁶⁰

B. CONTRACT LAW RESTRICTIONS ON USING WORKERS' DATA

The freedom of contract is strong, and there are few statutory restrictions for assigning copyright or processing workers' data. However, contract law does impose certain limitations, including that contracts or specific clauses can be rendered unenforceable on the basis of unconscionability or undue influence.

A bargain cannot be unfair and unconscionable, and courts in the UK and the United States have long recognized that even voluntary agreements may be voidable if that is the case. In *Lloyds Bank v. Bundy*, Lord Denning described unconscionability under the rubric of inequality of bargaining power, protecting those who, without independent advice, enter into contracts on grossly unfair terms while impaired by poverty, ignorance, or infirmity, and subject to undue pressure.⁶¹ English law has come to distill this doctrine into three separate requirements: (i) one party has been at a serious disadvantage to the other, (ii) the other party has exploited this disadvantage in a morally culpable manner, and (iii) the resulting transaction has been overreaching and oppressive.⁶² The first requirement, serious disadvantage, can include poverty, ignorance, and lack of independent advice, but it is debated whether a contract should be voidable if one party was pressured by circumstances entirely outside the other party's influence.⁶³ The second requirement, exploitation, demands a "high level of knowledge" of the disadvantage.⁶⁴ The third requirement, focused on the outcome, assumes that the contractual terms were imposed in a morally reprehensible manner, and the other party knowingly exploited the vulnerability.⁶⁵ These are difficult conditions for workers to meet in the context of computational use of data, especially where

57. *Id.* at art. 7(3)–(4) and recital 42.

58. *Id.* at art. 7(3).

59. *Id.* at recital 26.

60. *Id.* (defining anonymous data as instances where "the data subject is not or no longer identifiable"); see also Alvaro Moretón & Ariadna Jaramillo, *Anonymisation and Re-Identification Risk for Voice Data*, 7 EUR. DATA PROT. L. REV. 274 (2021) (discussing the risks of re-identification, in the case of voice data, using measures such as inference or linkage).

61. *Lloyds Bank v. Bundy* [1975] QB 326 at 339 (UK).

62. *Alec Lobb (Garages) Ltd. v. Total Oil (G.B.) Ltd.* (1984) 1 WLR 87 at 94–95 (UK).

63. *Id.*

64. See Rick Bigwood, *Contracts by Unfair Advantage: From Exploitation to Transactional Neglect*, 25 OXF. J. LEG. STUD. 65, 70–71 (2005).

65. *Mitchell v. James* [2001] All ER (Ch) at 116 (UK).

contractual terms were reasonable at the time of formation. Copyright assignment clauses are, as discussed, commonplace and hardly unconscionable terms. Because of the assignment, the new owner can use the data however and whenever they wish. It would almost certainly fail to argue that later computational use of workers' data retroactively renders a previous assignment unconscionable.

In the United States, unconscionability requires both procedural and substantive conditions to be met. Procedural unconscionability supposes that there has been oppression, that is inequality of bargaining power resulting in no real negotiation, and surprise, where the terms are hidden in prolix forms.⁶⁶ Substantive unconscionability asks whether the terms are one-sided and unduly harsh.⁶⁷ A contract that unreasonably favors the party asserting it is more likely to be found unconscionable as a matter of substance.⁶⁸ Compared to what is the position in the UK, the doctrine is notably broader in the United States and more favorable to workers. Still, American courts have generally been reluctant to strike down intellectual property assignment clauses on account of unconscionability, and for good reason. Such clauses are justified by the need to safeguard investment and flexibility in commercializing workers' work products, though there may be scope to challenge overly broad clauses where workers' bargaining power has been clearly exploited.⁶⁹

The situation in continental Europe markedly diverges again. Unconscionability is not recognized as a doctrine on its own, and European contract law is subject only to minimum harmonization. The Unfair Terms in Consumer Contracts Directive 93/13/EEC sets out that a non-negotiated term is unfair if, contrary to good faith, it creates a significant imbalance in the parties' contractual rights and obligations to the consumer's detriment.⁷⁰ Yet this is of no assistance to workers, who fall outside the Directive's scope as they are not contracting as consumers. In many other respects, contract law is a matter of national law in Europe. Scandinavian contract statutes, for example, allow any contract to be voided if "unreasonable,"⁷¹ while countries like Germany and France have narrower statutes, only providing protection against frustration, duress, usury, or contracts against public policy.⁷²

A more recent development is the EU Data Act,⁷³ which harmonizes rules on data access and use between businesses, users and the public sector, with particular

66. See *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 228 (3d Cir. 2008); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006).

67. See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010).

68. *Zimmer*, 523 F.3d at 228.

69. See Knuppel, *supra* note 44, at 985-95.

70. Council Directive 93/13, 1993 O.J. (L 95/29), at art. 3(1).

71. See CLAES-ROBERT VON POST, *STUDIER KRING 36 § AVTALSLAGEN MED INRIKTNING PÅ RENT KOMMERSELLA FÖRHÅLLANDEN* 47 (1999).

72. See A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 *LOV. L.A. INT'L & COMP. L. REV.* 455, 472-94 (1992).

73. Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on Harmonised Rules on Fair Access to and Use of Data and Amending Regulation (EU) 2017/2394

focus on facilitating data transfers within the Internet-of-Things framework.⁷⁴ It obliges “data holders” to provide data to “data recipients” under fair, reasonable, and non-discriminatory terms and in a transparent manner.⁷⁵ “Data” is defined broadly as any digital representation of acts, facts or information, including audiovisual material.⁷⁶ Article 13(1) renders unilaterally imposed terms concerning “access to and the use of data” by an enterprise on another enterprise not binding, if the terms are “unfair.”⁷⁷ A term is unfair if its use grossly deviates from good commercial practice in data access and use, contrary to good faith and fair dealing.⁷⁸ Articles 13(4) and 13(5) set out a long yardstick list, although non-exhaustive, of circumstances where a contractual term may be considered unfair.⁷⁹ This includes where a party imposes terms allowing access to data in a way significantly detrimental to the other party’s legitimate interests, particularly where trade secrets or intellectual property rights are involved.⁸⁰

Although the EU Data Act was not drafted with employment or contractor relationships in mind, its broad definitions could potentially extend protection to employees and independent contractors. This hinges on whether they are considered an “enterprise” in a “business-to-business relation” with their employer or contractee. The term “enterprise” broadly covers any natural or legal person that is acting for purposes which are related to that person’s trade, business, craft or profession.⁸¹ Workers might be considered “enterprises” from that perspective, and if correct, then workers’ data would also be considered “data” within the meaning of the Act.

Because of that, an overly broad copyright assignment clause, which is used to take full ownership of a worker’s data to eventually replace their own labor, could be considered “unilaterally imposed” and govern the “access and use of the data [. . .] in a manner that is significantly detrimental to the legitimate interests of the other contracting party.”⁸² Again, Article 13(5)(b) specifically exemplifies that this may be the case where such data is protected by intellectual property rights.⁸³ Yet the application of the EU Data Act to workers’ data is complicated by the fact that European copyright law is explicitly excluded from its scope.⁸⁴ However, and as discussed above, since European copyright law does not harmonize ownership and

and Directive (EU) 2020/1828, 2023 O.J. (L 2854) [hereinafter the “EU Data Act”] (on fair access to and use of data).

74. *Id.* at recital 5.

75. *Id.* at art. 8.

76. *Id.* at art. 2(1).

77. *Id.* at art. 13(1).

78. *Id.* at art. 13(3).

79. *Id.* at art. 13(4)–(5).

80. *Id.* at art. 13(5)(b).

81. *Id.* at art. 2(24).

82. *Id.* at art. 13(5)(b).

83. *Id.*

84. *Id.* at art. 1(8) (referring to Directives 2001/29/EC, 2004/48/EC, and the DSM Directive).

contractual assignments, these are left to Member States.⁸⁵ The question is therefore still left open, although the fact that European copyright law is excluded from the scope of the Act may suggest that, if the Act is given a purposive interpretation, copyright law specific to Member States should also be excluded.

C. WHETHER COMPANIES ARE UNJUSTLY ENRICHED BY THEIR WORKERS' DATA

Another potential remedy for workers is the doctrine of unjust enrichment, which is a common law cause of action. To succeed, the claimant must show: (i) that the defendant was enriched or received a benefit, (ii) at the claimant's expense, (iii) in circumstances that are unjust, and (iv) that there is no applicable defense.⁸⁶ Unlike tort, which compensates loss, unjust enrichment restores gains. It is, therefore, a claim of restitution and not compensation.⁸⁷

Enrichment is assessed objectively at market value, though courts also recognize subjective devaluation.⁸⁸ Yet even if the parties may value a benefit differently, the claimant can overcome this if they prove that the defendant requested or freely accepted the benefit, or that the enrichment is an "incontrovertible benefit."⁸⁹ English courts have also held that for a benefit to be "at the claimant's expense," there does not need to be perfect equivalence between loss and gain, but rather a "sufficiently close causal connection."⁹⁰ Lastly, enrichment is considered "unjust" under English law when one of several recognized "unjust factors" is present, such as mistake, duress, undue influence, or a failure of basis.⁹¹ Defenses, although controversial and not fully settled, include change of position, estoppel, and *bona fide* purchase for value, among others.⁹²

Unjust enrichment as a body of law is recognized in other common law jurisdictions, including Australia, Canada, and the United States. The American approach similarly focuses on whether a defendant has received a benefit at the claimant's expense and whether it would be unjust to retain it without adequate compensation.⁹³ The Restatement (Third) of Restitution & Unjust Enrichment suggests the market value of the benefit as a key metric for assessing adequate

85. See *supra* Section III.

86. See *Barton v. Morris* [2023] UKSC 3 [77] (referring to *Benedetti v. Sawiris* [2013] UKSC 50, [¶ 10]) (UK).

87. See *Banque Financière De La Cité v. Parc (Battersea) Ltd.* [1998] UKHL 7 (UK).

88. See *Benedetti v. Sawiris* [2013] UKSC 50, [¶¶ 12–16] (UK).

89. *Id.* at ¶ 25.

90. GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 118 (3rd ed. 2015); see also *Melissa Menelaou v. Bank of Cyprus UK Ltd.* [2013] EWCA (Civ) 1960, [¶ 42] (UK); *TFL Management Services Ltd. v. Lloyds Bank Plc* [2013] EWCA (Civ) 1415, [¶ 82] (UK); *Relfo Ltd. (in liquidation) v. Varsani* [2014] EWCA (Civ) 360, [¶ 56] (UK).

91. See *Deutsche Morgan Grenfell Grp. Plc v. Inland Revenue* [2006] UKHL 49, [¶ 151] (UK).

92. Andrew Burrows, *Defences Arising from Changes in the Defendant's Circumstances*, in *THE LAW OF RESTITUTION* 521–34 (3rd ed. 2011).

93. See Colleen P. Murphy, *Recognizing Restitutionary Causes of Action and Remedies Under Rhode Island Law*, 20 ROGER WILLIAMS U. L. REV. 429, 432–4 (2015).

compensation, with other grounds, such as the claimant's cost, being used if no market exists.⁹⁴

Applying this framework to a situation where an employer uses a worker's work products as data sources, it is clear that the employer is enriched by using the data for automation purposes. Meanwhile, the worker may gain little or even suffer loss if displaced as a result. However, the law of unjust enrichment is still not a perfect fit for the case of workers' data. Courts are generally reluctant to interfere with the terms of a freely negotiated contract, where the agreed-upon consideration has been paid. It is also a plausible defense that an employee's or contractor's compensation package represents fair market value for their services at the time of contracting. Any greater value extracted later would not necessarily be considered "unjust" for the lawful owner to keep.

These circumstances also do not fit squarely within the established "unjust factors." For the same reason that intellectual property assignments will generally not be unconscionable, nor will assignments with workers have been deemed entered into under undue influence.⁹⁵ There will also be a "basis" in the case of workers' data. This factor requires a total failure of the condition on which a benefit was conferred.⁹⁶ Workers enter into contracts for their services on the "basis" that they receive compensation for their work. This "basis" is received. In return, their employer or contractee receives the work product, and if copyright is assigned, then also acquires the ownership of any copyright forming part of such products. Workers do not enter contracts on the basis that they will be further compensated for their employer's later use of their work products, such as for automation. The fact that copyright has been intentionally assigned reinforces this assumption. While different common law jurisdictions may analyze these issues somewhat differently, it suffices to say that workers will face considerable difficulty in relying on unjust enrichment for restitution.

D. EMPLOYMENT LAW RESTRICTIONS OF REDUNDANCIES AND USING WORKERS' DATA

It is possible that, in some cases, using workers' data to automate workstreams will result in those same workers becoming redundant, in whole or in part, for some of their tasks. It falls outside the scope of this Article to discuss in more detail whether companies may, as a matter of employment law, terminate employees on grounds of redundancy in these circumstances. Broadly speaking, employees will have little to no say on the matter in most states in the United States, which allow employers to hire and dismiss their employees "at will" without having to establish

94. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 49(3) (A.L.I. 2011).

95. *See supra* Section IV.B.

96. *Fibrosa Spolka Akcyjna v. Farnburn Lawson Combe Barbour Ltd.* [1943] AC 32, [¶ 77] (HL) (UK); *Rover Int'l Ltd. v. Cannon Film Sales Ltd.* [1989] 1 WLR 912, [¶ 924b] (UK); *Stocznia Gdanska SA v. Latvian Shipping Co.* [1998] 1 WLR 574, [¶ 588] (UK).

just cause.⁹⁷ Employment laws provide greater protection for employees in the UK and continental Europe. Although not harmonized across Europe, employment laws typically require employers to justify redundancies, follow proper procedural requirements, and use objective selection criteria.⁹⁸ Taking the UK as an example, the Employment Rights Act 1996 defines two situations where a genuine redundancy may occur, including where (i) the employer ceases or intends to cease to carry on the business for the purposes of which the employee was employed, and (ii) the business requirement for the employee to carry out work of a particular kind ceases or diminishes.⁹⁹

There is a long history of employers optimizing workstreams and patterns to create efficiencies within their operations and workforces, which sometimes lead to redundancies. It is well-recognized that there is a genuine redundancy where the employer reorganizes the business to improve its efficiency, meaning that fewer people are needed to do the same amount of work. This is a question of fact, not law.¹⁰⁰ If there is no longer a need for the work to be done, the work is redundant. A job may also become redundant where a new process or system is introduced, if this causes the work to no longer be needed. In the UK, in deciding the question whether a redundancy situation exists, courts are not concerned with deciding whether the employer acted with commercial good sense.¹⁰¹ It is not a requirement that the dismissal of the employee actually achieves a cost saving for the employer.¹⁰² English courts will also not go behind the facts and investigate how the redundancy situation arose and whether it could have been avoided and whether there are any viable alternatives,¹⁰³ as the cessation or diminution of the work previously required may arise “for whatever reason.”¹⁰⁴ If an employer has optimized its business operations under similar circumstances, for example by adopting new AI technologies, it is possible that there could be a genuine redundancy situation. This position is unlikely to change even if such AI technologies have been developed with employees’ data. Employers may however be required to make a proper assessment of whether the employee, made redundant by AI, can

97. See Katherine V.W. Stone, *Dismissal Law in the United States: The Past and Present of At-Will Employment*, INT’L. COLLABORATIVE ON SOC. EUR. (2007).

98. See, e.g., Rochelle Le Roux & Allison Fiorentino, *Redundancy and Judicial Power: Between Inaction and Creative Boldness*, 4 COMP. LAB. L. & SOC. SEC. J. 126 (2017) (summarizing redundancy laws across Europe).

99. Employment Rights Act 1996, c. 18, § 139(1) (UK).

100. See *Murray v. Foyle Meats Ltd.* [1999] ICR 827, [¶ 829] (HL) (appeal taken from N. Ir.) (UK) (concluding that the diminution in the employer’s need for its employees was a question of fact, not law).

101. See *Moon v. Homeworthy Furniture (Northern) Ltd.* [1977] ICR 117 (EAT) (UK); *James W Cook (Wivenhoe) Ltd. v. Tipper* [1990] ICR 716 (EAT) (UK).

102. See *Jones v. BT Facility Servs. Ltd.* [2020] EAT (appeal no. 0237/19/BA) (UK).

103. See *TNS UK Ltd. v. Swainston* [2014] EAT (appeal no. 0603/12/BA) (UK) (citing *H. Goodwin Ltd. v. Fitzmaurice* [1977] IRLR 393 (EAT) (UK); *Moon v. Homeworthy Furniture (Northern) Ltd.* [1976] IRLR 298, [1977] ICR 117 (EAT) (UK); *Ass’n of Univ. Tchrs. v. Univ. of Newcastle-upon-Tyne* [1987] ICR 317 (EAT) (UK); *James W Cook & Co (Wivenhoe) Ltd. v. Tipper* [1990] IRLR 386, [1990] ICR 716 (CA)(UK)).

104. Employment Rights Act 1996, c. 18, § 136(6) (UK).

be redeployed in other areas and the failure to do so could still potentially result in unfair dismissal claims.¹⁰⁵

E. WHAT AI REGULATIONS SAY ABOUT USING WORKERS' DATA

In May 2024, the EU adopted its new EU AI Act, which sets out comprehensive obligations for the development, supply and deployment of AI systems and models.¹⁰⁶ Providers of high-risk AI systems face the most stringent requirements, including establishing risk management systems, drawing up technical documentation throughout the system's life cycle, putting in place record-keeping and transparency procedures, and ensuring accuracy, cybersecurity, and quality management.¹⁰⁷ Article 10 sets specific rules for data governance, including what testing datasets may be used for high-risk AI systems, and that providers must take measures to mitigate biases in datasets.¹⁰⁸ In addition, high-risk AI systems must undergo a conformity assessment procedure through internal control or responsible notified bodies,¹⁰⁹ register in public databases,¹¹⁰ and conform to certain reporting obligations.¹¹¹ Deployers of high-risk AI systems have fewer obligations to follow, but must, for example, assign human oversight to personnel, monitor the operation of the high-risk AI system on the basis of the instructions for use, and keep automatically generated logs.¹¹² Providers of general-purpose AI models must put in place a copyright compliance policy,¹¹³ provide certain technical documentation,¹¹⁴ and provide summaries of training data.¹¹⁵ Providers of general-purpose AI models with systemic risk¹¹⁶ are subject to more onerous requirements.¹¹⁷ Companies that provide or deploy AI systems that are neither

105. *Williams v. Compair Maxam Ltd.* [1982] ICR 156 (EAT) (UK) (establishing the five redundancy criteria under English employment law, including the fifth criterion that employer shall seek to see, if instead of making employees redundant, they could offer alternative employment to them instead).

106. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, Laying Down Harmonised Rules on Artificial Intelligence, 2024 O.J. (L 1689) [hereinafter, the "EU AI Act"].

107. *Id.* at arts. 9, 11–13, 15, 17–18.

108. *Id.* at art. 10.

109. *Id.* at arts. 16(f), 43.

110. *Id.* at art. 49.

111. *Id.* at art. 20.

112. *Id.* at art. 26.

113. *Id.* at art. 53(1)(c).

114. *Id.* at art. 53(1)(a)–(b).

115. *Id.* at art. 53(1)(d).

116. *See id.* at art. 3(65) (defining "systemic risk" as: "A risk that is specific to the high-impact capabilities of general-purpose AI models, having a significant impact on the Union market due to their reach, or due to actual or reasonably foreseeable negative effects on public health, safety, public security, fundamental rights, or the society as a whole, that can be propagated at scale across the value chain.").

117. *Id.* at art. 51(1).

high-risk nor general-purpose need to comply with fewer requirements, such as transparency,¹¹⁸ and staff AI literacy.¹¹⁹

It is expected that other countries will follow the footsteps of the EU AI Act, adopting their own AI regulations, and in particular countries which did so for data privacy after the GDPR was enacted. For example, Brazil¹²⁰ and Canada¹²¹ have announced similar draft AI regulations that introduce requirements for AI systems based on certain risk thresholds. The United States has no federal AI regulations as of yet, and with no federal initiatives pending, individual states are taking the lead. Colorado became the first state in May 2024 to adopt specific AI regulations, which take a staggered risk-based approach similar to the EU AI Act.¹²² Texas also recently passed its own set of AI regulations, the Texas Responsible Artificial Intelligence Governance Act.¹²³

The EU AI Act excludes employment law from the scope of the Act, expressly leaving Member States free to introduce provisions more favorable to workers.¹²⁴ This does not mean, however, that workers' rights are not impacted, at least indirectly. Deployers of high-risk AI systems must conduct a fundamental rights impact assessment prior to deployment.¹²⁵ This requires, *inter alia*, identifying (c) the categories of natural persons or groups likely to be affected, (d) the risks of harm they face, and (f) the measures to be taken should such risks materialize, including governance arrangements and complaint mechanisms.¹²⁶ Deployers must then notify the market surveillance authority of the results.¹²⁷ Where high-risk systems threaten to replace workers, deployers would be obliged to identify those workers as affected persons and specify the harm. Redundancy arguably constitutes such "harm." However, and importantly, Article 27 merely requires that deployers assess what measures they *should* take, such as internal governance and complaint mechanisms, without requiring that they adopt any particular measure.¹²⁸ There would be no obligation for deployers to issue compensation to workers made redundant due to AI. These protections are further limited in scope in that most AI systems adopted to automate workstreams are unlikely to fall within the high-risk category.

118. *Id.* at art. 50.

119. *Id.* at art. 4.

120. Senado Federal, Bill No. 2338/2023 (Dispõe sobre o uso da Inteligência Artificial [Framework for Artificial Intelligence]), Sessão Legislativa de 2023 (Braz.).

121. Artificial Intelligence and Data Act, Bill C-27, pt. 3, 44th Parl., 1st Sess., (Can. 2022).

122. S.B. 24-205, 2024 74th Gen. Assemb., Reg. Sess. (Colo. 2024).

123. H.B. 1709, 2024 89th Gen. Assemb., Reg. Sess. (Tex. 2024).

124. EU AI Act, *supra* note 106 at art. 2(11).

125. *Id.* at art. 27(1).

126. *Id.*

127. *Id.* at art. 27(3).

128. *Id.* at art. 27.

V. THE CASE FOR COMPANIES' RIGHT TO USE WORKERS' DATA

Adopting new technologies to improve efficiency, even at the cost of redundancies, is nothing new. Companies have a legitimate interest in leveraging innovation to remain competitive, enhance productivity, and increase shareholder value. This process of “creative destruction” is a core feature of capitalism, where outdated practices give way to more efficient alternatives.¹²⁹ Historically, technological change has reduced workforces, justified by companies as necessary for their long-term success. AI is no different.

Company directors are under a statutory duty in many jurisdictions to act in good faith to promote the success of the company for the benefit of its members, typically understood as the shareholders.¹³⁰ In the UK, this is encapsulated in the principle of enlightened shareholder value.¹³¹ Success is generally measured by profitability, growth, and returns, but not equated with maximizing profits in the abstract. Directors enjoy wide discretion in this regard, provided their judgment is exercised in good faith.¹³² In practice, this may include adopting AI technologies that displace human labor where they can perform tasks more accurately, quickly or cost-effectively. Corporate law imposes no parallel duty to protect employees or contractors.

Because companies often are the lawful owners of workers' data under copyright laws, or contractual arrangements, the premise is that they are free to use that data. This remains the case even if workers are harmed or made redundant by its use, and even though such data would not exist without the worker's contribution in the first place.¹³³ From the company's perspective, this unavoidable account is justified. It invests in employees by providing training, tools, and remuneration, and in return acquires the outputs produced as consideration for their own bargain. Companies have a legitimate interest in obtaining copyright ownership over their workers' work products. Assignment gives the company exclusive control to use, modify, commercialize, and integrate works into larger projects, without concerns about joint ownership or competing claims. It also ensures continuity of ownership when workers depart and prevents former employees from licensing works to competitors. While licensing could achieve much of this, assignment provides greater clarity and security.

The real complaint seems to be not that workers' data is used by companies, but that workers are not necessarily adequately compensated for use, and particularly

129. Faruk Ulgen, *Creative Destruction*, in *ENCYCLOPEDIA OF CREATIVITY, INVENTION, INNOVATION AND ENTREPRENEURSHIP* 1–8 (Elias G. Carayannis ed., 2017).

130. See, e.g., Companies Act 2006, c. 46, §172 (UK). In the United States, corporate law is governed primarily by state law, with Delaware being most influential. Under Delaware law, directors owe fiduciary duties to the corporation, including the duty of care and the duty of loyalty. The duty of loyalty requires directors to act in good faith to advance the best interests of the corporation and its stakeholders. See *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920 (Del. Ch. 2003).

131. *Re Smith and Fawcett Ltd* [1942] Ch 304, [¶ 306] (UK).

132. *Id.*

133. See *supra* Section III.

where those outputs later underpin AI systems deployed against their own interests. Yet contract law requires only that consideration be sufficient, not equal or adequate.¹³⁴ From a company's perspective, the status quo is a natural extension of ownership and contractual freedom: workers have been paid for their labor, and any data generated in the course of employment becomes company property, which workers have no say about.

VI. THE CASE FOR WORKERS' RIGHT TO REDRESS

The current framework of contract and employment law, which prioritizes freedom of contract and corporate ownership of workers' data, is not without criticism. In theory, it allows some companies to hire workers merely to capture their data, automate the same tasks, and then make those workers redundant. Unless otherwise agreed, and as discussed, workers are entitled to no additional compensation under contract or employment law when their data is used against their own interests.¹³⁵

Data is one of the most valuable resources in the age of AI, including for corporate automation purposes.¹³⁶ Workers provide not only tangible work outputs but also high-quality data sources. While they are paid for their immediate contributions, the value of their work increases when repurposed as data for automation. That added value, realized through productivity gains and cost savings, currently flows to company shareholders and executives, which calls into question the balance of power in employer-employee and contractee-contractor relationships. Ultimately, it invites the broader question of whether benefits from AI development should be more equitably shared with those who contribute to the underlying work products.

The dilemma is similar to that of the debate surrounding the development of AI models, particularly foundation models and large language models ("LLMs"), some of which were advanced using vast amounts of publicly available (often copyrighted) materials, and allegedly sometimes without permission from rightsholders.¹³⁷ Although LLMs do not replace authors or their works directly, they may reduce demand for them.¹³⁸ Yet these rightsholders are in a stronger legal position than workers. Unlike workers, they retain copyright and can claim compensation for infringement. In the EU, where text and data mining is subject to an opt-out regime, they may also preclude their works from being used in training.¹³⁹ By contrast, workers who assign copyright to their employers, or whose

134. See *Chappell & Co Ltd v. Nestle Co Ltd* [1959] UKHL 1.

135. See *supra* Section IV.

136. See Wang, Prabhat & Sambasivan, *supra* note 8.

137. See, e.g., *Kadrey v. Meta Platforms, Inc.*, No. 23-CV-03417-VC, 2025 WL 1752484, at *1 (N.D. Cal. June 25, 2025).

138. See Mattias Rättzén, *Location Is All You Need: Copyright Extraterritoriality and Where to Train Your AI*, 26 COLUM. SCI. & TECH. L. REV. 175, 200–01 (2024) (discussing, in the context of U.S. fair use arguments, how AI could reduce the demand for authors' original works).

139. See DSM Directive, *supra* note 10 at arts. 4(1), 4(3).

rights vest automatically by statute, are no longer “rightsholders” and cannot opt out.

Workers who “sweat the brow” for their employers are therefore worse off than external rightsholders. Once copyright is assigned, workers lose control over future uses of their works, and assignees owe no duty of disclosure. Secondary uses, such as data aggregation or machine learning, could in certain cases generate greater economic value than the original outputs, yet none of this value returns to workers.¹⁴⁰ There is an inherent lack of transparency. Workers may, in a misinformed state, assume that their companies are only using their work products tangibly, only to later find out that they have been accumulated as data fuel for automation purposes. Some might refuse to work for such companies, while others may demand additional compensation if they know their outputs serve broader purposes that could ultimately displace them in the future.

Freedom of contract is of little help to workers here. As discussed above, copyright is assigned to employers by default in several jurisdictions like the UK and the United States.¹⁴¹ Although workers could in theory resist assignment or seek to limit secondary use, they usually lack bargaining power.¹⁴² Copyright assignments for work products are routinely boilerplate clauses, and most companies would refuse to engage workers without owning the rights. While there are sound reasons for this, the imbalance suggests that if workers' data is to be treated more equitably, it is plain that statutory intervention is necessary.¹⁴³

VII. THE EUROPEAN “BEST-SELLER” RULE AND FAIR REMUNERATION FOR COPYRIGHT ASSIGNMENTS

A. THE “REAL” VALUE GAP IN THE DSM DIRECTIVE

One of the most controversial reforms in EU copyright law in recent years was the adoption of the DSM Directive.¹⁴⁴ The DSM Directive introduced a right for authors and performers to receive appropriate and proportionate remuneration for the exploitation of their works, along with the ability to adjust existing contracts to achieve this.¹⁴⁵ The reform addressed concerns that authors and performers, typically in a weaker bargaining position, may lack information on how their works are exploited and what revenues they generate.¹⁴⁶ This is problematic as it prevents them from assessing the true value of their rights, or from comparing different

140. See *infra* Section VIII (discussing in more detail the prevalence of a so-called “workers' data value gap”).

141. *Supra* Section III.

142. See WOUTER ZWYSEN, MONOPSONY AND NON-COMPETITIVE LABOUR MARKETS: WORKERS' WEAKENING BARGAINING POSITION, EUR. TRADE UNION INST. (Nov. 2024).

143. See *supra* Section V.

144. DSM Directive, *supra* note 10.

145. *Id.* at art. 20.

146. *Id.* at recital 72; see also *Commission Impact Assessment on the Modernisation of EU Copyright Rules*, at 173–75, SWD (2016) 301 final.

licensing deals.¹⁴⁷ As the European Commission observed in its impact assessment, creators in the music and audiovisual sectors particularly struggle with online and cross-border exploitation, where remuneration often bears little relation to use or success.¹⁴⁸ The rationale is that if remuneration to rightsholders is meant to reflect the economic value of their rights, then a framework should be established to facilitate the exchange of information, especially where they otherwise lack the necessary insight to assess that value, enabling them to negotiate fair remuneration. It was against this backdrop that what are now Articles 18–20 of the DSM Directive, also described as the “real” value gap, were negotiated and eventually introduced.

Article 18(1) entitles authors and performers to receive “appropriate and proportionate remuneration” when exploiting their works.¹⁴⁹ Recital 73 clarifies that this should reflect the actual or potential economic value of the licensed rights, taking into account the creator’s contribution to the overall work, and all other circumstances of the case, such as market practices or the actual exploitation of the work.¹⁵⁰ A lump sum payment can also constitute proportionate remuneration, but should be the exception rather than the norm.¹⁵¹ When implementing Article 18(1), Member States are free to use different legal mechanisms to take into account the principle of contractual freedom and a fair balance of rights and interests.¹⁵² Sweden, for example, has gone one step further, such that any contractual terms which restrict the right to fair remuneration are automatically void.¹⁵³

Lack of transparency lies at the root of the problem of what constitutes fair remuneration. If rightsholders cannot ascertain how their works are being used, then they cannot ascertain whether or not they are fairly compensated. With that in mind, Article 19 requires transferees, or their successors, to provide regular, relevant, and comprehensive information on exploitation, revenues, and remuneration.¹⁵⁴ This transparency obligation must be effective yet proportionate in every sector, allowing Member States to limit it where administrative burdens would outweigh the revenues at stake or where the creator’s contribution is insignificant, unless information is necessary for contract adjustment.¹⁵⁵

Still, a statutory right to fair remuneration does not automatically alter existing contracts. Because creators are typically in a weaker bargaining position, their ability to renegotiate contracts can be limited. Authors and performers are also often reluctant to enforce their rights against their contractual partners before a

147. DSM Directive, *supra* note 10 at recital 72; *Commission Impact Assessment*, *supra* note 146, at 174–75.

148. *Commission Impact Assessment*, *supra* note 146, at Annex 2, 30.

149. DSM Directive, *supra* note 10, at art. 18(1).

150. *Id.* at recital 73.

151. *Id.*

152. *Id.* at art. 18(2).

153. Prop. 2021/22:278, *supra* note 40 at 169–70.

154. DSM Directive, *supra* note 10, at art. 19.

155. *Id.* at art. 19(3)–19(4).

court or tribunal.¹⁵⁶ It was against that backdrop that Article 20 introduced a statutory contract adjustment mechanism, also known as the “best-seller” clause.¹⁵⁷ The “best-seller” clause reads:

“Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.”¹⁵⁸

Article 21 supplements this by introducing a voluntary, alternative dispute resolution mechanism for any contract adjustment or transparency claims: “Member States shall also ensure that representative organizations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.”¹⁵⁹

The Directive’s initial draft contained only a contract adjustment mechanism where the agreed remuneration turned out to be “disproportionately low”.¹⁶⁰ This was eventually split up into two, what is now Articles 18 and 20, following suggested amendments from the JURI Committee, to ensure that creators also receive fair remuneration at the outset of new contracts.¹⁶¹ The rationale was to empower creators who are vulnerable in negotiations by guaranteeing equitable remuneration and enabling adjustment where returns otherwise prove unfair.¹⁶² The logic, therefore, is that creators shall be entitled to fair remuneration when negotiating new contracts for the exploitation of their works. Creators shall also be provided with the necessary information to subsequently evaluate those contracts and, if their agreed remuneration turns out to be disproportionately low, be entitled to adjust them accordingly.

The right to claim additional remuneration is particularly significant in long-term exploitation contracts where rights increase in value after conclusion.¹⁶³ However, the wording of the article is not limited to any such case. Indeed, it was pointed out on multiple occasions during the legislative proceedings that the drafting language was very broad.¹⁶⁴ Articles 18 and 20 apply to all “authors” and “performers” for

156. See *id.* at recital 79.

157. *Id.* at art. 20; see also *Commission Impact Assessment*, *supra* note 146, at 187.

158. DSM Directive, *supra* note 10, at art. 20(1).

159. *Id.* at art. 21.

160. *Proposal for a Directive on Copyright in the Digital Single Market*, art. 15, COM (2016) 593 final [hereinafter the “DSM Proposal”].

161. *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, PE 601.094v01-00, at 43–44 (Mar. 10, 2017).

162. *Id.*

163. See DSM Directive, *supra* note 10, at recital 78.

164. See LIONEL BENTLY ET AL. (EUR. PARL. COMM. LEGAL AFFAIRS), STRENGTHENING THE POSITION OF PRESS PUBLISHERS AND AUTHORS AND PERFORMERS IN THE DSM DIRECTIVE 48 (Sept. 2017).

the “exploitation” of their works or rights, which are terms left undefined.¹⁶⁵ Although Article 18 was negotiated with online exploitation in mind, its neutral language means that it is expected to be equally neutrally implemented into national law. Importantly, Article 20 also contains no time limit, which exposes exploiters to potential retroactive claims down the line.¹⁶⁶ That risk, however, can be mitigated by providing transparent information under Article 19 and ensuring fair remuneration at the initial contracting stage.

Contract adjustment mechanisms in copyright law are nothing new in Europe. Several Member States, including Germany, Belgium, France, the Netherlands, and Spain, already had such provisions before the DSM Directive.¹⁶⁷ Indeed, several of those national rules served a basis for the discussions when the DSM Directive was negotiated, with Germany being most notable, having had such a mechanism since the adoption of the German Copyright Act 1965.¹⁶⁸ The Act provided that where an author’s remuneration was “conspicuously disproportionate” to the proceeds and benefits derived from use, the author could demand modification of the agreement to secure equitable participation.¹⁶⁹ The right applied even if remuneration was fair at the time of contracting, regardless of foreseeability, and extended to all works.¹⁷⁰

Such mechanisms historically had limited market impact.¹⁷¹ Rightsholders often hesitated to enforce them for fear of retaliation, contract termination, or market exclusion or “blacklisting,” while litigation costs likely had a further deterrent effect.¹⁷² However, there is lack of data from Member States on industry uptake, making it difficult to draw any real conclusions on how effective the rules are. What we know is that Germany has experienced many of the cases. A notable such example is the German Federal Court of Justice’s ruling from 2011 involving the cameraman of the film *Das Boot*.¹⁷³ The Court held that a “conspicuous

165. DSM Directive, *supra* note 10, at arts. 18, 20.

166. *Id.*

167. For a comparative survey, see *Commission Impact Assessment*, *supra* note 146, at Annex 14D.

168. UrhG [Gesetz über Urheberrecht und verwandte Schutzrechte] [Copyright Act], Sept. 9, 1965, BGBl. I at 1273 (Ger.) [hereinafter “German Copyright Act 1965”].

169. *Id.* at § 32a.

170. *Id.*; see also BENTLY ET AL., *supra* note 164, at 62–63.

171. Bently et al. describe it as that “[t]he economic evidence is that bestseller clauses are of limited effect and often merely assist those who have already acquired the market power to renegotiate existing deals.” *Id.* at 84. Other scholars have similarly argued that the mechanism is “inapt at solving the more general issue of uneven bargaining power.” See DUSOLIER ET AL., *supra* note 38, at 71. Dutch scholars have also noted that the measure in the Netherlands has been “rarely being invoked in practice.” See Stef J. van Gompel et al., *Evaluatie Wet Auteurscontractenrecht: Summary and Conclusions*, UNIV. LEIDEN 1, 4 (Sep. 1, 2020), <https://www.ivir.nl/publicaties/download/Evaluatie-ACR-Eindrapport-Summary-and-conclusions.pdf> [<https://web.archive.org/web/20250926184240/https://www.ivir.nl/publicaties/download/Evaluatie-ACR-Eindrapport-Summary-and-conclusions.pdf>].

172. van Gompel et al., *supra* note 171, at 4.

173. Bundesgerichtshof [BGH] [Federal Court of Justice], I ZR 127/10, *Das Boot* (Sept. 22, 2011) (Ger.); see also Amélie Lacourt, Justine Radel-Cormann & Sophie Valais, *Fair Remuneration for Audiovisual Authors and Performers in Licensing Agreements*, EUR. AUDIOVISUAL OBSERVATORY: IRIS PLUS 1, 87 (Dec. 2023).

disproportion" exists where the agreed remuneration is less than half of what is deemed equitable, which brought the cameraman further payment of €462,000, on top of the €104,303 lump sum he had originally been paid for his work.¹⁷⁴ The term "conspicuous disproportion" in the German Copyright Act 1965 has since been replaced with "disproportionately low remuneration" to reflect the wording of the DSM Directive.¹⁷⁵ The statutory amendment retriggered litigation between the parties in *Das Boot*, but was eventually settled.¹⁷⁶

A related, but different mechanism in Member States' copyright laws are measures that address new uses of copyrighted works. Parties may have initially agreed to a lump sum or royalties based on the assumption that a work would be used in a specific way. However, changes in market circumstances or new technology could enable different uses, rendering the initial remuneration unreasonable. Once again, Germany has led regulations in this area. For many years, the German Copyright Act 1965 forbade licensing rights for "unknown means of utilisation."¹⁷⁷ This meant that for any new use, an author could choose to extend their license and renegotiate payment.¹⁷⁸ But as new technologies emerged more frequently, this rule became ineffective. It was replaced in 2008 by a less rigid measure requiring authors to grant licenses or assignments for "unknown types of use."¹⁷⁹ If a licensee or assignee wants to exploit a work for a new, unstated use, they must notify the author, who is entitled to refuse the grant.¹⁸⁰ Similar "new use" provisions have since been adopted in the Netherlands and France.¹⁸¹ The Dutch version specifically allows the author to claim "additional fair compensation" for uses that were unknown when the contract was made.¹⁸² Since then, in both Germany and the Netherlands, these provisions have been interpreted narrowly to only apply to innovations that are transformative from the point of view of

174. Karl-Nikolaus Peifer, *Die unendliche Geschichte der Nachvergütung von Miturhebern im Filmbereich* [The Never-ending Story of Additional Remuneration for Co-authors in the Film Sector], ZUM 814 (2021) (Ger.).

175. UrhG [Gesetz über Urheberrecht und verwandte Schutzrechte], as amended by Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts, May 31, 2021, BGBl. I at 1204 (Ger.) [hereinafter "German Copyright Act 2021"], § 32a (in English translation: "[w]here the author has granted to another a right of use on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration proving to be disproportionately low in comparison to the proceeds and benefits derived from the use of the work, the other party is obliged, at the author's request, to consent to a modification of the agreement which grants the author further equitable participation appropriate to the circumstances. It is irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained.").

176. Lacourt, Radel-Cormann & Valais, *supra* note 173, at 88.

177. German Copyright Act 1965, *supra* note 168, at § 31(4).

178. U.K. INTELLECTUAL PROP. OFF. (U.K. IPO), RIGHTS REVERSION AND CONTRACT ADJUSTMENT (Feb. 6, 2023), at ch. 3.2.2.

179. German Copyright Act 2021, *supra* note 175, at § 31(a).

180. *Id.*

181. Lucie Guibault & Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, INST. FOR INFO. L., No. ETD/2000/B5-3001/E/69, at 51–52, 67 (May 2002).

182. Dutch Copyright Act, *supra* note 41, at § 25c(6).

consumers and which have the capability to open up new markets.¹⁸³ Although a “new use” provision was recommended in preparatory European policy reports, it was not included in the final draft of the DSM Directive.¹⁸⁴ This is understandable, given the broad scope of the right to fair remuneration and best-seller rule in the DSM Directive, which address any inequitable economic distribution, regardless of the cause.

Article 26(2) of the DSM Directive provides that it applies without prejudice to acts concluded and rights acquired before its entry into force.¹⁸⁵ Sweden has interpreted this to exclude earlier contracts, but Member States are free to deviate from that when implementing the rules into national law.¹⁸⁶ Sweden did precisely that, and extended the “best-seller” rule retroactively to contracts concluded within the previous twenty years, reasoning that the mechanism is designed to protect creators from inequitable bargains.¹⁸⁷ Some Member States, like the Netherlands, have already and previously applied their contract adjustment mechanisms retroactively.¹⁸⁸ Other Member States, like Germany, only extend their legislation to contracts that were entered into before its entering into force.¹⁸⁹

B. FAIR REMUNERATION FOR WORKERS’ DATA

In the draft proposal for the DSM Directive, the right to fair remuneration and “best-seller” rule for contract adjustments were neutrally drafted for all types of exploitation contracts.¹⁹⁰ Sweden, which has a long history of collective agreements on the labor market and strong unions, proposed that the rules should expressly exclude employment contracts. Other Member States did not share Sweden’s standpoint.¹⁹¹ Instead, they pointed out that excluding certain types of contracts from the scope of the rules could make it easier for parties to avoid the rules.¹⁹² The draft text in the Directive did not change in scope. In light of that history,

183. See U.K. IPO, *supra* note 178, at ch. 3.2.2 (referring to Artur-Axel Wandtke & Henrik Holzapfel, *Ist § 31 IV UrhG noch zeitgemäß*, GRUR 2004, [¶ 290]); see also Guibault & Hugenholtz, *supra* note 181, at 79 (stating, with respect to the German Copyright Act 1965, that “‘future or unknown forms of exploitation’ have been defined as those forms of use that are not technically possible or, even if so, the economic relevance of which is not known at the time of conclusion of the contract. Hence, a form of use is deemed to be new, when it is a clearly distinguishable economic and technical mode of exploitation of a work.”).

184. UK IPO, *supra* note 178, at ch. 3.2.2 (referring to DUSOLIER ET AL., *supra* note 38, at 104).

185. DSM Directive, *supra* note 10, at art. 28(2).

186. Prop. 2021/22:278, *supra* note 40, at 162–64.

187. *Id.* at 180.

188. See U.K. IPO, *supra* note 178, at ch. 3.2.1.

189. *Id.*

190. See DSM Proposal, *supra* note 160, at art. 15 (worded as, “...are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances”).

191. Prop. 2021/22:278, *supra* note 40, at 159.

192. *Id.*

Sweden concluded, when implementing the Directive into national law, that it was clear that the rules apply to all assignments, including those in employment contexts.¹⁹³ This was considered to apply regardless of whether the copyright assignment was express or implied, and whether the employment contract and its terms were agreed in writing or orally.¹⁹⁴ However, Sweden considered that neither Article 18 nor Article 20 are intended to apply to contracts entered into with organizations or unions, which are not directly associated with any contract with an individual author or performer.¹⁹⁵ If that assumption is correct, then some collective agreements on the labor market are likely to be excluded from the scope of the rules.¹⁹⁶

Although the rules on fair remuneration and the “best-seller” rule were originally intended for a different context, they would also apply to employment and contractor relationships where workers create copyright-protected content. The “best-seller” rule in Article 20 extends not only to exploitation licenses but also to copyright assignments, which are commonly found in employer-employee and contractor agreements.¹⁹⁷ In practice, this means the rule could benefit individuals whose creative works generate significant revenue for the organizations they serve, yet who are not compensated proportionally. Yet there is another important aspect which has to be considered as well, which is the data accumulated from such work products. Works produced by workers are increasingly valuable for automation purposes, as previously discussed.¹⁹⁸ When entering into employment or independent contractor agreements, where copyright may be assigned, workers are frequently not told how their work products will end up being used. The economic value of those work products could be increased when they are additionally used as data, for example for training AI systems, and especially if those systems are later deployed to replace their jobs.¹⁹⁹ Many workers have so far not received any additional compensation to account for that use and extracted added value. Whether the compensation agreed upon at the outset of the agreement is fair and proportionate will depend on the specific circumstances.

193. *Id.* at 159–60.

194. *Id.* at 160.

195. *Id.*

196. The DSM’s recital 72 appears to confirm this, stating “[t]hat need for protection does not arise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts.” DSM Directive, *supra* note 10, at recital 72.

197. *See id.* at recital 78 (“Accordingly, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism should be provided for as regards cases where the remuneration originally agreed under a *license or a transfer of rights* clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer.” (emphasis added)).

198. *See supra* Sections II and V.

199. *See infra* Section VIII (discussing in more detail the existence of a so-called workers’ data value gap).

Extending the “best-seller” rule to workers’ data when used for developing and deploying AI solutions would more equitably reward workers for their work, especially where such use may ultimately contribute to job displacement. But assigning a price on that data is far from straightforward. The fundamental question is: at what point does the value of workers’ outputs, when used as data, increase so substantially that the originally agreed compensation becomes “disproportionately low”? This gives rise to several related questions, including whether the economic value of a worker’s output should be assessed solely in relation to the individual work itself, or whether it should also reflect the work’s subsequent use, particularly its value when repurposed as data. Article 18 and Recital 73 of the DSM Directive suggest the latter. Article 18(1) ensures that authors receive fair remuneration for the exploitation of their works “or other subject matter,” and Recital 73 explains that such economic value should be both “actual or potential” and take into account “the author’s or performer’s contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.”²⁰⁰ This indicates that assessing economic value can include the use of copyrighted works as data.

This raises further challenges about how to value creative output when its worth is amplified not individually, but in aggregate. For instance, what is the economic value of a single work product that has limited standalone significance, but becomes substantially more valuable when pooled with others? Data typically has little value in isolation but becomes exponentially more valuable when aggregated. A purposive reading of Recital 73 would support evaluating economic value in light of this broader context. Consider a hypothetical: if ten documents are worth €100, but fifty similar documents used as training data are worth €1,000, fairness would suggest that remuneration should be calculated based on the latter value, if such large-scale exploitation occurs. Similarly, assume that a graphic designer who creates 500 images for an employer receives €10,000 for the set. Yet if those images are used to train an AI system capable of producing infinite variations of the same style, the economic value of the original images may be far greater than initially agreed. Articles 18 and 20 are designed to account for such scenarios by allowing for reassessment when new factors influence the fairness of remuneration.²⁰¹ There is no indication that the use of copyrighted works as data in AI development should be excluded from that analysis.

The extension of the DSM Directive to workers’ data would have far-reaching consequences. Although the Directive requires implementation through national legislation among Member States, Article 18 offers workers, whether employees or independent contractors, a legal tool to negotiate fair compensation for the data their work generates.²⁰² Under Article 19, employers and contractees are obliged to provide “relevant and comprehensive information” about the exploitation of

200. DSM Directive, *supra* note 10, at recital 73, art. 18.

201. *Id.* at arts. 18, 20.

202. *Id.* at art. 18.

works on a regular basis.²⁰³ In practice, this requires disclosing whether and how a particular worker's data is being used for automation or AI-related purposes. If a worker has received compensation for their work products but not for their subsequent use as data, they may be entitled under Article 20 to claim additional, fair remuneration. This right is triggered when "the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."²⁰⁴ As the use of workers' data to train AI systems becomes increasingly common, the importance of transparency, accountability, and equitable remuneration will only grow. The DSM Directive provides a flexible framework that could help ensure that workers are not left behind in this data-driven economy, although each case will ultimately depend on the specific facts.

C. A CONTRACT ADJUSTMENT ONLY, NOT LAW ADJUSTMENT

A potentially significant limitation of the "best-seller" rule under the DSM Directive is that it only permits the adjustment of contracts, not of the legal default ownership of rights. This distinction is essential because initial ownership of copyright in employment relationships is not harmonized in the EU. In several jurisdictions, such as Spain, the Netherlands, Poland, and Hungary, the employer is deemed the initial copyright owner by operation of law.²⁰⁵ The language of Article 20 makes clear that the right to claim additional, proportionate remuneration is only available to authors or performers "from the party with whom they entered into a contract for the exploitation of their rights."²⁰⁶ Where copyright ownership vests in the employer by statutory default, rather than being transferred through contract, it is arguable that there is no contractual baseline upon which the "best-seller" rule can operate.

If this interpretation holds, then the scope of Article 20 is significantly narrower than it might appear at first glance in employment contexts, and exclude a large segment of workers, those whose copyright is never contractually transferred, from becoming beneficiaries. This would be at odds with the broader purpose of the DSM Directive, which aims to harmonize copyright law across the EU and strengthen the position of authors and performers in the digital single market. Recital 78 clearly signals that the provision is designed to promote fairness and a more balanced bargaining environment for creators, including when creating as employees.²⁰⁷ There is also a potential policy inconsistency in denying Article 20 protection to employees whose rights are appropriated by law, but allowing it where rights are

203. *Id.* at art. 19.

204. *Id.* at art. 20.

205. See DUSOLIER ET AL., *supra* note 38, at 44–45; Legeza, *supra* note 32, at 12. In most Member States, however, and as discussed, the employee will by default own the copyright in employment relationships. See *supra*, Section III.

206. DSM Directive, *supra* note 10, at art. 20.

207. *Id.* at recital 78.

assigned through contract. The rationale behind the “best-seller” rule—namely, that creators should receive fair compensation if their work turns out to have significant downstream value—applies regardless of how the rights initially changed hands.

One alternative interpretation is to read Article 20 purposively, on the basis that employers are still exploiting the works produced by their employees. An employment contract could, from that perspective, still be considered an “exploitation contract” as a matter of copyright law. Even if their copyright has been assigned by statute, not contract, employees would be claiming additional remuneration “from the party [employer] with whom they entered into a contract for the exploitation of their rights.”²⁰⁸ Ultimately, this will be a task for the courts to decide in due course.

D. EXTRATERRITORIALITY AND CHOICE OF LAW IMPLICATIONS

The rules on fair remuneration and the “best-seller” clause in the DSM Directive are likely to have implications far beyond the borders of the EU, despite the territorial nature of copyright. Copyright arises automatically upon creation and subsists as a bundle of rights across multiple jurisdictions. Because of that, individuals working for foreign companies will be equally entitled to fair remuneration and the right to adjust their contracts with respect to their European copyright portfolio. However, these rights under Articles 18 and 20 are only triggered when the exclusive rights within the EU are implicated.²⁰⁹ This analysis becomes more complex in the context of AI, which, unless embedded in physical products, is inherently digital.²¹⁰ This practically means that courts will be faced with the situation of having to put a separate price tag on the European copyright bundle, taking into account how workers’ data is used within the EU specifically. That will, in turn, hinge on questions such as “how much” the data is being used within the EU and “how valuable” that use is.

To illustrate, consider a hypothetical scenario where workers are employed by a global technology company headquartered in the United States. Their data is stored on U.S. servers and used to fine-tune an LLM by teams based in the United States and Asia. The fine-tuned model is then used to deploy AI systems across global internal teams, including those in the EU. In such a case, the right to fair remuneration and contractual adjustment would apply only to the EU-specific copyright bundle across all global workers, thereby reducing any claim for

208. *Id.* at art. 20.

209. *Cf.* Rättzén, *supra* note 9, at 228–331 (discussing copyright territoriality and how the localization of cross-border infringements determine which law becomes applicable, following *lex loci protectionis*). The same general principle of copyright territoriality applies *mutatis mutandis* to Articles 18 and 20 of the DSM Directive. The DSM Directive can only regulate EU and not foreign copyright as a matter of sovereignty and public international law. *Id.* at 230–31.

210. See Mattias Rättzén, *Who Rules AI? The Rise of Extraterritoriality and Solving the Cross-Border AI Governance Crisis*, at 12–13 (unpublished manuscript) (on file with author).

additional remuneration. If the worker is also based in the EU, there is an argument that the price tag should be higher, especially if the downstream deployment of AI results in redundancy or job displacement within the EU. In practice, the rules on fair remuneration and “best-seller” in the DSM Directive therefore have an extraterritorial reach, and impact both workers and companies based outside the EU, but where workers’ data is incorporated into AI systems deployed in the EU.

There are some open questions about whether workers based outside the EU also qualify as beneficiaries under the EU rules. The international copyright framework is based on the principle of national treatment, which provides that authors who are not nationals of the “country of origin” of the work are entitled to the same rights in a foreign country as are granted to that country’s own nationals.²¹¹ The country of origin is where the work is first published, or—if published simultaneously in multiple countries—the one offering the shortest term of protection.²¹² Because nearly all countries are signatories to the Berne Convention providing this protection, it can almost always be assumed that the principle of national treatment applies. More pertinent is Article 5(2) of the Berne Convention, which provides that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”²¹³ This long-standing rule, commonly interpreted as referring to *lex loci protectionis*, derives from the principle of territoriality.²¹⁴ In practice, it means that copyright infringement is governed by the laws of the country where the infringing act occurs, unless the same act can also be localized elsewhere.²¹⁵ Where things become less certain is in relation to contractual elements, such as licensing and assignment of rights. It is debatable whether the principle of *lex loci protectionis* extends to these areas. The reference in Article 5(2) to “extent of protection” and “means of redress” could potentially be interpreted as referring specifically to the enforcement of substantive rights, rather than to contractual arrangements.²¹⁶ However, that distinction is likely overstated in the present context. Although Articles 18–21 of the DSM Directive govern licensing and assignments, their content is substantive in nature and aimed at

211. See Berne Convention, *supra* note 31, at art. 5(3).

212. *Id.* at art. 5(4)(a–b).

213. *Id.* at art. 5(2).

214. See SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND §§ 20.02–20.03 (2022); Alexander Peukert, *Territoriality and Extraterritoriality in Intellectual Property Law*, in TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 191–192 (Günther Handl ed., 2012); Raquel Xalabarder, *Copyright: Choice of Law and Jurisdiction in the Digital Age*, 8 ANN. SURV. INT’L & COMP. L. 79, 82–83 (2002).

215. See Mattias Rättzén, *Closing the Patent Loophole Across Borders*, 20 U.I.C. REV. INTELL. PROP. L. 358, 370 (2021).

216. See Mihály Ficsor, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS ¶ BC-5.11, at 42 (2004); SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND RELATED RIGHTS § 6.99 (2d ed., 2006); Ted Shapiro, *Remuneration Provisions in the DSM Directive and the Audiovisual Industry in the EU: The Elusive Quest for Fairness*, 12 EUR. INTELL. PROP. REV. 42 (2020).

safeguarding authors' economic rights.²¹⁷ They do not merely set out contractual norms. These provisions also provide remedial mechanisms and fall within the "means of redress" contemplated by Article 5(2) of the Berne Convention. Accordingly, there is a strong basis for concluding that non-EU workers can also benefit from Articles 18–21 when EU copyright is at issue.

The transparency, "best-seller," and alternative dispute resolution rules are mandatory rules and cannot be contracted out of.²¹⁸ While the right to fair remuneration under Article 18 can in principle be contractually waived, Member States are free to decide otherwise.²¹⁹ Sweden, for example, has chosen to make Article 18 mandatory as well.²²⁰ The mandatory nature of these provisions also prevents parties from circumventing them through a choice of foreign law in the contract. Recital 81 of the DSM Directive clarifies that "the parties' choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive, as implemented in the Member State of the forum."²²¹ This reflects Article 3(4) of the Rome I Regulation, which prevents parties from avoiding mandatory EU law where all relevant elements of the situation are located within the EU.²²² The only exception to this rule arises in cases where foreign overriding mandatory provisions apply. Specifically, Article 9(2) of the Rome I Regulation provides that "[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."²²³ These are provisions considered essential to safeguard a country's fundamental public interests, such as its political, social or economic organization. It is highly unlikely that Articles 19–21 of the DSM Directive would be displaced by such rules. Therefore, and to conclude, even where the contract is governed by non-EU law, the substantive rights and protections under the DSM Directive will continue to apply in full when EU copyright is involved.

VIII. IS THERE A WORKERS' DATA VALUE GAP?

A. AN ECONOMICS PRIMER OF THE VALUATION OF DATA IN AI

The right to fair remuneration and the "best-seller" rule in the EU DSM Directive opens up the possibility for workers to claim additional remuneration for the exploitation of their works. As discussed above, this includes cases where a worker's

217. DSM Directive, *supra* note 10, at arts. 18–21.

218. *Id.* at recital 81, art. 23(1).

219. *Id.* at art. 18(2).

220. Prop. 2021/22:278, *supra* note 40, at 169–70.

221. DSM Directive, *supra* note 10, at recital 81.

222. Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L177) 6. [hereinafter "Rome I Regulation"].

223. *Id.* at art. 9(2).

work products, if qualifying as copyright-protected works, are used as data inputs in AI systems. However, this right is only triggered when there is a clear and significant discrepancy between the economic value ultimately derived from the exploitation of those work products, including in the form of data, and the compensation originally paid. In other words, a so-called “workers’ data value gap” must exist for this claim to succeed.

Pricing data is not a trivial exercise, and the economic science behind data valuation and pricing is still evolving, with little consensus.²²⁴ The value of data is not static, and will depend on numerous factors such as its quality, quantity, relevance, and the context in which it is used.²²⁵ The relative impact of these factors is case-specific and will vary depending on the circumstances in which the data is deployed. Data is also inherently heterogeneous, often unstructured, and difficult to reduce to standardized measurement units. Unlike physical commodities, data does not have a straightforward measurement metric, such as weight or amount, and the amount of data that is useful will depend on the application.²²⁶ What is more, data often does not have a common market price, and there are few marketplaces from which data can be sold and bought.²²⁷ The latter is however changing quickly, and data vendors are becoming increasingly common.

Several economic theories and methodologies have been proposed for valuing data. One of the most common is the **cost-based method**, which assesses value based on either historical costs (i.e., how much was spent to acquire the data) or replacement costs (i.e. how much it would cost to reproduce it today).²²⁸ To assess

224. See Diane Coyle & Annabel Manley, *What Is the Value of Data? A Review of Empirical Methods*, BENNETT INST. FOR PUB. POL’Y, UNIV. OF CAMBRIDGE (July 2022) https://bennettschool.cam.ac.uk/wp-content/uploads/2022/07/policy-brief_what-is-the-value-of-data.pdf [https://web.archive.org/web/20251010221442/https://bennettschool.cam.ac.uk/wp-content/uploads/2022/07/policy-brief_what-is-the-value-of-data.pdf]; see generally Jun Hao, Zeyu Deng & Jianping Li, *The Evolution of Data Pricing: From Economics to Computational Intelligence*, 9 HELIYON (2023).

225. See Jian Pei, *A Survey on Data Pricing: from Economics to Data Science*, ARXIV (Sep. 9, 2020), at 32–33 (Sep. 9, 2020), <https://arxiv.org/abs/2009.04462> [<https://web.archive.org/web/20251010215622/https://arxiv.org/pdf/2009.04462>].

226. See Diane Coyle & Lianna Brinded, *The Value of Data: Summary of Findings from a Literature Review*, BENNETT INST. FOR PUB. POL’Y, UNIV. OF CAMBRIDGE (Feb. 2020) at 7, https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2020/12/Value_of_data_literature_review_26_February.pdf [https://web.archive.org/web/20251010215806/https://bennettschool.cam.ac.uk/wp-content/uploads/2020/12/Value_of_data_literature_review_26_February.pdf] (discussing how other data characteristics, such as exclusivity, accuracy, completeness, consistency, interoperability, etc. matter more).

227. Santiago Andrés Azcoitia, Costas Iordanou & Nikolaos Laoutaris, *What Is the Price of Data? A Measurement Study of Commercial Data Marketplaces*, ARXIV (Oct. 25, 2021), at 1–2 <https://arxiv.org/abs/2111.04427> [<https://web.archive.org/web/20251005174752/https://arxiv.org/abs/2009.04462>] (finding that data products varied widely in price, from free or a few dollars to several thousand dollars).

228. FRONTIER ECONOMICS, *THE VALUE OF DATA ASSETS: A REPORT FOR THE DEPARTMENT FOR DIGITAL, CULTURE, MEDIA AND SPORT* 13 (Frontier Networks Ltd., 2021), https://assets.publishing.service.gov.uk/media/6399f93d8fa8f50de138f220/Frontier_Economics_-

the costs associated with data, all the costs at all stages of the data life cycle are considered, including those for generating, collecting, storing, and replacing a dataset, as well as the costs if the data were lost.²²⁹ This approach comes from the standard practice of the System of National Accounts (“SNA”), which is the internationally recognized framework for compiling national economic statistics. The SNA endorses a “sum-of-costs” method where the value cannot be directly observed through a market transaction,²³⁰ which is recommended for valuing items such as databases.²³¹ Under the SNA, relevant cost inputs include preparing data in the appropriate format, staff time spent on developing the database, capital services used in the process, and intermediate consumption costs.²³²

Despite its appeal, the cost-based method has several limitations when applied to data. It is not always obvious how data-specific costs should be isolated from other development costs, especially in AI-related projects.²³³ Data costs may also vary widely depending on its role in decision-making processes or model training. Moreover, there is often no correlation between how much a dataset costs to produce and its commercial value. Data produced at low cost may have high strategic or revenue-generating potential, and vice versa.²³⁴ As a result, cost-based methods can either significantly understate or overstate the actual economic value of data.

Income-based methods assess the expected revenue streams generated by the underlying data.²³⁵ This approach is most helpful when revenues can be directly attributed to the data itself, but it becomes less effective when the causal link between data and income is weak or indirect.²³⁶ A related technique, commonly used in intellectual property valuation, is the “relief from royalty” method. This estimates the cost savings a company enjoys by generating its own data instead of

_value_of_data_assets_-_Dec_2021.pdf

[https://web.archive.org/web/20250919173626/https://assets.publishing.service.gov.uk/media/6399f93d8fa8f50de138f220/Frontier_Economics_-_value_of_data_assets_-_Dec_2021.pdf].

229. Coyle & Manley, *supra* note 224, at 5.

230. *Id.*

231. RECORDING AND VALUATION OF DATA IN NATIONAL ACCOUNTS 11 (Intersecretariat Working Group on National Accounts (United Nations), 2020), https://unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.20/2020/mtg1/3.4_Recording_of_Data_in_NA_Eurostat_June_2020_after_SG_comments.pdf [https://web.archive.org/web/20251010220515/https://unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.20/2020/mtg1/3.4_Recording_of_Data_in_NA_Eurostat_June_2020_after_SG_comments.pdf].

232. UNITED NATIONS STAT. COMM’N, SYSTEM OF NATIONAL ACCOUNTS (2008), at 10.113.

233. See Coyle & Manley, *supra* note 224, at 6.

234. FRONTIER ECONOMICS, *supra* note 228, at 14–15.

235. *Id.* at 8; see also Jenna Slotin, *What Do We Know About the Value of Data?*, GLOB. P’SHIP FOR SUSTAINABLE DEV. DATA, https://www.data4sdgs.org/sites/default/files/services_files/Value%20of%20Data%20Report_Final_compressed_0.pdf

[https://web.archive.org/web/20251005174738/https://www.data4sdgs.org/sites/default/files/service_s_files/Value%20of%20Data%20Report_Final_compressed_0.pdf] (last visited Aug. 17, 2025).

236. Coyle & Manley, *supra* note 224, at 8.

paying licensing fees to third parties.²³⁷ However, this method becomes harder to apply when comparable licensing arrangements do not exist, or when the data in question is not available for purchase on the open market.

Market-based methods rely on external observables. The most important of these is the market price of the product, or users' willingness to pay for the product.²³⁸ Where market prices are available, also known as "bottom-up," they are almost always a preferred method for valuation.²³⁹ Yet such prices are rarely available for data, which is often created and used internally by organizations without ever being bought or sold. Where market prices are not available, it is necessary to look at what is the market price for equivalent or comparable products, or what the user would be willing to pay for that.²⁴⁰ Equivalent or comparable products could be those from other companies or in related sectors. This exercise is inherently complex. Comparability is difficult to establish, and differences in use cases, quality, and sector norms can significantly impact price relevance. The drawback of this method becomes evident where data is concerned. There are so far few data marketplaces, and the price of the underlying data used in AI systems is invisible. Data is also often bundled together in larger datasets, which are sometimes made publicly available for free, making it less than ideal as a fiscal proxy.²⁴¹

One alternative market-based method, when there are no quantifiable market prices, is using a "top-down" approach, which looks at the market value of companies instead of their goods.²⁴² A top-down approach begins with evaluating the entire relevant market and then estimating a particular company's market share, if there is competition. The serviceable available market will represent the total addressable market which the company can serve with its goods. Lastly, the serviceable obtainable market is the relative share of the market which the company can realistically capture, or have captured, by their goods.²⁴³ A top-down approach is inherently speculative as it assumes that the relative market share can be attributed to the goods in question. This becomes even more difficult where data is concerned, as it often cannot be said that a company's market position can be attributed to inputs like using particular data. Success could come from a wide range of other factors, such as product execution and design, marketing, and so forth. A top-down approach would mainly be useful where the data itself is sold on the market, but less helpful when it is not. In most cases for data, when used

237. *Id.*

238. *Id.* at 9; Slotin, *supra* note 235.

239. FRONTIER ECONOMICS, *supra* note 228, at 15.

240. Slotin, *supra* note 235.

241. See, e.g., COMMON CRAWL, <https://commoncrawl.org/> [<https://web.archive.org/web/20250920005201/https://commoncrawl.org/>]], which is the largest open, free repository of web-crawled data from the internet.

242. FRONTIER ECONOMICS, *supra* note 228, at 15.

243. Daniel F. Spulber, *Finding Reasonable Royalty Damages: A Contract Approach to Patent Infringement*, 2 U. ILL. L. REV. 615, 688–89 (2019).

internally within organizations, there will simply be no “top” and no “down” as there is no market.

Impact-based methods value data based on the causal effect of its use.²⁴⁴ These can be distinguished from an income-based approach in that they are concerned with the actual effect and outcome resulting from using the data. For example, using certain data may make it possible to achieve a certain technical result, which otherwise would be difficult to achieve with other data or resources. That technical result may, in turn, also yield positive financial consequences. What makes impact-based methods more difficult to apply in practice is that they require a credible counterfactual: what would have been the outcome if another set of data had been used?²⁴⁵ Although that may be simulated or estimated, there will necessarily be a degree of uncertainty and a “what if” factor which can be over- or underestimated. For example, Arrieta-Ibarra et al. used counterfactual simulations to vary the amount of data which would be available for machine learning algorithms to use and compared their effect on company profits.²⁴⁶ In the case of a well-known ride-share company, which used data from drivers and riders for fare estimation, analytics, and marketing, they estimated that data use could account for up to 47% of the company’s annual revenue. If drivers were fully compensated for the value of the data they generate, the study suggested they could be entitled to up to \$30 per day solely for their data contributions.²⁴⁷

Real options methods are concerned with not the realized value of data post-deployment, but with its potential value at the time of collection.²⁴⁸ Data is often acquired without a specific use case in mind, under the assumption that it may prove valuable in the future. In this context, data functions as a strategic asset. It is useful simply by virtue of being available when future opportunities arise. Real options valuation involves simulating multiple hypothetical future scenarios in which the data might be used. The scenario value in each of these simulations is then aggregated to consider all possible outcomes.²⁴⁹ For example, a company might simulate how the data could be used in different use cases, and what the outcome would be in each of these cases. Those outcomes can then be combined to better inform the decision-making process, but indirectly also the value which the data assets may possess.

There is no consensus in economic theory on what valuation method is most appropriate for data. Each method has its strengths and limitations, and it may be advisable to apply multiple methods in parallel to triangulate a more accurate valuation. Depending on the circumstances, some methods may favor data producers, while others may advantage data users. Relying solely on one

244. Slotin, *supra* note 235; Coyle & Manley, *supra* note 224, at 15.

245. Coyle & Manley, *supra* note 224, at 16.

246. *Id.* at 15 (citing Imanol Arrieta Ibarra et al., *An Empirical Study of the Value of Data* (2020) (unpublished manuscript) (on file with Mimeo)).

247. *Id.*

248. *Id.* at 18.

249. *Id.* at 19.

methodology may lead to distorted or incomplete assessments. The analysis will also necessarily be context-specific. Data which improves the performance of a model in one scenario may not do so in another, meaning that the purpose behind using the data should be a key factor to consider in valuation.

AI applications and machine learning algorithms rely heavily on data for their training. Yet the data's value varies considerably depending on how it is used and the type of AI technology involved. In supervised learning, where labeled datasets train models to make predictions, data quality and relevance have a direct and measurable effect on accuracy.²⁵⁰ By contrast, unsupervised learning systems, which identify patterns in unlabeled data, derive value primarily from the volume and diversity of datasets.²⁵¹ Large and varied datasets can be especially valuable in deep learning, which typically requires vast amounts of data.²⁵² Fine-tuning pre-trained models is another area where data can hold significant value. In such cases, smaller, domain-specific datasets are often used to adapt a general-purpose model to a more targeted task.²⁵³ Data quality and domain relevance becomes paramount for this purpose. A similar principle applies to retrieval-augmented generation ("RAG") systems, which combine pre-trained language models with external knowledge retrieval. The value of data in RAG systems lies in its relevance to the retrieval task, meaning the more specific and relevant it is to the task, the more valuable it will be.

Lastly, the deployment context matters. Data used for AI deployed in high-risk applications, such as autonomous vehicles or medical diagnostics, might be valued more than data used for low-risk applications.²⁵⁴ Some data will also be more difficult to substitute than others, particularly where it derives exclusively from internal sources.²⁵⁵ Additionally, the value of data can differ depending on whether the AI technology is designed for a one-time task or continuous learning. In systems that continuously update and improve over time, such as recommendation engines, the ongoing collection of new data to refine the model will be particularly valuable.

250. See Saket Srivastava et al., *Impact of Data Quality on Supervised Machine Learning: Case Study on Drilling Vibrations*, 219 J. PETROLEUM SCI. & ENG'G 111058 (2022).

251. See Shayne Longpre et al., *A Pretrainer's Guide to Training Data: Measuring the Effects of Data Age, Domain Coverage, Quality, & Toxicity*, ARXIV, No. 2305.13169, at 3 (Nov. 13, 2023), <https://arxiv.org/abs/2305.13169> [<https://web.archive.org/web/20251005174847/https://arxiv.org/abs/2305.13169>].

252. Michael R. Douglas, *Large Language Models*, ARXIV, No. 2307.05782, at 5–7 (Oct. 6, 2023), <https://arxiv.org/abs/2307.05782> [<https://web.archive.org/web/20251005174955/https://arxiv.org/abs/2307.05782>]; see also Google LLC, *Comment Letter on Artificial Intelligence and Copyright*, 88 FED. REG. 59942, at 3–4 (Oct. 30, 2023).

253. Kunpeng Guo et al., *Fine-tuning Strategies for Domain Specific Question Answering Under Low Annotation Budget Constraints*, ARXIV, No. 2401.09168, at 3 (Jan. 14, 2024), <https://arxiv.org/abs/2401.09168> [<https://web.archive.org/web/20251010222726/https://arxiv.org/pdf/2401.09168>].

254. Cf. Coyle & Brinded, *supra* note 226, at 6–7 (discussing how liability issues relating to data could reduce the value of data); see also FRONTIER ECONOMICS, *supra* note 228, at 65.

255. See Coyle & Brinded, *supra* note 226, at 7.

This contrasts with AI systems designed for static tasks, where the initial dataset might represent most of the data's value.

B. WHAT MAKES THE VALUATION OF WORKERS' DATA UNIQUE

Workers' data differs from other data used in AI because it is generated in the course of employment. This exclusivity makes workers' data unique, context-specific, and generally irreplaceable. As a result, there are typically no external markets or substitutes. It is also this lack of substitutability that makes workers' data particularly valuable to organizations. Moreover, unless workers' work products have been shared with third parties or made public, competitors are unlikely to have access to equivalent datasets.

Market prices usually provide the most reliable valuation benchmark for data, but when no such market exists for workers' data, other approaches such as **cost-based methods** may be used. These focus on the costs associated with data generation that can be attributed to the worker, including salary, bonuses, or other forms of compensation paid.²⁵⁶ Broader overhead costs, such as those for systems, tools, or infrastructure used to capture, store, and process the data, should be excluded from the calculations. But even so, wages may still misstate the economic value, as they often reflect factors unrelated to the worth of the data produced. In some roles, data creation is incidental, while in others it represents the employee's main contribution. Where the latter applies, the data's value may already be fully or partly captured in pay. In other cases, workers may simply receive high or low compensation for reasons unrelated to the value of the work products they generate.

What complicates the economic analysis of workers' data is that workers may have already received fair compensation for the work products they generated. The challenge arises when those same work products, once transformed into data, are repurposed for new applications that create additional value and revenue streams for the organization. Traditional cost-based valuation methods, which focus on the initial costs of producing the data, such as employee wages, may not fully capture the economic value generated by the data over time.²⁵⁷ Workers' data can be used to develop entirely new applications in AI and machine learning, far exceeding the initial value of individual work products. This suggests that cost-based methods, while useful as a baseline, are insufficient on their own, and that complementary methods, such as **income-based valuation**, are necessary to account for the downstream value derived from data reuse. AI systems which are fine-tuned or developed internally within the organization could also be used externally, in which case these will have their own attributable revenue. The income generated from selling or licensing these AI systems should be considered when valuing workers'

256. Cf. Coyle & Manley, *supra* note 224, at 5 (discussing the valuation principles in respect of data generally).

257. See *id.* at 7 (discussing how data may change its value over time).

data. If the AI system is only used internally, the focus shifts to evaluating internal efficiencies and cost savings. Here, the value of workers' data could be measured by how much it reduces operational costs or improves productivity or decision-making. For example, if an AI system developed using workers' data significantly reduces the time required for a particular task, or means that fewer workers are needed to perform the same task, the cost savings could be substantial, which should be a factor when valuing the data.

Impact-based methods can also provide valuable insights. Workers' data may drive measurable outcomes, such as process optimization, that lead to tangible financial returns. In product development, workers' data could also contribute to new improvements, or in exceptional cases lead to new inventions. However, a key challenge of the impact-based approach lies in establishing the counterfactual: what would have occurred in the absence of using the workers' data? If similar outcomes could have been achieved using alternative data sources, the unique value of the workers' data is diminished from an impact-based perspective. Finally, where workers' data is collected with a view to potential future use, but no concrete use case yet exists, **real options methods** can be helpful. These methods rely on simulating hypothetical future scenarios, which necessarily involves a degree of speculation and often relies on sophisticated modelling techniques to generate meaningful valuation results.

Apart from choosing valuation methods, another important factor to consider will be who is contributing to the dataset and who is using the dataset. In scenarios where multiple data producers provide data to a single user, it will be difficult to measure the value of individual data contributions. In these cases, pricing strategies instead calculate the marginal contribution of data. The so-called Shapley value, which is a concept originating from cooperative game theory, is often used for such data valuation exercises.²⁵⁸ The Shapley value is defined using four axioms, which should each be satisfied: efficiency, symmetry, the zero element, and additivity. The exact calculation of the Shapley value requires evaluating all possible combinations of data points, which is computationally expensive and infeasible for large datasets. More specifically, the Shapley value for an agent i is given by:

$$\phi_i(v) = \sum_{S \subseteq N \setminus \{i\}} \frac{|S|!(|N| - |S| - 1)!}{|N|!} (v(S \cup \{i\}) - v(S))$$

where:

N is the set of all agents (data contributors).

S is a subset of N not including agent i .

258. See Jimin Xu et al., *Data-Driven Learning for Data Rights, Data Pricing, and Privacy Computing*, 25 ENG'G 66, 70 (2023) (citing Lloyd S. Shapley, *A Value for n -Person Games*, in *CONTRIBUTIONS TO THE THEORY OF GAMES* (Harold W. Kuhn & Albert W. Tucker eds., 2016)).

$v(S)$ is the value of the coalition S .

$v(S \cup \{i\})$ is the value of the coalition S plus agent i .

In a cooperative game, where multiple agents (or, in this case, data contributors) contribute to a collective outcome, the Shapley value determines how to distribute the total payoff among the participants based on their individual contributions. Efficiency ensures that the total value generated by the coalition is fully distributed among the participants. Symmetry ensures that if two agents contribute equally, they receive equal shares. The zero element principle excludes any agent that adds no value from receiving any payoff, and additivity allows for the combined value of agents to be considered across different coalition games. As Xu et al. have recognized, however, calculating the Shapley value presents significant challenges in the context of AI and machine learning.²⁵⁹ The exact calculation requires evaluating all possible combinations of data points, which is computationally expensive and infeasible for large datasets. Several other methods have been developed to address this. Ghorbani & Zou introduced Monte Carlo and gradient-based techniques to approximate Shapley values efficiently in supervised machine learning contexts.²⁶⁰ Jia et al. also developed a method for calculating exact Shapley values in K-nearest neighbors (“KNN”) models with improved computational efficiency.²⁶¹ In another neighboring method, Xu et al. have proposed to determine the value of data by its intrinsic nature, where the volume of the dataset is used as a coalition revenue function.²⁶² That is to say, the volume of the data, both in total and relative from each data contributor, is used to proxy the value.

The real challenge in assessing the value of individual data contributors does not lie in calculating the relative distribution of the value among them, but rather in accurately estimating each contributor’s marginal contribution. To determine the marginal contribution of an individual data contributor, it is necessary to compare the model’s performance with and without that contributor’s data.²⁶³ This involves creating counterfactual scenarios where the data from the contributor is either included or excluded.²⁶⁴ This exercise is inherently complex, especially in the context of AI and machine learning. For example, if a dataset contains data from contributors A, B, and C, it is necessary to train the model multiple times: once with all data, and then once without each contributor’s data (i.e., without A, without B, and without C, respectively). Only then is it possible to more accurately assess what

259. *Id.*

260. Amirata Ghorbani & James Zou, *Data Shapley: Equitable Valuation of Data for Machine Learning*, 97 PROCS. OF THE 36TH INT’L CONF. ON MACH. LEARNING (ICML) 2242, 2242 (2019).

261. Jia Ruoxi et al., *Efficient Task-Specific Data Valuation for Nearest Neighbor Algorithms*, 12(11) PROC. VLDB ENDOW. 1610, 1613 (2019).

262. Xinyi Xu et al., *Validation Free and Replication Robust Volume-Based Data Valuation*, 2021 PROCS. OF 35TH CONF. ON NEURAL INFO. PROCESSING SYS. 10837, 10838.

263. Huaiguang Cai, *CHG Shapley: Efficient Data Valuation and Selection Towards Trustworthy Machine Learning*, ARXIV, No. 2406.11730, at 2–3 (June 17, 2024), <https://arxiv.org/abs/2406.11730> [<https://web.archive.org/web/20251010223213/https://arxiv.org/pdf/2406.11730>].

264. Ghorbani & Zou, *supra* note 260, at 2244.

the relative impact of an individual contributor's data is on model performance, and ultimately its marginal contribution and economic value.

These counterfactual analyses are far from practical in legal settings. Conducting them with precision would likely require significant economic modeling and scientific expert evidence. A more pragmatic approach in the context of copyright and data valuation is to rely on **approximation methods**. Monte Carlo simulations involve sampling a subset of all possible coalitions of data contributors and averaging the marginal contributions, but since then even more simplified techniques have been proposed in economic literature.²⁶⁵ These new techniques rely on only small sample sizes, while still producing reliable approximations. It may also be useful to draw analogies from how marginal contribution issues have been handled in other domains of law. For example, in FRAND ("Fair, Reasonable, and Non-Discriminatory") patent litigation, courts have long grappled with the problem of estimating the relative value of individual patents within large patent portfolios. Some of the legal and economic theories developed in that context may offer useful insights for addressing similar valuation challenges in the context of workers' data. These parallels are explored further in subsequent sections.²⁶⁶

C. WHETHER WORKERS SHOULD BE COMPENSATED FOR THE USE OF THEIR DATA

Whether there is a workers' data value gap will depend heavily on the circumstances.²⁶⁷ On one hand, any compensation paid to workers already is likely to account for the fact that work products, at least to some extent, may contain data that could be used for AI or automation. Producing such outputs is often a worker's primary contractual duty, and once the copyright in those works vests in the employer or contractee, the worker is presumed to have received fair remuneration under a cost-based analysis. The employer or contractee is then free to exploit the data embedded in those works without owing further obligations. On the other hand, Article 20 of the DSM Directive unsettles this premise by introducing a contract adjustment mechanism.²⁶⁸ This shifts the focus away from the formal bargain at the time of contracting to whether remuneration remains proportionate to the actual or potential economic value later extracted. A cost-

265. Lauren Watson et al., *Accelerated Shapley Value Approximation for Data Evaluation*, ARXIV, No. 2311.05346, at 1 (Nov. 9, 2023), <https://arxiv.org/abs/2311.05346> [<https://web.archive.org/web/20251005175208/https://arxiv.org/abs/2311.05346>].

266. See *infra* Section IX.D.8.

267. Cf. David Nguyen & Marta Paczos, *Measuring the Economic Value of Data and Cross-Border Data Flows: A Business Perspective*, OECD DIGIT. ECON. PAPERS (Aug. 26, 2020), at 32-36, https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/08/measuring-the-economic-value-of-data-and-cross-border-data-flows_219e1b8b/6345995e-en.pdf [https://web.archive.org/web/20250919212326/https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/08/measuring-the-economic-value-of-data-and-cross-border-data-flows_219e1b8b/6345995e-en.pdf] (discussing the relative and circumstantial nature of economic analysis in valuing data).

268. DSM Directive, *supra* note 10, at art. 20.

based method for calculating the economic value of copyrighted works and their data may be inadequate on its own, in which case it opens up the possibility of valuing workers' data using income-based, impact-based, and real options methods.

The challenge is that economic theories of valuation need to align with copyright policy. This is essential not only because workers may qualify as authors, but also because any claim for additional compensation is grounded in copyright law, not contract. Copyright is justified on the premise that creative works exhibit quasi-public good characteristics, being non-rivalrous and partly non-excludable.²⁶⁹ Its non-rival nature lies in that the consumption of the good by one person does not reduce the supply available for consumption by another.²⁷⁰ Its non-excludable nature refers to that the use by one person neither prevents the access by other people simultaneously.²⁷¹ Copyright seeks to address the market failure that occurs when such works are underproduced or underutilized due to the risk of free-riding.²⁷² By conferring a statutory monopoly on rightsholders, copyright enables them to exclude others and charge prices above marginal cost, thus encouraging investment in creative production.²⁷³

Applying these principles to workers' data is not straightforward. Workers' data is a byproduct of work products, for which wages already serve as the incentive mechanism. Nor is it necessarily non-excludable, since companies routinely deploy technological and contractual means to restrict access.²⁷⁴ Furthermore, the potential for market failure is not obvious in employment or contractor settings. If someone has accepted a job and gets paid for it, they will execute the role, which will result in the creation of work products. Companies may argue that rewarding workers for their data is actually a free-riding problem in itself. They will have invested in the personnel, infrastructure, and systems that enable the collection and exploitation of workers' data. From that point of view, it is therefore companies, not workers, that must be incentivized to exploit workers' data if we are to avoid market failure. The broader societal benefits of extending statutory protection or compensation rights to workers' data are also uncertain. While the use of workers' data may lead to the development of more effective AI systems, which could benefit society as a whole, it is not clear how these benefits could or should be fairly distributed among the many workers whose contributions form the underlying data.

269. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 994–99 (1997); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

270. See Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 637 (2007).

271. *Id.*

272. *Id.* at 642–45.

273. *Id.* at 646–48.

274. See *supra* Section II (discussing how workers' data is often deployed exclusively within organizations).

Workers may nonetheless contend that they are entitled to a share of the additional value their data generates, particularly when that value is significant and when the data is redeployed in ways not contemplated at the time of contracting. This argument is most compelling when workers are displaced by automation trained on their own outputs.²⁷⁵ Extracting workers' data to automate work tasks and replacing the authors who contributed to that data is, in a way, a market failure in itself. This tension becomes even more pronounced when viewed through the lens of copyright. Courts in several jurisdictions have confirmed that AI-generated content cannot attract copyright protection absent human authorship.²⁷⁶ If automation increasingly replaces human creators, the volume of copyrightable works may diminish. While some may argue that copyright law will become obsolete in the age of AI, if human creativity is no longer central to the production process,²⁷⁷ others may view this development as eroding the incentive structure on which copyright is premised. In the long term, there is a risk of systemic decline in creative labor markets. A related, even if extreme, market failure is that companies exploiting workers' data to replace their own workforce could eventually face a situation where fewer workers are willing to work for them.

The "best-seller" right to contract adjustment in Article 20 of the DSM Directive reflects several of these broader concerns.²⁷⁸ It is a statutory mechanism that does not sit comfortably within the established economic theories of copyright. If authors have already signed contracts, been paid, and delivered their work, why should the law intervene? The European Commission, in its impact assessment preceding the first draft of the DSM Directive, explained that "[t]he contract adjustment mechanism could remedy those cases in which a lump-sum/buy-out deal turns out to be unfair, and it also addresses outright unbalanced deals as well as changed circumstances. The mechanism would reinforce creators' bargaining

275. *Id.*

276. See *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 146–150 (D.D.C. Aug. 18, 2023) (affirming the U.S. Copyright Office's position that AI-generated artwork is not eligible for copyright protection under U.S. law and explaining that human authorship is a "bedrock requirement of copyright"); *Naruto v. Slater*, 888 F.3d 418, 425–426 (9th Cir. 2018) (holding that only works created by a human can be copyrighted under U.S. copyright law); *Městský soud v Praze* 13.10.2023 [Decision of the Mun. Ct. Prague of 2023] č. j. 10 C 13/2023-16 (Czech.) (holding that an image created by Open AI's Dall-E was not protectable by copyright). Although there is no similar case law yet in the UK, its copyright law extends the concept of authorship to "the person by whom the arrangements necessary for the creation of the work are undertaken." Copyright, Designs and Patents Act 1988, c.48, § 9(3) (UK). It is an open question, however, if this means that AI-generated works could be protected by copyright where there is little to no human supervision, and, if so, who should be the author. In China, the Beijing Internet Court ruled in November 2023 that an AI-generated image generated using more than 150 prompts and negative prompts, and setting various parameters, could be awarded copyright protection as it was the direct result of a human's intelligent input and individual expression. *Li Moumou Su Liu Moumou Qin Hai Zuopin Shumingquan Xinxi Wangluo Chuanboquan Jiufen An* (李某某诉刘某某侵害作品署名权、信息网络传播权纠纷案) [Li v. Liu], Beijing Internet. Ct. No. 11279, Nov. 27, 2023 (China).

277. See Mark A. Lemley, *How Generative AI Turns Copyright Law Upside Down*, 25 COLUM. SCI. & TECH L.R. 21, 40 (2024).

278. DSM Directive, *supra* note 10, at art. 20.

position.”²⁷⁹ While one might argue that market failure may arise over time if there is a persistent mismatch between the value of content produced and the value extracted from it, that was not the Commission’s primary rationale. Recital 78 confirms this.²⁸⁰ Instead, Article 20 is, at its core, a protectionist measure designed to promote fairness and rebalance contractual power between creators and exploiters. The same fairness concerns extend to all exploitation contracts, including both employment and contractor settings.

Ultimately, whether workers should be compensated for the use of their data depends on whether a clear and significant imbalance exists between what companies gain (work products and their derivative use as data) and what workers receive (their agreed pay and benefits). This is not a simple question to answer, because valuing data, let alone workers’ data, is not simple. What the preceding discussion does suggest, however, is that a cost-based valuation method is often insufficient on its own. To capture the full value of workers’ data, alternative valuation metrics may be necessary.

Both income-based and impact-based methods suggest that workers’ data can yield substantial economic value, particularly where specialized datasets are required for AI systems and cannot be obtained elsewhere.²⁸¹ If those systems are subsequently deployed to displace the workers, whose data trained them, the resulting cost savings are direct evidence of the added value. That value may persist indefinitely. Once developed, AI systems can continue generating returns long after the workers have left, while the displaced workforce bears the cost of job loss without sharing in ongoing gains. Workers producing copyrighted works as part of their jobs are arguably in a more vulnerable position than ever. Altogether, this implies that in some cases a workers’ data value gap could exist, while in others it does not.

To illustrate this, consider the following scenario: an illustrator is employed to create original illustrations. These illustrations are used as training data to fine-tune an AI system capable of generating illustrations that closely resemble the original works, or which can be adapted across various use cases. If the illustrator is subsequently made redundant, the lost economic value could potentially be substantial. In such a case, the “best-seller” rule of Article 20 of the DSM Directive becomes relevant, as it applies to all forms of economic value: actual and potential, past, present, and future.²⁸² But how should we value an AI system that can indefinitely generate products that take advantage of a human worker’s output? The simple example below can help clarify this.

Facts:

279. *Commission Impact Assessment*, *supra* note 146, at 187.

280. *DSM Directive*, *supra* note 10, at recital 78.

281. *FRONTIER ECONOMICS*, *supra* note 228, at 27, 65 (highlighting the exclusiveness or scarcity of data as an important factor when valuing data, among other factors).

282. *DSM Directive*, *supra* note 10, at art. 20.

Assume the illustrator working full-time is paid an annual salary of €50,000 for creating original illustrations, which would average to around 200 works per year. Now, suppose that the fine-tuned AI model using the illustrator's data can generate illustrations of similar quality, requiring limited human supervision from someone working part-time, at a rate of 2,000 illustrations per year. The part-time human supervisor is paid an annual salary of €10,000 per year. The AI model costs €100,000 to develop, and costs €10,000 per year to maintain and update. Each illustration can be sold or used by the company to generate €600 in revenue.

Scenario A: Full-time human illustrator working over 10 years:

Total human-produced revenue:

200 works per year x €600 per work = €120,000 x 10 years = €1,200,000

Total human-related costs:

€50,000 salary x 10 years = €500,000

Net value (total revenue - total costs):

€1,200,000 - €500,000 = €700,000

Scenario B: Part-time human illustrator in combination with AI over 10 years:

Total human-produced and AI-generated revenue:

2,000 works per year x €600 per work = €1,200,000 x 10 years = €12,000,000

Total human-related costs:

€10,000 salary x 10 years = €100,000

Total AI-related costs:

€100,000 development cost + €10,000 annual maintenance cost x 10 years = €200,000

Net value (total revenue - total costs):

€12,000,000 - €300,000 = €11,700,000

Comparison of annual net value in Scenario B from Scenario A:

Annual net value in Scenario A: €120,000 - €50,000 = €70,000

Annual net value in Scenario B: €1,200,000 - €110,000 = €1,090,000

Increased annual net value from Scenario A to B: €1,090,000 - €70,000 = €1,020,000

Comparison of 10-year net value in Scenario B from Scenario A:

10-year net value in Scenario A: €700,000

10-year net value in Scenario B: €11,700,000

Increased 10-year net value from Scenario A to B: €11,000,000

In Scenario A, the full-time illustrator's cost-to-value ratio over a 10-year period would be approximately 42% (€500,000 / €1,200,000), and the entire €700,000 net value would be derived from human effort alone. In Scenario B, the AI combined with only using a part-time illustrator will allow the production of significantly more

illustrations per year, resulting in a 10-year net value increase which is more than 16 times higher than in Scenario A (€11,700,000 / €700,000). Meanwhile, the total cost-to-value ratio over a 10-year period would be as low as 2.5% (€300,000 / €12,000,000). The AI, leveraging the data derived from the illustrator's original works, therefore contributes to a massive increase in productivity and revenue. That together, with having significantly less costs spanning over a longer period of time, means that the economic output and value is significantly higher in Scenario B than Scenario A. In actual terms, the company's illustration practice is more than 16 times (!) more profitable in Scenario B, thanks to AI.

This strongly suggests that there could be a workers' data value gap in certain circumstances, and that the worker may be entitled to adjust his or her contract, now terminated, and claim further remuneration under Article 20 of the DSM Directive. The extent of that remuneration would, however and again, depend on what assumptions were made between the parties at the time of contracting. It would also largely depend on whether only the workers' work products were used as data for developing the AI, or if other data sources were used as well. How important the data content is for the AI outcome is another important factor to consider. The relative weight of these factors, and what economic proxies should be used to estimate the relative share of the economic value owed to the worker, will need to be considered in future litigation. Following sections discuss these and related questions in greater detail.

IX. BRIDGING THE WORKERS' DATA VALUE GAP

A. EXISTING CONTRACT AND EMPLOYMENT REMEDIES INADEQUATELY PROTECT WORKERS' DATA RIGHTS

The current legal framework falls markedly short in safeguarding workers' rights over the use of their data by employers or contractees. Much of the work produced by workers, and data contained therein, will be protected by copyright. As discussed above, jurisdictions will either assign the copyright to workers as first authors, or automatically assign it to their employers and in some cases contractees.²⁸³ In practice, however, copyright ownership is routinely contractually assigned to employers and contractees in many industries.²⁸⁴ Employees and independent contractors are also routinely expected to provide their consent for the processing of any personal data contained in their work products.²⁸⁵ The freedom of contract trumps, leaving workers with few remedies left in their toolbox in most jurisdictions.

Judicial intervention in these cases is rare. Courts are generally reluctant to set aside contracts or particular clauses on account of unconscionability, which sets a

283. See *supra* Section III.

284. See *Id.*

285. See *supra* Section IV.A.

high legal bar to meet. Unconscionability boils down to the notion that contracts should not be unfairly exploitative or oppressive to one party, and exploited by the other.²⁸⁶ There are legitimate reasons for employers and contractees to maintain ownership of their workers' data, and if it would ever be considered unconscionable it would be in exceptional circumstances only.²⁸⁷ For similar reasons, it would be difficult to mount a case that employers or contractees are unjustly enriched by using workers' data which they lawfully own.²⁸⁸ Moreover, both unconscionability and unjust enrichment are doctrines of the common law and are largely absent in civil law systems.

One exception can be found in the Nordic countries, where courts have a limited power to void unreasonable contract terms under general principles of fairness.²⁸⁹ Even so, the legal threshold of unreasonableness to meet in such cases is still high, particularly in commercial settings, and courts are still generally reluctant to adjust the terms or conditions for commercial contracts. This concern was recognized during Sweden's implementation of the DSM Directive. The government concluded that the contract adjustment mechanism under Article 20 offered a lower threshold than the doctrine of unreasonableness under general contract law.²⁹⁰ By contrast, most continental European legal systems lack any equivalent doctrine applicable to business-to-business relationships, and their courts will typically uphold the sanctity of contract unless clearly overridden by statute. Employment law and AI regulations similarly fail to address the issue of using workers' data for automation, and ultimately redundancy, purposes.²⁹¹

Although the recently adopted EU Data Act includes provisions that might conceivably be cited to support a claim concerning workers' data, the validity of such an interpretation remains uncertain. The law is primarily geared toward Internet-of-Things data sharing, and its structure and underlying intent do not plainly accommodate employment relationships or internal organizational datasets. A literalist reading may allow for some worker-related implications, but these are neither explicit nor easily actionable in practice.²⁹²

The net result is a substantial gap in existing legal protections for workers. Contract, employment, and data law all fall short of offering redress when workers' data is used for automation purposes, even if done to the detriment of those who created the data in the first place. Although many companies will be using workers' data for legitimate purposes, the current legal framework, or lack thereof, opens up the possibility of a "shadow" hiring culture, where skilled workers are hired for an initial period of time to accumulate enough data, but once accumulated, face reduced working hours or redundancies as automation replaces more tasks. It is

286. See *supra* Section IV.B.

287. See *supra* Section V.

288. See *supra* Section IV.C.

289. See CLAES-ROBERT VON POST, *supra* note 71.

290. Prop. 2021/22:278, *supra* note 40, at 174–75.

291. See *supra* Sections IV.D & E.

292. See *supra* Section IV.B.

ultimately a policy, not legal, question whether or not this form of practice should be accepted.

**B. WHAT LESSONS CAN BE LEARNED FROM PATENT LAW FOR COMPENSATION FOR
EMPLOYEE-INVENTIONS?**

The question of compensating workers for their creations finds a useful parallel in patent law. Employees in design and research capacities often create inventions that generate substantial value for their employers. Recognizing this, many jurisdictions have introduced statutory mechanisms allowing employees to claim additional compensation for inventions created in the course of their employment, in addition to any contractual remuneration, such as salary or bonuses.

In the UK, employees who make inventions are entitled to a “fair share” of the reward to the employer.²⁹³ The right to compensation differs depending on if the invention initially belongs to the employer or the employee. If the employee invents something that belongs to the employer from the outset, typically due to contractual terms, then the employee may apply for compensation only if the invention has conferred an “outstanding benefit” on the employer.²⁹⁴ If, however, the invention initially belongs to the employee but is later assigned or licensed to the employer, the employee may claim compensation if the benefit to them is “inadequate” compared to that received by the employer.²⁹⁵ In such cases, there is no requirement to prove that the invention was of “outstanding benefit.” The amount of the “fair share” compensation is determined to account for the benefit which the employer has derived, or may reasonably be expected to derive, having considered all the circumstances.²⁹⁶ Among the factors considered include the employee’s duties and remuneration, the skill and effort contributed by the employee and others, and the employer’s support, such as facilities, guidance, and commercial or managerial expertise.²⁹⁷

Similar laws that grant employee-inventors a right to claim additional compensation for their inventions have been introduced in other European countries. In Germany, the employee will have initial ownership of the invention. Employees are obliged to offer the right to use “service inventions” to their employers,²⁹⁸ for which employers have a duty to pay reasonable compensation.²⁹⁹ Service inventions are those which have resulted from the employee’s tasks in the

293. Patents Act 1977, § 41 (UK).

294. *Id.* at § 40(1).

295. *Id.* at § 40(2).

296. *Id.* at § 41(1).

297. *Id.* at § 41(4).

298. Gesetz über Arbeitnehmererfindungen [ArbNErfG] [German Employees’ Inventions Act] July 25, 1957, BUNDESGESETZBLATT TEIL I at § 6(1). For an English translation, see https://www.dpma.de/docs/dpma/schiedsstelle/employee_inventions_act.pdf [https://web.archive.org/web/20251010224457/https://www.dpma.de/%20docs/dpma/schiedsstelle/employee_inventions_act.pdf].

299. *Id.* at § 9(1).

work, or which are essentially based upon the experience or activities of the employer.³⁰⁰ Multiple factors need to be taken into account when considering the amount of compensation, including the commercial applicability of the service invention, the duties and position of the employee, and the employer's contribution to the invention.³⁰¹

Such laws also exist in France,³⁰² Sweden,³⁰³ the Netherlands,³⁰⁴ and many other countries in Europe and in other parts of the world. The situation in the United States differs significantly. Under U.S. law, the default rule is that inventors retain ownership of their inventions, unless assigned to their employers.³⁰⁵ However, American courts have granted employers so-called "shop rights," which grant the employer a non-exclusive, royalty-free license to use any inventions created by an employee during the course of their employment.³⁰⁶ Employee-inventors are not entitled under statute to any compensation for such licenses to their employers, which must be contractually agreed between the parties.³⁰⁷ However, because the license is non-exclusive, employee-inventors are, unless otherwise agreed, free to commercialize their inventions outside the employment context to obtain additional compensation.

Employees' right to compensation for employee-inventions has been justified on the basis that such inventions may generate substantial value for their employers.³⁰⁸ These inventions, arising from the employee's labor, skills, and use of employer resources, contribute directly to corporate success. The rationale behind compensating for those inventive efforts is rooted in equity, as market-based arrangements may be inadequate. In the UK, before the Patents Act 1977, inventions created in the course of employment were owned by the employer, with employees having no right to additional compensation. The Report of the Committee to Examine the Patent System and Patent Law criticized this "master and servant" approach as inequitable, noting that it was not in line with "modern views on industrial relations."³⁰⁹ In particular, it was considered that the old regime was unfair when employees produced exceptional inventions that led to substantial profits to their employers, for which they obtained no share.³¹⁰ Employees are typically in a worse bargaining position than their employers and would, in the

300. *Id.* at § 4(2).

301. *Id.* at § 9(2).

302. Code de la propriété intellectuelle [Intellectual Property Code] art. L. 611–7 (Fr.).

303. Lag om rätten till arbetstagares uppfinningar [Act (1949:345) on the Right to Employee's Inventions] (Svensk författningssamling [SFS] 1949:345) (Swed.).

304. Rijksoctrooiwet 1995 [Dutch Patent Act], Stb. 1995, 109, art. 12(1) (Neth.).

305. See *Banks v. Unisys Corp.*, 228 F.3d 1357, 1359 (Fed. Cir. 2000).

306. See *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 187 (1933); *Mechmetals Corp. v. Telex Comput. Prods., Inc.*, 709 F. 2d 1287, 1291 (9th Cir. 1983).

307. See *Dubilier Condenser Corp.*, 289 U.S. 178, 188–89 (1933).

308. See Hanns Ullrich, *Harmonization of Employee Invention Laws: The Black Hole of the EU's Innovation Policy*, MAX PLANCK INST. FOR INNOVATION & COMPETITION RSCH. PAPER SERIES (2022), at 25–29.

309. See Report of the Committee to Examine the Patent System and Patent Law, Cmnd. 4407 (1970) (U.K.), at ¶ 459 (cited in *Kelly & Anor v. GE Healthcare Ltd* [2009] EWHC 181 (UK)).

310. *Id.*

absence of statutory intervention, likely only be able to secure significantly less compensation. Statutory compensation schemes prevent that from happening. Adequate compensation for employee-inventions also follows the public policy rationale of the patent system to reward and incentivize inventions.³¹¹

Patent law thus ensures compensation for intellectual contributions that create value beyond ordinary remuneration. There are several parallels which can be drawn from that to using workers' data for AI development and deployment. Like employee-inventors, workers generate valuable data through their expertise and daily tasks, which will possess increased value in the age of AI. When companies use such data to train AI systems that reduce costs or displace workers, they effectively monetize employee labor without additional reward. Just as patent laws have evolved to protect employee-inventors and ensure they receive a fair share of the benefits their inventions generate, there is a case for adopting similar protection in the case of workers' data in copyright law.

The analogy, however, has its limits. Patentable inventions are exceptional, novel, and non-obvious creations, whereas much of workers' data are generated from routine tasks that lack such qualities. There is no policy need to incentivize routine work, for which employees are already remunerated. Rather, the policy concern lies in the employer's computational use of those routine outputs to extract disproportionate value. That value is not adequately returned to workers, and in fact, the opposite is true if the AI systems using workers' data are used to make those same workers redundant. The value of such data can also be long-term, even potentially indefinite in time. Thus, while patent law provides a helpful starting point for framing equitable compensation in the data economy, there are important distinctions to be made.

C. TOWARDS A CONTRACT ADJUSTMENT MECHANISM FOR THE USE OF WORKERS' DATA

The current legal framework concerning the use of workers' data offers limited protection against potential exploitation in an era increasingly dominated by AI technologies. At present, the most promising legal remedy available in the EU is found in the DSM Directive, which provides a right to fair remuneration for the exploitation of copyrighted works, as well as a contract adjustment mechanism, known as the "best-seller rule."³¹² Originally intended to address imbalances in the remuneration of authors in the digital distribution of works (e.g. audiovisual content), the DSM Directive was not, at the time of its drafting, designed with AI or data-driven automation in mind. Nevertheless, its provisions are broadly worded

311. Ullrich, *supra* note 308, at 28–29.

312. DSM Directive, *supra* note 10 at art. 20.

and, on their face, apply to all forms of copyright licensing and assignment, including those in employer-employee or contractee-contractor relationships.³¹³ This interpretation is supported by government statements in Member States such as Sweden, confirming that the Directive's application to such relationships was discussed during its transposition into national law.³¹⁴ Whether the framework extends to situations where workers' copyrighted work products are used as data to develop AI systems is ultimately a question for judicial interpretation, which is explored in more detail below.

Importantly, the right to fair remuneration can be waived by contract.³¹⁵ Whether such a waiver exists in a given case will often depend on how the contract is drafted and interpreted. If compensation for the use of workers' data was never discussed or expressly excluded at the time of contracting, the legal position may be unclear. Of course, this can be easily rectified by expressly including, or excluding, the right to fair remuneration in the contract; no doubt an important lesson to be learned for all drafting parties.

What cannot be waived, not even by choosing the governing law of the contract, is the "best-seller" rule.³¹⁶ The "best-seller" rule allows authors to claim additional, appropriate, and fair remuneration when the actual or potential economic value of their work turns out to be significantly higher than originally estimated, regardless of whether they have assigned their rights.³¹⁷ The main policy goal is to ensure that authors receive a fair share of the full economic value generated from the exploitation of their works.³¹⁸ If the remuneration initially agreed proves to be disproportionately low, the author can seek a retroactive adjustment to the contract.

If the "best-seller" rule is extended to workers' data, then this could have potentially far-reaching implications for industries where corporate automation projects are underway or planned. Those implications could further extend to workers and companies based outside the EU and therefore have an extraterritorial effect.³¹⁹ However, because the rules have seemingly been drafted to address another problem, there are a host of questions that remain unanswered. First, it is not clear how the economic value of workers' work products, which are protected by copyright, should change when transformed into data, and when aggregated within datasets. The value of data arises not only from quality, but also from volume and context, which are factors not easily addressed by traditional copyright

313. See *supra* Section VII.B.

314. *Id.* (referring to prop. 2021/22:278, *supra* note 40, at 159–60).

315. DSM Directive, *supra* note 10, at recital 81, art. 23(1). The optional nature of Article 18 of the DSM Directive follows from that it is not expressly referred to in Article 23 as being mandatory.

316. *Id.*

317. *Id.* at art. 20(1).

318. *Id.* at recital 73.

319. See *supra* Section VII.D. However, any right to redress that exists in these transnational circumstances will be limited to the EU-specific copyright portfolio and EU-specific use of the data, which makes valuation adjustments significantly more complex. This is discussed in more detail in Section IX.D.12, *infra*.

valuation methods. Second, it remains to be determined what threshold of economic disproportion should trigger the right to contract adjustment. The rule was never intended to apply universally, but only “in the event that the economic value of the rights turns out to be significantly higher than initially estimated.”³²⁰ Whether and when this threshold is met in the context of AI training data is an open question. It is also not clear how the rule should apply in the cases where the resulting AI system is used to replace the worker, but if traditional economic theories apply, it would suggest that the company may have extracted significantly greater economic value from the copyrighted works.

Contract adjustment mechanisms are, as discussed, nothing new in continental European copyright law, and have existed in several Member States long before the DSM Directive. Following Brexit, the UK chose not to implement the DSM Directive. There have subsequently been parliamentary discussions on whether to introduce a contract adjustment mechanism in the UK, similar to that of the DSM Directive. The Digital, Culture, Media and Sport Select Committee made several recommendations to the House of Commons in its final report in 2022, including a contract adjustment mechanism, arguing that this “would give creators greater leverage when negotiation [sic] contracts with music companies.”³²¹ The UK government’s response was that the “impact of these proposed new rights are uncertain and warrant further analysis.”³²² The UK government has since commissioned research on these issues, which led to the UK IPO publishing a report in February 2023.³²³ So far no new substantive proposals have been made in the UK, but a similar bill in the context of musicians and certain performers did recently pass. The Copyright (Rights and Remuneration of Musicians, Etc.) Bill amends the Copyright, Designs and Patents Act 1988 to introduce a right to equitable remuneration where the making available right is transferred concerning sound recordings, a transparency obligation, and a right to contract adjustment.³²⁴ These rights would, however, not apply in the present context of workers and their work products being used as a data source.

Contract adjustment mechanisms are rare outside Europe. The United States has no similar contract adjustment mechanism. Moreover, because the work-for-hire doctrine in U.S. copyright law assigns copyright to the employer by default in employee–employer relationships, it seems even less likely that such a rule could come into play. That said, U.S. copyright law does contain a recapture right that shares some conceptual similarity. For works published after 1978, authors can terminate copyright assignments or licenses after thirty-five years, allowing them

320. DSM Directive, *supra* note 10, at recital 78.

321. DIGITAL, CULTURE, MEDIA & SPORT COMM., ECONOMICS OF MUSIC STREAMING: SECOND REPORT OF SESSION 2021–22, HC 50, at 67 (UK).

322. DIGITAL, CULTURE, MEDIA & SPORT COMM., ECONOMICS OF MUSIC STREAMING: GOVERNMENT AND COMPETITION AND MARKETS AUTHORITY RESPONSES TO COMMITTEE’S SECOND REPORT: SECOND SPECIAL REPORT OF SESSION 2021–22, HC 719, at 2 (UK).

323. U.K. IPO, *supra* note 178.

324. Copyright (Rights and Remuneration of Musicians, Etc.) Bill 2021–22, HC Bill [19] (UK).

to renegotiate terms or reassign rights.³²⁵ The fact that this right only materializes after thirty-five years means that it will virtually never come into play for most workers, and even if it does, workers who have been made redundant from AI a long time ago will have little benefit from the rule. None of this is surprising as the right to recapture was mainly intended for other authors, such as musicians, artists, or performers, whose works are used and contracted for a long time.

D. A CONTRACT ADJUSTMENT ROADMAP FOR WORKERS' DATA

There is an urgent need to critically assess whether a contract adjustment mechanism is suitable for addressing the growing gap between the economic value workers generate through their data and the compensation they receive. The ability to adjust exploitation contracts could offer workers new legal recourse in the EU, where their work products are used to develop AI systems or drive automation. This would be especially significant for workers made redundant as a result of such technologies. However, no empirical studies have yet examined the potential economic impacts of applying contract adjustment mechanisms within employment or contractor settings. Nor has there been substantive discussion on how these mechanisms might apply to copyrighted works repurposed as data inputs for AI. These are unexplored issues of major concern, and the need to explore them is increasingly urgent as workers' data is expected to be used to a considerable extent in the coming years, potentially leading to the displacement of millions of jobs. It goes beyond the scope of this Article to analyze these issues in detail, yet the call for such analysis and discussion could not be greater. However, because there may already be an existing cause of action for workers whose data is used in the EU for AI or automation purposes, it is still meaningful to discuss what will be the most important questions to address, by way of an intellectual roadmap, in these contract adjustment cases. Twelve such important questions and various common scenarios are covered below.

1. Does the text and data mining exception exempt organizations from the contract adjustment mechanism?

The text and data mining exception in Article 4(1) of the DSM Directive requires Member States to introduce into national law exceptions and limitations for the reproduction and extraction of "lawfully accessible" works and other subject matter for the purposes of text and data mining.³²⁶ Consequently, in the absence of an opt-

325. 17 U.S.C. § 203(a)(3).

326. DSM Directive, *supra* note 10, at art. 4(1).

out by the rightsholder under Article 4(3), the use of copyrighted works for text and data mining does not constitute copyright infringement in the EU.³²⁷ The text and data mining exception raises the question whether companies can also rely on that exception in the case of workers' data. There is nothing suggesting that they may not. Companies will have lawful access to the works produced by their workers, and will frequently be the owners of any copyright attached to such works.

That companies may carry out text and data mining activities with respect to workers' data without infringing does not mean, however, that workers will not be entitled to claim further remuneration for such exploitation. The "best-seller" rule in Article 20 of the DSM Directive to adjust contracts assumes that the exploiting party has an existing, lawful right to exploit the works, whether by license or assignment.³²⁸ The fact that there may *also* be a lawful right to exploit the works on the basis of statutory exceptions and limitations does not change this. A contract has still been entered into. In fact, it is the employment or contractor agreement which is what makes the company's right to exploit the workers' work products "lawful," unless copyright ownership is automatically assigned by statute in national law. If it were not for the employer–employee or contractee–contractor relationship, the original authors of the works would be in the same position as other rightsholders and have the possibility to reserve their rights by opting-out of text and data mining.

In short, the answer to the question is no: the text and data mining exception under EU copyright law does not exempt organizations from the contract adjustment mechanism. If workers suffer a substantial loss in the economic value derived from their work products, they may still be entitled to seek fair, additional remuneration under the DSM Directive.

2. Is an infringing act carried out in the EU in respect of workers' data?

The right to adjust contracts previously entered into for additional, fair remuneration is triggered only with respect to workers' EU-specific copyright portfolio and only insofar as a hypothetically infringing act that can be localized to the EU. This is a hypothetical question as the employer or contractee will have the right to use the workers' work products as a matter of contract or statute. Yet it is still important to answer initially, because what is fair remuneration for the EU-specific copyright portfolio can only be called into question by acts occurring in the EU. If no such acts occur in the EU, the EU-specific copyright portfolio is not implicated, and no entitlement to fair remuneration under EU copyright law arises.

Workers' data, like other data, will typically be reproduced as part of the training dataset used to develop an AI system or model. That act of reproduction will generally occur, at least, at the location of the server storing the data.³²⁹ More

327. *Id.* at art. 4(3).

328. *Id.* at art. 20.

329. See Rättzén, *supra* note 9, at 232.

complex scenarios arise when the individual downloading or uploading the data is located in one jurisdiction while the server is located in another. In such cases, where multiple connecting factors exist, several states may each assert jurisdiction over the activity, consistent with the principle that states may apply their laws to conduct that takes place, wholly or partly, within their territory.³³⁰ Recognizing this, the Canadian Supreme Court has famously held that, “[i]n terms of the Internet, relevant connecting factors would include the situs of the content provider, the host server, the intermediaries, and the end user . . . that Canada could exercise copyright jurisdiction in respect [of] both of transmissions originating here, and transmissions originating abroad but received here, is not only consistent with our general law but with both national and international copyright practice.”³³¹ Similar views have also been favored by courts in the United States,³³² UK,³³³ and Europe,³³⁴ which have generally attached legal significance to all relevant territorial connecting factors. Accordingly, if neither the server nor the uploading/downloading individual is located in the EU, there can be no act of reproduction localizable to the EU—and thus, no basis for triggering the contract adjustment mechanism under Article 20 of the DSM Directive.

One possible exception arises where the person instructing or directing the training activities is based in the EU. This could become relevant where a company organizes their activities such that the infringing act of reproduction takes place outside the EU, but has operations in the EU which are participating in the training activities. The scenario can be compared with agency or management situations, where a principal instructs its own operations or an agent to commit infringing acts abroad. Jurisdictions differ on the treatment of such cases. In *Subafilms*, the Ninth Circuit held that authorization within the United States of infringing acts abroad did not trigger U.S. copyright liability.³³⁵ Consistent with earlier decisions, the Ninth

330. *Id.*

331. *See* Soc’y of Composers, Authors & Music Publishers of Canada v. Canadian Ass’n of Internet Providers, [2004] 2 S.C.R. 427, 430 (Can.).

332. *See* Nat’l Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10, 12 (2d Cir. 2000) (holding that a public performance or display includes “each step in the process by which a protected work wends its way to its audience” (citing *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988))).

333. *See* EMI Records Ltd. v. Brit. Sky Broad. Ltd. [2013] EWHC 379 (Ch), at ¶¶ 35–38 (finding that the act of communication to the public can be localized to the UK where the uploading party is located in the UK, notwithstanding that the server is located abroad).

334. *See* Case C-5/11, Titus Alexander Jochen Donner, 2012 E.C.R. I-00000 at ¶¶ 26–27 (holding that the distribution right in copyright is characterized by a series of acts going “at the very least” from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public, and that acts giving rise to a distribution to the public may therefore take place in a number of member states); Case C-192/04, Lagardère Active Broadcast, 2005 E.C.R. I-7199 at ¶¶ 46, 53–55 (holding that neither EU law nor international law prevents Member States from localizing the act of broadcasting within their respective territories if transmitters located in those states are used, even if the broadcast has minimal or no impact on the rights holder’s exclusive market in those states).

335. *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1099 (9th Cir. 1994).

Circuit stood fast that the U.S. Copyright Act does not apply to foreign activities.³³⁶ Case law is, however, not conclusive. Years before *Subafilms*, the Second Circuit found in *Update Art* that the U.S. Copyright Act may reach foreign conduct where the type of infringement permits further reproduction abroad.³³⁷ Courts in other countries such as Germany³³⁸ and Sweden³³⁹ have also accepted that mere authorization of foreign infringing acts can amount to infringement domestically.

The situation resembles that of contributory infringement, where the contributory act takes place domestically, but the primary infringing act takes place abroad. The prevailing view from national courts is that the contributory act in a cross-border situation shall follow the law applicable to the primary infringing act.³⁴⁰ Meaning that, if the primary infringing act is not actionable abroad, then neither can the contributory act be infringing at home. Recognizing this, Mr. Justice Arnold noted in *British Broadcasting* that “[c]onsistently with the territorial nature of UK copyright, any act constituting a primary infringement of copyright must take place within the UK.”³⁴¹

336. In particular, the Ninth Circuit explained that “we think it inappropriate for the courts to act in a manner that might disrupt Congress’s efforts to secure a more stable international intellectual property regime unless Congress otherwise clearly has expressed its intent. The application of American copyright law to acts of infringement that occur entirely overseas clearly could have this effect. Extraterritorial application of American law would be contrary to the spirit of the Berne Convention, and might offend other member nations by effectively displacing their law in circumstances in which previously it was assumed to govern.” *Id.* at 1097.

337. *Update Art, Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988). Several U.S. district courts have also declined to follow *Subafilms*. See, e.g., *Expeditors Int’l of Wash., Inc. v. Direct Line Cargo Mgmt. Serv., Inc.*, 995 F. Supp. 468, 477 (D.N.J. 1998) (holding that “mere authorization of infringing acts abroad constitutes direct infringement and is actionable under United States Copyright Law”); *Curb v. MCA Records, Inc.*, 898 F. Supp. 586, 594 (M.D. Tenn. 1995) (“*Subafilms* relies upon a peculiar interpretation of the scope and nature of the authorization right in 17 U.S.C. § 106. This interpretation . . . appears contrary . . . to well-reasoned precedent, statutory text, and legislative history.”); *Nat’l Football League v. Primetime 24 Joint Venture*, No. 98 Civ. 3778 (LMM), 1999 U.S. Dist. LEXIS 3592, at *10 (S.D.N.Y. Mar. 24, 1999) (holding that, “where an individual commits an act of infringement in the United States that permits further reproduction outside the United States . . . a court may assert jurisdiction over those foreign acts and a plaintiff may recover damages for the infringing acts that took place extraterritorially.”).

338. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 29, 1960, GRUR 423, I ZR 109/58 (finding that an offer in Germany to sell infringing products in another country was considered patent infringement in Germany).

339. Svea hovrätt [HovR] [Svea Court of Appeals] Case T 1253/89, Dec. 12, 1990 (Swed.) (finding that when a Swedish company offered for sale a patented product to a foreign company, delivered from another foreign location, it constituted an infringing offer for sale in Sweden). However, in NJA 2005 at 180 (*Formsprutarna*) the Swedish Supreme Court found that the instruction from a Swedish company to manufacture infringing design products in another country did not constitute design infringement.

340. See *Subafilms*, 24 F.3d at 1092 (holding that “there could be no liability for contributory infringement unless the authorized or otherwise encouraged activity itself could amount to infringement”); *Abkco Music & Records Inc. v. Music Collection Int’l Ltd.* [1995] RPC 657 (UK) (holding that the act of authorization does not have to occur in the UK, provided that the primary act of infringement so authorized does); Bundesgerichtshof [BGH] [Federal Court of Justice], June 16, 1994 GRUR 798 I ZR 24/92 (Ger.) (holding that the act of authorization in Germany to conduct an auction of infringing products in another country did not amount to an infringement in Germany).

341. *British Broad. Corp. & Anor v. Mech.-Copyright Prot. Soc’y Ltd & Ors* [2018] EWHC 2931 (Ch).

The takeaway from all of this is that there is a risk that the “best-seller” right to contract adjustment in the DSM Directive, although it cannot be contracted out, could still be avoided by arranging the data training activities differently and locating them outside the EU. Even companies which are based in the EU could, in theory, exploit this potential loophole by sending workers’ data to foreign servers and ensuring that only non-EU personnel are engaged in the training activities. Servers, and people, can of course be situated almost anywhere with little effort. Historically, however, European courts have shown a willingness to extend the reach of intellectual property laws where infringing conduct can be arbitrarily located somewhere else,³⁴² and particularly where the infringing party can still benefit from that foreign conduct in the forum.³⁴³ This is no doubt the case for AI model training, and it remains to be seen whether courts would take a similar approach when it comes to reproductions of workers’ data.

The main reason that extraterritoriality becomes a sensitive issue for using workers’ data is because, more often than not, that data will be used to develop or deploy internal, not external, AI systems. In such cases, there will be no communication or distribution to the public, because there is no “public.” However, to the extent that the AI system is communicated or distributed to third parties, and those parties are located in the EU, this gives rise to a second difficult issue: if training data is embedded within the model’s parameters or weights, does the sale or licensing of the system equate to a sale of the training data? This is a highly complex technical question without clear answers.³⁴⁴

It is possible that some European courts might frame these contract adjustment claims not as primarily copyright-based, but as contractual in nature. Under this approach, the relevant nexus would be the contractual relationship, not the location of the reproduction. So long as courts have adjudicative jurisdiction over

342. See Case C-324/09, *L’Oréal v. eBay*, E.C.R. I-6011 at ¶¶ 61–62; Case C-173/11, *Football Dataco v. Sportradar*, ECR I-0000 at ¶¶ 44–47. Similarly, in the patent context, the England and Wales High Court held in *Illumina, Inc. v. Premaitha Health Plc* that there would be direct infringement in the UK for a method patent claim involving blood diagnostics, where the method was carried out abroad where there was no patent and where the results from the method were subsequently provided to customers in the UK. The High Court considered that the “substance” of the method was still performed inside the UK as blood samples were retrieved from UK customers, and “any other result would make it far too easy to avoid infringement of patents of this nature, given the ease of digital transmission and the ability to off-shore computer processing.” *Illumina, Inc. v. Premaitha Health Plc* [2017] EWHC 2930 (Pat), at 507–08.

343. *L’Oréal*, E.C.R. I-6011 at ¶¶ 62–63. A similar explanation was provided in Case C-173/11, *Football Dataco v. Sportradar*, ECR I-0000 at ¶¶ 44–47 (rejecting the argument that an act of re-utilization must be located exclusively to the territory of the member state where the web server is located from which the data in question is sent, which would impair the effectiveness of the protection afforded under that national law).

344. For a discussion generally about model memorization and encoding and copyright infringement, see Rättzén, *supra* note 9, at 220–27. In a recent German case, the Regional Court of Munich found that OpenAI infringed copyright by training its GPT language models with protected song lyrics without obtaining a license from GEMA. The court accepted that the lyrics had been “memorized” in the model’s parameters and could be reproduced by simple prompts, constituting unauthorized reproduction and further acts communication to the public under German copyright law. See Case No. 42 O 14139/24, *GEMA v OpenAI* (Nov. 11, 2025) (Ger.).

the contract, then that may suffice from that point of view, regardless of copyright territoriality. In the EU, courts have special adjudicative jurisdiction in matters relating to a contract at the place of performance of the obligation in question.³⁴⁵ The “place of performance of the obligation” in the Brussels Ia Regulation is understood to refer to, in the case of the sale of goods, the place where the goods were delivered or should have been delivered, or in the case of the provision of services, the place where the services were provided.³⁴⁶

In contrast, intellectual property infringement claims may be brought proceedings before the courts of the place where the harmful event occurred.³⁴⁷ The concept of where the “harmful event” occurred has been interpreted to mean either where “the event giving rise to the damage” took place or where “the damage occurred.”³⁴⁸ It is unclear whether contract adjustment claims should be characterized as contractual or non-contractual under private international law. Although the claims concern the contractual relationship, the substantive right at issue comes from statute and serves to protect authors and ensure equitable remuneration for the exploitation of their works.

Where employment contracts are involved, additional jurisdictional rules may apply. Article 20(2) provides that, in matters relating to individual employment contracts, the employer shall be deemed domiciled in a Member State if it has a branch, agency, or other establishment there.³⁴⁹ Disputes arising out of those operations may be brought in that Member State. Disputes over employment contracts may also be brought before the courts where the employee habitually carries out his work or in the courts for the last place where he did so.³⁵⁰ The employment rules of special jurisdiction will become determinative if courts characterize the dispute as concerning the employment contract as such. This will turn on the specific facts, including the nature of the relationship and the terms of the contract.

3. Are all employment and contractor agreements exploitation contracts?

The right to contract adjustment only applies to contracts “for the exploitation of their rights.”³⁵¹ What is meant by exploitation contracts is not further defined in

345. Regulation (EU) No 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1 [hereinafter, the “Brussels Ia Regulation”], at art. 7(1)(a).

346. *Id.* at art. 7(1)(b).

347. *Id.* at art. 7(2).

348. Case C-68/93, *Shevill v. Presse Alliance*, 1995 E.C.R. I-415, ¶ 20.

349. Brussels Ia Regulation, *supra* note 345, at art. 20(2).

350. *Id.* at art. 21(1)(b)(i).

351. DSM Directive, *supra* note 10, at art. 20(1).

the DSM Directive.³⁵² As discussed above,³⁵³ it was considered during the negotiations of the DSM Directive whether the rules should exclude employment contracts, which Sweden proposed. This was ultimately not accepted by other Member States as it could make it easier for the parties to avoid the rules by designating the exploitation under a particular contract label. Thus, the agreed premise was that all forms of exploitation contracts should be covered, including employment and contractor agreements.

Not all employment or contractor agreements are alike. In some cases, the license or assignment of copyright forms an essential part of the bargain. The employer or contractee has entered into the contract for the main purpose of obtaining the author's or performer's rights. In other cases, the license or assignment may be incidental or of limited value: the contract is primarily for the worker to perform ordinary duties, which sometimes will involve producing work products. The resulting copyright is transferred as a consequence, and although it possesses some value it is not the main purpose for entering into the employment contract.

There is an argument to be made that the statutory wording, contracts "for" the exploitation of works, suggests that the exploitation should form an essential purpose for the contract for the "best-seller" rule to apply. Yet, the fact that Member States choose not to define the scope any further on account of preventing the circumvention of the rules suggests that a broader interpretation should be favored. Limiting the rule to cases where exploitation is the main purpose for entering into the agreement would make it easy to sidestep. If that was the case, then a party in need of exploiting works could have the license or assignment clause included in a larger contractual context, thereby diluting its main or essential purpose. It is more likely that courts will come to interpret the rules broadly as encompassing any contracts involving any form of exploitation and to any extent. The relative extent and significance of the exploitation of the works is more properly analyzed in the substantive test for contract adjustment. Where the exploitation of the works is of limited value to the bargain between the parties, then courts will likely be more reluctant to find significant undervaluation that justifies adjustment.

4. When will workers' data yield a significantly higher economic value than their underlying work products?

The basic premise is that all authors and performers, even those in a work setting, should receive fair remuneration for the exploitation of their works.³⁵⁴ This

352. Although not relevant for the present context, recital 78 refers to "contracts for the exploitation of rights harmonised at Union level," which may suggest that some contracts which concern exploitation *not* harmonized should be excluded. *Id.* at recital 78. See also BENTLY ET AL., *supra* note 164, at 48.

353. See *supra* Section VII.B.

354. DSM Directive, *supra* note 10, at art. 18(1).

translates into assessing what is the actual or potential economic value of the rights which are exploited, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.³⁵⁵ The right to have previously agreed contracts retroactively adjusted is a drastic and extraordinary legal measure. It should be the exception rather than the norm.

The right to have employment or independent contractor agreements adjusted will turn on whether workers' data yields a "significantly higher economic value" than their underlying work products.³⁵⁶ If that is the case, and if workers have been "disproportionately" undercompensated when compared with the compensation provided and initially agreed upon, then workers will have the right to adjust their contracts retroactively. Not every discrepancy between what compensation has already been paid, and what greater economic value has not been paid for, will trigger this right. What is needed is a clear and significant discrepancy.³⁵⁷ This is a high threshold to meet in most cases, and will require economic evidence and legal interpretation, a task for European courts to refine in the years to come.

Several scenarios may plausibly give rise to such a significant discrepancy between the compensation received by workers and the economic value realized from their data, which are discussed below. These scenarios are not mutually exclusive and can, and often will, overlap in practice.

Scenario 1: The parties have not intended or foreseen at the time of contracting the greater economic value which can be realized from workers' data.

There is no requirement that the full, realized economic value must have been unforeseen by the parties. However, the fact that neither party, especially the worker, anticipated the potential for such value may be a legally relevant factor.³⁵⁸ A significant divergence between the parties' expectations and the actual outcome may signal that contract adjustment is warranted. This situation may arise, for example, where work products were never intended or discussed as potential data sources, or where their subsequent use as data yielded far greater economic value than originally contemplated. Recital 78 of the DSM Directive confirms that the parties' intentions and their anticipations are relevant factors to consider when assessing whether an adjustment is justified.³⁵⁹

355. *Id.* at recital 73.

356. *Id.* at recital 78.

357. *Id.* at recitals 73, 78. *See also* prop. 2021/22:278, *supra* note 40, at 176–77, 229–30 (stating that there must be a "clear discrepancy" between the contracted remuneration and the subsequent economic value for exploiting the works, which turns out to be "significant").

358. Prop. 2021/22:278, *supra* note 40, at 228–29.

359. Specifically, Recital 78 states that "[c]ertain contracts for the exploitation of rights harmonized at Union level are of long duration, offering few opportunities for authors and performers to renegotiate them with their contractual counterparts or their successors in title in the event that the economic value of the rights turns out to be significantly higher than initially *estimated*." DSM Directive, *supra* note 10, at recital 78 (emphasis added). When implementing the rules into national law, Sweden similarly

Scenario 2: Workers' compensation does not depend, or depends, on the extent of the use of their work products.

Another important factor to consider is whether the worker's compensation structure reflects the degree to which their work products are exploited. In some roles, work products may be of little importance, and mere byproducts to a broader set of duties which workers are being paid for. Simply put, the worker is primarily being compensated to do other things than produce work products, or the work products themselves have limited economic value. Income-based and impact-based valuation methods are less appropriate under these circumstances. If copyright law would intervene in such cases, then it could risk rewriting the original contract and the assumptions behind it. This is clearly not the intention behind the contract adjustment mechanism and would disregard the freedom of contract.³⁶⁰ Rather, these mechanisms are meant to remunerate authors for their works so that the economic value is fully realized, as it should have been from the start in an equal and transparent bargaining situation. They should not be used as a legal vehicle to fundamentally change the underlying assumptions and terms of contract.

Scenario 3: The economic value of workers' data changes over time.

There will be many cases where work products will have been produced over longer periods of time, accumulating data. The parties may or may not have discussed or anticipated at the time of contracting that those products may be promising data sources for automation, particularly given how AI and machine learning technologies have only come to gain traction more recently. Importantly, the DSM Directive does not impose a fixed timeline or deadline for assessing the economic value of copyrighted works. Instead, Recital 73 confirms that remuneration should be "appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights," which suggests that economic value realized much later in time, for other use cases, are equally relevant.³⁶¹ This interpretation is consistent with both income-based and impact-based valuation methods.³⁶² The right to adjust contracts is therefore both *ex ante* and *ex post*, in

emphasized the parties' intentions as relevant factors to consider. See prop. 2021/22:278, *supra* note 40, at 228–29.

360. Recital 78 appears to confirm this, stating that "[t]he assessment of the situation should take account of the specific circumstances of each case, including *the contribution of the author or performer*, as well as of *the specificities and remuneration practices in the different content sectors*, and whether the contract is based on a collective bargaining agreement." DSM Directive, *supra* note 10, at recital 78 (emphasis added).

361. *Id.* at recital 73.

362. Both income-based and impact-based valuation methods are concerned with the total economic value from a particular activity; it does not matter when (in time) the value arose so long as there is a causal relationship. See *supra* Section VIII.A (discussing income-based and impact-based valuation methods more generally).

the sense that all events occurring before and after contracting are relevant to consider when assessing the economic value. This is particularly relevant for workers' data accumulated over time, which may not be utilized until much later, possibly even after the worker has left the organization.

Scenario 4: Workers' data is used internally within the organization.

Although copyright law is primarily meant to incentivize the creation of creative content and prevent free-riding by third parties, there is no indication in the DSM Directive that works produced and used exclusively within organizations are excluded from its scope. Copyrighted works in employment and contractor settings are, as explained above, equally provided for under the rules.³⁶³ This is because the contract adjustment mechanism is not necessarily designed to prevent market failure, but to ensure economic fairness and level the contracting playing field.³⁶⁴ Consequently, the fact that the added economic value from using the works can only be traced to internal gains should not be a relevant factor as such.

When workers' data is used internally, such as to automate workflows, optimize processes, or support internal decision-making, the economic value may not be captured through direct revenue but through substantial cost savings and productivity gains. These benefits, though harder to quantify due to the absence of an external market price or benchmark, are nonetheless real and measurable. Both cost-based and impact-based valuation methods could be helpful to put a price on workers' data in these circumstances.³⁶⁵ The most obvious example given in this Article is where the workers' data is used to replace workers themselves by automating their tasks.³⁶⁶ There will be clear cost-savings for companies when doing so, and previously paid wages for those tasks may offer a reference point for valuing the data's contribution in such cases.

Scenario 5: Workers' data is used externally outside the organization.

Although it is uncommon for organizations to share or commercialize workers' data externally, given its strategic and often proprietary nature, such cases do arise. For example, companies may sell this data to third parties, license it for joint ventures, or use it in collaborative innovation projects. These scenarios typically involve a discernible price or exchange value, providing a clearer basis for economic valuation. Another common situation involves the use of workers' data in the development of new products or services that are marketed externally and generate independent revenue streams. In such cases, the data's contribution to external commercial success could potentially establish a case for a contract

363. See *supra* Sections VII.B and IX.C.

364. See *supra* Section VII.A (discussing the history and rationales behind the "best-seller" rule).

365. See *supra* Section VIII.B (discussing how cost-based and impact-based valuation methods apply to workers' data, including when such data is only used for internal purposes).

366. See *supra* Section VIII.C.

adjustment, especially where the worker's original contribution was not proportionately reflected in the remuneration received.

Scenario 6: Workers' data is used for producing new creative content.

Workers' data may not only support automation and analytical tasks but also serve as creative input in the generation of new artistic, literary, or design works. This is especially true in creative industries, where AI systems trained on a worker's prior outputs can be used to generate new content at scale. For example, AI trained on an illustrator's works may be capable of producing new images in a similar style. Even where the generated outputs are not direct copies, the underlying stylistic elements, such as shapes, color schemes, or composition, can be reused or recombined across diverse applications. This same logic applies to other creative fields, including journalism, music, marketing, branding, graphic design, software development, copywriting, and even professional services such as law and finance. In some cases, the AI-generated output may enhance existing workstreams, while in others it may substitute for or compete directly with the original human-created work.³⁶⁷ There is added value in both cases, but arguably greater in the latter. Workers may be in a more favorable position for a contract adjustment case, when there have been no prior discussions about using their works as data sources, if the contract is unclear on the issue, or where the AI is used to displace workers and automate their previous job duties.

Scenario 7: Workers' data is used to come up with new inventions.

A more unique scenario arises where workers' data is used to develop AI systems or models that, in turn, lead to the creation of new inventions. This is especially relevant for workers in knowledge-intensive or specialist industry sectors. In the UK, an inventor is the "actual deviser" of the invention.³⁶⁸ This means that it is the person who came up with the inventive concept who will become the inventor.³⁶⁹ Other countries take similar approaches, with the United States for example defining inventorship by determining who "conceived the invention" or "contributed to the conception of the invention."³⁷⁰ No court to this day has recognized AI systems themselves as inventors, if they are used as a tool to develop new inventions. To the contrary, the UK Supreme Court held in January 2024 that

367. See Rättzén, *supra* note 9, at 200–1 (discussing how AI-generated outputs could, in some cases, compete with original creators or reduce demand for their original works).

368. Patents Act 1977, c.37, § 7(3) (UK).

369. See *Yeda Rsch. & Dev. Co. Ltd. v. Rhone-Poulenc Rorer Inter'l Holdings Inc.* [2007] UKHL 43, ¶ 20.

370. See *Fiers v. Revel*, 984 F.2d 1164, 1168 (Fed. Cir. 1993); *In re Hardee*, 223 USPQ 1122, 1123 (Comm'r Pat. 1984).

patent law assumes that the inventor must be a natural person.³⁷¹ An AI is not a natural person, let alone a person. This of course leads to the question: who else can be the inventor, where AI has been used to generate the inventive concept or to materially contribute to it?

The U.S. Patent and Trademark Office published in February 2024 non-binding guidance on inventorship for AI-assisted inventions, which explained that:

“A natural person who develops an essential building block from which the claimed invention is derived may be considered to have provided a significant contribution to the conception of the claimed invention even though the person was not present for or a participant in each activity that led to the conception of the claimed invention. In some situations, the natural person(s) who designs, builds, or trains an AI system in view of a specific problem to elicit a particular solution could be an inventor, where the designing, building, or training of the AI system is a significant contribution to the invention created with the AI system.”³⁷²

It is not explained in the guidance what is meant by “essential building block,” and what contributors are significant for “building” the AI system. It should not be categorically excluded that individuals who contribute data could be considered inventors. However, such cases are likely to be rare and would likely require that the data contribution played a decisive role in the invention’s conception. In contrast, when large datasets are used and the AI independently identifies novel patterns, individual data contributors are less likely to meet the legal threshold for inventorship.

If workers who contribute their data to AI systems are, in fact, deemed inventors, then the laws for compensating employee-inventions will come to apply.³⁷³ There is also a chance that they could claim further compensation in copyright law under the DSM Directive. The question will turn on what the added economic value of using their data is for the purpose of coming up with inventions, and to what extent workers have already received a fair portion of that value.³⁷⁴ This analysis is necessarily fact-specific. Workers whose roles do not ordinarily include inventing, yet whose data has materially contributed to the invention, may be in a stronger position to argue for further compensation under a contract adjustment mechanism. This is especially true where their agreed remuneration did not contemplate such high-value, downstream uses of their copyrighted work, making it very similar to Scenario 1 above.

371. See *Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2023] UKSC 49, ¶. 56. Similarly, in the United States, the Federal Circuit confirmed that an AI system could not be a valid inventor under U.S. patent law. See *Thaler v. Vidal*, 43 F.4th 1207, 1211 (Fed. Cir. 2022).

372. U.S. Patent & Trademark Off., *Inventorship Guidance for AI-Assisted Inventions* (Feb. 13, 2024), 89 Fed. Reg. 10043, 10049 (citing *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co., Ltd.*, 964 F.3d 1365, 1372–74 (Fed. Cir. 2020) (finding that “Drs. Freeman and Wood were found to be joint inventors even though they did not conceive of the claimed invention of using anti-PD-1 antibodies to treat tumors but instead discovered the expression of PD-L1 in human tumors and that PD-1/PD-L1 interaction inhibits the immune response”)).

373. See *supra* Section IX.B (discussing the law of employment invention compensation).

374. See *supra* Section VII.B.

Scenario 8: Workers' data is used to replace or displace workers.

Another scenario arises when workers' data is used to train AI systems that subsequently generate content or perform tasks that directly or indirectly compete with the original work products created by those same workers. This type of use can create substantial economic value for organizations. It allows for the computational scaling of creative or knowledge-based production processes, enabling the generation of more content, at a faster pace, and potentially of new types that would otherwise have been difficult or costly to produce manually. Depending on deployment, the AI system may perform functions similar to those of human workers, displacing them directly or gradually eroding the need for their roles.

The economic value of a worker's role is typically reflected in their compensation, which can serve as a benchmark when assessing the value an organization gains from automating that role. Cost-based valuation methods are especially relevant here, as they quantify the economic benefits derived from replacing or displacing labor.³⁷⁵ Yet job loss alone does not entitle a worker to contract adjustment under Article 20 of the DSM Directive. Instead, what matters is whether the employer's gain is causally and substantially linked to the use of the worker's protected work, and whether it exceeds what was contractually anticipated and compensated for.

The worker's fair share of added economic value may vary with circumstances, and in some cases may be none. The fact that the worker has already been paid for their duties is not what is key in this regard, as has been explained. Rather, the question is whether there is a significant discrepancy between the agreed remuneration and the economic value later derived from the data. For example, a creative professional whose work is used to train an AI capable of producing similar outputs may be fairly compensated for the original content, but not necessarily for unexpected downstream uses of automation. If it cannot be shown that the agreed compensation contemplated such uses, a right to contract adjustment may arise.

5. How should the relative share of the economic value be apportioned to the use of work products as data?

The former analysis helped determine whether the use of workers' data in AI systems contributes to a significantly greater economic value than the value of the underlying work products. The next step, having concluded that there may in fact be such added value in some cases, is to ask how to calculate the workers' relative share of that value. In other words: what should be the additional price for using workers' work products as data sources?

375. See *supra* Section VII.B (discussing cost-based valuation methods as applied to workers' data).

The best measure of a good's economic value is often its market price.³⁷⁶ Market prices are excellent proxies because they will have already factored in the supply and demand for the good.³⁷⁷ They are the result of negotiations between different parties, and determine what others on the market are willing to pay. Actual market transactions serve as useful benchmarks for other sales in this regard.³⁷⁸ When no external market exists, prices must be estimated based on related or similar goods, which is a classic problem in economics and one that courts have often addressed in intellectual property law.³⁷⁹ When assessing damages for infringement, and in the absence of a clear licensing market price, courts have inferred value from comparable licenses.³⁸⁰ If such licenses exist, entered into by other parties, their relevance must be assessed by comparing all relevant factors, including the licensed goods and their differences, the nature of the parties, the markets involved, the scope, territory, and duration of the license, and other terms that formed the basis of the negotiations.³⁸¹ Where no comparable licenses exist on the same market, courts have turned to related markets and constructed a hypothetical negotiation scenario between the parties.³⁸² This legal fiction imagines what a willing licensor and a willing licensee would have agreed upon under similar market conditions, but the outcome is inherently speculative.³⁸³

In most cases, there will be no direct market comparables for workers' data, as the data is unique to the organization. This makes its valuation more difficult. If a hypothetical license-fee approach is to be applied to workers' data, the question becomes what the organization would have been willing to pay for the data, if it were available for purchase on the market. The price of comparable datasets could assist in this regard, to the extent any such comparables exist. Where they do not, courts will need to construct the hypothetical market conditions themselves. This exercise involves distinguishing the received value of a good from the cost of obtaining or providing it.³⁸⁴ This is easier said than done for data. What is the received value of particular data, especially when it forms only part of a larger dataset? And how should one assess the relative value of that data in relation to

376. See Daniel F. Spulber, *Access to Networks: Economic and Constitutional Connections*, 88 CORN. L. REV. 885, 899 (2003).

377. *Id.* at 895.

378. *Id.* at 900–1.

379. See Spulber, *supra* note 243, at 668.

380. *Id.* at 668–9.

381. *Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1119–20 (S.D.N.Y. 1970), modified sub nom. *Georgia-Pac. Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971)); *Unisplay, S.A. v. Am. Elec. Sign Co., Inc.*, 69 F.3d 512, 517 n.7 (Fed. Cir. 1995); *Smith Kline & French Laboratories Ltds (Cimetidine) Patents* [1990] R.P.C. 203 (UK) (holding that “object of the comparability exercise, in this as in any other branch of the law, is to find the closest possible parallel. If there is an exact parallel, there is no point in looking any further. If there are slight differences, an allowance may be made.”); *Unwired Planet Int’l Ltd. v. Huawei Techs. Co., Ltd.* [2017] EWHC 2988 (Pat), at ¶ 170 (UK).

382. See Spulber, *supra* note 243, at 622.

383. See John C. Jarosz & Michael J. Chapman, *The Hypothetical Negotiation and Reasonable Royalty Damages: The Tail Wagging the Dog*, 16 STAN. TECH. L. REV. 769, 783–84 (2013).

384. See Spulber, *supra* note 376, at 902.

the performance of an AI model? In practice, answering these questions would require a counterfactual baseline, comparing the performance of the model with and without the data.

The difficulty of assigning a price to data on the basis of hypothetical market values suggests the need to consider alternative valuation methods, such as cost-based, income-based or impact-based approaches.³⁸⁵ Cost-based methods are attractive because they are quantifiable. For workers' data, the attributed cost would at minimum include the worker's compensation, proportionally adjusted to reflect the time spent producing the relevant data rather than other tasks. Additional costs could include those of processing, storing and curating the data, as well as the technical personnel involved in developing the AI system. The challenge, however, is that cost-based methods may systematically undervalue workers' data, especially where it is unique, irreplaceable, or unavailable from other sources. In such cases, income-based or impact-based methods may provide a better measure, since they assess the context of use, the data's purpose, and the quantifiable outcomes it enables. Yet these approaches carry their own risk of overvaluation. For example, the data may be used in a highly profitable project, but its actual marginal contribution to profits might be negligible. Overestimation also arises where workers' data constitutes only a small portion of a much larger dataset, or where its role in the functioning of an AI system is incidental.

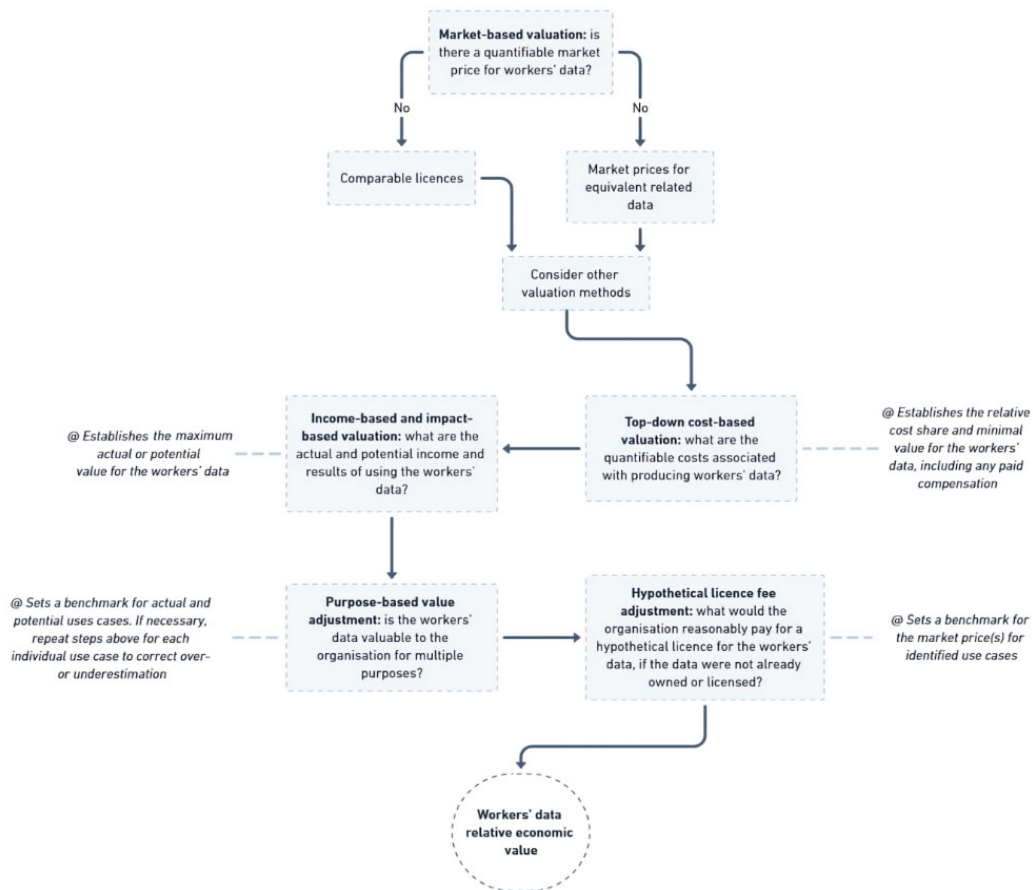
One way to navigate this dilemma is through a hybrid framework. A cost-based method can first be used to estimate the relative share of workers' data in the total costs of developing and deploying the AI system(s) in which it is used. This relative share provides a baseline, or *minimum* value as a "top-down" estimate.³⁸⁶ Income-based and impact-based methods can then be used to establish an upper ceiling by estimating the *maximum* actual or potential value of the data in generating revenue or other gains. However, these methods must be applied carefully to avoid overestimating value. They may also underestimate the value of data when the data can serve multiple purposes that have not yet been realized. The value of a dataset is inherently contextual; it may be highly valuable in one application yet insignificant in another. The data should therefore be priced to account for all possible non-exclusive uses, in addition to the particular AI system which has already been deployed using the data. Once this analysis is complete, the final step would be to introduce a hypothetical licensing analysis: what would the organization be willing to pay to access the data, if it did not already own it? This hypothetical pricing scenario allows for correction of any inaccuracies from previous valuation steps and anchors the analysis in a more realistic market-facing perspective. The result is a

385. See *supra* Section VIII.B.

386. Top-down valuation methods are common in economics and have been discussed previously. See *supra* Section VIII.A. Although criticized, top-down methods have also been employed by courts and litigants in FRAND patent litigation. See Roya Ghafele, (*F*)*randomomics*, 20 COLO. TECH. L.J. 64, 79–87 (2022).

more balanced framework for estimating the relative economic value of workers' data, which is illustrated below.

The situation involving workers' data is unique in that the data is produced in the course of employment, and the worker has, more or less, already been compensated for generating it as a by-product of their work products. The bottom line should be that the fact that the worker has been a former worker should not put them in a better valuation position than where the data is sourced from a third party source. If anything, the fact that the worker has already received compensation, and may have assigned any copyright to the employer or contractor, suggests that workers should be paid *less* than what a third party licensor might receive. The proposed framework above can help courts understand the market



price of workers' data. But knowing that, courts must determine what should be the relative share of that market price, accounting for what has been previously

agreed between the contracting parties. Again, the relevant question is whether there is a “clear and significant” discrepancy between the economic value received by the employer and the remuneration received by the worker, one that renders the original compensation “disproportionately low.”³⁸⁷ The contract adjustment mechanism is *not* designed to fairly or evenly distribute economic value between authors and their contracting counterparts in all cases, but only where the economic value of their rights “turns out to be significantly higher than initially estimated.”³⁸⁸

6. How should previously paid compensation to workers be factored in?

Authors should never be compensated twice for the same work. Companies may argue that their workers have already been fairly compensated for their data, having been paid for producing the underlying work products. While that may be true in some cases, it cannot automatically be assumed that compensation for the work products also covers the use of the data embedded within them. If that were always the case, then no contract could ever be adjusted. Indeed, a contract adjustment mechanism presupposes the existence of a contract and that the author has received some payment. The real question is whether the author was paid enough, taking into account *both* the economic value of the work and the terms agreed upon by the parties.

Recital 73 of the DSM Directive clarifies that a lump-sum payment can constitute proportionate remuneration in certain circumstances and that Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector.³⁸⁹ This implies that salaries, bonuses, and other forms of fixed compensation may count as fair remuneration, depending on the context. When implementing the DSM Directive, Sweden interpreted the rules to mean that compensation to authors in employment settings, which have been bargained in collective agreements, should be presumed to be fair.³⁹⁰ However, the government made no statements about individual employment agreements that are not collectively negotiated and did not exclude the possibility of exceptions.³⁹¹ It also acknowledged that, even if an author is entitled to fair remuneration for the exploitation of their work under each contract, the “best-seller” contract adjustment rule allows consideration of factors beyond the specific contract in question.³⁹²

What will be key in these cases is whether the parties have discussed or intended that the work products may be used as data for automation purposes, or that there could be unexpected gains from using the work products. If so, the employer or

387. DSM Directive, *supra* note 10, at recitals 73, 78.

388. *Id.* at recital 78.

389. *Id.* at recital 73.

390. Prop. 2021/22:278, *supra* note 40, at 228.

391. *Id.*

392. *Id.* at 228–30.

contracting party has a strong argument that the agreed compensation already accounted for the data use.³⁹³ A right to contract adjustment is also less likely to arise where the parties explicitly or implicitly agreed that the worker's pay would be determined solely by time worked or direct output, without regard to the actual or potential value of that work.³⁹⁴ However, even where the worker has expressly or implicitly consented to the use of their work products as data, the contract adjustment rule does not exclude the possibility of further compensation. Because Article 20 of the DSM Directive is mandatory in nature, it cannot be waived by contract, meaning that the question still revolves around whether compensation already received is disproportionately low when compared to the realized economic value.³⁹⁵ The parties may have underestimated the economic value at the of contracting, or the worker's bargaining position was weakened. The contract adjustment mechanism is also meant to step in to correct these imbalances.

7. Should workers or organizations reap the rewards for the higher economic value derived from their work products when transposed into data?

Although the legal principles underlying contract adjustment are well established, the rules were clearly drafted with a different scenario in mind. It is only recently that using data contained in copyrighted works for automation purposes has emerged as a new phenomenon, and it is not clear how the rules should apply in this context. The central issue is that while the individual work products may hold limited economic value on their own, when aggregated as data, they can generate substantially greater value. It is ultimately a policy question as to who should benefit from these additional rewards.

In this new context, companies may argue that one of the core responsibilities of workers in the age of AI is not just to produce traditional work products, but to generate data. From this perspective, the transformation of work into data is not a mere byproduct but an integral part of the job, and something workers are already being compensated for. Companies may also point to the significant investments and commercial risks involved in developing, maintaining, and deploying AI systems, arguing that these factors justify their entitlement to the bulk of the economic gains. The argument here is that these investments are not merely supportive but transformative; they turn raw data into a meaningful product that can generate significant economic returns in ways which the data alone cannot. Workers, by contrast, may argue that the economic value extracted from data ultimately derives from their creative labor. From that perspective, the data's usefulness, and its role in powering AI systems, stems directly from their intellectual contributions. From this standpoint, their right to fair remuneration should not be diminished simply because the medium has shifted from traditional work products

393. *Id.* at 229 (emphasizing the need to carefully consider what the parties have agreed upon before adjusting their contracts).

394. *Id.* at 229–30.

395. *Id.* at 229; DSM Directive, *supra* note 10, at art. 20.

to data, especially when those data-driven AI systems may ultimately replace their roles.

For now, EU copyright law appears to favor the workers' side of this debate. As discussed, Articles 18 to 20 of the DSM Directive are broadly framed and do not exclude any category of work, usage, or commercial context.³⁹⁶ There is nothing in the Directive to suggest that the conversion of copyrighted works into data undermines the basic principle that creators should receive a fair share of the value generated by the exploitation of their works. If anything, the rise of data-driven business models introduces a growing risk that authors' contributions will be undervalued. Whether the emergence of these new uses calls for a revised legal framework, particularly in the context of employer-employee and contractor-contractee relationships, remains an open policy question.

8. How should the economic value of accumulated workers' data be assessed in relation to other data sources?

It is rare for AI systems to rely exclusively on data from a single source. More commonly, they are trained on data aggregated from multiple sources, which can include data from other workers, public databases or publicly available data, third party vendors or synthetic data. For that reason, workers' data is typically not used in isolation but as part of a broader dataset combining numerous sources. Data may have been sourced from the entire organization, including hundreds or thousands of other workers, along with other data sources accessible to the organization. Such data aggregation complicates the analysis of fair remuneration and the potential for contract adjustment. Once individual data contributions are combined, their value can become diluted, and direct attribution of economic benefit to a particular contribution becomes far more difficult.

From a company's perspective, once data contributions are aggregated into a unified dataset, the resulting asset is collective in nature. Hence, they may argue that the dataset should be assessed as a single whole rather than attempting to dissect and value individual contributions. The loss of granularity makes it impractical to link any specific worker's data to a measurable outcome or share of value creation. In contrast, workers may argue that individual contributions retain significance even when aggregated. Just as a copyrighted work retains its economic value when included in a database, a worker's contribution does not lose value simply because it becomes part of a larger dataset. The economic value of data in the context of AI is also closely linked to the quality, relevance and uniqueness of the data, not just its volume.

The reality likely lies somewhere in between these diverging positions and will depend on the context. Individual data contributions will become significantly harder to distinguish and put a price where they form part of larger models, such as large multimodal models and foundation models. However, companies

396. See *supra* Section VII.B.

increasingly use custom-built AI systems tailored for specific applications. These models are often fine-tuned on proprietary datasets generated by specific departments or teams.³⁹⁷ For example, a company may develop internal AI agents trained exclusively on data from a particular department. In such cases, it becomes far more practical to estimate the economic value of individual data contributions.

Fairly distributing economic value to individual contributors whose contributions are used as a collective asset is a well-known problem in economics. The Shapley value can be used to resolve this problem, but will be computationally demanding, expensive and infeasible where the contributors are many.³⁹⁸ Determining each contributor's marginal contribution means creating multiple counterfactual scenarios and excluding each contribution, one by one, until the relative impact of each contribution on model performance has been determined.³⁹⁹ Variations of the Shapley value, such as Monte Carlo simulations, are arguably more appropriate for this purpose.⁴⁰⁰ This will involve the sampling of a subset of possible coalitions of individual data contributors. Practically, this would mean estimating the average value of marginal contributions within the defined subset. This will not be completely accurate, but a more pragmatic choice.

Courts are not unfamiliar with economic estimations, and have frequently used them in FRAND patent litigation to estimate the essentiality ratio for patent portfolios.⁴⁰¹ A central issue in FRAND patent litigation is determining what standard-essential patents ("SEPs"), which have been declared as essential to a particular technology standard, are actually essential to that standard. This task is made more difficult when SEP portfolios are large, sometimes comprising thousands of patents from multiple parties, which would take an extremely long time to review individually. Once courts have determined what should be the aggregate license value for an SEP portfolio, they must allocate that value relatively among the individual SEPs.⁴⁰² Courts have gone about this in several ways. One such method is so-called patent counting or essentially counting, which establishes the total number of SEPs declared as essential, and then estimates the number of patents actually confirmed or deemed essential to the standard within that group.⁴⁰³ This method crudely counts the number of patent contributions, without

397. See *supra* Section II (discussing common company use cases for workers' data).

398. See *supra* Section VIII.B (discussing the Shapley value and how it can measure the value of individual data contributions).

399. *Id.*

400. *Id.*

401. See *infra* notes 403–406.

402. See SEPs Expert Group, *Contribution to the Debate on SEPs* (Jan. 2021), at 108, https://www.pagewhite.com/images/content/SEPs_Expert_Group_Contribution_to_the_Debate_on_SEPs.pdf

[https://web.archive.org/web/20250927011229/https://www.pagewhite.com/images/content/SEPs_Expert_Group_Contribution_to_the_Debate_on_SEPs.pdf].

403. See *Unwired Planet Int'l Ltd. v. Huawei Techs. Co. Ltd. & Anor*, [2017] EWHC (Pat) 711 (UK). In a report for the European Commission, it has also been proposed that analyzing random samples of declared SEPs would be an alternative for assessing whether the SEPs are truly essential. See Pierre Régibeau et al., *Transparency, Predictability, and Efficiency of SSO-Based Standardization and SEP*

assessing their actual importance and relative value, and has rightly been criticized for that reason.⁴⁰⁴ Similarly, patent-weighted counting assumes that each patent in a given portfolio by a SEP holder has the same value. For example, if one SEP holder has charged a 10% royalty fee for a portfolio consisting of a hundred patents, the royalty fee is 0.1% per patent. The justification for doing so is purely practical, as it would be an unrealistic exercise to evaluate the individual value and relative significance of hundreds or thousands of patents.⁴⁰⁵ A related method which has been proposed to determine the value of a patent portfolio is to look at the number of patents that have been accepted into a technical standard. For example, if more than 50% of all SEPs within a standard come from one patent holder, then this may suggest that this patent holder owns a large SEP market share and hence is entitled to a greater royalty share.⁴⁰⁶

None of these methods have been warmly accepted in patent law. They are very rough estimations only, without individually evaluating the significance of each patent. They could, however, be more promising in the context of workers' data. Unlike patents, which may differ significantly from each other in terms of relevance and validity, individual data contributions in datasets are likely to be more uniform and better categorized. Datasets are organized to account for different types of data sources, which is often a technical necessity for the model to work effectively. The value of the data will also be more tied to its relative volume. Data counting might be a promising method for estimating the value of individual data contributions forming part of a larger dataset, where data value is assumed to be relatively uniform. This approach assumes that each data contribution is equally useful across all use cases of the model. If the data can be separated into distinct subsets, then a more granular valuation may be possible. The following example illustrates how such a method might work in practice:

Facts:

A media company fine-tunes a third party LLM to generate automated news articles. The fine-tuning dataset comprises 20,000 articles written by 100 journalists, averaging 200 articles per journalist. All articles are categorized uniformly within the dataset. The AI system's effectiveness depends on the entire dataset rather than on

Licensing: A Report for the European Commission (June 2016), at 61; Justus Baron, *Counting Standard Contributions to Measure the Value of Patent Portfolios—A Tale of Apples and Oranges*, 44 TELECOMM. POL'Y. 13 (Apr. 2020).

404. *Unwired Planet*, [2017] EWHC (Pat) 711 (UK); see also SEPs Expert Group, *supra* note 402, at 109.

405. *Unwired Planet*, [2017] EWHC (Pat) 711 at [183] (UK) (holding that “[s]hort of the disproportionate task of evaluating every single patent thoroughly in order to compare each one with all the others, one can only ever hope to analyze SEPs in broad categories and it is not meaningful to attempt to weigh the value of individual patents within these categories against one another”).

406. However, this approach was rejected by the District Court for the Central District of California in *TCL Commc’n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, as it was based on the assumption that the SEP portfolio strength is directly proportional to its size in numbers and that each patent or contribution is treated equally. No. SACV 14-341 JVS(DFMx), 2017 WL 6611635, at *41 (C.D. Cal. Mar. 9, 2018).

any individual journalist's work.

Some journalists will have written more articles than others, and not all journalists are paid the same. Some articles from prominent journalists will have yielded more online viewings and therefore added greater revenue to the media company.

- Annual revenue from traditional (human-authored) articles: €2,000,000
- Annual revenue from the AI system using the dataset: €4,000,000

Uniform data contribution valuation:

If the value is distributed uniformly across all data points (articles), each article's contribution to the overall annual value as work products is €100 (€2,000,000 total revenue / 20,000 total articles). Therefore, each journalist's work product contribution value annually, by average, would then be €20,000 (€100 x 200 articles). The value of the work products as data sources would then be twice as much, €200 per article and €40,000 per journalist in total each year.

Individual data contribution valuation:

Let's adjust the calculations for the prominent journalists who could command higher revenue earnings for their articles as work products. If we assume that 10 prominent journalists would contribute double the annual revenue for their articles, then each article's contribution is €200 (€100 x 2). These 10 prominent journalists would, by average, contribute slightly fewer articles per year, approximately 175 per prominent journalist. Their total, combined annual value would therefore be €350,000 (€200 x 175 articles x 10 journalists), or €35,000 per prominent journalist.

The higher value of these articles as work products will not necessarily mean that a higher value should similarly be charged for them as data. For example, if the purpose of the AI system is to automate the writing of a journalist article, not necessarily in the style of a prominent author, if there is such a style, there is no reason why their data should be valued more than others. However, assuming that the fact that the articles are written by prominent journalists in a certain style is also valuable for the AI system, then the value as data would be twice as much as work products: €400 per article, €70,000 per journalist, and €700,000 in total AI-related annual revenue.

The remaining data value for the other non-prominent articles would then be: €4,000,000 - €700,000 = €3,300,000 total data value share. The average data value per non-prominent article would be €180 (€3,300,000 / 18,250 articles). Each non-prominent journalist would contribute with, by average, 203 articles per year (18,250 articles / 90 journalists). Each non-prominent journalist's data contribution would then be valued annually €36,540 (€180 x 203 articles).

While rough estimation methods such as data counting are unsatisfactory in patent law due to patent heterogeneity and complexity, they may be better suited for data valuation in copyright contexts. Unlike patents, copyrighted works are not subject to invalidation, and workers' data contributions are often well-structured and relatively uniform. Even where some contributions differ in quality or

prominence, it may be possible to distinguish their relative value, as illustrated above, by distinguishing their relative contributions and apportioning them a separate value. Altogether, this suggests that data counting is a relevant valuation method to consider for workers' data.

9. How should workers' redundancies be considered?

In principle, one's own loss is not relevant under economic valuation theories.⁴⁰⁷ However, when a worker's loss results in a corresponding gain for the organization, that loss becomes economically significant. A parallel to this can be found in copyright law, where rightsholders are entitled to claim damages for lost profits.⁴⁰⁸ That said, the contract adjustment mechanism in copyright law is not intended to fill potential policy gaps in employment law. It is not designed to compensate workers for job loss due to AI deployment. Rather, it aims to compensate workers for the additional economic value they bring to their former employers or contractual partners, both before and after being made redundant, that was not already reflected in their compensation.

As previously discussed, the economic value of workers' data, particularly in specialist and creative industries, is expected to be considerable when AI systems are used to automate tasks and replace human labor.⁴⁰⁹ These systems can often perform the same tasks, and in some cases at a scale or speed that no human could match. One of AI's major advantages lies in its scalability, allowing it to perform work that would otherwise require many individuals. The value it generates will likely continue to materialize for several years after the original workers have been displaced. There is no built-in timeline or expiration date. Ultimately, this also means that companies that use or develop AI systems based on workers' data must carefully consider the implications of using such systems to replace their workforce.

10. Should different types of workers be remunerated differently for the

407. An exception to that premise is tort and restitution law, where the objective is to compensate for economic loss or to restore a previous economic state that corresponds to a social loss. See Francesco Parisi, *Liability for Pure Financial Loss: Revisiting the Economic Foundations of a Legal Doctrine*, in *LIABILITY FOR PURE ECONOMIC LOSS IN EUROPE: FRONTIERS OF TORT LAW* 75, 78 (Mauro Bussani & Vernon Palmer eds., 2003) (discussing the economic theories of tort law, including how only economic losses that constitute a social loss ought to be compensated).

408. See *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir. 2003) ("[A]ctual damages are usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer."). In the UK, claimants are able to claim either damages or accounts of profits; see Copyright, Designs and Patents Act 1988, § 96(2).

409. See *supra* Section VIII.C.

exploitation of their work products?

Copyright law rests on the principle that the law should not discriminate between different types of authors.⁴¹⁰ That all authors are treated equally does not mean that all works have equal value, however. Works can, and often do, differ significantly in their economic worth. The same logic applies to contract adjustment mechanisms. If an author has not been proportionally paid for their specific works, which may possess a greater economic value than others, then there is a claim to be made.

In the context of workers' data, the reality is that not all work products will carry the same economic value as data. Some workers will also have received higher pay than others because their contributions were deemed more valuable. There is nothing to suggest that Article 20 of the DSM Directive is meant to adjust those underlying assumptions. Rather, Recital 78 confirms that "[t]he assessment of the situation should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices in the different content sectors."⁴¹¹ In other words, the more valuable the work product is as data, the greater the potential economic value. However, and as noted above, the existence of high economic value in the use of work products as data does not automatically entitle the worker to additional compensation.⁴¹² In each case, it is necessary to examine the specific terms of the employment or contractor agreement to determine whether that value has already been sufficiently compensated, and for what exactly. In some roles, the core duties may not involve producing economically valuable work products, or the work products may hold limited independent economic value. If copyright law were to adjust such contracts solely based on the value of the data generated, it would effectively rewrite the original agreement and its underlying assumptions. That cannot be the intended function of the DSM Directive's contract adjustment mechanism.⁴¹³

If this understanding is correct, many workers would not have a claim to contract adjustment even if their data is used without further compensation, notwithstanding that the data can be of significant economic value for AI or automation purposes. This will particularly be the case for employees in administrative or support roles, where the primary duties are not to produce work products. Conversely, contract adjustment claims are more likely to arise in roles where the work product itself holds intrinsic value, such as those in knowledge-based, specialist, media or creative sectors. Which interpretation is correct in which scenario remains to be seen and will ultimately need to be decided by courts depending on the specific circumstances of each case.

410. See Christiana Sappa, *The Principle of Non-Discrimination*, in EU COPYRIGHT LAW 23–37 (Iirini Stamatoudi & Paul Torremans eds., 2021).

411. DSM Directive, *supra* note 10 at recital 78.

412. See *supra* Section IX.D.4 (Scenario 2).

413. *Id.*

11. How should the worker be compensated for the future use of their data?

An extraordinary feature of the contract adjustment mechanism in Article 20 of the DSM Directive is that it accounts for *all* revenue gained from the licensed or assigned works, representing both “actual and potential” economic value.⁴¹⁴ This encompasses all past, present, and future income generated from the exploitation of the works. Whether this means that the author is compensated for future use will depend on the nature and terms of the original contract. As discussed in the preceding section, the purpose of the contract adjustment mechanism is to correct the distribution between the parties of the economic value, not to rewrite the underlying assumptions of the contract.

Where copyright has been assigned, future uses of the work product are necessarily included in the remuneration already paid, or in any additional compensation that may be awarded. Assignment is, by nature, a permanent transfer of rights. In contrast, where the copyright has only been licensed and royalties are paid periodically, any further remuneration will generally only cover past and ongoing exploitation, unless the license fee was structured as a lump sum. Only in such cases can remuneration for future use be contractually adjusted upfront. Since copyright is typically assigned to employers or contractors in employment or contracting relationships, assignment is the more relevant scenario for present purposes. The fact that contracts may be adjusted to account for not only past but also anticipated future revenue has significant implications. The task is to consider whether *all* of the economic value has been adequately accounted for in the original compensation. If not, and if the contract is not adjusted, that value will remain unaccounted for going forward. This is not a straightforward assessment and could lead to substantial additional liability for the exploiting party where the discrepancy in value is significant.

The difficulties of estimating future unrealized economic value will become even more pronounced for workers' data and AI. AI technology is relatively new, and predicting its development or market conditions a decade from now is highly uncertain. Additionally, companies often alter their business plans over time, or may face bankruptcy. It is not settled how such future events of uncertainty should be addressed in contract adjustment cases. It is also not clear what will happen if market projections are wrong. For example, if a court orders the adjustment of an assignment contract to better balance the economic value between the parties for exploiting the works, and if the assumptions made by the court regarding future exploitation turns out to be wrong, will the author become liable to repay to the other party what it should not have been paid? These are unresolved questions that future case law will need to address.

Consider the following hypothetical. Suppose a worker's contributions are used to train an AI system that is projected to generate €100,000 in annual revenue. Prior to being replaced by the AI, the worker received an annual salary of €50,000 as a

414. DSM Directive, *supra* note 10, at recital 73, art. 20.

lump sum for their work and copyright assignment. If the court finds this remuneration disproportionately low, and there was no mutual understanding at the time that the salary covered the use of their work as AI training data, what should be the appropriate time horizon for calculating future revenue owed to the worker? Should courts assume that the AI-related revenue will remain the same, or increase for the next five or ten years, or indefinitely at given market projections?

One possible compromise is for courts to only correct workers' fair remuneration, when in the form of lump sum payment such as salary, for past and present actions. Article 19 of the DSM Directive ensures that authors receive updated information about ongoing exploitation, including revenue data, at least annually.⁴¹⁵ Based on this, workers can claim additional remuneration periodically. Recital 75 clarifies that "[a]s long as exploitation is ongoing, contractual counterparts of authors and performers should provide information available to them on all modes of exploitation and on all relevant revenues worldwide with a regularity that is appropriate in the relevant sector, but at least annually."⁴¹⁶ Although more accurate, such a piecemeal approach is administratively burdensome and expensive. Practically, it would compel authors to repeatedly monitor exploitation, request data, and enforce their rights on a continuous basis to claim further remuneration for new exploitation, potentially indefinitely, so long as their works continue to be exploited. From a policy perspective, this is far from ideal, particularly since not all authors have the means, willingness, or legal resources to pursue such claims on a continuous basis.

12. How should the economic value of the EU-specific copyright portfolio and EU-specific acts be assessed when workers' data are used outside the EU?

The right to fair remuneration and the "best-seller" right to contract adjustment in the DSM Directive will only be triggered when there is EU-specific use concerning authors' EU-specific copyright portfolio. This is because copyright is a territorial right, as previously discussed.⁴¹⁷ The DSM Directive lays down rules for authors' bundle of copyright within the EU, which can only be infringed by acts carried out within the EU. Assuming a relevant act can be localized to the EU, the next question is how to put a price on the EU-specific copyright portfolio.⁴¹⁸ That analysis will depend on whether the relevant conduct is *also* carried outside the EU, or whether it is *only* carried out within the EU.

To estimate the value for the EU-specific copyright portfolio will be more difficult in the former situation, where the works, now in the form of data, are only partially or remotely used in the EU. There are two ways to approach that pricing dilemma. The first is to argue that the act of reproduction, even if only partially or remotely

415. *Id.* at art. 19.

416. *Id.* at recital 75.

417. *See supra* Section VII.D.

418. *See supra* Section IX.D.2 (discussing when an infringing act is deemed to be carried out within the EU).

occurring in the EU, serves as a jurisdictional “hook.” Once such a hook is established, the rights to fair remuneration and contract adjustment should apply in full, even in respect of related acts conducted outside the EU. Although criticized, extraterritorial damages awards are not uncommon in copyright law, and have been awarded by American courts on numerous occasions.⁴¹⁹ Several European courts have taken similar views.⁴²⁰ The alternative is to argue that the scope of the remedy should be in proportion to the amount or degree of infringing activity occurring in the relevant territory. This aligns more closely with the principle of copyright territoriality, in that remedies are only awarded with effect within the respective country of protection. Whether an act of reproduction occurs within the EU may also be arbitrary in the data lifecycle. Servers can be located anywhere, and therefore workers’ data can be stored and processed anywhere. When data can be transmitted globally at any time, where exactly does the economic value of its reproduction lie?

A related but distinct view is that it is the economic value of the completed AI system, not the underlying data, that should determine value attribution. According to this view, the location of the AI system’s use, whether inside or outside the organization, is what matters for apportioning value across regions or jurisdictions. This position is intuitively appealing because it aligns with the broader idea that the value of workers’ data stems from its ultimate use in a functional AI system. It fits less neatly, however, with copyright territoriality if considered strictly. The relevant conduct from a copyright perspective for using workers’ data will be the act of reproduction of the data, not its subsequent use within an AI system. Copyright laws do not grant exclusive rights to authors for the “use” of their works. Copyright laws are primarily concerned with copying, distribution, and performance rights. If we are to strictly conform to notions of territoriality and exclusive rights in this regard, we have to successfully argue that workers’ data has been encoded or memorized into the AI system’s parameters or weights, such that further acts of reproduction,

419. See, e.g., *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 68–70 (2d Cir. 1988) (holding that the predicate act of copyright infringement in the United States permitted the defendants’ extraterritorial conduct, and therefore supported an award of damages for foreign lost profits); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939), *aff’d*, 309 U.S. 390 (1940) (awarding extraterritorial damages for foreign sales and distribution of an infringing motion picture produced in the United States); *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 992 (9th Cir. 1998) (holding that the defendants were responsible for extraterritorial damages where predicate acts of infringement relating to broadcast videos took place in the United States); *Tire Eng’g & Distrib., LLC v. Shandong Linglong Rubber Co., Ltd.*, 682 F.3d 292, 307 (4th Cir. 2012), *cert. denied*, 133 U.S. 846 (2013) (“[O]nce a plaintiff demonstrates a domestic violation of the Copyright Act, then, it may collect damages from foreign violations that are directly linked to the U.S. infringement.”).

420. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 19, 1975, ZR 110/74, 9 IIC 276, 276–81 (1977) (Ger.) (“The [defendant’s] accounting on the distribution of the wall plates manufactured in the Federal Republic of Germany is to be without any territorial limitations since the [right holder’s] royalty receipts payable by [its U.S. licensee] have been reduced through [the defendant’s] distribution abroad.”); *Experience Hendrix LLC v. Times Newspapers Ltd.* [2010] EWHC (Ch) 1986 [141] (UK) (“Losses might also be recoverable by infringement proceedings in respect of some overseas right brought in the jurisdiction where that overseas right is based.”).

or communication or distribution to the public, will occur when the completed AI system is deployed within or outside the organization.⁴²¹ Alternatively, further acts of reproduction will occur where the generated output is identical or substantially similar to the underlying work products.

E. SHOULD WORKERS' PRIOR CONSENT BE REQUIRED OR AN OPT-OUT MECHANISM BE INTRODUCED FOR THE USE OF WORKERS' DATA?

The many difficulties with a contract adjustment mechanism and putting a price on workers' data raises the question whether another approach would be preferable. The starting point is that, reproducing copyrighted materials in the course of AI training activities, without the permission of the rightsholder, will infringe copyright unless there is an applicable exception or limitation.⁴²² There are significant differences in this regard between different jurisdictions in the absence of international harmonization on copyright exceptions and limitations.⁴²³ In the EU, Member States must provide a text and data mining exception for reproductions and extractions of copyrighted works.⁴²⁴ However, rightsholders may expressly reserve their rights, in which case their works cannot be used for text and data mining purposes.⁴²⁵ This opt-out mechanism seeks to balance the interests of developers in accessing publicly available content with authors' interest in controlling the use of their works online.⁴²⁶

There are two ways to go about the same problem for workers' data:

1. **Prior and informed consent:** Workers would need to provide express consent before their work products could be reproduced or extracted for text and data mining, even if they have assigned their copyright to their employer or contracting entity.
2. **Statutory opt-out:** Companies may reproduce or extract workers' data for text and data mining by default, however workers would retain the right to exclude their work products, and hence data, through a positive opt-out mechanism, even after assigning their copyright.

Making the use of workers' data conditional upon the prior and informed consent of the worker, even if their rights for their copyrighted works, as work products, have been assigned to their employer or contractee is interesting for several reasons. It is, first of all, a clear and simple rule, and would bring clarity to

421. See *supra* Section IX.D.2 (referring to Rättzén, *supra* note 9, at 220–27, regarding a discussion about model memorization, encoding and copyright infringement).

422. See Rättzén, *supra* note 9, at 192–96 (discussing how AI training often involves carrying out acts of reproduction).

423. *Id.* at 196–220 (comparing the differences in data reproduction for training purposes under copyright exceptions and limitations in the EU, UK, U.S., Japan, Singapore, India, Australia, and Brazil).

424. DSM Directive, *supra* note 10, at art. 4(1).

425. *Id.* at art. 4(3).

426. *Id.* at recital 18.

workers and companies alike. It also requires companies to be transparent about if and how they plan to use workers' work products as data sources, before they do it. Such an *ex ante* approach would be strongly preferred over an *ex post* contract adjustment mechanism. Introducing an opt-out mechanism for workers' data would be advantageous for similar reasons, and ensure that workers are not completely at the mercy of their employers' or contractees' decisions regarding data use.

Requiring the prior and informed consent from workers for using their work products as data sources, even if copyright has been assigned, would come to mirror the legal treatment of personal data in several ways. Unless companies have a legitimate interest to process their employees' or contractors' personal data, or where it is necessary for the performance of a contract, it will often be necessary to obtain the consent of the data subject, which must be freely given.⁴²⁷ Such consent is routinely provided in employment or contractor agreements. The risk that workers would refuse to provide their consent for using their workers' data is mostly theoretical. If a statutory consent regime is introduced, the greater risk is that such consent would become a mere formality if routinely expected as a condition of work, thereby reducing the rule to a transparency obligation with limited practical effect. While transparency is valuable, it does little to address the economic imbalance if workers' data is used to create automation systems that could ultimately replace their roles. Of course, in theory workers would be in a position to gauge if their employment or contractor agreement sufficiently compensates them for both their work products and their data. If that is not the case, then workers may either bargain for more compensation at the outset, or walk away. Yet workers are typically in a much weaker bargaining position than their respective employers or contractees. There is a significant risk that this could be taken advantage of at the cost of the weaker party.

The opt-out mechanism in Article 4(3) of the DSM Directive is currently limited to "rightsholders."⁴²⁸ Workers who have assigned their rights to their employers or contractees will no longer be "rightsholders," meaning that the rule would need to be redrafted to extend to workers. Introducing a mandatory opt-out mechanism would put the control over workers' data back in the hands of workers. That is to say, even if copyright has been assigned or licensed in an employment or contractor setting, the worker would always have the statutory right to exclude the use of their work products as data sources. Because the worker would always have the last word. If an employer or contractee uses data despite a valid opt-out, the worker could claim fair remuneration through a contract adjustment. However, an opt-out regime introduces significant administrative and operational challenges. Workers would still need to take affirmative action. Passive workers who are not aware of their right to opt-out would be disadvantaged. Employers would also need to track opt-outs and trace corresponding data, which can be highly complex without robust

427. See *supra* Section IV.A (discussing data privacy restrictions for the processing of workers' personal data).

428. DSM Directive, *supra* note 10, at art. 4(3).

data labeling systems. If opt-outs were widely exercised, data scarcity could arise, potentially stifling corporate innovation and automation. Although the prohibitive effects of an opt-out mechanism could be a relatively rare occurrence, that is not to say it could not happen, and if it does, then it would be very serious for a company's competitiveness. Given the growing importance of data in a digitalized corporate environment, a blanket opt-out mechanism would be inappropriate. Clearly, companies need reliable access to the data within their own organizations.

A more balanced solution would be to introduce a compulsory licensing or compensation scheme. Unlike Article 20 DSM's case-specific contract adjustment mechanism, a compulsory license would standardize the right to further remuneration while allowing parties to negotiate specific terms. But standardize how? The truth is that most compulsory licensing statutes do not set out any fixed royalties or amounts, and leave it to the parties to negotiate what is fair compensation.⁴²⁹ The scheme is usually limited to setting out the circumstances for when there is a statutory duty to provide a license, without setting out the details of such a license, which are best reserved for the parties to determine. There is much truth to that for also workers' data, which economic value will vary significantly depending on its content, use and context.

The existing "best-seller" right to adjust contracts can be highly accurate when determining what is a fair distribution of the economic value of workers' data, and is, in a way, a form of a compulsory licensing scheme. It requires companies exploiting authors' works to provide further remuneration, in addition to what has previously been agreed upon, where this is economically justified. Yet this is a highly fact-intense and complex analysis, as discussed above, which leaves open the question whether it should be standardized in some way. It goes beyond the scope of this Article to explore these questions any further, and it may well be that we will have to wait and see how workers' data negotiations pan out before further statutory intervention.

F. SHOULD A WORKERS' DATA EXCEPTION AND LIMITATION BE INTRODUCED?

Companies need reliable access to the data within their own organizations, particularly as corporate automation projects become both more common and more critical for maintaining competitiveness. The current contract adjustment mechanism in the DSM Directive, when applied to workers' data, does not restrict companies' right to use their workers' data when they are the lawful copyright owners.⁴³⁰ However, this mechanism carries the risk of potentially having to pay workers additional remuneration, thereby raising the potential overhead costs of

429. See CMS, *The Compulsory Licensing E-Guide: An e-guide from the Global Intellectual Property Group* (Feb. 2021), <https://cms.law/en/media/expert-guides/files-for-expert-guides/cms-compulsory-licensing-global-expert-guide-feb-2021> [<https://web.archive.org/web/20251011015423/https://cms.law/en/media/expert-guides/files-for-expert-guides/cms-compulsory-licensing-global-expert-guide-feb-2021>].

430. DSM Directive, *supra* note 10, at art. 20.

internal AI development and deployment. Valuing workers' data is also legally and economically complex. Nearly every contract adjustment case would involve a difficult and fact-intensive assessment of the economic value of the data, creating fertile ground for disputes and litigation. That in itself could be sufficient to impede or slow down corporate automation projects.

Given these challenges, it is worth considering whether a workers' data exception or limitation should be introduced. Article 4(1) of the DSM Directive already obliges Member States to implement exceptions and limitations for reproductions and extractions of works for text and data mining purposes.⁴³¹ This extends to workers' data, as previously discussed.⁴³² However, this does not mean that organizations are entirely free to use their workers' data, even when they hold the copyright for the underlying work products. The "best-seller" rule in Article 20 to adjust contracts previously entered into still applies to the contracts for the exploitation of their rights.⁴³³ This currently puts companies in an awkward legal situation. They are not free to use the data within their own organization which is derived from their workers without being subject to the potential liability of having to pay further remuneration to those workers. Yet companies are free to use publicly available copyrighted works from third party rightsholders for text and data mining purposes. No compensation has to be paid to rightsholders in such circumstances. But of course, this statement is too simple, and fails to consider that third party rightsholders may have opted-out of text and data mining by reserving their rights under Article 4(3). If that is the case, then the choice companies have is really between "not using at all" third party data sources and "paying some" for workers' data.

The question is whether this is an acceptable compromise. One possible reform would be to redraft Article 4(1) so that it overrides Article 20, allowing companies to use their workers' data for text and data mining purposes without any obligation to provide further remuneration, regardless of the economic value of that exploitation. However, bluntly excluding text and data mining uses from Article 20 could have significant and unintended consequences, many of which are difficult to foresee at this stage. It could lead to a situation where workers' contributions are significantly undervalued, or where companies exploit their workers by a "hire and fire" approach. That is to say, companies employ workers to generate data for automating their tasks and then dismiss them once that data has served its purpose. Such job disposability could exacerbate what is already, in many cases, an unequal bargaining relationship to the detriment of workers. If a workers' data exception and limitation were to be introduced, it would need to strike a careful balance between facilitating corporate innovation and protecting workers' rights. One middle ground could be to allow companies to rely on a "legitimate interest" basis, similar to the GDPR, which would permit the use of workers' data for text and data

431. *Id.* at art. 4(1).

432. *See supra* Section IX.D.1.

433. *Id.*

mining without additional remuneration, provided certain transparency and fairness safeguards are met.⁴³⁴ For example, such a “legitimate interest” rule could permit companies to transparently use workers’ data for automation purposes which do not put workers’ jobs at risk, but if disproportionately impacting the worker it could give rise to additional compensation.

Ultimately, only time will tell if the current system is skewed too much in favor of workers than companies who need reliable and effective access to workers’ data. If that turns out to be the case, we will no doubt notice it. If companies with operations based in the EU struggle to find enough data for their AI or corporate automation projects, or pay too much for it, they will need to make their voices heard to policymakers. If those voices fall on deaf ears, then the EU may come to experience corporate migration in the thousands.

X. WHAT CAN WORKERS DO TO REALIZE THE VALUE OF THEIR DATA?

Workers today find themselves in a difficult position. The companies they work for increasingly rely on their work products as valuable data sources for developing and deploying AI systems. Not only do workers generally receive no additional compensation for this use of their data, but they may also face redundancy if their own work is used to automate the very tasks they perform. Millions of jobs across the world are expected to be lost in the coming years this way. The pressing question is: what can workers do to protect their interests and realize the value of their data?

As discussed throughout this Article, workers currently have few legal tools to rely on in most jurisdictions. Traditional contract and employment laws are not well equipped to address the challenges of a looming “job apocalypse.” A notable exception exists in the EU, where the DSM Directive provides workers with the right to fair remuneration and the ability to seek contract adjustment in specific circumstances. However, this right is exceptional and reserved for cases where “the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.”⁴³⁵ In practice, the employer must have realized economic value “significantly higher” than what was initially paid or expected.⁴³⁶ This means that what has been agreed and discussed between the parties becomes crucial. Although the right to adjust contract is indeed meant to do exactly that, adjust what has been agreed between the parties, what has been mutually intended will impact whether the remuneration is “disproportionately low.” It is, therefore, both an objective and subjective analysis combined.

This framework has important implications for workers when negotiating employment or contractor agreements. Clarity will be king, and workers should

434. GDPR, *supra* note 48, at art. 6(1)(f).

435. DSM Directive, *supra* note 10, at art. 20.

436. *Id.* at recital 78.

carefully scrutinize any copyright assignment or license provisions. If the contract is silent or ambiguous on whether work products can be used as data sources, workers may wish to raise the issue and insist on that the contract explicitly defines the permissible uses of work products and the context in which they may be exploited. Workers who produce valuable data should also maintain evidence of what is, and is not, said during contract negotiations. While jurisdictions differ on the admissibility of pre-contractual discussions for contract interpretation,⁴³⁷ preserving this evidence strengthens the worker's overall position. After entering into the contract, workers are entitled under the DSM Directive to receive "relevant and comprehensive information on the exploitation of their works [. . .] in particular as regards modes of exploitation, all revenues generated and remuneration due," at least annually.⁴³⁸ The transparency obligation provides workers with the legal means for knowing how their works are exploited, which would include using their works for automation purposes. If and when an AI system has been developed using workers' data, workers are also entitled to continuously receive information about its revenue.

Collective action offers another option. Workers should consider leveraging unions or collective bargaining to address the use of work products as data sources. This would not be a new trend. For example, in May 2023, screenwriters in the United States went on strike, demanding that generative AI tools support, rather than replace, human writing.⁴³⁹ The resulting agreement required that AI not be used to generate source material and affirmed that writers could choose whether to use AI as a tool. Importantly, that same agreement also stated that the Writers Guild of America West reserved the right to "assert that exploitation of writers' material to train AI is prohibited by MBA or other law."⁴⁴⁰ The use of workers' data is an industry-wide issue and should, ideally, be resolved as such, rather than forcing workers to negotiate such difficult questions themselves on an individual basis. It is expected that there will be future class action lawsuits, if not union disputes, revolving around the use of workers' data, particularly where large groups of workers have been made redundant due to AI.

Finally, workers should recognize that their copyright arises automatically in nearly every jurisdiction, not only in the country where they reside or where their company is located. Even if they live or work outside the EU, the DSM Directive's

437. In the UK, for example, the general rule is that pre-contractual discussions are inadmissible as evidence to assist in determining the construction of a contract. See *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381 (H.L.) (UK).

438. DSM Directive, *supra* note 10, at art. 19(1).

439. See Alissa Wilkinson, *The Looming Threat of AI to Hollywood, and Why It Should Matter to You*, Vox (May 2, 2023), <https://www.vox.com/culture/23700519/writers-strike-ai-2023-wga> [wayback tk].

440. See Writers Guild of America West, *Summary of the 2023 WGA MBA* (Oct. 24, 2023), <https://www.wga.org/contracts/contracts/mba/summary-of-the-2023-wga-mba> [<https://web.archive.org/web/20251011020747/https://www.wga.org/contracts/contracts/mba/summary-of-the-2023-wga-mba>].

right to contract adjustment could still be relevant, as discussed in this Article.⁴⁴¹ For workers employed by multinational companies, or by organizations that conduct business in the EU, AI systems trained using their data could trigger a right to contract adjustment if that data is exploited in the EU. While the exact scope of these claims remains unsettled and may require judicial clarification, it is possible that only a modest degree of “use” of workers’ data within the EU could be sufficient to establish a valid claim.

XI. WHAT CAN COMPANIES DO TO PROTECT THEIR INTERESTS?

Companies have a strong and legitimate interest in maintaining full access to the data generated within their organizations. Lacking such access could cripple business operations and corporate innovation, and increasingly so in a future driven by AI. The right to contract adjustment under the DSM Directive is expected to be triggered in more exceptional rather than routine cases, where workers’ data forms a uniquely critical component of an AI system or model. Many routine automation projects will remain unaffected, particularly where the workers’ data is generic, widely available, or less reliant on the intrinsic value of the content as a creative work. However, the risk of contract adjustments increases significantly when the data originates from knowledge workers, specialist employees, or individuals in creative and media industries. The risk is also heightened when the same work products are used to train AI systems that automate the very tasks those workers perform, especially if the employees are later made redundant. Similarly, concerns arise where workers’ data is used to generate new inventions or to automate creative processes that produce commercially valuable content. In such scenarios, the economic value derived from the additional use of workers’ outputs can potentially be substantial.

What has been agreed between the parties will similarly become critical in these cases. While the statutory right to contract adjustment cannot be waived, courts will consider what the parties intended and agreed upon when assessing whether the remuneration is “disproportionately low.” Companies can, therefore, reduce risk by influencing relevant factors through careful drafting. Contracts may expressly state that employees’ or contractors’ work products may be used for text and data mining or similar purposes. Where a worker has been clearly informed of such use from the outset, courts are more likely to consider the original remuneration fair, even if the data subsequently generates significant economic value. That said, explicit contractual notice does not eliminate the risk of adjustment. To further protect their position, companies may also consider offering redundancy compensation packages to employees whose roles are automated using AI trained on their own work products. Such redundancy compensation could assist companies with arguing that workers who have been made redundant have been fairly remunerated for the use of their data.

441. See *supra* Sections IX.D.2 and IX.D.12.

Companies using or considering using workers' data as data sources should establish data governance policies that clearly define how the data is collected, stored, processed, and shared. Because the right to contract adjustment could come into play even for companies based outside the EU, it will equally be important to detail where workers' data are stored and used. Internal transparency regarding workers' data will be important not only for reducing the risk of contract adjustment claims, but also to comply with statutory transparency obligations. Article 19(1) of the DSM Directive imposes a proactive duty on companies to provide authors and performers with "relevant and comprehensive information" on the exploitation of their works and the revenues generated, at least on a regular basis.⁴⁴² This obligation applies regardless of whether the author formally requests the information, and there is no indication that works used solely for text and data mining are exempt.⁴⁴³

The legal situation is less clear when workers' data is used for coming up with new inventions. There is a lack of guidance and case law on whether the workers responsible for producing the relevant data could qualify as inventors in patent law, and companies are wise to account for that uncertainty when naming inventors and filing for patent applications.⁴⁴⁴ If a worker would coincidentally be considered an inventor, due to the importance of their underlying data for coming up with the invention, then they will be entitled to claim inventorship and may be statutorily entitled to compensation in patent laws. There is also the possibility that they may be entitled to compensation on a contract adjustment basis in copyright law.

XII. LAST WORDS TO REGULATORS

The governance of workers' data has so far been overlooked in regulations across the world. Currently, the default position is that employers or contracting parties, either by statute or contract, hold the copyright in works created by individuals in the course of their duties. This long-standing rule has provided companies with the freedom and flexibility to use employees' work products as they see fit. In the era of corporate automation, this includes using those work products as data sources, which for many companies will be the most valuable data to use for AI and automation purposes.

The EU is a noteworthy exception. The DSM Directive introduced a right for authors to receive fair remuneration for the exploitation of their works, and a right to seek contract adjustments where that remuneration is disproportionately low. The legislative intent at the time was to address inequitable relationships and correct market failures where authors were undercompensated for the economic value of their works. It is, perhaps, a mere coincidence that the DSM Directive has been drafted in such a way that enables potential contract adjustment claims in

442. DSM Directive, *supra* note 10, at art. 19(1).

443. Prop. 2021/22:278, *supra* note 40, at 232.

444. See *supra* Section IX.D.4 (Scenario 7).

relation to workers' data. Although the legislative history of the Directive confirms that the intention has been for employment and contractor relationships to be covered by the rules, not a single word has been said about the use of copyrighted works as valuable data sources for AI and automation purposes. Nevertheless, the same economic logic applies. This Article has concluded that, if workers' data can generate significantly greater value for companies, especially when used to develop AI systems that automate the very tasks those workers performed, courts may find a basis for contract adjustment in certain cases. This will be particularly relevant in industries where the underlying work products themselves have high value, such as in knowledge-intensive, media, or creative sectors, and where workers are displaced as a result of the AI trained on their work. Though the existence of a "workers' data value gap" will always need to be assessed on a case-by-case basis.

We lack reliable evidence on how workers' data is currently being used. Although this is not surprising, as we are concerned with proprietary data, it makes it much more difficult to assess the scale of the issue or the urgency of a policy response. However, industry trends and news suggest that many companies have already begun, or will soon begin, replacing parts of their workforce with AI. If workers' data is a critical ingredient in these AI systems, we may come to see a new wave of litigation, particularly in the EU for contract adjustment claims. Whether this will strike the right balance between protecting workers and encouraging innovation remains to be seen.

There is, in principle, nothing extraordinary about rewarding workers for valuable contributions to their employers. Employee-invention statutes in patent law have compensated employees for their inventions to their employers for many years, even if the right to patent the inventions has been assigned to their employers and even if they have received compensation contractually for their work. What sets workers' data apart from workers' inventions, however, is that the data will often derive from work products produced in more routine tasks. There is a policy reason to incentivize new inventions, but there is no need to incentivize routine tasks which workers are already paid for. The rationale behind a right to contract adjustment is in many ways different. Instead, it serves as a protectionist instrument to correct market inequalities and even the contracting playing field, where the author often has a weaker bargaining position. That logic extends to many employment and contractor relationships as well, but arguably becomes more complex in the case of workers' data. What makes workers' data unique in many ways is that its value does not necessarily have to correlate with the value of the underlying work product. Depending on the context and application, its value may come from accumulation in the masses, often together with data from other workers. The economics behind workers' data is largely unexplored and this Article has identified a clear demand for further economic research. What is also not clear is if workers actually think that they should be paid more for their workers' data when adding greater value to the companies they work for, or if workers are mainly concerned with using their data to make their own jobs redundant. There is a need to conduct large-scale interviews to obtain this important policy information.

The right to contract adjustment is in many ways a blunt legal instrument. It is designed to address market inequalities *ex post*, relying on fact-intensive, complex and costly discovery and/or litigation. Article 21 of the DSM Directive accounts for that by requiring Member States to offer voluntary alternative dispute resolution mechanisms, but these have little practical impact if parties can simply refuse to participate.⁴⁴⁵ A system that forces each dispute to be litigated individually is unsatisfactory for both workers and companies.

This Article has discussed other alternative legal mechanisms to tackle specifically the use of workers' data. One option would be to create a mandatory opt-out mechanism from text and data mining activities for workers' data, similar to what already exists in the DSM Directive for rightsholders who have not assigned their rights to someone else.⁴⁴⁶ This would give workers control over their data and ensure they are not at the mercy of their employers' decisions. The downside of that is that companies could run into data scarcity issues, if all their workers decide to opt-out of using their work products as data. It also requires workers, who may not be aware of their rights, to take affirmative action by opting-out. Another option would be to treat workers' data similar to personal data and require companies to obtain prior and informed consent from the worker to use their work products as data sources for text and data mining purposes. This could however in practice turn out to favor companies at the cost of workers, if such consent provisions become boilerplate in most employment and contractor agreements. A hybrid approach of resolving that would be to condition the use of workers' data on certain "legitimate interest" factors. For example, companies could be allowed to use the data without workers' consent or having to pay additional remuneration, if they are transparent about such use and if it does not disproportionately disadvantage the worker.

Finally, regulators must confront the novel problem of workers' data being used to make workers themselves redundant. While technological displacement is not new, what is new is that employees' own work products, often protected by copyright, are now being used to build the very systems that replace them. If no legal recourse is provided for workers in these circumstances, there is a risk that some companies come to exploit this asymmetry by hiring workers to produce the data they need for automation purposes and then dismiss the same workers from their jobs. This creates a serious policy concern that warrants regulatory attention, whether through a right to contract adjustment or other legal means.

XIII. CONCLUSION

This Article may come as a wake-up call to companies that have initiated or completed corporate automation projects using workers' outputs as data sources. Conversely, it may offer some hope to workers who have lost, or may soon lose,

445. DSM Directive, *supra* note 10, at art. 21.

446. See *supra* Section IX.E.

their jobs to AI. This Article has examined what legal recourse workers may have against their employers or contractees when their work products are used for AI or automation purposes. While the outlook in most jurisdictions remains bleak, where employment, contract, and AI laws offer little protection, copyright law may provide an unexpected remedy to workers. In the EU, the right to contract adjustment, also known as the “best-seller” rule, under the DSM Directive could alter the legal analysis of using workers’ data and potentially require companies to provide further compensation to workers.

This Article has concluded that a workers’ data value gap could, in certain cases, arise where companies derive significantly greater economic value from using workers’ work products as AI training data than what any agreed compensation reflects. Whether or not this triggers a contract adjustment claim under the “best-seller” rule will depend on a highly fact-specific analysis of the economic value generated versus the remuneration received and agreed upon. The right to contract adjustment is mostly a European legal mechanism, at least for now, and does not exist in the UK or the United States. European copyright law could however come to apply extraterritorially in cases where non-EU based companies use their workers’ data for corporate automation projects deployed in the EU, where workers’ data is stored or processed on servers located in the EU, or where the workers themselves are based in the EU.

In the coming years, the right to contract adjustment is expected to generate new litigation, both individual and collective, as millions of workers face AI-driven displacement. Whether this is a positive or negative development remains an open policy question, and it is uncertain whether copyright law provides the optimal framework to address the challenge. This Article urgently calls for economic and legal research to explore these questions in greater detail. If companies are allowed to claim the majority of the economic benefits from workers’ data without adequately compensating workers, only to later displace those same workers who produced the data, it could lead to a situation where the value of human labor is systematically eroded in the long-term. This could have broader societal implications, including the exacerbation of income inequality and the undermining of both authors’ and workers’ rights in the digital economy. Yet if workers are allowed to claim significant, further remuneration for the use of their data, it could slow the deployment of new AI technologies in industries that need them. Workers’ data is poised to become one of the most valuable corporate assets of the coming decade, and so if companies lack reliable access to such data, innovation could effectively stall. The challenge, therefore, will be to strike a balance between fairness and competitiveness, ensuring that corporate automation advances without systematically undervaluing the human contributions that make it possible.

Once Upon an Infringer: What Similarity Analysis Can Learn From Structural Folkloristics

*Madeline C. Mooney**

© 2025 Mooney. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction, provided the original author and source are credited.

TABLE OF CONTENTS

I.BACKGROUND TO NARRATOLOGY	168
A. Overview and Major Ideas	168
1. General History	168
2. Modern Thought and Applications	169
B. Folkloristics and the ATU Index	170
II.THE COPYRIGHT LANDSCAPE.....	173
A. Current Approaches to Narrative Infringement	173
1. The Issue	173
2. <i>Funky Films</i>	173
3. <i>Nichols</i>	175
B. Abstraction-Filtration-Comparison (AFC) in Software.....	176
1. <i>Altai</i> and Software Infringement Context.....	176
2. The AFC Test	177
III.ABSTRACTION-FILTRATION-COMPARISON FOR NARRATIVE WORKS...	178
A. The Adapted Test	178
1. Abstraction	178
2. Filtration	179
3. Comparison.....	180
B. Applying the Test.....	181
1. <i>Funky Films</i>	181
2. <i>Nichols</i>	183
C. In Practice	185
1. The Role of Experts.....	185
2. The Role of Juries.....	186
IV.CONCLUSION	186

INTRODUCTION

Few things can reveal more about a culture than the stories it chooses to tell. From the epics of Greece and Mesopotamia to the comedies gracing modern televisions, narratives are unparalleled in their ability to both reflect and capture the human mind. Because of this universal social significance, the study of narratives and their appeal is a time-honored academic tradition. Efforts to break stories down into their constituent elements have especially proliferated within the area of folkloristics, where indexing systems are used to trace the historical lineages and permutations of familiar stories and characters. It is precisely the universality, both cultural and temporal, of the elements identified by folklorists which indicates that the methodology employed in that discipline need not be limited to the study of traditional myths and fairy tales but might also be extended to the more contemporary modes of storytelling driving the creative economy.

The centrality of storytelling to human culture is naturally reflected in the economic activity surrounding the media industries: For example, the global box office generated an estimated 33.9 billion dollars in 2023,¹ and the domestic publishing industry made a revenue of 29.9 billion dollars that same year.² While the financial success possible to creators is secured in part by robust copyright laws, this possibility makes it all the more enticing to attempt to bypass those laws and profit from another's creative effort. This infringement need not be literal: As Judge Hand recognized in *Nichols v. Universal Pictures Corp.*, without some extension of protection beyond the verbatim level, "a plagiarist would escape by immaterial variations."³ This need for extended protection must be balanced with copyright law's idea/expression dichotomy: Only expressions, not the ideas underlying them, are afforded legal protection. Where that line is to be drawn is a question which has perplexed courts, as evinced by the myriad analytical frameworks developed across the circuits and the often vague and conclusory decisions in cases involving narrative comparisons.

* J.D. Candidate, Columbia Law School, Class of 2026; B.A., University College London, Class of 2023. Warm thanks to my advisor, Avery Katz, to the staff of Columbia Journal of Law & the Arts, and to my family and friends. You have all made this Note a joy to write.

1. Nancy Tartaglione, *Global Box Office Reaches \$33.9B in 2023, Up 31% on 2022—Analysts*, DEADLINE (Jan. 4, 2024), <https://deadline.com/2024/01/global-box-office-2023-total-barbie-super-mario-bros-oppenheimer-international-china-1235694955/> [<https://web.archive.org/web/20241225085824/https://deadline.com/2024/01/global-box-office-2023-total-barbie-super-mario-bros-oppenheimer-international-china-1235694955/>].

2. Jim Milliot, *Publishing Revenue Fell Slightly in 2023, but Unit Sales Dropped 5.7%*, PUBLISHERS WEEKLY (Aug. 22, 2024), <https://www.publishersweekly.com/pw/by-topic/industry-news/financial-reporting/article/95788-publishing-industry-sales-fell-slightly-in-2023.html> [<https://web.archive.org/web/20241230181358/https://www.publishersweekly.com/pw/by-topic/industry-news/financial-reporting/article/95788-publishing-industry-sales-fell-slightly-in-2023.html>].

3. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

Scholarship in the area of structural narratology, along with developments in analysis for software infringement, may offer valuable guidance in this realm. By applying a rigorous categorical methodology to narratives and their elements, scholars have provided courts with tools to examine stories at different levels of abstraction, therefore making it easier to distinguish universal structures and elements from protectable creative expression. Such a methodology would offer greater predictability for parties and creators, decisions less likely to be clouded by personal and cultural biases, and greater transparency as to which elements of a narrative copyright law is actually designed to protect.

This Note proposes that through an understanding of structural folkloristics, specifically the Aarne-Thompson-Uther (ATU) index and the *Motif-Index of Folk-Literature*, courts can modify the abstraction-filtration-comparison (AFC) test originally developed within the software infringement context to narrative works.⁴ Part I will provide an overview of structural narratology as an intellectual tradition, with special attention to its application in folkloristics and the methodologies used within that discipline. Part II will examine the state of narrative comparisons in copyright law, with *Funky Films, Inc. v. Time Warner Entertainment Co.* and *Nichols* as examples, as well as the more structure-based AFC test for software infringement.⁵ Part III will present a model informed by work in structural folkloristics for applying that test to narrative works, and will re-analyze *Funky Films* and *Nichols* through that proposed lens. The Note will conclude with insights into the roles of judges, juries, and narrative scholars in applying the ideas articulated here. As the scholarship reveals, the study of narrative is very much the study of copying and retelling, which makes it an appropriate ally for the copyright system.

I. BACKGROUND TO NARRATOLOGY

A. OVERVIEW AND MAJOR IDEAS

1. General History

Narratology is the study of narrative structures and how such structures convey meaning. Its central justification is the vast, lofty axiom that narrative is the universal means through which the human mind constructs and articulates meaning.⁶ However, the emphasis within the discipline on structure and the identification of constituent narrative elements tends to give rise to granular, detail-dependent theories. The discipline's central ethos, that every narrative has a discernable structure which encompasses its aesthetic appeal, has served as a valuable guiding principle for literary theorists and social scientists.

4. STITH THOMPSON, MOTIF-INDEX OF FOLK-LITERATURE (1955–58).

5. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072 (9th Cir. 2006); *Nichols*, 45 F.2d 119.

6. See, e.g., HAYDEN WHITE, THE CONTENT OF THE FORM 1 (1982).

Ideas akin to narratology can be identified in writings as early as Aristotle's *Poetics*, which extolled rules for the construction of a tragic poem,⁷ but its genesis as a strand of modern literary criticism is generally attributed to the school known as the Russian Formalists.⁸ This movement, which flourished from the 1910s to 1930s, emphasized the study of literature as its own product of human life divorced from other disciplines such as philosophy and psychology.⁹ In analyzing literature without the intermediary lens of another discipline from the humanities or social sciences, these theorists embraced a methodology which viewed a text as a hierarchal set with its own internal structure, and they viewed these structures as all that were needed to fruitfully delineate genres and compare texts.¹⁰

In the twentieth century, the most prominent theorists to work within the narratology tradition include Roland Barthes, who used semiotic theories to analyze the structure of an Honoré de Balzac novella,¹¹ Claude Lévi-Strauss, known for his work on the conceptual oppositions across various mythology systems,¹² and Tzvetan Todorov, who coined the term "narratology" and employed a methodology akin to formal logic or linguistic syntax in his analysis of the tales in Boccaccio's *Decameron*.¹³ Central to this scholarship was the underlying tenet that narratology identifies and examines naturally occurring features of human storytelling of which the storyteller might not be consciously aware.

In the mainstream consciousness, however, ideas resembling structural narratology have proliferated as prescriptive models designed to help writers, especially screenwriters, craft compelling and profitable stories by following rules regarding plot points and character archetypes (a trend instigated, perhaps, by George Lucas's admission that he modeled the plot of *Star Wars* on Joseph Campbell's work in comparative mythology).¹⁴ In light of the profit motive for successful creators, the appeal of a theory which attempts to identify and describe the core of narrative aesthetic appeal is quite obvious. It is this impact on the stories told by the contemporary entertainment industry that warrants an examination of the theory and how its goal of an objective methodology might be relevant in infringement analysis.

2. Modern Thought and Applications

By taking inspiration from more structural disciplines within the humanities, an idea exemplified by Todorov's work, modern scholars have begun to catalog the iterative nature of narratives. Todorov's line of thought has been continued by

7. ARISTOTLE, *POETICS* (Malcolm Heath trans., 1996).

8. See generally PETER STEINER, *RUSSIAN FORMALISM* (1984).

9. *Id.* at 22.

10. *Id.* at 32.

11. ROLAND BARTHES, *S/Z* (Richard Miller trans., 1975).

12. Claude Lévi-Strauss, *The Structural Study of Myth*, 68 J. AM. FOLKLORE 428 (1955).

13. TZVETAN TODOROV, *GRAMMAIRE DU DÉCAMÉRON* [GRAMMAR OF THE DECAMERON] (1969).

14. See, e.g., BLAKE SNYDER, *SAVE THE CAT!* (2005); JOSEPH CAMPBELL, *THE HERO'S JOURNEY* 186–87 (Phil Cousineau ed., 3rd ed. 2003).

Henri Wittmann, who used the term “narreme” to describe the smallest discernible unit of narrative structure.¹⁵ Central to this concept is a linguistic metaphor; the narreme is analogous to the morpheme (smallest linguistic unit with independent meaning) and phoneme (smallest possible phonetic unit). In Wittmann’s paradigm, narremes are constituents of “narrative algorithms” in a hierarchical system which resembles generative grammar as developed by Noam Chomsky.¹⁶

When narratives are understood as being comprised of hierarchically structured elements such as narremes and algorithms, their similarities and differences become more readily visible. This feature of the methodology has proven especially useful in the area of folkloristics, as these constituent elements, and their levels of centrality to the narratives in question, can allow researchers to determine the evolutionary paths taken by folktales. When certain elements are compared, they might reveal when and where related tales branched off from each other, and how these differences might reflect the cultures and time periods in which they emerged. For example, phylogenetic research into variations of the “Little Red Riding Hood” story suggest that East Asian versions of the tale may represent a hybrid form of two distinct European tale types, and this may reflect a consistent pattern of local modification associated with “specific ecological, political, or religious variables.”¹⁷ In this way, structural narratology illuminates the ways in which stories are copied and retold, and the process by which a seemingly new narrative can owe its origin to a distant ancestor. That similarity exists on a spectrum is an axiom underlying the project of comparative folkloristics.

B. FOLKLORISTICS AND THE ATU INDEX

Folkloristics is the branch of anthropology concerned with folklore, a culture’s shared traditional body of expression and belief. It emerged as an academic discipline in nineteenth century Europe with publications of oral narratives collected through field research, such as those of the Brothers Grimm.¹⁸ Perhaps due to its lineage as a social science rather than as a pure branch of the humanities, there has long been an emphasis within the discipline on objective methodology and categorization, an emphasis which naturally opens the field to influence from work in structural narratology.

15. Henri Wittmann, *Topics in the Theory of Narrative Algorithms*, 3 TRAVAUX LINGUISTIQUES 1 (1974).

16. Henri Wittmann, *La Structure de Base de la Syntaxe Narrative dans les Contes et Légendes du Créole Haïtien* [The Basic Structure of Narrative Syntax in Haitian Creole Tales and Legends], in POÉTIQUES ET IMAGINAIRES: FRANCOPLYPHONIE LITTÉRAIRE DES AMÉRIQUES [POETICS AND IMAGINARIES: LITERARY FRANCOPLYPHONY OF THE AMERICAS] 207 (Pierre Laurette & Hans-George Ruprecht, eds., 1995).

17. Jamshid J. Tehrani, *The Phylogeny of Little Red Riding Hood*, 8 PLOS ONE 1, 9 (2013).

18. Jack Zipes, *How the Grimm Brothers Saved the Fairy Tale*, 36 HUMANITIES (2015), <https://www.neh.gov/humanities/2015/marchapril/feature/how-the-grimm-brothers-saved-the-fairy-tale> [https://web.archive.org/web/20241226181851/https://www.neh.gov/humanities/2015/marchapril/feature/how-the-grimm-brothers-saved-the-fairy-tale#expand].

An early figure exemplifying the drive within folkloristics towards objective methodology was the Soviet scholar Vladimir Propp, a member of the Russian Formalist school. In his 1928 book *Morphology of the Folktale*, Propp analyzed one hundred Russian fairy tales and attempted to deconstruct them into their simplest constituent elements.¹⁹ In so doing, he identified thirty-one narrative elements, or “functions,” which consistently occur in a specific order, although any given tale need not include all thirty-one.²⁰ Seven character archetypes, such as the “donor” and the “false hero” are also identified.²¹ While this project was rather narrow in scope, the ethos of trying to map the metaphorical narrative genome of a specific culture’s output was invaluable in establishing the possibility of evaluating similarity between works descended from the same generic tradition.

In contemporary folkloristics, the most widely used system for cataloging folktales is the Aarne-Thompson-Uther (ATU) index, which summarizes thousands of narrative types and groups them together according to their similarity. The index as it exists today is the result of a series of expansions dating back to its initial German publication in 1910 by Antti Aarne.²² Throughout the twentieth century, it was translated, revised, and expanded by Stith Thompson,²³ and was most recently expanded in 2004 by Hans-Jörg Uther.²⁴ It is used in tandem with Thompson’s *Motif-Index of Folk-Literature*, which catalogues thousands of common motifs and stock characters; categories of motifs include such things as “deceptions” and “identity tests.”²⁵ While Propp initially criticized this project as overlooking underlying narrative functions in favor of more salient plot motifs, its strength is in its applicability across different cultures and time periods as well as in its flexibility.²⁶ This flexibility of contemporary folkloristics combined with the structured methodology of a social science makes this discipline a relevant lens through which to analyze contemporary narratives and their similarities, a task demanded by copyright law.

In demonstrating how these resources function, it is helpful to examine part of the ATU entry for a familiar tale, “Cinderella” (it is located at ATU 510A and is a subtype of the more general “Persecuted Heroine” narrative type).²⁷ The bracketed citations are to entries in the *Motif-Index*, and parentheticals refer to alternative motifs:

19. VLADIMIR PROPP, *MORPHOLOGY OF THE FOLKTALE* (Laurence Scott trans., 2d ed. 1968).

20. *Id.* at 25.

21. *Id.* at 79–81.

22. Antti Aarne, *Verzeichnis der Märchentypen [List of Fairy Tale Types]*, 3 FOLKLORE FELLOWS COMM’NS 1 (1910).’’

23. See, e.g., Stith Thompson, *The Types of the Folktale: A Classification and Bibliography*, 74 FOLKLORE FELLOWS COMM’NS 1 (1927); Stith Thompson, *The Types of the Folktale: A Classification and Bibliography*, 184 FOLKLORE FELLOWS COMM’NS 1 (1961).’’

24. Hans-Jörg Uther, *The Types of International Folktales: A Classification and Bibliography, Based on the System of Antti Aarne and Stith Thompson*, 284–286 FOLKLORE FELLOWS COMM’NS (2004).’’

25. STITH THOMPSON, *MOTIF-INDEX OF FOLK-LITERATURE* (rev. ed. 1955–1958).

26. PROPP, *supra* note 19, at 5.

27. Uther, *supra* note 24, at 293–94.

A young woman is mistreated by her stepmother and stepsisters [S31, L55] and has to live in the ashes as a servant. When the sisters and the stepmother go to a ball (church), they give Cinderella an impossible task (e.g. sorting peas from ashes), which she accomplishes with the help of birds [B450]. She obtains beautiful clothing from a supernatural being [D1050.1, N815] or a tree that grows on the grave of her deceased mother [D815.1, D842.1, E323.2] and goes unknown to the ball. A prince falls in love with her [N711.6, N711.4], but she has to leave the ball early [C761.3]. The same thing happens on the next evening, but on the third evening, she loses one of her shoes [R221, F823.2].

The prince will marry only the woman whom the shoe fits [H36.1]. The stepsisters cut pieces off their feet in order to make them fit into the shoe [K1911.3.3.1], but a bird calls attention to this deceit. Cinderella, who had first been hidden from the prince, tries on the shoe and it fits her. The prince marries her.

Combinations: This type is usually combined with episodes of one or more other types, esp. 327A, 403, 480, 510B, and also 408, 409, 431, 450, 511, 511A, 707, and 923.²⁸

The index's utility in comparing tales is evident if the entry for "Cinderella" is compared with that of "Peau d'Asne" [Donkey Skin], a related story at ATU 510B:

A king promises his wife on her deathbed [M255] only to marry another woman who is as beautiful as she is (whom a particular ring fits). Because she is the only one who meets this condition, the king wants to marry his grown daughter. In order to delay the wedding, the young woman asks him to give her dresses like the sun (gold), the moon (silver), and stars (diamonds), and a coat made of many different kinds of fur (a covering of wood). After he provides all these, the daughter runs away from her father [T311.1] and, disguised in the ugly skin [K521.1, F821.1.3, F821.1.4], works as a kitchen maid (goose-girl) in another castle. Cf. Types 706, 706C.

When a series of feasts is held in the castle where she works, the young woman secretly puts on her splendid dresses. The prince falls in love with her [N711.6] but does not recognize her as the kitchen maid [R255]. On the following days he treats the kitchen maid badly. During the feasts he asks the beautiful woman where she comes from, and she gives cryptic answers that refer to how he had treated the kitchen maid [H151.5]. He gives her a ring. Then the prince becomes lovesick. In her character as kitchen maid, she slips his ring into his soup (bread). He finds her [H94.2, H94.4] and marries her.

Sometimes the young woman is discovered while she is bathing or dressing instead of being recognized through a token.²⁹

These tales are similar in that both follow a noblewoman forced into humble labor by parental oppression, who must then be identified by her princely lover. However, they differ notably in their more granular motifs, as evinced by the *Motif-Index* citations. These differences, despite the similar narrative appeal, illuminate the multiple levels at which similarities between narratives can be analyzed, as well

28. *Id.*

29. *Id.* at 295.

as the utility of specifically delineated elements. While a level of subjectivity was certainly employed in the cataloging and identifying of tales and motifs, the result is a clear and reasonable methodology which could inspire new analytical methods in contemporary copyright law.³⁰

II. THE COPYRIGHT LANDSCAPE

A. CURRENT APPROACHES TO NARRATIVE INFRINGEMENT

1. The Issue

The method of narrative classification and delineation exemplified by structural folkloristics has not yet reached copyright law, a discipline often concerned with comparing narrative works in a visible, meaningful way. While judges across different circuits have articulated principles as to how narrative comparisons should be done, and have sometimes even alluded to examining works across different levels of abstraction, their approaches have often been subjective and are seldom thoroughly explained.³¹

In illustrating this problem, this Note will analyze the reasoning, and attempts to set forth standards for narrative comparisons, in two cases from the Second and Ninth Circuits. As is evinced by dicta in these cases as well as by precedent in the software context, copyright law is open to more structured, objective methodologies in determining similarity, and, as demonstrated below, many of the issues this Note will identify could be mollified if such an approach were employed in narrative cases.

2. *Funky Films*

The Ninth Circuit case *Funky Films, Inc. v. Time Warner Ent. Co.* exemplifies the “extrinsic” and “intrinsic” tests, which respectively pertain to objective similarity as decided by the judge and to an ordinary viewer’s observations.³² The latter asks the jury to consider “the response of the ordinary reasonable person” based on the works’ “total concept and feel,” while the former may be applied at summary judgment.³³ As this is an appeal from summary judgment, only the extrinsic test is applied, and in doing so the court alludes to structuralism in identifying particular

30. The methodology used by folkloristics is similar to ones already present in the legal setting: consider, for example, the West Key Number System, which identifies elements through which to classify cases and identify similarity. See THOMSON REUTERS, *Efficient Legal Research: Why You Need the West Key Number System* (May 20, 2025), <https://legal.thomsonreuters.com/blog/why-you-need-the-west-key-number-system> [<https://web.archive.org/web/20251006111709/https://legal.thomsonreuters.com/blog/why-you-need-the-west-key-number-system/>].

31. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

32. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072 (9th Cir. 2006).

33. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985).

elements to compare.³⁴ However, the court seems to disregard any sense of hierarchy or relative centrality within the elements of a narrative, and the reasoning seems to rely too much on the court's own conclusions about which elements are and are not protectable.³⁵ As such, this analysis might have benefited from a more clearly delineated methodology with expert input, which might have alleviated some of the inherent problems in asking any individual to discern "objective" similarity.

The works at issue undoubtedly bear some resemblance in their premises. Plaintiffs/appellants are owners of *The Funk Parlor*, a screenplay about brothers who inherit their father's funeral home, one of whom becomes romantically involved with a woman who, unbeknownst to him, is a serial killer.³⁶ The allegedly infringing work is *Six Feet Under*, an HBO series which similarly deals with the personal lives of brothers who inherit a funeral home, but which includes additional family members and lacks the murder plotline.³⁷ The appellants allege multiple similarities across different levels of granularity, from minor gags to the overarching idea (although not verbatim plagiarism).³⁸

In applying the extrinsic test, meant to entail an observation rooted in more objectivity than the reaction of an ordinary audience member, the court acknowledges that any narrative can be examined for its constituent elements:

The extrinsic test focuses on "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events" in the two works. In applying the extrinsic test, this court "compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters."³⁹

The court sets out six domains across which to compare elements of both works: plot, characters, themes, setting/mood/pace, dialogue, and sequence of events.⁴⁰ In affirming summary judgment for the defendant, the court concludes that the extrinsic test is failed because "[t]he similarities recounted throughout appellants' brief rely heavily on *scènes à faire*—not concrete renderings specific to 'The Funk Parlor'—and are, at best, coincidental. Consequently, the two works are not substantially similar."⁴¹

In identifying those specific domains within which to compare specific elements, the court approaches an analytical methodology inspired by narratology, and implicitly acknowledges that if its analysis can have any claim to objectivity, some sort of methodology must be visibly employed. However, the domains chosen lack the sort of hierarchical relationship which the ATU index and Wittmann's

34. *Funky Films*, 462 F.3d at 1076–77.

35. *Id.* at 1078–81.

36. *Id.* at 1075.

37. *Id.* at 1075–76.

38. *Id.* at 1077–78.

39. *Id.* at 1077 (internal citations omitted).

40. *Id.* at 1078–81.

41. *Id.* at 1081.

scholarship have shown to be a useful framework through which to understand and compare narratives. The court's analysis could also be made clearer if it provided more guidance as to which elements are the most central to the work's expressive quality.

Lessons from structural folkloristics would be relevant here in that the ATU index's organization of similar tales establishes a hierarchy based on the centrality of certain elements, and the motifs/*scènes à faire* are identified by experts. Because the works at issue in this case are both dark comedies in a contemporary setting, the *Motif-Index* itself would be of limited utility in identifying elements, but it would be able to serve as a model for similar expert-driven indexing projects for different genres, media, and time periods.

A more structured methodology would also reduce the subjectivity inherent in even the supposedly objective extrinsic test. There has long existed in copyright law a desire for judges to abstain from making aesthetic judgments, which an unguided evaluation of the significance of certain narrative elements might consciously or subconsciously prompt.⁴² There is even some evidence of this phenomenon in the *Funky Films* opinion, which describes some characters as being "less developed" and others as possessing greater "complexity."⁴³ This opinion exemplifies the current lack of methodological standards in narrative comparison analysis, despite the implicit awareness that some methodology is necessary.

3. *Nichols*

The Second Circuit opinion *Nichols v. Universal Pictures Corp.* clearly invokes the idea of narrative elements being situated within different levels of abstraction, but the court is rather conclusory in its application of the theory it posits.⁴⁴ Also palpable in this opinion is the court's disdain for literary analysis having any place in the courtroom, especially as it pertains to the use of expert witnesses.⁴⁵ However, the court overlooks the possibility that experts in narratology and specific genres might *aid*, rather than hinder, an analysis using the abstractions theory upon which the court relies.

The plaintiff alleged that her play, *Abie's Irish Rose*, was infringed by the film *The Cohens and the Kellys*.⁴⁶ Both works deal with a couple, one of whom is Jewish and the other Irish Catholic, who fall in love despite disapproval from their families, and whose families abandon their feud after children are born to the couple.⁴⁷ The court affirms a finding for the defendant, as the works have distinct high-level themes

42. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

43. *Funky Films*, 462 F.3d at 1079.

44. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

45. *Id.* at 123 ("We hope that in this class of cases such evidence [from expert witnesses] may in the future be entirely excluded, and the case confined to the actual issues; that is, whether the defendant copied it, so far as the supposed infringement is identical.").

46. *Id.* at 120.

47. *Id.* at 120–21.

(religion in the plaintiff's, and class in the defendant's) and the shared characters are too underdeveloped to be protectable.⁴⁸ The case is less relevant for its factual analysis and more so for its theory of abstractions (as the court gives little insight into how it applies the principles it delineates). The opinion reflects an understanding of narratives as layered, hierarchal structures, and also recognizes a spectrum of protectability of the elements along those layers. Such an understanding naturally invites a more detailed methodology:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.⁴⁹

Despite recognizing that narratives are composed of elements from multiple levels along the idea/expression spectrum, the court criticizes the length of the record, including the use of expert witnesses.⁵⁰ However, an abstraction analysis of the type implicitly proposed in the opinion would require expert input, or at least attention to published scholarship, if it is to be as consistent and objective as possible. While judges might believe that their knowledge of copyright doctrine entitles them to attempt to fix the boundary of protection independently, they risk imposing underinformed judgments when they neglect scholarly insight into narrative structures and common elements of a genre. While absolute objectivity may be ultimately impossible, the Second Circuit's abstraction analysis, which was eventually developed for software comparison cases, reflects a methodology from which judges seeing narrative cases could take inspiration.

B. ABSTRACTION-FILTRATION-COMPARISON (AFC) IN SOFTWARE

1. *Altai* and Software Infringement Context

In the context of software infringement, a specifically delineated methodology has developed which lends similarity analyses the sense of transparency and objectivity that is often lacking in narrative comparisons. Software is considered an "expressive work" like novels and films, and is therefore protected by copyright law.⁵¹ Despite the obvious differences between software programs and more traditional expressive works, that they are grouped together in this way suggests

48. *Id.* at 121-22.

49. *Id.* at 121.

50. *Id.* at 123.

51. *See, e.g.,* Google LLC v. Oracle Am., Inc., 593 U.S. 1, 22 (2021) (noting that computer code has both expressive and functional qualities).

that an analytical methodology developed for the former might also be relevant in cases involving the latter.

In *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, the plaintiff, Computer Associates, created a job scheduling program (a program which automatically controls a computer's background tasks), which included a component designed to allow it to run on different operating systems.⁵² Altai, in creating its own job scheduler, recruited a former Computer Associates employee who extensively copied from the compatibility component.⁵³ In response to an earlier lawsuit, Altai rewrote its program without the copied material, and Computer Associates alleged that its non-literal expression was still being infringed.⁵⁴ While the court acknowledged that software infringement need not be literal, it found that in this case, there was no non-literal infringement either through application of the test it developed in the opinion.⁵⁵

2. The AFC Test

While the Second Circuit formulated this test within the software, rather than the narrative, context, the structural methodology developed within folkloristics invites the possibility of modifying this test so that narrative cases can be more clearly and easily analyzed. In fact, the *Altai* court cites *Nichols* for originating the idea of abstraction levels in copyright law.⁵⁶ Despite its specific technical context, this test is descended from a wider tradition of copyright similarity analysis and could be reapplied in a more expansive range of cases.

In applying the test, the court first identifies a software program's characteristics at each level along a spectrum of increasing abstraction, from the written code itself (most protectable) to the software's ultimate function (an unprotectable idea).⁵⁷ The program is therefore understood as having a hierarchal structure, with each element being a constituent of some higher-level structure. A layer's abstraction level is inversely correlated with its protectability: "A program has structure at every level of abstraction at which it is viewed. At low levels of abstraction, a program's structure may be quite complex; at the highest level it is trivial."⁵⁸

After identifying the levels of abstraction, the court then "filters out" unprotectable material.⁵⁹ This includes elements dictated by practical considerations (for example, hardware specifications), elements which any program of that nature must carry (a sort of *scènes à faire* doctrine as applied to software, which serves as further evidence of this test's ultimate descent from

52. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 698–99 (2d Cir. 1992).

53. *Id.* at 699–700.

54. *Id.* at 698–701.

55. *Id.* at 702, 715.

56. *Id.* at 706.

57. *Id.* at 706–07.

58. *Id.* at 707.

59. *Id.* at 707–10.

narrative analysis), and anything taken from the public domain.⁶⁰ When these elements are excluded from the analysis, the structure which remains will retain its hierarchical nature, but it will be leaner and restricted to only those few, less abstract levels which copyright law seeks to protect. This facilitates an easier comparison between the two works.

The final step of this analysis is to compare what remains of each program after filtration, described by the *Altai* court as the “golden nugget” of protectable expression.⁶¹ In comparing these expressions, the court focuses not only on if copying appears to have occurred, but also its significance: “At this point, the court’s substantial similarity inquiry focuses on whether the defendant copied any aspect of this protected expression, as well as an assessment of the copied portion’s relative importance with respect to the plaintiff’s overall program.”⁶² The hierarchical understanding upon which the AFC test, as well as much structural narratology, rests aids in the significance analysis. An especially significant element is likely to strongly influence the character of the higher-level structure of which it is a constituent.⁶³

When the standard for analysis in software infringement cases is compared with the analytical tradition in narrative infringement cases, it might be seen that the former is easier to apply consistently and depends less on opaque, subjective judgments. While software’s technical nature as opposed to the more traditionally creative media likely explains courts’ ready adoption of a structure-dependent methodology, the existence of a rigorous and continually updated cataloging system for folktales demonstrates that such a methodology might also be possible in the narrative context.

III. ABSTRACTION-FILTRATION-COMPARISON FOR NARRATIVE WORKS

A. THE ADAPTED TEST

1. Abstraction

In applying a version of the AFC test to narrative works, a hierarchy of increasingly abstract layers must be established analogous to that which exists for software. While *Nichols* and *Funky Films* both mention elements of a narrative which might be relevant, no court has laid out any sort of workable hierarchy. Such a hierarchy, then, may be informed by the arrangement of cataloging systems such as the ATU index, as well as by narratological work inspired by generative grammar’s hierarchies (such as that of Wittmann). A workable abstraction hierarchy for narrative works, from most to least protectable, might look like this:

60. *Id.*

61. *Id.* at 710.

62. *Id.*

63. For example, the specific character of the wicked stepmother contributes strongly to the more abstract structure of Cinderella as “persecuted heroine.”

- a. The literal text/images of the work.
- b. The “narremes,” to adopt the term used by Wittmann.⁶⁴ It is likely that a precise definition would be somewhat challenging, and it might be easiest to define this level in relation to those between which it sits. For the sake of this Note, narremes will be defined as the most granular non-literal elements to carry any narrative function. An example from “Cinderella” would be the “tree that grows on the grave of her deceased mother” in certain versions of the story.⁶⁵
- c. The “narrative algorithms,” a level to which the generative grammar metaphor is particularly relevant.⁶⁶ The subtypes of the ATU index (for example, the structural differences which place “Cinderella” and “Peau d’Asne” under the same number but different entries in the index)⁶⁷ would lie between this level and the next one, depending on their level of delineation. Narrative algorithms would be most analogous to the motifs (both characters and events) identified in the *Motif-Index*.
- d. Broader plot structure. This would identify the interactions between the most salient motifs. For example, a plot structure in which a prince falls in love with a persecuted heroine.
- e. Overarching theme, abstractly stated. For example, love, religion, deception.

While the task of dissecting a narrative, especially a lengthy or complex one, in this way may appear daunting, a court need not delineate every element across every level of abstraction. It could instead identify only those levels and elements alleged to be copied, as well as any significant differences which weigh against a finding of infringement. For example, the *Funky Films* court appropriately compares the works only across those elements appellants claim are similar, while still noting significant points of difference (such as the mother in *Six Feet Under*, “a strong-willed woman who struggles to overcome her lingering maternal instincts over her now-grown children” who lacks an analog in *The Funk Parlor*).⁶⁸ That *Six Feet Under* is comprised of sixty-three episodes also underscores the practicality of a targeted rather than thorough abstraction analysis.⁶⁹

2. Filtration

In the next step of the analysis, unprotectable elements are to be identified and extracted from consideration. While some levels of abstraction are obviously

64. Wittmann, *supra* note 15, at 2.

65. Uther, *supra* note 24, at 293.

66. Wittmann, *supra* note 16.

67. Uther, *supra* note 24, at 293–295.

68. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1078-79 (9th Cir. 2006).

69. *Six Feet Under*, IMDB, <https://www.imdb.com/title/tt0248654/> [https://web.archive.org/web/20250223192235/https://www.imdb.com/title/tt0248654/] (last visited Feb. 23, 2025).

protectable or unprotectable (such as the verbatim level and the overarching theme level), others present more of a challenge in discerning the protectability of their elements.

Narremes, and to a lesser extent algorithms, might be either unprotectable tropes or protectable units of expression depending on their delineation. As such, narremes might be viewed not only as the smallest non-verbatim unit of narrative meaning, but also as the most broadly defined unit of “expression” as opposed to “idea.” However, it is not beyond the realm of possibility that a narrative algorithm might be a unit of protectable expression if it represents an especially original combination of narremes.⁷⁰

At this stage, the idea of a motif cataloging system is relevant in identifying which elements are so commonplace as to belong to the public domain. The *Motif-Index* itself, despite its history of updates and the universality of many of the elements it identifies, would be of limited utility in many cases involving niche genres, more contemporary settings, or non-Western cultures. This is why analogous cataloging projects and research into all forms of narrative art, regardless of traditional social stature, should be essential scholarly aims, and why courts should be open to expert input in narrative analyses.⁷¹

3. Comparison

The court is then tasked with comparing the metaphorical “golden nuggets” of protectable expression.⁷² Regardless of the methodology used to reach this point, this is one area of the analysis in which subjectivity is difficult to reduce. As the *Nichols* court noted, there is no bright-line point at which similarity becomes infringement short of verbatim copying.⁷³ However, the inherently subjective nature of this final stage is mitigated by the structured, scholar-informed methodology underlying the abstraction and filtration stages.

As the court compares the protectable elements of the works at issue, two guiding principles can be identified. First, the higher the level of abstraction, the more tolerant the court should be of similarity, and second, the relative importance of a copied element within the plaintiff’s work should be considered (as was noted in *Altai*).⁷⁴ Any comparison must be carried out in a transparent and fully informed

70. While it is likely theoretically possible, it must be conceded that an example of a protectable narrative algorithm is exceedingly difficult to derive. Such an algorithm would likely be so novel as to be tied to the genesis of an entirely new genre. Even though this type of speculative narratology is outside the scope of this Note, it should be noted that user-driven “new media” and artificial intelligence are worthy of attention in this regard. See generally Dan L. Burk, *Copyright and Hypernarrative*, 31 L. & LITERATURE 1 (2019) (exploring the rise of interactive texts, such as video games, which challenge the conventional notions of narrative and authorship underlying copyright law).

71. It should be noted that cataloging projects similar to the kind proposed here are already used in the legal field. See THOMSON REUTERS, *supra* note 30.

72. *Computer Assocs. Int’l, Inc. v. Altai*, 982 F.2d 693, 710 (2d Cir. 1992).

73. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

74. *Altai*, 982 F.2d at 710.

manner, and as further illustration of how the AFC test might be adapted to the narrative context, this Note will now re-analyze *Funky Films* and *Nichols* through this proposed lens.

B. APPLYING THE TEST

1. *Funky Films*

As this analysis will show, the similarities between the works are mostly confined to the higher, and less protectable, levels of abstraction. Although the works at issue here take place in contemporary settings and are therefore comprised of many elements not found in traditional folklore, this analysis demonstrates that the principles embodied by structural folkloristics are relevant to infringement analysis even if not the substantive elements.

In delineating the levels of abstraction across which the two works are structured, a table is provided. The least abstract level, literal text and images, is excluded in the interest of space and especially because literal copying was not alleged in this case. The narreme level is limited to only those elements most relevant to the analysis:

	<i>The Funk Parlor</i> ⁷⁵	<i>Six Feet Under</i> ⁷⁶
Narremes	<ul style="list-style-type: none"> • Suicide of father. • Deteriorating funeral parlor. • Love interest: aspiring nun by day, serial killer by night who murders protagonist's brother. 	<ul style="list-style-type: none"> • Father killed in hearse accident.⁷⁷ • Dead father as ghostlike mentor, resolves problems he was unable to in his lifetime. • Love interest: massage therapist met on a plane. • Love interest: gay police officer met at church.

75. *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1075 (9th Cir. 2006).

76. *Id.* at 1075–76.

77. *SIX FEET UNDER: Pilot* (HBO television broadcast, aired Jun. 3, 2001).

Algorithms	<ul style="list-style-type: none"> • Death of father. • Two brothers. • Prodigal son. • Revival of the family business. • Rival business causing problems. • Relationship with childhood crush/"girl next door." • "Wolf in sheep's clothing" figure. • Death of the brother. • A character must kill his own love interest. • The protagonist returns home after defeating the villain. 	<ul style="list-style-type: none"> • Death of father. • Two brothers. • Prodigal son. • Gay brother who struggles with his orientation. • Mother and sister. • Rival business causing problems. • Dead father returns as ghostlike presence.
Broader structure	Rags to riches + dark love story.	Family drama + coping with grief.
Overarching themes	Family, death, sexuality.	Family, death, sexuality.

The next step of the analysis is to filter out all unprotectable ideas and *scènes à faire*, a task in which a scholar-prepared index of tropes common to contemporary dark comedies would be helpful. Even in the absence of such an index, one can discern that all elements more abstract than the narreme level are unprotectable, as well as some of the less delineated narremes (in this specific comparison, those would likely be the fathers' respective deaths, the deteriorating funeral home, and probably also the ghostly mentor character). What is left (in addition, of course, to the literal words and images) are the narremes delineating specific characters, such as the love interests. However, it must be considered that the guidance of an expert in the conventions of this genre might dictate that these characters too should not warrant any protection, or that narremes too widespread in the broader culture to inherently warrant protection might be so striking in this specific context to deserve some protection.

In comparing the protectable expression, it is evident that the court was correct that no infringement can be found. This analysis reveals that features of narratives which cause them to appear similar are very often too abstract to be of any legal significance, and ordering abstractions in this way makes it easier to deconstruct the intuition on which judges seem to rely and conclusively find non-infringement.

Abstract themes and broad plot structures are undeniably aesthetically significant, but it is this same significance which allows them to be so distracting in analyzing which features of a work copyright law actually seeks to protect.

2. *Nichols*

Examining these works in *Nichols* is especially illuminating in that the court alluded to an abstraction-based methodology similar to the one proposed here, but provided little elaboration as to its application to the facts at issue. In revealing the type of analysis which might have animated the court's decision in *Nichols*, I hope to provide a workable model as to how courts can reach conclusions as to infringement as transparently and objectively as possible. Because the works at issue here are older and deal with more traditional stock characters and incidents, the case is also useful in illustrating the utility to courts of structural narratology scholarship.

The analysis begins by mapping the elements across the levels of abstraction. As in the *Funky Films* analysis, I will exclude the verbatim level from my illustration because no copying was alleged there, and I will limit the narremes to the most relevant ones:

	<i>Abie's Irish Rose</i> ⁷⁸	<i>The Cohens and the Kellys</i> ⁷⁹
Narremes	<ul style="list-style-type: none"> • Wealthy Jewish family in New York. • Father is a widower with one son. • Son is in love with an Irish Catholic woman. • Son introduces wife to father, pretending she is Jewish. • Father likes the woman, insists on Jewish wedding. • Woman's father is also a widower, lives in a different state. • The fathers meet and fight. 	<ul style="list-style-type: none"> • Poor families, one Jewish and one Irish, are neighbors in New York. • Mothers, lovers' brothers, and dogs also hate each other. • Jewish woman, Irish man. • Jewish family inherits wealth, moves to a better house. • Jewish father flees the state after a confrontation with son-in-law. • Irish family visits Jewish family's house. • Lawyer as jealous suitor. • It is revealed that the Irish

78. *Nichols*, 45 F.2d at 120.

79. *Id.* at 120–21.

	<ul style="list-style-type: none"> • Priest and rabbi are friendly, approve of the match. • Couple have boy-girl twins. • Both fathers arrive at Christmas with baby gifts. 	<p>family is actually entitled to the inheritance.</p> <ul style="list-style-type: none"> • Lawyer blackmails Jewish father. • Jewish father shares wealth with Irish father; families reconcile.
Algorithms	<ul style="list-style-type: none"> • Religious antagonism. • Secret marriage. • Multiple wedding ceremonies. • Fathers try to break up the marriage. • Children disowned. • The couple have children. • Fathers bring gifts. • Reconciliation. 	<ul style="list-style-type: none"> • Religious antagonism. • Secret marriage. • Inheritance. • Woman's father fends off her lover. • Father absconds. • Birth of a child. • Daughter disowned. • A jealous suitor. • Mistaken identity. • Blackmail. • Reconciliation.
Broader structure	Forbidden love → families reconcile.	Forbidden love → families reconcile.
Overarching themes	Religion, forbidden love, enmity.	Greed, class, forbidden love, enmity.

In filtering out unprotectable elements, the algorithm, structure, and theme levels fall out of consideration, as do many of the more general narremes (such as the twins and the widower father in *Abie's Irish Rose* and the blackmailing lawyer in *The Cohens and the Kellys*). In addition to the verbatim texts, it is likely that multiple narrative beats remain from both works.

Even after abstraction and filtration, there appear to be more similarities between these works than between the works at issue in *Funky Films*. However, it is worth noticing that the similarities between several of these narremes are accounted for in more abstract levels—when two works are similarly structured and deal with common themes, it would of course be expected that some of their more granular elements would also be similar, and this perspective further evinces the value of a hierarchical understanding of narrative structure. In addition to this explanation for the similarities, enough significant differences at the narreme level exist to justify a finding of non-infringement. This analysis illustrates the diversity of motifs which can exist within the same general plot structure, and how these

differences can lead to distinct aesthetic appeals or overarching themes. Exploring differences of this type are part of the project of structural folkloristics and tend to reflect natural permutations in storytelling rather than malicious infringement.

C. IN PRACTICE

1. The Role of Experts

For courts to reap the full benefits enabled by a modified AFC test for narrative infringement cases (that is, greater transparency and predictability and less subjectivity), they would need some input from experts in narratology as well as specific genres and media. However, the history of using experts in such cases is not without controversy.⁸⁰ While an in-depth exploration of evidence issues regarding experts in the humanities is beyond the scope of this Note, it is worth noting that experts are routinely employed in copyright cases regarding visual art forms—therefore, evaluation of aesthetic endeavors is not considered inherently problematic.⁸¹

In applying the AFC test to narrative works, experts would be useful in the abstraction and filtration stages: They could break down a work along the different levels and then identify which elements are common to that genre. Experts need not venture into the comparison stage, which is most analogous to the “unlawful appropriation” analysis in which *Arnstein v. Porter* restricts the use of experts.⁸² Their role would instead be to provide background for the factfinder to make an informed decision. Expert guidance would be particularly useful in cases involving genres and settings with which factfinders are less familiar, especially considering the relative lack of demographic diversity in the federal judiciary.⁸³

If copyright litigation is to be more informed by narratology, new research directions could be prompted within literary and film studies with relevance beyond the needs of individual lawsuits. New indices, analogous to the *Motif-Index* used in

80. See, e.g., *id.* at 123 (“[Literary expert testimony] cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naïve, ground of its considered impressions upon its own perusal.”)

81. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 545 (2023) (describing the testimony of an art expert who spoke as to how Warhol’s print differs from the photograph on which it was based in meaning and aesthetic impact).

82. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

83. See *Diversity of the Federal Bench*, AM. CONST. SOC’Y, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://web.archive.org/web/20250119154003/https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/>] (last visited Jan. 19, 2025) (showing that of federal judges confirmed since 2009, approximately 66% have been white and 59% have been male). For an example of the implications for copyright law, see Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 L. & LITERATURE 20 (2013) (introducing the female-dominated culture of “fan vids,” which set clipped material from television shows to music in order to create a new narrative or commentary, and arguing that judges should afford some deference to the understandings of the intended audiences of such works in assessing fair use).

folkloristics, could be developed to map the conventions of contemporary genres. TV Tropes, a crowdsourced website which catalogs common media tropes and cites examples, might resemble a project of this nature.⁸⁴ The *Motif-Index* has already served as a model to scholars in cataloging certain historical genres as well as the folklores of specific cultures, which shows the viability of this methodology in diverse contexts.⁸⁵

2. The Role of Juries

It is worth revisiting the Ninth Circuit's inherently subjective "intrinsic test," which asks the jury to respond to the works at issue based on "the response of the ordinary reasonable person" and their "total concept and feel."⁸⁶ Perhaps because this test is animated by an interest in the ultimate consumer of popular media, expert testimony and "the comparison of individual features of the works" are expressly disallowed in its application.⁸⁷ Such a prohibition, however, overlooks the motivating question behind much work in narratology: *why* audiences respond to and resonate with stories in the ways that they do. Analyses of the type proposed here might be able to lay out similarities between works, but the jury would still be essential in determining the extent to which the similarities and differences matter (that is, the comparison prong). If courts find some subjectivity valuable in narrative similarity analysis (and the existence of the intrinsic test suggests that many do), an expert-informed structural methodology need not totally eliminate it. Experts would be able to help the jury discern what is and is not protectable in each work, but the centrality of protectable and unprotectable elements to the work's "total concept and feel" could still be subject to the jury's discretion. Thus, the ultimate conclusion would be better informed by copyright's goal of protecting expression, not ideas.

IV. CONCLUSION

While courts have always accepted that the line between idea and expression must protect more than just the verbatim level, the issue of where exactly to draw it has been marked by vagueness and excessive subjectivity. While narrative comparison decisions do often allude to discernable methodologies, such as the theory of abstractions posited in *Nichols* or the six domains in which the works at issue in *Funky Films* are compared, these methodologies are limited in that they are informed only by the judge's knowledge of how narratives function, and as such are prone to opaque, conclusive reasoning and a lack of predictability.

84. TV TROPES, <https://tvtropes.org/> [https://web.archive.org/web/20241229154449/https://tvtropes.org/] (last visited Oct. 6, 2025).

85. See, e.g., BACIL KIRTLEY, A MOTIF-INDEX OF TRADITIONAL POLYNESIAN NARRATIVES ('1971); ANN TRACY, THE GOTHIC NOVEL 1790–1830: PLOT SUMMARIES AND INDEX TO MOTIFS (1981).

86. See, e.g., *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985).

87. *Id.*

However, the tradition of software infringement offers a more structured, transparent methodology. The abstraction-filtration-comparison test developed in *Altai* asks a court to delineate a program's elements across increasingly abstract hierarchical levels, filter out unprotectable elements, and then compare the remaining expression of both programs. This test, inspired by the abstractions theory alluded to by the *Nichols* court, could be readapted to the context from which it is descended with the aid of structural folkloristics, a discipline whose interest in identifying constituent elements and *scènes à faire* renders narratives especially amenable to this sort of analysis.

Applying a version of the AFC test to narrative works would make decisions more transparent and predictable, as well as easier to reach. An alliance between courts and scholars would be central to this project, as the increasingly diverse and inventive genres becoming popular today demand attention to their conventions, patterns, and structures. While expert input would be indispensable in delineating narratives and identifying those elements which are too commonplace to warrant copyright protection, the ultimate task of comparison would lie with the factfinder, now better informed. As narratologists have demonstrated, the study of narrative structure is also the study of how stories are transformed, borrowed, and developed across cultures and time periods. When a structured methodology is able to distinguish time-honored narrative ideas from truly original expressions, copyright law is better able to carry out its goal of balancing protection for creators with cultural access for all.

