

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

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

On the Devolution of Copyright Scholarship: Part I—  
Tracing the Digital Copyright Revolution  
*Peter S. Menell*

Reconciling Copyright Originality for Photography and  
Generative Artificial Intelligence  
*Zoe B. Kaiser, Kanu Song, & Simon J. Frankel*

AI Influencers and a Right of Publicity  
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Burden-Shifting: Amending United States Trade Regulations to Protect  
International Cultural Heritage Property During Armed Conflict  
*Nina Chandra*

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CONTENTS

ARTICLES

On the Devolution of Copyright Scholarship: Part I—  
Tracing the Digital Copyright Revolution  
*Peter S. Menell* ..... 185

Reconciling Copyright Originality for Photography  
and Generative Artificial Intelligence  
*Zoe B. Kaiser, Kanu Song, & Simon J. Frankel*..... 339

AI Influencers and A Right of Publicity  
*Victoria L. Schwartz* ..... 355

NOTES

Burden-Shifting: Amending United States Trade Regulations  
to Protect International Cultural Heritage Property  
During Armed Conflict  
*Nina Chandra*..... 409

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## On the Devolution of Copyright Scholarship: Part I— Tracing the Digital Copyright Revolution

Peter S. Menell<sup>†</sup>

As the digital revolution unfolded in the 1990s and early 2000s, a charismatic hacktivist faction took hold in the copyright legal academy. In its purest form, the copyleft movement celebrated the notion that “information wants to be free” and opposed copyright protection in cyberspace. Some copyleft scholars served as lead counsel in efforts to overturn copyright legislation and immunize filesharing enterprises from copyright liability, blurring the line between interpretive scholarship and policy analysis. Many academic amicus briefs took on the tactics of zealous advocates, selectively and misleadingly presenting empirical, statutory, and doctrinal analysis.

This Article chronicles the evolution of copyright law while tracing the devolution of copyright scholarship through this tumultuous era. It highlights the origins of the copyleft movement and ways in which many scholars lost sight of essential academic values—independence, objectivity, transparency, scrupulousness, methodological soundness, and analytical rigor—in an effort to persuade courts to remake copyright law through less than forthright and non-democratic means. In the process, they eroded the trust that courts had placed in the legal academy. As the Article shows, the courts have largely remained faithful to the rule of law in copyright cases and this has for the most part promoted cultural, social, and economic progress.

A follow-on article examines the chasm between judicial interpretation of copyright law and the views of many in the copyright academy through an empirical examination of Supreme Court academic briefs, anthropological analysis of the

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<sup>†</sup> Koret Professor of Law; Co-Founder and Director, Berkeley Center for Law & Technology; Co-Founder and Faculty Director, Berkeley Judicial Institute; University of California at Berkeley School of Law. This article is based on the 37th Horace S. Manges Lecture at Columbia Law School presented at Columbia Law School on March 24, 2025. A video of the lecture can be accessed at: [https://www.youtube.com/watch?v=\\_5FQG7OoBtw](https://www.youtube.com/watch?v=_5FQG7OoBtw). Judges Jon O. Newman and Pierre Leval, as well as Judge (later Justice) Stephen Breyer) were formative influences on my career. David Nimmer and Shyam Balganesh have been my closest copyright colleagues. Many others, too numerous to mention, have shaped my path. I thank Essex Liu Inness Gall, Tuong-Vi Nguyen, Zachary Price, Barbara Rasin, and Jesse Wang for research assistance. I, alone, bear responsibility for the views expressed here.

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copyright legal academy. It then assesses the ramifications of the devolution of copyright scholarship for the judiciary, democratic institutions, the scholarly community, and society at large.

I. Copyright, the Digital Revolution, and the Legal Academy .....	193
A. An Accidental Copyright Scholar.....	194
1. The LaST Frontier Conference.....	195
2. Follow-on Projects .....	196
3. Founding of the Berkeley Center for Law & Technology .....	197
4. <i>Lotus v. Borland</i> .....	197
5. Intellectual Property Casebooks.....	199
6. BCLT's Path to Sustainability.....	199
7. Expanding Interests and Projects.....	201
a. Entertainment Law .....	202
b. Judicial Education.....	202
8. Reflections on the Early Career .....	203
B. The Internet Revolution and the Academic Realist Turn .....	204
1. The Emergence of the Copyleft Movement .....	205
a. Technological and Social Forces.....	205
i. The Emergence of Home Copying and Production Technology.....	205
ii. The Open Source Movement, the Interoperability Movement, and Electronic Freedom .....	207
1. The Open Source Movement.....	208
2. American Committee for Inoperable System .	210
b. The Electronic Freedom Foundation .....	210
c. The Emergence of the Copyleft Scholarly Community .	216
d. Copymiddle: Toward Balanced Policy Reform .....	220
2. The Gathering Storm: Unauthorized Digital Distribution...223	
a. Ramping Up Criminal Enforcement and Remedies .....	225
b. The WIPO Copyright Treaties and the Digital Millennium Copyright Act.....	225
c. The Copyright Term Extension Act.....	229
d. The Digital Theft Deterrence and Copyright Damages Improvement Act .....	229
3. Challenging the CTEA and Stretching the Academic Role .	230
II. The Digital Distribution Enforcement War .....	234
A. Constitutionality of the Anti-Circumvention Prohibition .....	235
B. The Filesharing Disruption .....	239
1. Napster's Rapid Rise and Fall .....	240
2. The Demise of Aimster .....	242
3. Second-Generation Filesharing Technology and the <i>Grokster</i> Litigation .....	244
a. The Scholarly Divide.....	247

i.	Filesharing Freakonomics.....	250
ii.	Leveraging Academia .....	251
b.	<i>MGM v. Grokster</i> : The Lower Court Decisions .....	251
c.	Solving the Interpretive Puzzle.....	252
d.	The Supreme Court Briefing .....	255
i.	Petitioners.....	255
ii.	Amicus Briefs Supporting Petitioners .....	256
iii.	Respondents .....	258
iv.	Amicus Briefs Supporting Respondents.....	259
v.	Amicus Briefs Supporting Neither Party.....	262
e.	The Supreme Court Decision .....	263
4.	<i>Grokster</i> Aftermath.....	265
C.	End-user Enforcement and the Distribution Right Controversy...	270
1.	Subpoena Defense Campaign .....	275
2.	Interpretation of the Distribution Right.....	277
3.	The Holdout Cases .....	282
a.	<i>Capitol Records v. Jammie Thomas-Rassett</i> .....	285
b.	<i>Sony BMG Music Ent. v. Tenenbaum</i> .....	287
D.	Rampant Piracy Expands to Films: The Cyberlocker Battle.....	293
E.	The Copyright Levee Holds: Licensing, Paywalls, and the Celestial Jukebox.....	299
III.	Reconciling “Free Culture” and Copyright Protection: Fitting Professional Creators and Users into the Digital Ecosystem.....	305
A.	Market Institutions.....	308
1.	Pre-Authorization: PROs and the Creative Commons .....	308
2.	Insurance .....	310
3.	Social Norm–Based Institutions.....	310
4.	Google’s YouTube Evolution .....	313
B.	Reconciling the Derivative Work Right and Fair Use .....	317
1.	Judicial and Scholarly Drift.....	318
2.	<i>Dr. Seuss Enterprises v. ComicMix</i> .....	323
3.	<i>Andy Warhol Foundation for the Visual Arts v. Goldsmith</i> .....	325
4.	<i>Warhol</i> Aftermath.....	332
C.	Missed Opportunity: Legislative Reform .....	335

## ON THE DEVOLUTION OF COPYRIGHT SCHOLARSHIP: PART I— TRACING THE DIGITAL COPYRIGHT REVOLUTION

I am deeply honored to present the 37th Horace S. Manges Lecture. I thank Professor Jane Ginsburg, Professor Shyamkrishna Balganesh, and the Kernochan Center for this opportunity. I am pleased to follow in the footsteps of distinguished judges, policymakers, scholars, and practitioners, especially Judge Jon O. Newman, the inaugural Manges lecturer.<sup>1</sup>

I had the good fortune to clerk for Judge Newman four decades ago. I am particularly grateful to Judge Newman and my former colleague Bill Eskridge for guiding my understanding of statutory interpretation and the rule of law.<sup>2</sup>

Horace Manges served as counsel and trial lawyer to leading writers and publishers over the course of his distinguished career.<sup>3</sup> He also participated in the hearings on what would become the Copyright Act of 1976. Like him, I have participated in copyright policy discussions and filed briefs in copyright cases. But unlike him and other practitioners, I have approached such matters not as an advocate, but as a legal scholar. It is that difference in perspective that I explore in this lecture. This lecture and article should be of interest to practitioners in view of the growing number of “academic” amicus briefs filed in copyright litigation and the American Law Institute’s Copyright Restatement Project.<sup>4</sup>

My academic career has coincided with a natural experiment in the evolution of the role and practices of law professors. Professors rarely filed amicus briefs prior to the 1990s.<sup>5</sup> That has become a common occurrence, especially in the copyright field.

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1. See Jon O. Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459, 459 (1987–88).

2. Bill was a pioneer in the modern field of statutory interpretation. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994). Judge Robert Katzmann summarized the methodology and principles in *Judging Statutes*. ROBERT KATZMANN, *JUDGING STATUTES* (2014). See also Jon O. Newman, *The Myths of Textualism and Their Relevance to the ALI’s Restatement of the Law, Copyright*, 44 COLUM. J.L. & ARTS 411 (2021).

3. See Horace S. Manges, 87, *Copyright Law Expert*, N.Y. TIMES, (Feb. 14, 1986), <https://www.nytimes.com/1986/02/14/obituaries/horace-s-manges-87-copyright-law-expert.html> [<https://web.archive.org/web/20251103221657/https://www.nytimes.com/1986/02/14/obituaries/horace-s-manges-87-copyright-law-expert.html>].

4. I discuss that project in a follow-on article: Peter S. Menell, *On the Devolution of Copyright Scholarship: Part II—Supreme Court Academic Briefs, Evolution of the Copyright Academy, and Ramifications of Scholarly Devolution* (forthcoming) [hereinafter “*Devolution II*”].

5. Richard H. Fallon, *Scholars’ Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 223–24 (2012) (observing that the Supreme Court fielded just three academic amicus briefs in 159 merits cases during its 1985 Term; that number grew to thirty academic amicus briefs in (only) seventy-two merits cases in its 2010 Term).

Consistent with this pattern, only one law professor filed an amicus brief in any Supreme Court copyright case prior to 1990. Appropriately for this lecture, it was Professor John Kernochan.<sup>6</sup> Since that time, law professors have filed over seventy briefs with over 1,000 signatories in twenty Supreme Court copyright cases since 1990.<sup>7</sup>

Over the course of my career, I have pursued several interrelated roles: educating students and judges, solving interpretive puzzles, using interdisciplinary methods to study the functioning of law and prescribe statutory and institutional reforms, preparing and filing amicus briefs, founding scholarly research and public policy centers, advising public officials, founding and operating a publishing enterprise, and consulting and serving as an expert witness on intellectual property matters.

My law school education unfortunately did not adequately prepare me for what has become a key aspect of many of these activities: how to interpret statutes. Drawing upon the legal realist school,<sup>8</sup> many of my law professors intermingled interpretive and normative analysis, emphasizing that judges often disregarded the distinction, reaching decisions based on their normative predilections and then using the flexibility of law to backfill their rulings.<sup>9</sup> As I departed law school, my perceptions of “the rule of law” and the role of judges were foggy at best.

Clerking for Judge Newman brought these concepts into clearer focus. I witnessed an agile legal mind cut through zealous advocacy to apply the law faithfully across an

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6. See Brief of Volunteer Lawyers for the Arts Inc. et al., as Amici Curiae, in Support of the Respondent, *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (No. 88-293). Professor Kernochan co-authored that brief with author and journalist John Hersey and Barbara Ringer, former Register of the Copyright Office, on behalf of Volunteer Lawyers for the Arts.

7. See *Devolution II*, *supra* note 4. That does not include more than a dozen academic briefs filed by and on behalf of computer science, economists, media professors, and other academics in Supreme Court copyright cases over the past several decades.

8. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222 (1931) (observing that “[b]ehind decisions stand judges; judges are men; as men they have human backgrounds”); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897) (“The language of judicial decision is mainly the language of logic . . . [b]ut certainty generally is illusion . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment . . . You can give any conclusion a logical form[, but such a conclusion] is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.”).

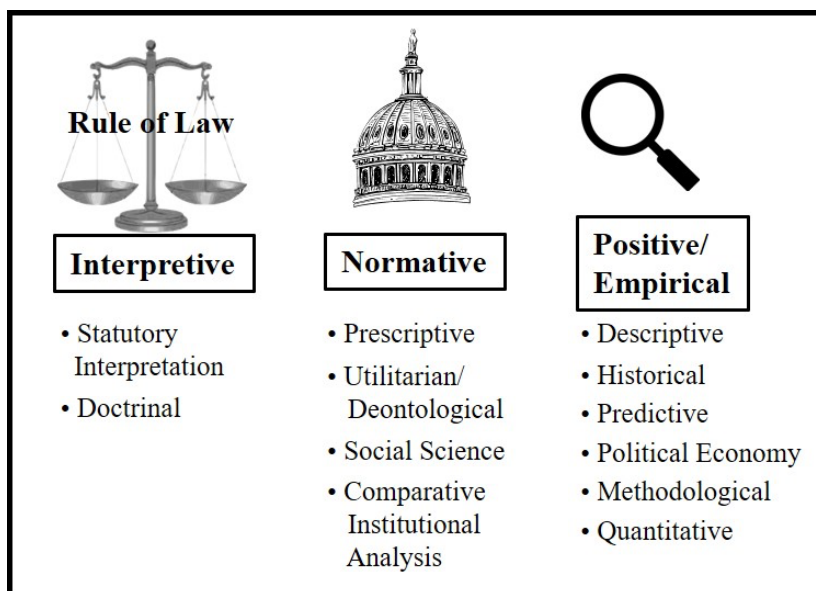
9. Justice Elena Kagan, one of my classmates, captured this experience in a 2015 colloquy. In declaring that “[w]e [the Supreme Court Justices] are all textualists now,” she contrasted this interpretive method with her formative law school experience, noting that the inquiry concerning a statute during her formative law school experience was “what should this statute be,” rather than what do “the words on the paper say.” She attributed this inquiry to a “policy-oriented” approach with judges “pretending to be congressmen.” HARV. L. SCH., *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (YouTube, Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://web.archive.org/web/20251114205047/https://www.youtube.com/watch?v=dpEtszFT0Tg>]. Justice Kagan’s bold textualist proclamation may itself require some interpretation. See Newman, *supra* note 2.



array of cases.<sup>10</sup> In interpreting statutes, Judge Newman assiduously sought to carry forward the legislature's intent, not his policy preferences.<sup>11</sup> Over lunches and through work on opinions, he shared his experience as a legislative aide and how it informed his approach to statutory interpretation. It was not always easy to apply dated statutory provisions to new circumstances, but Judge Newman methodically worked through the statutory text, as well as historical and legislative context, in reaching faithful readings of seemingly ambiguous statutory text. This experience rounded out my understanding and appreciation of the meaning of the rule of law and the role of courts. Professor Eskridge's generous tutelage and seminal scholarship on statutory interpretation complemented this foundation.<sup>12</sup> I have come to rely heavily upon that training in teaching, scholarship, judicial education, and amicus brief writing.

As illustrated in Figure 1, legal scholarship can usefully be divided among three buckets: interpretative analysis, the foundation for the rule of law and supporting the judiciary; normative analysis, which guides law reform; and positive and empirical research, which can inform both interpretive and normative analysis.

**Figure 1: Legal Scholarship Typology**



10. See, e.g., *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1105–08 (2d Cir. 1988) (Newman, J., dissenting).

11. In *How Judges Think*, Judge/Professor Posner wrote that Judge Newman has “no discernible judicial philosophy.” RICHARD A. POSNER, *HOW JUDGES THINK* 346 (2008). Judge Newman considered that a badge of honor, although he noted that he does “tend to be a strong proponent of the freedom of expression guaranteed by the First Amendment and a strong opponent of racially based governmental actions prohibited by the Equal Protection Clause of the Fourteenth Amendment.” JON O. NEWMAN, *BENCHED* 252–53 (2017).

12. See sources cited *supra* note 2.

Distinguishing among these modes is essential to academic values of independence, objectivity, transparency, scrupulousness, methodological soundness, and analytical rigor. Judges aim to interpret and apply law faithfully. Conflating normative and interpretive analysis, as well as selective presentation of pertinent authority, undermines the rule of law as well as academic integrity.

By several measures—including the reception and adoption of casebooks<sup>13</sup> and judicial guides<sup>14</sup> and the outcomes and reasoning of judicial decisions in cases in which I have submitted amicus briefs<sup>15</sup>—my interpretive scholarship has been well-received and influential. I have also pursued various doctrinal, normative, positive, and empirical projects over the course of my career,<sup>16</sup> with some notable influence.<sup>17</sup>

My software copyright scholarship was warmly embraced by the scholarly community, courts, and policymakers alike.<sup>18</sup> It led to opportunities to advise public officials, judges, and learned societies on intellectual property law and policy.<sup>19</sup> Yet as

13. See, e.g., PETER S. MENELL MARK A. LEMLEY, ROBERT P. MERGES, AND SHYAMKRISHNA BALGANESH, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* (2025). This casebook, now in its seventeenth edition, has been the most widely adopted intellectual property casebook for nearly three decades.

14. See PETER S. MENELL ET AL., *TRADE SECRET CASE MANAGEMENT JUDICIAL GUIDE* (Federal Judicial Center, 2023); Mark A. Kaplow, *Trade Secret Case Management Judicial Guide Released*, CROWELL (Aug. 30, 2023), <https://www.crowelltradeseecretstrends.com/2023/08/trade-secret-case-management-judicial-guide-released/> [<https://web.archive.org/web/20251011114046/https://www.crowelltradeseecretstrends.com/2023/08/trade-secret-case-management-judicial-guide-released/>] (well-known practitioner commenting that the treatise “contains comprehensive insights for courts and litigants in the various stages of a trade secret case” and “is required reading for those practicing in the field”); PETER S. MENELL ET AL., *PATENT CASE MANAGEMENT JUDICIAL GUIDE* (1st ed. Federal Judicial Center 2009, Lexis 2010; 2d ed. Federal Judicial Center 2012; 3rd ed. 2016). The leading patent blog characterized this treatise as the “patent litigator’s Bible.” Dennis Crouch, *Book Review: Justifying Intellectual Property*, PATENTLY-O (Oct. 14, 2011), <https://patentlyo.com/patent/2011/10/merges-justifying-intellectual-property.html> [<https://web.archive.org/web/20251011115649/https://patentlyo.com/patent/2011/10/merges-justifying-intellectual-property.html>].

15. See *infra* Section I(A).

16. See *Author Page for Peter S. Menell*, SOC. SCI. RSCH. NETWORK, [https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=99590](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=99590) [[https://web.archive.org/web/2025101124909/https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=99590](https://web.archive.org/web/2025101124909/https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=99590)] (last visited Oct. 11, 2025).

17. See, e.g., Peter S. Menell, *The Defend Trade Secrets Act Whistleblower Immunity Provision: A Legislative History*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 398, 398 (2017) (explaining how the whistleblower immunity provision of the Defend Trade Secrets Act (2016) was modeled upon the proposal set forth in Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CAL. L. REV. 1 (2017)).

18. See Peter S. Menell, *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, 43 ANTITRUST BULL. 651 (Fall-Winter 1998).

19. See, e.g., *An International Guide to Patent Case Management for Judges*, WORLD INTELL. PROP. ORG. (WIPO), <https://www.wipo.int/about-patent-judicial-guide/en/> [<https://web.archive.org/web/20251011134410/https://www.wipo.int/about-patent-judicial-guide/en/>] (co-organizer of this project); COPYRIGHT IN THE DIGITAL AGE: BUILDING EVIDENCE FOR POLICY, NAT’L

the battles over copyright enforcement and statutory interpretation in the Internet Age expanded, I have been increasingly ostracized by members of the copyright scholarly community, including some with whom I had collaborated during the software copyright battles. Was it me or had the scholarly community, and/or academic values, changed? Moreover, what explains the large and growing chasm that emerged between judicial interpretations of copyright law and widely held views within the copyright scholarly community? This Article explores aspects of the first question and the latter question. A follow-on article delves more deeply into the former question.

Various judges and scholars have recognized the divergence between the legal academy and the judiciary.<sup>20</sup> My account reflects experience in the copyright scholarship field. As background for this inquiry, the first section traces my path into the legal academy and copyright scholarship, the controversies over copyright reform at the dawning of the Internet Age, and the emergence of the copyleft movement. The second section chronicles the digital distribution enforcement war that soon unfolded. The third section examines the battle over “free culture”—the view that First Amendment principles and the fair use doctrine override much of copyright law’s derivative work right—and how professional creators and users fit into the digital ecosystem. These explorations reveal the emergence of a wide rift between much of the copyright scholarly community and the judiciary over the proper interpretation of copyright law.

## I. COPYRIGHT, THE DIGITAL REVOLUTION, AND THE LEGAL ACADEMY

The opening salvos of the first digital copyright war—over the scope of protection for computer software—were being fired in 1980 just as I was beginning graduate school in law, social science, and public policy. My side interest in computer programming led me down an unexpected path.

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RSCH. COUNCIL (Stephen A. Merrill & William J. Raduchel eds., 2013) (report of National Academies of Sciences Committee on “The Impact of Copyright Policy on Innovation in the Digital Era” (2010–13) (Vice-Chair)); U.S. CONGRESS, OFF. OF TECH. ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES LAW (1989) (advisory panel) (hereinafter “COPYRIGHT AND HOME COPYING”). I have organized most of the Federal Judicial Center’s intellectual property education for federal judges since 1998. See *infra* Section I(A)(7)(b). I served as one of the two inaugural Edison Visiting Professionals for the U.S. Patent and Trademark Office in 2012–13, and as an Edison Distinguished Scholar and Expert Consultant for the U.S. Patent & Trademark Office in 2022–23.

20. See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016); POSNER, *supra* note 11, at ch. 8 (entitled “Judges Are Not Law Professors”); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

### A. AN ACCIDENTAL COPYRIGHT SCHOLAR

As I moved from college to graduate and law school, I planned to focus on law and economics and environmental law and policy. The battle over legal protection for computer software caught my attention for a practical reason. As a graduate student writing papers using mathematical notation, I became interested in the IBM Personal Computer (“PC”) around that time.<sup>21</sup> XyWrite, a program that enabled users to format symbolic notation on the PC, offered a convenient way to write papers.<sup>22</sup> Unfortunately, the IBM PC cost \$3,000, well beyond my graduate school stipend.

As a reader of hobbyist computer magazines, I was aware that IBM did not manufacture the principal components (disk drives, monitor, and printer) of the PC, which were available (collectively) for substantially less than half the assembled product price. IBM manufactured the chassis and circuit boards, but the costs of those components were not substantial: formed metal, circuit boards, and a microprocessor chip. As an economics graduate student, I wondered how IBM could charge so much for the assembled product. My search for the solution would fundamentally redirect my career path.

Within a year of the PC’s introduction, IBM began offering just the chassis with the motherboard to university students at a steep discount—a form of price discrimination. With direct purchases of the other components from advertisements at the back of hobbyist magazines, I was able to assemble a fully operational PC for about \$1,500—still a stretch, but manageable on a ramen diet.

More significantly, my curiosity motivated a tantalizing research project: analyzing the economics of intellectual property for computer software. Then-Judge Stephen Breyer’s seminar on public policy provided an opportunity to explore the technical aspects of microcomputer design, the emerging literature on network economics,<sup>23</sup> antitrust law, and intellectual property law.

I came to see that IBM’s market power stemmed from its control over the Basic Input/Output System (“BIOS”) chip on the PC circuit board.<sup>24</sup> Software developers like

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21. See Andrew Pollack, *Big I.B.M.’s Little Computer*, N.Y. TIMES (Aug. 13, 1981), <https://www.nytimes.com/1981/08/13/business/big-ibm-s-little-computer.html> [<https://web.archive.org/web/20251108185207/https://www.nytimes.com/1981/08/13/business/big-ibm-s-little-computer.html>].

22. See L. R. Shannon, *Mastering XyWrite*, N.Y. TIMES (June 14, 1988), <https://www.nytimes.com/1988/06/14/science/peripherals-mastering-xywrite.html> [<https://web.archive.org/web/20251108185516/https://www.nytimes.com/1988/06/14/science/peripherals-mastering-xywrite.html>].

23. See Michael Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985); Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70 (1985).

24. See Brett Glass, *The IBM PC BIOS*, 14 BYTE 303, 308 (Apr. 1989), [https://archive.org/details/eu\\_BYTE-1989-04\\_OCR/page/n5/mode/2up](https://archive.org/details/eu_BYTE-1989-04_OCR/page/n5/mode/2up).

the makers of XyWrite designed their software to interoperate with IBM's method for communicating among the PC's input/output devices, monitor, operating system, and application programs. The growing supply of software written for the IBM PC would not run on other microcomputers unless they precisely emulated IBM's BIOS functional specifications.<sup>25</sup> As the gatekeeper for this growing trove of valuable software tools, IBM could charge a high entrance fee. The resulting paper—*Tailoring Legal Protection for Computer Software*—explored the distinctive economics surrounding such products and proposed a *sui generis* approach for addressing the dual market failure problem: optimizing incentives to innovate while addressing the lock-in effects of network externalities.<sup>26</sup>

Clerking for Judge Newman in the year following this experience deepened my interest in intellectual property. We handled several fascinating cases.<sup>27</sup> In pursuing teaching positions for the following year, I expressed interest in law and economics, environmental law, property law, and intellectual property law in that order.

### 1. The LaST Frontier Conference

Shortly after embarking on my academic career, I was approached by Milton Wessel, then director of Arizona State University's Center for the Study of Law, Science, and Technology, with an enticing opportunity. Drawing on the National Institutes of Health model for non-adversarial "consensus conferences" to provide

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25. After the emergence of home computers designed and built by start-ups for computing hobbyists in the late 1970s, IBM skyrocketed to dominance with the launch of its PC line of microcomputers for home and business use. See Andrew Pollack, *Big I.B.M. Has Done It Again*, N.Y. TIMES, <http://www.nytimes.com/1983/03/27/business/big-ibm-has-done-it-again.html> [<https://web.archive.org/web/20251012212758/https://www.nytimes.com/1983/03/27/business/big-ibm-has-done-it-again.html>] (reporting that by 1983, "[v]irtually every software company [was] giving first priority to writing programs for the I.B.M. machine"); *IBM's Personal Computer Spawns an Industry*, BUS. WK., Aug. 15, 1983, at 88; *Business Week* soon proclaimed: *Personal Computers: And the Winner Is IBM*, BUS. WK., Oct. 3, 1983, at 76.

26. Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1337–45, 1359–71 (1987) (highlighting the dynamic nature of software lock-in and the relevance of legal doctrines, such as trademark law's genericide doctrine and leeway for reverse engineering, that could adapt to the emergence of de facto industry standards).

27. See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); *Stormy Clime Ltd. v. ProGroup, Inc.*, 809 F.2d 971 (2d Cir. 1987). The *Salinger* case would ultimately play a role in the issues animating this paper. It was fascinating to observe Judge Newman work through this complex case with such a keen focus on the Supreme Court's early fair use jurisprudence and the detailed factual record—particularly the fine line between copies and paraphrases. I would later get to know Judge Pierre Leval, the district judge reversed in the case. See Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPYRIGHT SOC'Y U.S.A. 167, 168 (1989) (observing that "[i]t has been exhilarating to find myself present at the cutting edge of the law, even though in the role of the salami"). Judge Leval would draw on this experience and others in making an influential contribution to copyright jurisprudence. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). Judge Newman and Judge Leval worked through their differences of opinions respectfully. See *id.* at 1115, n.51; Jon O. Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y U.S.A. 12, 15 (1990).

reliable scientific advice for the medical profession and the public and the American Law Institute's approach for producing restatements of the law, Wessel invited me to co-convene, with Professors Dennis Karjala and Pamela Samuelson, a "LaST Frontier" conference (*Law, Science and Technology* conference dealing with a "frontier" issue) addressing copyright protection of computer software.<sup>28</sup> As a *Star Trek* fan<sup>29</sup> and a software copyright scholar, I was in.

We invited a broad range of intellectual property scholars<sup>30</sup> to spend two days exploring the challenges of applying copyright protection to computer software.<sup>31</sup> Since few of the participants had background in computer technology or network economics, we began the conference with tutorials on computer programming, the computer industry, and network economics.<sup>32</sup> We were delighted to see that there was significant agreement among the conferees about how copyright should apply to computer software. The three of us worked late into the night to draft a report. We devoted the second day to a markup session that produced a detailed report setting forth areas of agreement while noting areas of disagreement.<sup>33</sup> Our report validated Milton Wessel's vision for guiding courts and policymakers on legal/technological challenges.

## 2. Follow-on Projects

I was soon invited to participate in projects being undertaken by the U.S. Congress's Office of Technology Assessment relating to software, copyright, and home copying.<sup>34</sup> Judge Breyer encouraged me to write a follow-up paper analyzing copyright

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28. Milton R. Wessel, *Introductory Comment on the Arizona State University LaST Frontier Conference on Copyright Protection of Computer Software*, 30 JURIMETRICS 1 (1989).

29. The opening line from the original *Star Trek* episodes began: "Space: the final frontier. These are the voyages of the starship *Enterprise*. Its five-year mission: to explore strange new worlds, to seek out new life and new civilizations, to boldly go where no [one] has gone before." STAR TREK (NBC television broadcast, aired 1966–1969).

30. In addition to the convenors, the conference group comprised: Professors Donald S. Chisum (University of Washington Law School), Rochelle Cooper Dreyfuss (New York University School of Law), Paul Goldstein (Stanford Law School), Robert A. Gorman (University of Pennsylvania School of Law), Edmund W. Kitch (University of Virginia School of Law), Leo J. Raskind (University of Minnesota School of Law), and Jerome H. Reichman (Vanderbilt University School of Law).

31. See *Statement of Issues Presented to Conferees at the LaST Frontier Conference on Copyright Protection of Computer Software*, 30 JURIMETRICS J. 11, 11 (1989).

32. See Joseph Farrell, *Standardization and Intellectual Property*, 30 JURIMETRICS J. 35 (1989); Bill Curtis, *Engineering Computer "Look and Feel": User Interface Technology and Human Factors Engineering*, 30 JURIMETRICS J. 51 (1989); Alfred Z. Spector, *Software, Interface, and Implementation*, 30 JURIMETRICS J. 79 (1989).

33. Donald S. Chisum et al., *LaST Frontier Conference Report on Copyright Protection of Computer Software*, 30 JURIMETRICS J. 15 (1989). The principal area of disagreement was that "some conferees believe that legislative changes may be desirable, and others consider that Congress has correctly placed computer programs within the ambit of copyright protection." *Id.* at 15.

34. See U.S. CONG., OFF. OF TECH. ASSESSMENT, FINDING A BALANCE: COMPUTER SOFTWARE, INTELLECTUAL PROPERTY AND THE CHALLENGE OF TECHNOLOGICAL CHANGE (1992); U.S. CONG., OFF. OF

protection for application programs, which found favor in court decisions.<sup>35</sup> The Second Circuit *Computer Associates v. Altai* decision relied on the article in applying Judge Learned Hand's seminal abstraction-filtration-comparison framework to computer software infringement analysis,<sup>36</sup> as did the District Court in the battle between Apple and Microsoft over the scope of copyright protection for graphical user interface technology.<sup>37</sup>

At Professor Samuelson's initiative, she, Professor Karjala, and I collaborated on an amicus brief in *Sega v. Accolade* proposing the framing that we had articulated in the LaST Frontier report for analyzing copying of software to determine functional specifications.<sup>38</sup> The Ninth Circuit adopted this approach, holding that copying of software object code for the purpose of deciphering unprotectable interoperability specifications constituted fair use.<sup>39</sup>

### 3. Founding of the Berkeley Center for Law & Technology

In 1992, I floated the idea of launching an academic center focusing on law and technology. I drafted a blueprint for the initiative, assessed possible faculty hires, and recommended recruiting Professor Rob Merges to join our faculty. He visited in 1994 and joined the faculty soon thereafter. We formally co-founded the Berkeley Center for Law & Technology ("BCLT") later that year. It was vitally important that BCLT maintain its academic independence, provide a neutral venue that could bring together scholars, judges, policymakers, and practitioners to promote progress, and involve students in many aspects of the Center's work.

### 4. *Lotus v. Borland*

The scope of copyright protection for computer software was being tested in *Lotus Dev. Corp. v. Borland Int'l, Inc.*, a case involving the protection for Lotus 1-2-3's particular labeling of commands for its spreadsheet.<sup>40</sup> Borland sought to emulate this functionality

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TECH. ASSESSMENT, COMPUTER SOFTWARE AND INTELLECTUAL PROPERTY, BACKGROUND PAPER (1990); COPYRIGHT AND HOME COPYING, *supra* note 19.

35. Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045 (1989).

36. *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 697-98, 705, 708, 712 (2d Cir. 1992).

37. *See, e.g., Apple Comput., Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1025 (N.D. Cal. 1992) (referencing the network externality analysis in Menell, *supra* note 35, at 1059), *aff'd in part, rev'd in part*, 35 F.3d 1435 (9th Cir. 1994).

38. *See* Brief Amicus Curiae of Eleven Copyright Law Professors, *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), *as amended* (Jan. 6, 1993), *reprinted in* 33 JURIMETRICS 147 (1992).

39. *See Sega*, 977 F.2d at 1520-28.

40. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 799 F. Supp. 203 (D. Mass. 1992), *adhered to*, 831 F. Supp. 202 (D. Mass. 1993), *rev'd*, 49 F.3d 807 (1st Cir. 1995).

in its Quattro product so as to enable users who had written macros—high level programs based on the particular 1-2-3 command labels—to run on Borland’s spreadsheet. The cost of re-implementing these macros raised the cost for switching to Borland’s product. Apart from supporting users’ ability to port macros from 1-2-3 to Quattro, Borland’s product had entirely different software code and graphics. Lotus sought to control the use of its menu command hierarchy, a feature that had been learned and implemented by the user community. The district court found that Borland was not permitted to achieve macro compatibility with the 1-2-3 product, distinguishing the treatment of external constraints noted in the *Altai* decision because such constraints had to exist when the first program was created.<sup>41</sup> Thus, Judge Keeton effectively ruled that constraints governing the design of computer systems must be analyzed *ex ante* (based on technical considerations at the time the first program is written) and not *ex post* (after the market has operated to establish a *de facto* standard).

Soon thereafter, Professor Samuelson circulated a draft amicus appellate brief.<sup>42</sup> Professor Karjala reached out to me to discuss the brief. Although we shared Professor Samuelson’s disagreement with the lower court’s decision, we saw a more fundamental error than the misapplication of *Altai*. Consequently, we decided to submit our own amicus brief questioning whether a menu command hierarchy was protectable at all under § 102(b) and the idea-expression dichotomy doctrine.<sup>43</sup> The First Circuit grounded its reversal largely on that reasoning.<sup>44</sup>

I then had my first experience with the rough and tumble of zealous advocates. Anthony Clapes, then–Assistant General Counsel at IBM, which had acquired Lotus Corporation, noted that “[t]he [*Altai*] court cited only one law review article and one academic text as sources of criticism of the Third Circuit rule that a program’s structure, sequence, and organization may be protectable expression. The law review article was written by a well-known antiprotectionist law professor.”<sup>45</sup> The accompanying footnote states: “In addition to being a member of the widely criticized LaST Frontier conference steering committee, Professor Menell is a member of the ‘gang of ten’ law

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41. *Id.*

42. Brief Amicus Curiae of Copyright Law Professors at 33, *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807 (1st Cir. 1995) (No. 93-2214) (arguing that “The Successive Filtering Test for Infringement Endorsed in *Altai* Is More Consistent With Traditional Principles of Copyright Law Than Is The Paperback/Borland Test”).

43. Brief Amicus Curiae of Professor Dennis S. Karjala & Professor Peter S. Menell, *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807 (1st Cir. 1995) (No. 93-2214).

44. See *Lotus*, 49 F.3d at 815 (recognizing that “[w]hile the *Altai* test may provide a useful framework for assessing the alleged nonliteral copying of computer code, we find it to be of little help in assessing whether the literal copying of a menu command hierarchy constitutes copyright infringement”).

45. Anthony L. Clapes, *Confessions of an Amicus Curiae: Technophobia, Law, and Creativity in the Digital Arts*, 19 U. DAYTON L. REV. 903, 923 (1994); see also *id.* at 913 n.23 (“Perhaps unaware of the peculiar Luddist [sic] filter through which Professor Menell looks at the art of programming, the [*Altai*] court adopted his views as to the nature of computer programs in whole cloth.”).



professors who filed amicus briefs in support of copyright defendants in software copyright cases.<sup>46</sup> Although a bit taken aback by the tone of this comment, I was bemused. Such partisan criticism was a badge of honor.

## 5. Intellectual Property Casebooks

Around that time, I joined with Professor Merges, recent University of California at Berkeley law graduate Mark Lemley, and antitrust specialist Professor Tom Jorde on an ambitious pair of projects: a casebook covering the landscape of intellectual property law and antitrust law emphasizing their application to information technologies (software and biotechnology) that would become *Intellectual Property in the New Technological Age*;<sup>47</sup> and a second casebook that would become *Software and Internet Law*.<sup>48</sup> We envisioned courses built around these books anchoring BCLT's expanding IP curriculum.

## 6. BCLT's Path to Sustainability

Professor Samuelson joined UC Berkeley's new Information School faculty in 1996, and Professor Merges and I invited her to join us as a BCLT Director. We later invited her to collaborate on *Software and Internet Law*. Professor Samuelson became a Public Policy Fellow with the Electronic Frontier Foundation in 1997.

Professor Mark Lemley also joined our faculty around that time. The first edition of *Intellectual Property in the New Technological Age* was published in 1997. We were developing a broad array of technology law courses, hosting an impressive array of academic/policy conferences, and shifting the center of IP policy engagement toward the Bay Area. As a way of increasing student engagement with research, I started teaching intellectual property law in the spring semester so that first year students could get a jump start on technology law studies and their careers. I also began teaching the Law & Technology Writing Workshop as a way to involve our students directly in scholarship. The papers for this seminar comprised the *Berkeley Technology Law Journal's Annual Review of Law & Technology*. We sent this publication as well as an annual newsletter to intellectual property professors that year and the University of California at Berkeley School of Law jumped to the *U.S. News & World Reports'* top ranking for intellectual property programs in 1999.<sup>49</sup>

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46. *Id.* at 923 n.81.

47. See ROBERT P. MERGES, PETER S. MENELL, MARK A. LEMLEY, & THOMAS M. JORDE, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* (1st ed. 1997).

48. See MARK A. LEMLEY, PETER S. MENELL, ROBERT P. MERGES, & PAMELA SAMUELSON, *SOFTWARE AND INTERNET LAW* (1st ed. 2000).

49. See J. Paul Lomio et al., *Ranking of Top Law Schools 1987–2006 by U.S. News & World Report*, ROBERT CROWN L. LIBRARY, May 2009, at 51, <https://law.stanford.edu/wp-content/uploads/2015/03/wilsons->

Just like Silicon Valley start-ups, BCLT's stock was rapidly rising. There were rumblings in the IP academic community about Berkeley Law's dominance, with informal references to BCLT's Directors as the "Gang of Four," a tongue-in-cheek reference to the Chinese Communist Party's dominance during the cultural revolution. Yet we were hardly exclusionary. We welcomed collaboration and were, along with Cardozo and DePaul law schools, founders of the Intellectual Property Scholars Conference (IPSC), an annual conference focused on mentoring junior IP scholars.<sup>50</sup> We also developed collaborations with foreign universities.

With all of this activity, we came to realize that we needed some support staff and program funding. Professor Merges and I had successfully solicited funding from a dozen law firms to launch the program, but that initial infusion had run out by 1998. A new fiscally minded dean informed us that we would need to be fully self-funding. We convened a meeting with him to discuss paths forward. Professor Merges, Professor Lemley, and I believed that sustaining BCLT was worthwhile and were cautiously optimistic that sustainable funding could be found. Professor Samuelson expressed a preference to dismantle BCLT. She was laying the groundwork for a law, technology, and public policy clinic that she and her spouse would underwrite. The dean gave his approval to seeing if we could get BCLT on a sustainable path.

I agreed to take on BCLT's Executive Director role and soon thereafter rolled out an annual sponsorship program. The timing was propitious. Law firms were paying headhunters \$30,000 for each associate that they recruited from east coast law firms to build Bay Area technology practices. BCLT could save the law firms tremendous time, money, and effort if the new crop of associates were available locally. Our program was already attracting many strong students and our unrivaled curriculum, extracurricular activities, and exposure to the fertile crescent of tech law could grow this pool substantially.

I developed a pitch deck and went door-to-door among San Francisco and Silicon Valley law firms over the next year. Along the way, a name partner at one of the leading technology law firms used our meeting to broach an "of counsel" arrangement with the firm. I declined and refocused the meeting on BCLT sponsorship. The primacy of scholarship and the avoidance of conflicts, constraints, or appearances of impropriety on academic independence and integrity was paramount.<sup>51</sup> By the end of the

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rp27.pdf

[<https://web.archive.org/web/20260114131212/https://law.stanford.edu/wp-content/uploads/2015/03/wilsons-rp27.pdf>].

50. See *24th Annual Intellectual Property Scholars Conference*, UC BERKELEY LAW (2024) <https://www.law.berkeley.edu/research/bclt/bcltevents/24th-annual-intellectual-property-scholars-conference/>

[<https://web.archive.org/web/20260114132123/https://www.law.berkeley.edu/research/bclt/bcltevents/24th-annual-intellectual-property-scholars-conference/>].

51. I have served as a consultant and an expert witness for the federal and state governments as well as technology and entertainment firms. See *Oracle (Barbados) Foreign Sales Corp. v. Commissioner, Nos.*

sponsorship drive, BCLT was on a sound financial foundation, with thirty law firms contributing between \$10,000 and \$25,000 of unrestricted funds annually to support our efforts.

The program had the added bonus of bridging the academic and practice communities. Law firm representatives were speaking to students about career paths and participating in our programs. As law firms from New York, Washington, D.C., and Boston set up Bay Area offices, BCLT sponsorship enabled them to quickly get involved with the Bay Area technology law community.

## 7. Expanding Interests and Projects

With affirmance of the *Lotus* case by an equally divided vote at the Supreme Court, it appeared that the software copyright war had resolved in a propitious manner.<sup>52</sup> I marked the occasion by writing *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, and was looking forward to moving on to new adventures.<sup>53</sup> With the internet taking off, there was no shortage of interesting projects to pursue.

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13298-98, 13299-98, 13300-98, 13301-98 (T.C. consolidated Jan. 13, 1999) (expert witness on Behalf of the IRS (licensing of intellectual property)); *Microsoft Corp. v. Commissioner*, No. 16878-96, 1998 Tax Ct. Memo LEXIS 56 (T.C. Feb. 10, 1998) (expert witness on Behalf of the IRS (licensing of intellectual property)); *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (TPJ), Civil Action No. 98-1233 (TPJ), 1998 U.S. Dist. LEXIS 14231, (D.D.C. Sep. 14, 1998) (consultant to States' Attorneys General); *Lucasfilm Ltd & Ors v. Ainsworth & Anor* [2008] EWHC (Ch) 1878 (expert witness on behalf of Lucasfilm); *F.B.T. Prods., LLC v. Aftermath Recs.*, 621 F.3d 958 (9th Cir. 2010) (consultant for F.B.T. Productions); *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904 (9th Cir. 2010) (consultant for MGA Entertainment); *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (consultant for Gaye family).

I have only once taken on the role of counsel for client. I represented a software developer (Robin Antonick) whom I believed was unfairly treated by the technology company that commercialized his work. See Reply Brief for Petitioner, *Robin Antonick v. Elec. Arts Inc.*, 841 F.3d 1062 (9th Cir. 2016); Peter S. Menell, David Nimmer & Kevin Green, *Why the Ninth Circuit's Antonick v. Electronic Arts Case Is an Ideal Vehicle for Addressing the Circuit Split over Admissibility of Expert Testimony in Software Copyright Cases* (Oct. 27, 2017) (UC Berkeley Public Law Research Paper); Peter S. Menell, David Nimmer & Kevin Green, *Distinguishing Mayor McCheese from Hexadecimal Assembly Code for Madden Football: The Need to Correct the 9th Circuit's "Nutty" Rule Barring Expert Testimony in Software Copyright Cases* (Oct. 27, 2017) (UC Berkeley Public Law Research Paper). My work on that case aligned with my scholarly views. See Shyamkrishna Balganeshe & Peter S. Menell, *The Use of Technical Experts in Software Copyright Cases: Rectifying the Ninth Circuit's "Nutty" Rule*, 35 BERKELEY TECH. L.J. 663 (2020). I have not served as counsel of record for any other private clients and have come to believe that law professors should not take such roles.

I have served as counsel of record in numerous cases in which I submitted amicus briefs on behalf of myself and one or a few law professors. I have been lead author or co-lead author on those briefs and have paid the costs of submitting those briefs myself. I have never been compensated or used BCLT, university, or other funding for this work. The experience with the *Lotus* brief, see *supra* Section I(A)(4), sensitized me to importance of not signing on to amicus briefs without ensuring that I supported both the analysis and the outcome.

52. See *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233 (1996).

53. Menell, *supra* note 18. The smoldering embers of the software copyright war reignited with Oracle's decade-long battle against Google over the use of JAVA APIs in the Android operating system. See Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and*

As the intellectual property field increasingly looked to economics research, I prepared several encyclopedia chapters on the law and economics of intellectual property law.<sup>54</sup> I also co-authored books and casebooks on environmental law<sup>55</sup> and property law.<sup>56</sup> Two new opportunities, however, would significantly shape my career and the themes in this article.

*a. Entertainment Law*

As BCLT was taking off, students approached me about expanding our curriculum to encompass entertainment law. I asked my colleagues if they had any interest, but found no takers. My work in the software copyright field had piqued a broader interest in copyright law and I could see that the second wave of the digital revolution—the internet—was bringing content distribution and Hollywood more directly into play. This decision expanded my appreciation of the creators and industries that contribute to culture, social change, and economic growth. I soon found myself teaching, researching, and advising on entertainment law and the copyright issues affecting artists and content companies<sup>57</sup> in addition to my long-standing work in the digital technology field.

*b. Judicial Education*

Of perhaps most importance to my career, I learned in late 1997 that the Federal Judicial Center (FJC)—which was responsible for, among other duties, training federal judges—was looking to develop intellectual property programming to aid judges in taking on the growing wave of intellectual property cases hitting the federal judiciary shore. I offered to assist. My timing was opportune. After a background check, the FJC's judicial education staff asked me to plan a multi-day program for federal judges to be held at Berkeley the following spring.

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*Functional Features of Computer Software*, 31 HARV. J. L. & TECH. 305 (monograph for Special Issue: Software Interface Copyright (2018)). The case would eventually make its way to the Supreme Court. See *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021). I expedited publication of the monograph so as to provide a thorough background to this complex case.

54. PETER S. MENELL & SUZANNE SCOTCHMER, 2 HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., 2007); PETER S. MENELL, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (2001); 2 PETER S. MENELL, ENCYCLOPEDIA OF LAW & ECONOMICS (2000).

55. See ENVIRONMENTAL LAW (Peter S. Menell ed., International Library of Essays in Law and Legal Theory Ser. No. 2, 2002); see also PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY (1994). I would later merge my interests in intellectual property and environmental law. See PETER S. MENELL & SARA TRAN, INTELLECTUAL PROPERTY, INNOVATION, AND THE ENVIRONMENT (2014).

56. JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE (1998).

57. See Peter S. Menell, *Reflections on Music Copyright Justice*, 49 PEPP. L. REV. 533 (2022) (chronicling some of my projects in the music and entertainment law field).

I assumed that most federal judges were acquainted with intellectual property law and therefore submitted a draft proposal modeled after the academic conferences and workshops that I had been accustomed to organizing and attending. The FJC staff soon responded that most judges had only limited knowledge of intellectual property law and that they were looking for a comprehensive training program that combined coverage of intellectual property law with case management, not academic critiques of emerging jurisprudence or policy reform proposals.

Going back to the drawing board, I drew on my Silicon Valley and Los Angeles intellectual property litigation community contacts. I enlisted Judge Ronald Whyte (who was developing the Northern District of California's Patent Local Rules) and leading intellectual property treatise authors (David Nimmer and Professor J. Thomas McCarthy) for the intellectual property "Dream Team." The program wove innovative presentation materials together with simulations of judicial intellectual property proceedings (a claim construction hearing, a trademark preliminary injunction hearing, a music copyright simulation) to synthesize a highly integrated, interactive, and engaging training program. In May 1998, forty federal judges convened at UC Berkeley. The evaluations praised the program, and the FJC soon invited me to reprise the program the following year (and for the next twenty-seven years).

I have devoted one to two months annually since that time to organizing more than sixty IP training programs for the federal judiciary, including a webinar series during the pandemic. This led me to lead the development of intellectual property case management treatises<sup>58</sup> as well as collaborate with the World Intellectual Property Organization on an international patent case management guide.<sup>59</sup> The opportunity to work closely with so many judges shaped my appreciation of the challenges facing the judiciary and led to my co-founding the Berkeley Judicial Institute and writing about judiciary reform.<sup>60</sup> Of most importance to this article, this work sharpened my understanding of the interpretive/normative distinction so central to the rule of law and the role of judges.

## 8. Reflections on the Early Career

The first decade of my academic career exceeded what I had imagined when I embarked on this path. My intellectual property scholarship was having influence,

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58. MENELL ET AL., TRADE SECRET CASE MANAGEMENT JUDICIAL GUIDE, *supra* note 14; KATHI VIDAL ET AL., PATENT MEDIATION GUIDE (2019); MENELL ET AL., PATENT CASE MANAGEMENT JUDICIAL GUIDE, *supra* note 14; PETER S. MENELL ET AL., SECTION 337 PATENT INVESTIGATION MANAGEMENT GUIDE (1st ed., 2012; 2nd ed. 2023).

59. PETER S. MENELL & ALLISON SCHMITT, U.S. CHAPTER, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) PATENT CASE MANAGEMENT JUDICIAL GUIDE (2023).

60. See Peter S. Menell & Ryan Vacca, *Charting a Path for Federal Judiciary Reform*, 108 CAL. L. REV. 789 (2020) (lead article for Symposium: Judiciary Reform).

BCLT was off to a successful start and had achieved a sustainable, independent funding model, and the judicial education role was an entirely unexpected and rewarding role. I was still teaching and writing in law and economics, property law, and environmental law and policy, but running BCLT and teaching and researching intellectual property law were taking up a growing portion of my bandwidth. BCLT stood at the center of a crucial set of crossroads: the academic and practitioner communities; the academic and judicial communities; the academic and Washington policy communities; and the content (southern California) and technology (northern California) communities. A new set of opportunities, challenges, and experiences was beginning to unfold, leading to a deep schism within the copyright scholarly community. I soon found myself stuck in the middle.

### **B. THE INTERNET REVOLUTION AND THE ACADEMIC REALIST TURN**

During the 1990s, the tectonic plates of the information technology industry were shifting as the internet came to life. Many great things, such as affordable and increasingly powerful microcomputers, search engines, Wikipedia, eBay, news websites, and smart(ish) mobile phones, as well as some more controversial developments, such as parasitic filesharing services, emerged. The dot-com bubble was inflating. The next decade would witness the most dynamic period in intellectual property law history, not to mention a massive shift in the sources of America's economic prosperity.

To understand the shifting copyright landscape during this era, it is important to trace the emergence of the copyleft movement, a counter-narrative to copyright protection that took hold in the copyright academy and the technology sector. This phalanx of scholars, nongovernmental organization ("NGO") lawyers, and technology company counsel played a growing role in both the legislative process and the courts. Although I had been close to several copyleft pioneers through the software copyright battles, I did not wholeheartedly embrace their growing skepticism of copyright protection in general. Nor did I align with copyright maximalists who sought to protect traditional business models from technological advance. I came to see the opportunity for symbiotic technological change that could promote internet commerce, freedom of expression, and greater market reach for creators.

A battle over the very survival of copyright protection unfolded at the turn of the millennium. Moreover, the copyleft movement drove many professors to leave behind the academic values of independent, objective, and scrupulous analysis and pursue zealous advocacy. By 2012, copyright protection in cyberspace had largely held, and a dynamic, symbiotic ecosystem built around copyright law and norms took shape. But the effects of this tumultuous period would undermine core academic values.

## 1. The Emergence of the Copyleft Movement

Beginning in the 1970s, technological advances in consumer electronics and computer technology empowered consumers and users to exercise greater agency in the use of copyrighted works. These interests combined with an emerging electronic libertarian philosophy. These forces coalesced in the 1990s to form a populist movement that came to view copyright protection skeptically. The content industries reasonably feared that the coming wave of technology could decimate their business models and mounted a lobbying campaign to shore up copyright protections. The computer and software industries as well as an emerging online services industry joined the policy debate, assisted by a phalanx of constitutional and copyright scholars developing the copyleft counter-narrative. Big Tech corporate interests would eventually co-opt the cyberlibertarian and copyleft idealists.<sup>61</sup> Authors, musicians, filmmakers, artists, and other creative professions were somewhat lost in the tumult. By the turn of the millennium, a polarized and explosive ecosystem had developed in both the online marketplace and the copyright scholarly community.

### a. *Technological and Social Forces*

The roots of the copyleft movement trace to the development of electronic copying and creation technologies, grassroots software developer communities, and charismatic libertarian voices.

### i. *The Emergence of Home Copying and Production Technology*

Consumer empowerment would come to play a significant role in the copyleft movement. The entertainment and mass media industries that dominated culture in the mid-twentieth century—sound recording, film, radio, and television—curated and delivered content to passive consumers. Recorded music was delivered on fixed discs, radio was packaged by disc jockeys, and television was programmed. The technology of the early content industries was one-directional.

With advances in electronics, transistors, and microcomputers in the 1960s, that controlled directionality gradually gave way to consumer involvement and ultimately substantial consumer control over access to and production of creative works. Tape recorders enabled users to record music in their own home. The Moog synthesizer, introduced in the late 1960s, provided the means for keyboardists to play with and compose sound in new and creative ways.<sup>62</sup> With affordable cassette home tape

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61. See *Devolution II*, *supra* note 4.

62. See Jennifer Gersten, *The Moog Synthesizer's Dynamic Musical History*, WQXR (Apr. 11, 2017), <https://www.wqxr.org/story/moog-synthesizers-dynamic-musical-history/>

recording technology, listeners gained agency. By the 1970s, music fans could produce mixtapes—their own curation of their favorite music. They could play these tapes on car stereos. Sony's Betamax video cassette recorder (“VCR”), introduced in 1975, enabled wealthy households to record television shows and watch them on their schedules, not those set by the broadcasters.<sup>63</sup> The Sony Walkman, introduced in 1979, provided an affordable device for listening to music anywhere.<sup>64</sup>

Cassette technology posed only a modest threat to record sales. Copying tapes was time consuming, and there was fidelity loss in each generation of copies.<sup>65</sup> VCR technology, however, upended the motion picture industry's plan to introduce a videodisc player and sell pre-recorded videodiscs, sparking the first lawsuit in which content owners alleged that the manufacturer of a consumer device was indirectly liable for copying by end-users of the device.<sup>66</sup> And although the early version of the Sony Betamax device did not enable users to easily skip commercials, that eventuality was foreseeable and threatened to undermine the broadcasting industry's advertising-based revenue model.

The lawsuit awakened the consumer electronics industry and consumers to the tension between consumer rights and copyright protection. Founded in 1981 principally funded by consumer electronics manufacturers, the Home Recording Rights Coalition sought to secure and protect consumer rights to access and record radio and television broadcasts.<sup>67</sup> The litigation over the VCR, the first copyright case to reach the Supreme Court following passage of the 1976 Copyright Act, galvanized public opinion.<sup>68</sup> The Supreme Court's decision held that consumers' time-shifting of television broadcasting was fair use but did not resolve the status of archiving.<sup>69</sup>

[<https://web.archive.org/web/20251205162551/https://www.wqxr.org/story/moog-synthesizers-dynamic-musical-history/>].

63. See *Sony History* at part 2, ch. 2, SONY, <https://www.sony.com/en/SonyInfo/CorporateInfo/History/SonyHistory/>

[<https://web.archive.org/web/20251205163050/https://www.sony.com/en/SonyInfo/CorporateInfo/History/SonyHistory/>] (last visited Dec. 5, 2025).

64. *Id.* at part 2, ch. 6.

65. See COPYRIGHT AND HOME COPYING, *supra* note 19. Nonetheless, the RIAA succeeded in persuading Congress to ban record rentals. See Rental Record Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (amending 17 U.S.C. §§109, 115); Ryan Vacca, *Expanding Preferential Treatment Under the Record Rental Amendment Beyond the Music Industry*, 11 LEWIS & CLARK L. REV. 605, 612–13 (2007) (describing the concern that record stores were renting phonorecords at the time that cassette tapes were readily available).

66. See Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 945–46 (2007); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).

67. See *Home Recording Rights Coalition*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Home\\_Recording\\_Rights\\_Coalition](https://en.wikipedia.org/wiki/Home_Recording_Rights_Coalition) [<https://web.archive.org/web/20251003085107/https://en.wikipedia.org/favicon.ico>] (last visited Oct. 7, 2025).

68. See *Sony*, 464 U.S. 417.

69. *Id.* at 456.



Consequently, the Court addressed whether Sony could be held indirectly liable. Drawing on the “historic kinship” of patent and copyright law, the Court engrafted patent law’s staple article of commerce provision—immunizing sellers of products “suitable for substantial noninfringing use”<sup>70</sup> from contributory liability—onto copyright law.<sup>71</sup>

The introduction of compact disc (“CD”) technology in the mid-1980s provided consumers with digital recordings—a breakthrough in fidelity, resilience, and convenience. Within a decade, this format would largely displace vinyl and cassette sales.<sup>72</sup> While the record industry profited handsomely from this new format, it came to fear that digital recordings could result in viral piracy. Unlike analog media such as vinyl and cassette, digital media could be recorded and re-recorded without any loss of fidelity. When Sony introduced consumer digital audio tape (“DAT”) technology in the late 1980s, the recording industry and the consumer electronics industry came together to support the Audio Home Recording Act (“AHRA”),<sup>73</sup> clearing DAT’s entry onto the market while deterring piracy.<sup>74</sup>

Although the AHRA soon became obsolete, a new generation of microcomputers provided the means for playing, storing, and burning CDs without encryption or other technological protection. Advances in computer storage and speeds, as well as data compression—most notably the MP3 format—would enable consumers to transfer files to portable MP3 players. The internet unleashed content owners’ greatest fear—effortless, widespread, viral distribution of music files.

ii. *The Open Source Movement, the Interoperability Movement, and Electronic Freedom*

Developments in the computer industry paralleled the shift of control in the consumer electronics marketplace. Computer programmers sought greater control over the use of the rapidly developing computer systems being released by computer manufacturers. In addition, recognizing the importance of network effects, new entrants to the computer hardware, peripheral device, and software markets sought to develop interoperable technologies.

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70. *Id.* at 439; 35 U.S.C. § 271(c).

71. *See infra* Section II(B)(3)(e) (tracing the legislative history of the 1976 Act to uncover Congress’s intent regarding indirect copyright liability).

72. Felix Richter, *From Tape to Tidal: Four Decades of U.S. Music Sales*, Statista (June 24, 2022), <https://www.statista.com/chart/17244/us-music-revenue-by-format/> [<https://web.archive.org/web/20251205164403/https://www.statista.com/chart/17244/us-music-revenue-by-format/>].

73. Audio Home Recording Act, Pub. L. No. 102—563, 106 Stat. 4237.

74. *See* Joel L. McQuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 HASTINGS COMM. & ENT. L. J. 311, 321–22 (1994).

## 1. The Open Source Movement

Apart from the early copyright litigation over computer software in the early 1980s, tight control by computer manufacturers on the distribution of source code—human readable versions as distinguished from object or binary code—and restrictive software licenses sparked a backlash against intellectual property protection for computer software among computer researchers.<sup>75</sup> Beginning in the early 1980s, Richard Stallman, a researcher in MIT’s Artificial Intelligence Laboratory, rallied programmers to develop a non-proprietary version of UNIX, a widely used computer operating system controlled by AT&T.<sup>76</sup> Stallman established the Free Software Foundation (“FSF”) to promote users’ rights to use, study, copy, modify, and redistribute computer programs.<sup>77</sup> Stallman propounded a broader conception of freedom for the digital revolution: “free as in speech, not as in beer.”<sup>78</sup> The phrase emphasized the importance of liberty to run, copy, distribute, study, change and improve software, as distinguished from a free good, as in a complimentary beverage.

FSF developed the General Public License (“GPL”) to ensure that programs would remain non-proprietary and that users would be free to run, study, share (copy), and modify the software as long as the users permit the use of any derivative works on the same terms.<sup>79</sup> This inversion of control from initial developers to users spawned the term “copyleft,” which is often represented as a backwards or reversed “c” in a circle.<sup>80</sup>

75. See *Staff and Board: Richard M. Stallman*, FREE SOFTWARE FOUND., <https://www.fsf.org/about/staff-and-board> [<https://web.archive.org/web/20251104231319/https://www.fsf.org/about/staff-and-board>] (last visited Nov. 4, 2025); see generally Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, 34 BERKELEY TECH. L.J. 219, 260–64 (2019) (tracing the history of the free and open source movement).

76. Researchers at M.I.T., AT&T, and General Electric developed UNIX in the late 1960s and early 1970s and it became a foundation for modern computer operating system design. See *UNIX*, BRITANNICA, <https://www.britannica.com/technology/UNIX> [<https://web.archive.org/web/20251104232008/https://www.britannica.com/topic-content/page/482290/2>] (last visited Nov. 4, 2025); Marshall Kirk McKusick, *Twenty Years of Berkeley Unix: From AT&T Owned to Freely Redistributable*, in OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION 31, 36–39 (Chris DiBona & Sam Ockman eds., 1999).

77. See McKusick, *supra* note 76.

78. See Amy Harmon, *The Rebel Code*, N.Y. TIMES MAG., Feb. 21, 1999, at 34; *Gratis versus libre*, Wikipedia, [https://en.wikipedia.org/wiki/Gratis\\_versus\\_libre](https://en.wikipedia.org/wiki/Gratis_versus_libre) [[https://web.archive.org/web/20251115152401/https://en.wikipedia.org/wiki/Gratis\\_versus\\_libre](https://web.archive.org/web/20251115152401/https://en.wikipedia.org/wiki/Gratis_versus_libre)] (last visited Nov. 15, 2025).

79. See Brian W. Carver, *Share and Share Alike: Understanding and Enforcing Open Source and Free Software Licenses*, 20 BERKELEY TECH. L.J. 443 (2005). GPL software “infects” derivative works and spreads, like a virus, through the ecosystem—liberating computer software from proprietary rights.

80. See *Copyleft*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Copyleft> [<https://web.archive.org/web/20251115152817/https://en.wikipedia.org/wiki/Copyleft>] (last visited Nov. 15, 2025).

Stallman set forth a task list for the development of a viable UNIX-compatible open-source operating system.<sup>81</sup> Programmers throughout the world voluntarily contributed to this effort and by the late 1980s, they had assembled most of the components. The project reached fruition in 1991 when Linus Torvalds developed a UNIX-compatible kernel—the central core of the operating system.<sup>82</sup> Torvalds structured the evolution of his component on the GPL model. The resulting UNIX-compatible free software program, dubbed “Linux,” gradually gained widespread use and spread the open-source model through important sectors of the computer software industry.<sup>83</sup>

The “open source” movement emerged as a middle ground between proprietary software distribution and the “free” software movement. Like Linux, the open source movement traces its roots to efforts to liberate UNIX. In the mid-1970s, Ken Thompson at UC Berkeley spearheaded an effort by Berkeley faculty and students to enhance UNIX capabilities.<sup>84</sup> In contrast to the GPL, the Berkeley Software Development (“BSD”) project offered its software on a “permissive” basis: Licensees could distribute modifications of the BSD software whether or not the modifications were freely licensed.<sup>85</sup> Nonetheless, the licensee was still obliged to obtain a license from AT&T for the underlying UNIX code.

As the internet took off in the late 1990s, a growing number of hardware and software vendors embraced “free” and “open-source” development and distribution strategies.<sup>86</sup> They saw these non- or less-proprietary licensing models as means to prevent Microsoft from expanding its influence into the internet and other platform technologies while simultaneously promoting competition and innovation. There is now a wide variety of permissive open-source licensing models. Free (GPL) and open-source software play strong and increasing roles in network technologies, such as operating systems (e.g., Linux), internet infrastructure (e.g., Apache Web Server), and mobile devices (e.g., Android), but have been less successful in penetrating consumer

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81. See Richard Stallman, *The GNU Project*, GNU OPERATING SYS., <https://www.gnu.org/gnu/thegnuproject.html> [<https://perma.cc/CZ6Y-QWPT>] (last visited Nov. 4, 2025).

82. See *Linux*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Linux> [<https://web.archive.org/web/20251115153247/https://en.wikipedia.org/wiki/Linux>] (last visited Nov. 4, 2025).

83. See STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* (2005).

84. See *Berkeley Software Distribution*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Berkeley\\_Software\\_Distribution](https://en.wikipedia.org/wiki/Berkeley_Software_Distribution) [[https://en.wikipedia.org/wiki/Berkeley\\_Software\\_Distribution](https://en.wikipedia.org/wiki/Berkeley_Software_Distribution)] (last visited Oct. 8, 2025).

85. See *Permissive Software License*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Permissive\\_software\\_license](https://en.wikipedia.org/wiki/Permissive_software_license) [[https://web.archive.org/web/20251009021325/https://en.wikipedia.org/wiki/Permissive\\_software\\_license](https://web.archive.org/web/20251009021325/https://en.wikipedia.org/wiki/Permissive_software_license)] (last visited Oct. 8, 2025).

86. See WEBER, *supra* note 83.

as opposed to programmer-centric product areas. Notwithstanding the proliferation of free and open-source licenses, there have been relatively few litigated disputes.

## 2. American Committee for Interoperable System

In parallel with the open software movement's grassroots effort, a consortium of more than twenty hardware and software industry companies formed the American Committee for Interoperable System ("ACIS") in 1984 to advocate for "policies and principles of intellectual property law that provide a balance between rewards for innovation and the belief that computer systems developed by different vendors must be able to communicate fully with each other."<sup>87</sup> The consortium worked on developing standards to ensure that different systems could communicate and operate together effectively. As the copyright litigation over interoperability unfolded in the 1990s, ACIS filed amicus briefs.<sup>88</sup> It also became involved in legal and policy debates about interoperability throughout the world.<sup>89</sup>

### b. *The Electronic Freedom Foundation*

In 1990, the U.S. Federal Bureau of Investigation ("FBI")'s monitoring of computer networks brought together an unusual consortium of early online enthusiasts: retired Wyoming rancher, and LSD-inspired<sup>90</sup> Grateful Dead lyricist, and cyberlibertarian John Perry Barlow;<sup>91</sup> early Sun Microsystems engineer and civil libertarian John

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87. Fact Sheet, American Committee for Interoperable System (ACIS) (Aug. 3, 1992), <https://ccianet.org/wp-content/uploads/2014/10/ACIS-Letter-to-Clinton-Admin-1992.pdf> [<https://web.archive.org/web/20251009023954/https://ccianet.org/wp-content/uploads/2014/10/ACIS-Letter-to-Clinton-Admin-1992.pdf>]. Sun Microsystems took a leadership role in ACIS. In an audacious opportunist corporate move, Oracle Corporation would later acquire Sun Microsystems and institute a lawsuit against Google over the Android operating system's interoperability with Sun's Java platform. See Menell, *Rise of the API Copyright Dead*, *supra* note 53, at 345–74.

88. See, e.g., Brief Amici Curiae of American Committee for Interoperable Systems and Computer & Communications Industry Association in Support of Respondent, *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 15 U.S. 1191 (1995) (No. 94-2003).

89. See JONATHAN BAND, INTERFACES ON TRIAL 3.0: GOOGLE V. ORACLE AMERICA AND BEYOND 15, 26, 36, 91–92 (2021) (noting that ACIS "filed amicus briefs in *Computer Associates v. Altai*, *Lotus v. Borland*, and numerous other cases where it argued that copyright did not extend to interface specifications"); JONATHAN BAND & MASANOBU KATOH, INTERFACES ON TRIAL 2.0, 33–34, 75–76, 170–74, 179–80 (2011); JONATHAN BAND & MASANOBU KATOH, INTERFACES ON TRIAL: INTELLECTUAL PROPERTY AND INTEROPERABILITY IN THE GLOBAL SOFTWARE INDUSTRY 120–23, 128, 137, 161–63, 188, 192–93, 304–08 (1995).

90. See Aaron Davis, *Wyoming's Estimated Prophet: John Perry Barlow*, BUCKRAIL (Feb. 8, 2018) (discussing Barlow's LSD fascination), <https://buckrail.com/wyomings-estimated-prophet-john-perry-barlow/> [<https://web.archive.org/web/20251009040057/https://buckrail.com/wyomings-estimated-prophet-john-perry-barlow/>].

91. See *John Perry Barlow*, WIKIPEDIA, [https://en.wikipedia.org/wiki/John\\_Perry\\_Barlow](https://en.wikipedia.org/wiki/John_Perry_Barlow) [[https://web.archive.org/web/20251009040459/https://en.wikipedia.org/wiki/John\\_Perry\\_Barlow](https://web.archive.org/web/20251009040459/https://en.wikipedia.org/wiki/John_Perry_Barlow)] (last visited Oct. 9, 2025). Inspired by the 1950s Beatnik movement, the Grateful Dead came to epitomize the psychedelic, escapist counterculture of the 1960s. See *Deadhead*, WIKIPEDIA,

Gilmore;<sup>92</sup> and software entrepreneur (co-founder of Lotus Development Corp.) and philanthropist Mitch Kapor.<sup>93</sup> After Barlow posted an account of the FBI's investigation of software piracy on The WELL ("Whole Earth 'Lectronic Link"), one of the first virtual communities,<sup>94</sup> the three joined forces to form the Electronic Frontier Foundation ("EFF").<sup>95</sup>

EFF aimed to leverage internet civil liberties issues<sup>96</sup> as part of a plan to "hack government" and bring about an open society.<sup>97</sup> As journalist Joshua Quittner characterized EFF's formative years, the EFF founders were "the Merry Pranksters, those apostles of LSD, who tripped through the 1960s."<sup>98</sup> The "former acid-heads turned millionaires: ideologues who came of age during the 1960s, then proved themselves in the marketplace." They envisioned a utopian society in which the internet would "overcome the advantages of economies of scale . . . so the big guys don't rule."<sup>99</sup> Political parties would become obsolete if "open networks enable people to

<https://en.wikipedia.org/wiki/Deadhead>

[<https://web.archive.org/web/20251009042018/https://en.wikipedia.org/wiki/Deadhead>] (last visited Oct. 9, 2025). The Grateful Dead's first show was at one of Ken Kesey's Acid Tests. See *Acid Tests*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Acid\\_Tests](https://en.wikipedia.org/wiki/Acid_Tests)

[[https://web.archive.org/web/20251009042713/https://en.wikipedia.org/wiki/Acid\\_Tests](https://web.archive.org/web/20251009042713/https://en.wikipedia.org/wiki/Acid_Tests)] (last visited Oct. 9, 2025). These experiences "gave [the band] glimpses into the form that follows chaos." Michael Kaler, *The Grateful Dead's Spiritual Context—The Acid Tests and Afterwards*, in DAUGHTER'S GRIMOIRE, GET SHOWN THE LIGHT 189 (2006), The Grateful Dead's improvisational style grew out of the members' and audiences' shared, often drug-mediated, experience. The band's "shows were the sacrament . . . rich and full of blissful, transcendent musical moments that moved the body and enriched the soul." BLAIR JACKSON, GARCIA: AN AMERICAN LIFE 219 (1999).

92. See *John Gilmore*, ELEC. FRONTIER FOUND., <https://www.eff.org/about/board/john-gilmore> [<https://web.archive.org/web/20251105010237/https://www.eff.org/about/board/john-gilmore>] (last visited Nov. 4, 2025).

93. See *Mitchell Kapor*, LONG NOW, <https://longnow.org/people/mitchell-kapor/> [<https://web.archive.org/web/20251108185835/https://longnow.org/people/mitchell-kapor/>] (last visited Nov. 4, 2025).

94. See Joshua Quittner, *The Merry Pranksters Go to Washington*, WIRED (June 1, 1994), <https://www.wired.com/1994/06/eff>

[<https://web.archive.org/web/20251010012206/https://www.wired.com/1994/06/eff/>]; *What is The WELL*, WELL.COM, <https://www.well.com/about-2/> [<https://web.archive.org/web/20251108190022/https://www.well.com/about-2/>] (last visited, Nov. 4, 2025); FRED TURNER, FROM COUNTERCULTURE TO CYBERCULTURE: STEWART BRAND, THE WHOLE EARTH NETWORK, AND THE RISE OF DIGITAL UTOPIANISM 73–81 (2006) (tracing Stewart Brand 1968 WHOLE EARTH CATALOG to countercultural values, rejection of hierarchy, and enthusiasm for technology); *id.* at 162 (noting the influence of The WELL on John Perry Barlow).

95. See *Electronic Frontier Foundation*, Wikipedia, [https://en.wikipedia.org/wiki/Electronic\\_Frontier\\_Foundation](https://en.wikipedia.org/wiki/Electronic_Frontier_Foundation)

[[https://web.archive.org/web/20251113031407/https://en.wikipedia.org/wiki/Electronic\\_Frontier\\_Foundation](https://web.archive.org/web/20251113031407/https://en.wikipedia.org/wiki/Electronic_Frontier_Foundation)] (last visited Nov. 15, 2025).

96. See *id.*

97. See Quittner, *supra* note 94.

98. See *id.*

99. *Id.* (quoting EFF board member Esther Dyson).

organize ad hoc.”<sup>100</sup> This cyberlibertarian movement opposed government regulation.<sup>101</sup>

As the reality of building and funding a civil liberties law firm/lobbying organization hit, EFF took on corporate donors, moved from Cambridge, Massachusetts, to Washington, D.C., and hired inside-the-beltway operatives.<sup>102</sup> Jerry Berman, EFF’s Executive Director, learned the ropes as Chief Legislative Counsel for the American Civil Liberties Union from 1978 to 1988, where he engaged in the rough and tumble of inside-the-beltway politics.<sup>103</sup> Berman’s work on the Communications Law Enforcement Assistance Act of 1994 (“CALEA”),<sup>104</sup> which required telecommunications companies to install specialized equipment and design their digital facilities in a way that made it easy to wiretap, generated a backlash from EFF members.<sup>105</sup> Following Mr. Berman’s departure in 1994, EFF relocated to San Francisco, where it received funding from and became more closely aligned with large technology companies and the developing ISP industry.<sup>106</sup>

100. *Id.*

101. See Mitchell Kapor, *Where Is the Digital Highway Really Heading?* WIRED (Mar. 1, 1993), <https://www.wired.com/1993/03/kapor-on-nii/> [<https://web.archive.org/web/20251115155617/https://www.wired.com/1993/03/kapor-on-nii/>] (“Private, not public . . . life in cyberspace seems to be shaping up exactly like Thomas Jefferson would have wanted: founded on the primacy of individual liberty and a commitment to pluralism, diversity, and community.”); TURNER, *supra* note 94, at 208 (“Its faith that the Internet constituted a revolution in human affairs legitimated calls for telecommunications deregulation and the dismantling of government entitlement programs elsewhere as well.”).

102. Yasha Levine, *All EFF’d Up: Silicon Valley’s Astroturf Privacy Shakedown*, 40 THE BAFFLER 45, 52 (July 2018), <https://thebaffler.com/salvos/all-effd-up-levine> [<https://web.archive.org/web/20250907033329/https://thebaffler.com/salvos/all-effd-up-levine>]; YASHA LEVINE, *SURVEILLANCE VALLEY: THE SECRET MILITARY HISTORY OF THE INTERNET*, at 78 (2018).

103. See Quittner, *supra* note 94; Levine, *All EFF’d Up*, *supra* note 102 (commenting that “Berman was a Beltway insider who in the 1980s was at the center of a push to turn the ACLU into a big business lobby and an ally of intelligence agencies and right-wing political interests. Among other things, the Berman-era ACLU defended Big Tobacco from regulations on advertising and worked with the National Rifle Association to fight electronic collection of arrest data by the Department of Justice for background checks to deny firearms licenses.”).

104. Pub. L. No. 103-414, 108 Stat. 4279 (codified at 47 U.S.C. §§ 1001–1010).

105. See Levine, *All EFF’d Up*, *supra* note 102.

106. See *Electronic Frontier Foundation*, BRITANNICA, <https://www.britannica.com/topic/Electronic-Frontier-Foundation> [<https://web.archive.org/web/20250806190512/https://www.britannica.com/topic/Electronic-Frontier-Foundation>] (last visited Nov. 15, 2025) (observing that “[b]ecause of internal tensions, the EFF underwent a variety of reorganizations. Disagreements over the experiences in Washington caused a major shake-up in 1994–95, during which then-executive-director Jerry Berman was fired and co-founder Mitch Kapor left the organization. The EFF then moved its offices to San Francisco, greatly in debt and with a significantly reduced staff.”); Levine, *All EFF’d Up*, *supra* note 102; *Electronic Frontier Foundation (EFF)*, INFLUENCE WATCH, <https://www.influencewatch.org/non-profit/electronic-frontier-foundation-eff> [<https://web.archive.org/web/20251105235203/https://www.influencewatch.org/non-profit/electronic-frontier-foundation-eff>] (last visited Nov. 15, 2025) (noting that EFF received donations from large technology businesses such as IBM, Microsoft, and Bell Atlantic).

Barlow's 1994 essay, *The Economy of Ideas*, expanded EFF's mission into intellectual property policy.<sup>107</sup> His subtitle "A Framework for Patents and Copyrights in the Digital Age" noted parenthetically that "[e]verything you know about intellectual property is wrong."<sup>108</sup> Barlow equated Thomas Jefferson's recognition that knowledge cannot "in nature" be property<sup>109</sup> with Stewart Brand's quip that "Information Wants to Be Free."<sup>110</sup> Drawing on the Grateful Dead's success in encouraging fans to make and distribute bootleg recordings as a way to drive tour and merchandising revenue,<sup>111</sup> Barlow questioned the need for copyright protection.<sup>112</sup> He extrapolated those propositions to conclude that intellectual property was foolhardy and should not be enforceable on the internet.<sup>113</sup>

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107. John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1, 1994), <https://www.wired.com/1994/03/economy-ideas/> [<https://web.archive.org/web/20251005072547/https://www.wired.com/1994/03/economy-ideas/>].

108. *Id.*

109. See Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334–35 (Andrew A. Lipscomb ed., 1903).

110. See *Information Wants to Be Free*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Information\\_wants\\_to\\_be\\_free](https://en.wikipedia.org/wiki/Information_wants_to_be_free). [[https://web.archive.org/web/20251012044751/https://en.wikipedia.org/wiki/Information\\_wants\\_to\\_be\\_free](https://web.archive.org/web/20251012044751/https://en.wikipedia.org/wiki/Information_wants_to_be_free)] (last visited Oct. 12, 2025). Brand is a writer, environmental activist, founder and editor of the Whole Earth Catalog, and co-founder of The WELL. See Stewart Brand, WIKIPEDIA, [https://en.wikipedia.org/wiki/Stewart\\_Brand](https://en.wikipedia.org/wiki/Stewart_Brand) [[https://web.archive.org/web/20251011190414/https://en.wikipedia.org/wiki/Stewart\\_Brand](https://web.archive.org/web/20251011190414/https://en.wikipedia.org/wiki/Stewart_Brand)] (last visited Oct. 11, 2025). The full quotation in context conveys a deeper, and more logical, meaning:

In fall 1984, at the first Hackers' Conference, I said in one discussion session: "On the one hand information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other."

See *Information Wants to Be Free . . .*, Roger Clark's Web-Site, <http://www.rogerclarke.com/II/IWtbF.html> [<https://web.archive.org/web/20251008082617/http://www.rogerclarke.com/II/IWtbF.html>] (last visited Oct. 8, 2025).

111. See Barlow, *supra* note 107 (noting that "I don't get any royalties on the millions of copies of my songs which have been extracted from concerts, but I see no reason to complain. The fact is, no one but the Grateful Dead can perform a Grateful Dead song, so if you want the experience and not its thin projection, you have to buy a ticket from us. In other words, our intellectual property protection derives from our being the only real-time source of it.").

112. *See id.*

113. *See id.*

Notwithstanding his selective and misleading reading of Jefferson<sup>114</sup> and the economics of intellectual property,<sup>115</sup> Barlow's revolutionary prose attracted passionate followers, including Fred von Lohmann<sup>116</sup>—who would go on to lead EFF's copyright litigation work and become Google's Senior Copyright Counsel in 2010—Professor Pamela Samuelson,<sup>117</sup> and Professor Lawrence Lessig.<sup>118</sup>

In early 1996, John Perry Barlow, again extrapolating misleadingly from Thomas Jefferson,<sup>119</sup> issued "A Declaration of the Independence of Cyberspace."<sup>120</sup> Drawing

114. Although Thomas Jefferson was initially skeptical of patents, Letter from Thomas Jefferson to Jedy de l'Hommande (Aug. 9, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 11 (Julian P. Boyd et al. eds., 1955), he came to recognize the importance of intellectual property and contributed to and supported the nation's early patent system. See Edward C. Walterscheid, *The Use and Abuse of History: The Supreme Court's Interpretation of Thomas Jefferson's Influence on the Patent Law*, 39 IDEA 195 (1999); Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev. 993, 998–99, 1026–34 (2006); P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC'Y. 237, 238 (1936); see also Letter from Thomas Jefferson to James Madison (Aug. 1789), in 5 THE WORKS OF THOMAS JEFFERSON, at 113 (Ford ed., 1895) (stating that he would have been pleased by an express provision in this form: "Art. 9. Monopolies may be allowed to persons for their own productions in literature & their own inventions in the arts, for a term not exceeding—years but for no longer term & no other purpose."); Letter from Thomas Jefferson to Oliver Evans (May 2, 1807), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/99-01-02-5538> [<https://perma.cc/D62T-JERZ>] ("Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. . . . Nobody wishes more than I do that ingenuity should receive a liberal encouragement.").

115. Although the internet unquestionably diminished the costs of disseminating works and other technological advances reduced the cost of creating many works of authorship, it was foolhardy to suggest that authorship was costless.

116. See Sharon Driscoll, *The Open Internet, Congress, and Corruption: A Conversation with Larry Lessig*, STAN. LAWYER 78, 25 (2008) (quoting Fred von Lohmann that reading Barlow's 1994 essay was his "conversion moment").

117. See Pamela Samuelson, EFF, <https://www.eff.org/about/board/pamela-samuelson> [<https://web.archive.org/web/20250624130208/https://www.eff.org/about/board/pamela-samuelson>] (last visited June 24, 2025); Rebecca Jeschke, *New Chair of EFF's Board of Directors: Renowned Legal Expert Pamela Samuelson*, <https://www.eff.org/deeplinks/2019/09/new-chair-effs-board-directors-renowned-legal-expert-pamela-samuelson> [<https://web.archive.org/web/20250820041812/https://www.eff.org/deeplinks/2019/09/new-chair-effs-board-directors-renowned-legal-expert-pamela-samuelson>] (last visited Aug. 20, 2025). Professor Samuelson became an EFF Fellow in 1997. Pamela Samuelson, WIKIPEDIA, [https://en.wikipedia.org/wiki/Pamela\\_Samuelson](https://en.wikipedia.org/wiki/Pamela_Samuelson) [[https://web.archive.org/web/20250831161827/https://en.wikipedia.org/wiki/Pamela\\_Samuelson](https://web.archive.org/web/20250831161827/https://en.wikipedia.org/wiki/Pamela_Samuelson)] (last visited Aug. 31, 2025) (EFF Public Policy Fellow (1997–2000), Board Member (2000), Vice Chair of Board (2009–19), Chair, Board of Directors (since 2019)).

118. See Driscoll, *supra* note 116 (noting that Lessig was then a member of the EFF Board).

119. See Thomas Jefferson and the Declaration of Independence, MONITCELLO, <https://www.monticello.org/thomas-jefferson/jefferson-s-three-greatest-achievements/the-declaration/jefferson-and-the-declaration/> [<https://web.archive.org/web/20251001222551/https://www.monticello.org/thomas-jefferson/jefferson-s-three-greatest-achievements/the-declaration/jefferson-and-the-declaration/>] (last visited Oct. 1, 2025) (noting that Thomas Jefferson is considered the principal author of the Declaration of Independence).

120. See John Perry Barlow, *A Declaration of the Independence of Cyberspace*, EFF (Feb. 6, 1996), <https://www.eff.org/cyberspace-independence> [<https://web.archive.org/web/20251006051442/https://www.eff.org/cyberspace-independence>]; cf. David



rhetorical analogy to the United States Declaration of Independence, Barlow proclaimed cyberspace as an open, borderless, free, and open domain beyond the coercive powers of *any* government.<sup>121</sup> It read more like a bizarre remix of Karl Marx, Friedrich Hayek, and Ludwig von Mises than Jefferson, and came to epitomize “Internet Exceptionalism,” the view that the internet is, or at least ought to be, beyond government regulation.<sup>122</sup>

EFF would play a key role in leading the copyleft movement in the decades to come. Its libertarian ideals were generally supportive of disruption and hacking. It would work and align closely with Big Tech companies seeking to relax copyright protections on the internet.<sup>123</sup> These companies also pursued business models that undermined privacy protection,<sup>124</sup> in some instances with EFF’s support.<sup>125</sup> EFF would also serve as catalyst for legal scholars seeking to influence policy and how courts interpret copyright law based on John Perry Barlow’s vision. Getting ahead of the

Post & David Johnson, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (suggesting that the internet could be considered a sovereign virtual nation-state).

121. Barlow, *A Declaration of the Independence of Cyberspace*, *supra* note 120.

122. In his classic 1831 work, *DEMOCRACY IN AMERICA* (Henry Reeve tr. 1876), Alexis de Tocqueville described America as encompassing liberty, individualism, democracy, meritocracy, and laissez-faire economics, which would come to epitomize “American exceptionalism,” a phrase that came into common usage a century later. See *American Exceptionalism*, WIKIPEDIA, [https://en.wikipedia.org/wiki/American\\_exceptionalism](https://en.wikipedia.org/wiki/American_exceptionalism) [[https://web.archive.org/web/20251115161555/https://en.wikipedia.org/wiki/American\\_exceptionalism](https://web.archive.org/web/20251115161555/https://en.wikipedia.org/wiki/American_exceptionalism)] (last visited Nov. 15, 2025); cf. KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* (1998) (tracing the internet’s revolutionary origins).

123. See Levine, *All EFF’d Up*, *supra* note 102 (discussing Google’s extensive lobbying operations and its funding of academics, EFF, and many other NGOs to support its surveillance capitalism business plan; noting in particular that “[a]s Google and other Silicon Valley companies began to use their wealth and power to craft legislation and influence public debate, EFF emerged as a leading partner. And EFF’s 2004 defense of the launch of Gmail offered a perfect opening for this new phase of the group’s lobbying career.”); LEVINE, *SURVEILLANCE VALLEY*, *supra* note 102, at 135–36 (“*Wired* and EFF were extensions of the same larger business-counterculture-New-Right network and ideology that emerged out of Stewart Brand’s *Whole Earth*. That’s where *Wired*’s real cultural power lay: using cybernetic ideals of the counterculture to sell corporate politics as a revolutionary act.”).

124. See, e.g., STEVEN LEVY, *IN THE PLEX: HOW GOOGLE THINKS, WORKS, AND SHAPES OUR LIVES* 6 (2011) (observing that “Google professed a sense of moral purity—as exemplified by its informal motto, ‘Don’t be evil’—but it seemed to have a blind spot regarding the consequences of its technology on privacy and [intellectual] property rights”).

125. See Levine, *All EFF’d Up*, *supra* note 102 (describing EFF’s role in supporting Google’s effort to quash California legislation that would have constrained Google’s emerging surveillance-based advertising business); Jane Perrone, *Google Free Email Faces Legal Challenge*, *GUARDIAN* (Apr. 13, 2004), <https://www.theguardian.com/technology/2004/apr/13/internationalnews.onlinesupplement> [<http://web.archive.org/save/https://www.theguardian.com/technology/2004/apr/13/internationalnews.onlinesupplement>]; *CA Senator Drafts Anti-Google Bill*, *TECH MONITOR* (Apr. 22, 2004) [https://www.techmonitor.ai/technology/ca\\_senator\\_drafts\\_anti\\_google\\_bill?cf-view](https://www.techmonitor.ai/technology/ca_senator_drafts_anti_google_bill?cf-view) [[https://web.archive.org/web/20251024220610/https://www.techmonitor.ai/technology/ca\\_senator\\_drafts\\_anti\\_google\\_bill?cf-view](https://web.archive.org/web/20251024220610/https://www.techmonitor.ai/technology/ca_senator_drafts_anti_google_bill?cf-view)] (reporting that many privacy advocates were “outraged” by Google’s Gmail service; State Senator Liz Figueroa’s bill would “allow email providers to scan the content of outgoing email or instant messages only with the express consent of the user”).

story,<sup>126</sup> many scholars, investigative journalists, and whistleblowers place the decline of American political institutions on surveillance capitalism and the excesses of technology giants.<sup>127</sup>

c. *The Emergence of the Copyleft Scholarly Community*

Barlow's vision took root within the legal academic community as the internet took off in the mid-1990s. The self-proclaimed "copyleft" community reflected a variety of perspectives ranging from those skeptical of overprotection of computer software to those highly critical of copyright protection in general.<sup>128</sup>

The Digital Future Coalition ("DFC") was formed to advocate "prosperous information commerce" and "a robust shared culture."<sup>129</sup> Convened by copyright scholar Professor Peter Jaszi, the DFC's membership comprised educators, computer and telecommunications industry associations, libraries, artists, software and hardware producers, archivists, and scientists.<sup>130</sup> The DFC initially focused on participating in deliberations over adapting copyright legislation to address the digital revolution. Around this time, Professor Pamela Samuelson entered the political fray over what would become the Digital Millennium Copyright Act of 1998.<sup>131</sup>

Out of and from beyond the DFC community emerged a range of scholars advocating for greater freedom to access, use, and adapt copyrighted works.<sup>132</sup> Many of

126. See Devolution II, *supra* note 4.

127. See, e.g., SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019); CHRISTOPHER WYLIE, *MIND\*CK: CAMBRIDGE ANALYTICA AND THE PLOT TO BREAK AMERICA* (2019); JONATHAN TAPLIN, *MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY* (2017); LEVINE, *SURVEILLANCE VALLEY*, *supra* note 102.

128. See *Copyleft*, *supra* note 80.

129. See Letter from Peter Jaszi, Digital Future Coalition to the U.S. Copyright Office et al. (n.d.), reprinted by U.S. COPYRIGHT OFF., <https://www.copyright.gov/reports/studies/dmca/comments/Init009.pdf> [<https://web.archive.org/web/20251024223018/https://www.copyright.gov/reports/studies/dmca/comments/Init009.pdf>] (last visited Oct. 24, 2025).

130. See *id.*; *Digital Future Coalition*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Digital\\_Future\\_Coalition](https://en.wikipedia.org/wiki/Digital_Future_Coalition) [[https://web.archive.org/web/20240905001023/https://en.wikipedia.org/wiki/Digital\\_Future\\_Coalition](https://web.archive.org/web/20240905001023/https://en.wikipedia.org/wiki/Digital_Future_Coalition)] (last visited Oct. 24, 2025).

131. See Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996), <https://www.wired.com/1996/01/white-paper/> [<https://web.archive.org/web/2025081045229/https://www.wired.com/1996/01/white-paper/>].

132. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U.L. REV. 354, 386–400 (1999); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 664–78 (1997); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 301–05 (1996); Brief for Concerned Law Professors Robert C. Berry et al. as Amici Curiae Supporting Petitioners, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (No. 92-1292) (advocating a First Amendment defense for parody).

these scholars came to question the very notion of creativity based on what Professor James Boyle characterized as the “romantic authorship” myth.<sup>133</sup> Illustrating Boyle’s point, Professor Jessica Litman in 1990 began an article with the provocative assertion that “[a]rtists have been deluding themselves, for centuries, with the notion that they create. In fact they do nothing of the sort.”<sup>134</sup>

An emerging cadre of internet exceptionalists grappled with the implications of cyberspace for law development and enforcement.<sup>135</sup> Professor Lawrence Lessig’s *Code* proclaimed that “Code Is Law.”<sup>136</sup> “Real space” is governed by “constitutions, statutes, and other legal codes,” whereas software code, written by computer programmers, is the law of cyberspace.<sup>137</sup> Professor Lessig would soon mount a series of projects aimed at fundamentally reshaping copyright protection.

133. See JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996); ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 219–20, 283, 378 n.52, 379 n.56 (1998); RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 33–68 (1996) (tracing the ownership and control of culture and information to corporate interests); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29, 29–30 (Martha Woodmansee & Peter Jaszi eds. 1994) (quoting Michel Foucault, *What Is an Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURAL CRITICISM* 141, 141 [Josue V. Harari ed., 1979]) (discussing Michel Foucault’s questioning of the emergence of “authorship” as a “privileged moment of individualization in the history of ideas”). *But see* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 *TEX. L. REV.* 873, 877–85 (1997) (questioning Boyle’s critique of copyright law as mired in an eighteenth-century mythical view of authors creating “original works from whole cloth”).

134. Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965, 965 (1990) (quoting Spider Robinson, *Melancholy Elephants*, in *MELANCHOLY ELEPHANTS* 1, 16 [1985]). Professor Boyle would deepen this line of thinking. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *L. & CONTEMP. PROBS.*, 33, 60–61 (2003); JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008). He would also become an advocate, co-founding Duke Law School’s Center for the Study of the Public Domain in 2002. See *About Us*, *CTR. FOR THE STUDY OF THE PUB. DOMAIN*, <https://web.law.duke.edu/cspd/about/> [<https://web.archive.org/web/20251010160620/https://web.law.duke.edu/cspd/about/>] (last visited Nov. 15, 2025).

135. See David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367, 1401 (1996) (concluding that “the law of Cyberspace will reflect its special character, which differs markedly from anything found in the physical world”); Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 *TEX. L. REV.* 553 (1998); LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* (1999).

136. See LESSIG, *supra* note 135, at 3.

137. See *id.* at 5. The flaws in internet exceptionalism were soon laid bare. See Tim Wu, *When Code Isn’t Law*, 89 *VA. L. REV.* 679 (2003) (developing a richer theory of the interplay of computer code and law using peer-to-peer technology as a case study); JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006) (using a multitude of examples to show that John Perry Barlow’s Declaration of the Independence of Cyberspace never manifested); Orin S. Kerr, *Enforcing Law Online*, 74 *U. CHI. L. REV.* 745 (2007) (favorably reviewing *WHO CONTROLS THE INTERNET?* and opining that the “cyberutopian” vision was destined to fail as soon as the internet grew from a small, ideologically aligned group of counterculture internet pioneers to the broader public).

Notwithstanding its labeling, the copyleft/copyright divide did not mirror the traditional left/right political divide, especially as it relates to copyright law. Supreme Court justices have not voted in copyright cases along the political lines of the presidents who appointed them.<sup>138</sup> Since his early career, then-Professor Stephen Breyer has been skeptical of copyright protection.<sup>139</sup> By contrast, Justice Ruth Bader Ginsburg, another Clinton appointee, has been far more supportive of copyright protection.<sup>140</sup>

A strong case can be made that copyright protection combines progressive, market-based, and meritocratic values to promote cultural, social, economic, and political progress. Copyright provides a powerful engine for the broad range of voices, including those who have historically been underrepresented, to reach wider audiences. One of the virtues of copyright protection is its capacity to overcome the discriminatory biases within society through the medium of competitive markets.

As a powerful example, the music industry was deeply discriminatory in the mid-twentieth century. The recordings of Black artists were segregated into the “race” music category, and record labels routinely released white artist covers of Black recordings to success in the larger and more lucrative “popular” music category. By the late 1950s, Ray Charles, Sam Cooke, and Little Richard crossed over into the mainstream market, creating a foothold for Black artists. Motown continued those in-roads, and by the 1970s and 1980s, Stevie Wonder, Michael Jackson, Prince, and other Black artists became music industry leaders, topping the charts and changing power structures.<sup>141</sup> The rap and hip-hop genres and labels, in many cases owned by Black artists and entrepreneurs, came to dominate the modern music industry. Furthermore, the music from some of these artists served as rallying cries for civil rights and other progressive movements.<sup>142</sup>

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138. See Tonja Jacobi & Matthew Sag, *The Paradox of Intellectual Property at the U.S. Supreme Court*, 41 BERKELEY TECH. L. J. \_\_\_\_ (forthcoming 2026) (concluding that “in the midst of those controversies and the highest level of political polarization on the Court ever measured, it appears that the Roberts Court is less ideologically predictable than its predecessors in [intellectual property law]”).

139. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

140. See THE JURISPRUDENTIAL LEGACY OF JUSTICE RUTH BADER GINSBURG 105 (Ryan Vacca & Ann Bartow, eds., 2023) (concluding that “Ruth Bader Ginsburg’s copyright decisions favored copyright owners and authors,” but noting that her decisions were driven by healthy respect for legislative intent).

141. None of this is to suggest that the racist practices of the past have been eliminated or rectified. Rather, it is to point out that copyright protection has played a constructive role in empowering disadvantaged artists and communities.

142. See Sam & Dave’s “Soul Man” Defined a Movement SOULMUSIC.COM (Dec. 28, 2024), <https://soulmusic.com/sam-daves-soul-man-anthem/>; <https://web.archive.org/web/20251010164008/https://soulmusic.com/sam-daves-soul-man-anthem/>; Tyrina Steptoe, *Marvin Gaye’s “What’s Going On” Is as Relevant Today as It Was in 1971*, SMITHSONIAN MAG. (May 18, 2021), <https://www.smithsonianmag.com/history/marvin-gayes-whats-going-relevant-today-it-was-1971-180977750/>; <https://web.archive.org/web/20251010164421/https://www.smithsonianmag.com/history/marvin-gayes->

Empowering authors through copyright protection promotes a deeper conception of free expression. It enables creators to invest in their creative activities and supports institutions and intermediaries that both fund and distribute creative expression.

The copyleft movement reflects a peculiar (and in some respects contradictory) mix of cyberlibertarian and socialist values.<sup>143</sup> Its adherents are technological optimists who place absolute freedom to develop new technologies for communication above copyright protection. Some question the need for monetary incentives for expressive creativity and see technological disruption and hacking as desirable means to achieve copyright reform.<sup>144</sup> They see any restrictions beyond wholesale piracy as violative of free speech; and they see restrictions on technology that facilitate wholesale and widespread piracy as inappropriate restrictions on the right to tinker. Yet there is also an aspect of socialistic egalitarianism running through the academic branch of copyleft.<sup>145</sup> These scholars see unbridled technological advance as a means for reducing the power of copyright intermediaries, thereby allowing money to flow to creators and addressing societal income inequality more generally.

Several leaders of the copyleft movement sought to put these cyberlibertarian ideas into action through work with NGOs and the establishment of technology law and policy clinics. Professors Lessig and Samuelson became part of EFF's leadership group. In 1996, Harvard Law Professors Jonathan Zittrain and Charles Nesson founded the "Center on Law and Technology," which would become the Berkman Center for

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whats-going-relevant-today-it-was-1971-180977750/]; Jacob Barnhill, *Marvin Gaye's What's Going On and the Civil Rights Movement: A History and Analysis*, STEPHEN F. AUSTIN ST. U. (2019), <https://scholarworks.sfasu.edu/etds/234> [<https://web.archive.org/web/20251010164840/https://scholarworks.sfasu.edu/etds/234/>].

143. See generally DAVID GOLUBIA, *CYBERLIBERTARIANISM: THE RIGHT-WING POLITICS OF DIGITAL TECHNOLOGY* (2024) (revealing the internal contradictions of the cyberlibertarian movement and showing its connection to autocracy). His book chillingly anticipated the rise of anarcho-capitalism, autocracy, alt-right radicalism, and effective altruistic rationalism. See *id.* at Chapter 7 ("Cyberlibertarianism and the Far Right").

144. See *id.* at xxi ("At its narrowest core, cyberlibertarianism is a commitment to the belief that digital technology is or should be beyond the oversight of democratic governments . . . Frequently, the sentiment can be reduced to the view that democratic governments cannot or must not regulate the internet . . ."); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 268 (2002) (contending that since the internet and digital technology eliminate the cost of distributing intellectual works, "[c]opyright, therefore, is no longer necessary to create property rights artificially in digital works to eliminate free riding"; therefore "the file sharing enabled by digital technology and Internet services such as Napster is not theft. Instead, it is an example of what Joseph Schumpeter described as 'creative destruction.'" (footnotes omitted)); EDUARDO M. PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (2010).

145. See Jessica D. Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 16–25 (2010) (criticizing copyright law as empowering corporations (in the form of copyright intermediaries) to control much of the economic value derived from copyright protection at the expense of artists and the public).

Internet & Society a year later following the arrival of Professor Lawrence Lessig.<sup>146</sup> Professor Jack Balkin founded Yale Law School's Information Society Project in 1997.<sup>147</sup> Duke Law School launched the Center for the Public Domain in 1999.<sup>148</sup> Professor Lawrence Lessig founded the Center for Internet & Society at Stanford Law School in 2000.<sup>149</sup>

Professor Pamela Samuelson and her spouse, technologist Robert Glushko, founded and funded the Samuelson Law, Technology, and Public Policy Clinic at UC Berkeley in 1999.<sup>150</sup> Over the ensuing years, they founded clinics at American University, Fordham University, the University of Colorado-Boulder, the University of Ottawa, and the University of Amsterdam. Other such clinics were established at the University of Southern California Gould School of Law, Stanford Law School, NYU School of Law, Georgetown University Law Center, and the University of Washington School of Law.

#### d. *Copymiddle: Toward Balanced Policy Reform*

I was astonished that so many legal scholars took John Perry Barlow's anti-copyright vision (or perhaps more accurately, rantings) seriously. Notwithstanding my collaboration with some of the copyleft leaders in the software copyright field and enjoyment of more than a few Grateful Dead shows, I was skeptical of Barlow's hacktivist call to action and "information wants to be free"/copyright-free internet

146. *Berkman Gift of \$5.4 Million to Support Professorship for Entrepreneurial Legal Studies and Center for Internet & Society*, CTR. FOR INTERNET & SOC'Y (Mar. 4, 1998), [https://cyber.harvard.edu/newsroom/berkman\\_gift](https://cyber.harvard.edu/newsroom/berkman_gift) [[https://web.archive.org/web/20251205174714/https://cyber.harvard.edu/newsroom/berkman\\_gift](https://web.archive.org/web/20251205174714/https://cyber.harvard.edu/newsroom/berkman_gift)].

147. See *Information Society Project*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Information\\_Society\\_Project](https://en.wikipedia.org/wiki/Information_Society_Project) [[https://web.archive.org/web/20251106152058/https://en.wikipedia.org/wiki/Information\\_Society\\_Project](https://web.archive.org/web/20251106152058/https://en.wikipedia.org/wiki/Information_Society_Project)] (last visited Nov. 15, 2025).

148. See *Center for the Public Domain*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Center\\_for\\_the\\_Public\\_Domain](https://en.wikipedia.org/wiki/Center_for_the_Public_Domain) [[https://web.archive.org/web/20251106152335/https://en.wikipedia.org/wiki/Center\\_for\\_the\\_Public\\_Domain](https://web.archive.org/web/20251106152335/https://en.wikipedia.org/wiki/Center_for_the_Public_Domain)] (last visited Nov. 15, 2025). It spun out the Center for the Study of the Public Domain in 2002.

149. See *About Us*, STAN. CTR. FOR INTERNET & SOC'Y, <https://cyberlaw.stanford.edu/about-us/> [<https://web.archive.org/web/20251010165859/https://cyberlaw.stanford.edu/about-us/>] (last visited Nov. 15, 2025).

150. Professor Glushko came into a large sum of money through his involvement with Commerce One, an online auction B2B e-commerce start-up that attained a large market capitalization before going bankrupt following the bursting of the dot-com bubble burst. See *Robert J. Glushko*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Robert\\_J.\\_Glushko](https://en.wikipedia.org/wiki/Robert_J._Glushko) [[https://web.archive.org/web/20251106152630/https://en.wikipedia.org/wiki/Robert\\_J.\\_Glushko](https://web.archive.org/web/20251106152630/https://en.wikipedia.org/wiki/Robert_J._Glushko)] (last visited Nov. 15, 2025); *Commerce One*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Commerce\\_One](https://en.wikipedia.org/wiki/Commerce_One) [[https://web.archive.org/web/20251106152941/https://en.wikipedia.org/wiki/Commerce\\_One](https://web.archive.org/web/20251106152941/https://en.wikipedia.org/wiki/Commerce_One)] (last visited Nov. 15, 2025). He would later become an adjunct professor at UC Berkeley's School of Information.

rallying cries. The cyberlibertarian ethos reminded me of *The Monkey Wrench Gang*,<sup>151</sup> a book from my somewhat rebellious youth that popularized the term “monkeywrench”: to engage in sabotage acts in defense of nature.<sup>152</sup> But I was no longer sixteen years old and came to appreciate the importance of both the rule of law and copyright law’s role as a positive force for social change. I also questioned whether the demise of copyright would be good for free expression or democracy.

That said, I recognized that the content companies were, like other companies (including technology companies), driven by profits and reluctant to embrace technological changes that threatened their short-term bottom lines.<sup>153</sup> Record labels clung to a model of selling unbundled \$18 CDs. They also took advantage of recording artists.<sup>154</sup> The industry needed to change. Yet Barlow’s prescription would throw out the professional creativity baby with the greedy, intransigent industry bathwater. I did not see how many of the most important and diverse voices in literature, music, and film could pursue their artistic and expressive careers without a well-functioning copyright system in both the bricks and mortar world and cyberspace.

Over the course of my life up to that point (and more so since), I had benefited from the myriad ways in which creative expression supported by copyright protection had fostered positive social, cultural, economic, and democratic progress.<sup>155</sup> The economic success of a diverse range of authors, artists, theatrical performers, and athletes—another important form of entertainment supported largely through broadcasting revenues—had produced notable *structural* economic change in

151. EDWARD ABBEY, *THE MONKEY WRENCH GANG* (1975).

152. See *Monkeywrench*, Oxford English Dictionary (2002), [https://www.oed.com/dictionary/monkeywrench\\_v?tl=true](https://www.oed.com/dictionary/monkeywrench_v?tl=true) [[https://web.archive.org/web/20251010170539/https://www.oed.com/dictionary/monkeywrench\\_v?tl=true](https://web.archive.org/web/20251010170539/https://www.oed.com/dictionary/monkeywrench_v?tl=true)] (last visited Oct. 10, 2025); *Monkeywrenching*, BRITANNICA, <https://www.britannica.com/topic/monkeywrenching> [<https://web.archive.org/web/20251010170838/https://www.britannica.com/topic/monkeywrenching>] (last visited Oct. 10, 2025).

153. See generally PETER DECHERNEY, *HOLLYWOOD’S COPYRIGHT WARS: FROM EDISON TO THE INTERNET* (2012) (chronicling Hollywood’s struggle to adapt to technological change).

154. See STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* (2009); Rick G. Morris, *Selling Out for a Song: “Artist Abuse” and Saving Creatives from Servitude and Economic Disadvantage in the Entertainment Industry*, 25 SMU SCI. & TECH. L. REV. 145 (2022); F.B.T. Prods., LLC v. Aftermath Recs., 621 F.3d 958, 968 (9th Cir. 2010) (holding that that digital downloads are governed by the “masters licensed” clause and not the “records sold” clause of standard record label agreements, and thereby entitling recording artists to the 50 percent license fee rather than a much smaller percentage royalty for digital downloads; full disclosure: I served as a consultant for F.B.T. in this matter); Edwin F. McPherson, *F.B.T. v. Aftermath: Eminem Raps the Record Industry*, 29 ENT. & SPORTS LAW. 1, 3 (2011) (noting the broad applicability of this decision to recording artists); David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y. U.S.A. 387 (2001).

155. See Peter S. Menell, *Intellectual Property and Social Justice: Mapping the Next Frontier*, in HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE: ACCESS, INCLUSION, EMPOWERMENT 21, 37–43, 46–52 (Steven D. Jamar & Lateef Mtima, eds. 2024).

exclusionary industries.<sup>156</sup> These advances had in turn directly advanced civil rights, cultural progress, cross-cultural appreciation, inclusion, and political change.

It also struck me that intellectual property scholars, and particularly those at elite universities, came from very different backgrounds and led very different lives than authors, musicians, filmmakers, and other creatives responsible for much of society's literary and artistic output and progress. We have ample salaries, health insurance, pension funds, and the rare privilege of life tenure. Many of us gladly devote long hours to writing articles and books without having to worry about our and our family's basic needs. And some of us earn royalties to boot. We face few of the risks experienced by those outside of the ivory tower.

By contrast, when she undertook the first Harry Potter novel, J. K. Rowling was a single parent on the United Kingdom's welfare rolls.<sup>157</sup> The prospect of a writing career was possible only because of copyright law. And the career that it spawned has delighted generations of readers, as well as fueled dreams and promoted literacy.<sup>158</sup> Similarly, many of the most influential musicians could never have emerged without record label advances and the prospect of royalties. Although many of them earn income from live performance and merchandise, their ability to sustain their careers would be substantially diminished if online distribution supplanted record sales and other revenue streams. Life on the road is not easy, as even Jerry Garcia came to understand.<sup>159</sup>

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156. The music industry has gone from the Jim Crow segregation of the 1950s to a modern era in which Black and female artists lead many aspects of the nation's musical culture, record charts, and many of the leading record labels. Similar transformations have unfolded in film, television, and sports.

157. See *From an Impoverished Single Mom to World's Richest Writer, A Look at JK Rowling's Incredible Journey*, ECON. TIMES (Jul. 31, 2023), <https://economictimes.indiatimes.com/magazines/panache/from-an-impoverished-single-mom-to-worlds-richest-writer-a-look-at-jk-rowlings-incredible-journey/creating-magic-from-nothing/slideshow/102274591.cms> [https://web.archive.org/web/20251115171759/https://economictimes.indiatimes.com/etstatic/breakingnews/etjson\_bnews.html]; *J. K. Rowling*, WIKIPEDIA, [https://en.wikipedia.org/wiki/J.\\_K.\\_Rowling](https://en.wikipedia.org/wiki/J._K._Rowling) [https://web.archive.org/web/20251106162428/https://en.wikipedia.org/wiki/J.\_K.\_Rowling] (last visited Nov. 15, 2025).

158. John Perry Barlow's writings reflected his own cultural journey, as well as a bit of cultural snobbery. See, e.g., E-mail from John Perry Barlow to Dave Winer, July 18, 2000, quoted in JESSICA LITMAN, *DIGITAL COPYRIGHT 151* (2001) (stating that failure to enforce copyright in the face of digital piracy "is an assault on the system that stole every dime the Chambers Brothers ever made while grotesquely enriching Britney Spears"). I am also a fan of the Chambers Brothers, see *The Chambers Brothers*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Chambers\\_Brothers](https://en.wikipedia.org/wiki/The_Chambers_Brothers) [https://web.archive.org/web/20251106163126/https://en.wikipedia.org/wiki/The\_Chambers\_Brothers] (last visited Nov. 15, 2025), and appalled at how many artists, especially Black musicians, have been mistreated by record labels, managers, and other intermediaries. That said, I believe that scholars need to be careful not to let their own tastes interfere with objective analysis of the functioning of law.

159. *LONG STRANGE TRIP*, Amazon Prime (Amazon MGM Studios 2017), Amir Bar-Lev's extended 2017 documentary (executive produced by Martin Scorsese), captures the Grateful Dead's unconventional three-decade run that tragically ended in 1995 as a result of Jerry Garcia's untimely death at fifty-three years of age.



The output of well-funded and high-quality film and television programming would be decimated if Barlow's *Declaration of Cyberspace Independence* came to fruition. Furthermore, the fourth estate—the journalism on which a free and democratic republic critically depends—would be severely undermined in a world in which the gathering, writing, and editing of news was free.<sup>160</sup>

One did not need to accept Samuel Johnson's observation that "no man but a blockhead ever wrote, except for money" to have qualms about copyleft rhetoric.<sup>161</sup> The copyright system motivated the creation and distribution of a great volume, quality, and range of creative expression. Improving the functioning and fairness of the copyright system struck me as far more socially beneficial than defenestrating copyright protection on the internet, what was fast becoming the most important distribution channel for music, books, and audiovisual works. The proper goal was not a copyright-free internet, but rather a celestial jukebox—or a competitive marketplace of celestial jukeboxes.<sup>162</sup>

The digital piracy threat could not, in my view, be so blithely dismissed. Nor could concerns about Hollywood holding back technological change. Copyright lobbyists soon descended upon Washington, D.C., and change was about to come. Thanks to the No Electronic Theft ("NET") Act, the Digital Millennium Copyright Act ("DMCA"), and the judiciary's fidelity to law, celestial jukeboxes took root about a decade later. And much of the public came to embrace these services and the explosion of new works that they distributed.<sup>163</sup>

## 2. The Gathering Storm: Unauthorized Digital Distribution

By the mid-1990s, the internet's tremendous potential and risks were becoming clearer. As a university professor and technology enthusiast, I had relatively early access to the internet, and it was exciting. Yet, I could also understand why copyright owners would be nervous about this new ecosystem. Teaching about both technology and entertainment exposed me the opposing camps.

The window for legislative action was tight. As I observed in a paper around that time, "the opportunity for comprehensive reform is most propitious before interest groups form around a new technology, but policymakers usually do not have sufficient

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160. There is reason to believe that dismantling of the fourth estate is well underway for a variety of reasons, but that does not detract of the importance of professional journalism.

161. See SAMUEL JOHNSON, 3 BOSWELL'S LIFE OF JOHNSON 19 (G. Hill ed., 1934), quoted in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

162. See PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 197–236 (1994) (recognizing the vision).

163. See *infra* Section II(E).

understanding of the path of such technology and the implications for an appropriate intellectual property regime during this nascent stage of development.”<sup>164</sup>

Hackers were already disrupting content markets. In 1994, David LaMacchia, a twenty-one-year-old M.I.T. student, set up an electronic bulletin board that allowed users to upload and download copyrighted software applications and games.<sup>165</sup> As word of this internet resource spread, the U.S. Department of Justice caught wind and indicted Mr. LaMacchia for wire fraud.<sup>166</sup> He escaped liability, however, on the ground that application of the wire fraud statute required proof of commercial advantage, an element of Copyright Act’s criminal liability provision.<sup>167</sup>

Notwithstanding ruling for Mr. LaMacchia, Judge Stearns questioned the defendant’s “hacker” ethics, noting that the allegations revealed actions that were “at best” “heedlessly irresponsible” to “at worst” “nihilistic, self-indulgent, and lacking in any fundamental sense of values.”<sup>168</sup> Judge Stearns concluded his opinion with a call for legislative reform: “Criminal as well as civil penalties should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer.”<sup>169</sup> As an M.I.T. graduate, I was familiar with hacker culture, which ranged from prankish (sometimes bordering on dangerous) to clever, humorous, artistic, and brilliant.<sup>170</sup>

The case alerted Congress to the need to strengthen copyright protection in the online environment. Meanwhile, Hollywood lobbyists were busy at work developing new protections for content owners just as technology and early internet companies were seeking safe harbors from crushing copyright exposure. Hollywood and Silicon Valley would go to Washington, Geneva, and back again over the next several years in enacting the Digital Millennium Copyright Act. Along the way, Hollywood would succeed in persuading Congress to extend the term of copyright protection and ramp up statutory damages to outlandish levels (that would ultimately backfire). All of this activity set the stage for the most dramatic decade in the history of copyright law.

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164. Peter S. Menell, *The Challenges of Reforming Intellectual Property Protection for Computer Software*, 94 COLUM. L. REV. 2644, 2651–52 (1994). I would later learn that this dilemma had been recognized earlier. See *Collingridge Dilemma*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Collingridge\\_dilemma](https://en.wikipedia.org/wiki/Collingridge_dilemma) [[https://web.archive.org/web/20251106164121/https://en.wikipedia.org/wiki/Collingridge\\_dilemma](https://web.archive.org/web/20251106164121/https://en.wikipedia.org/wiki/Collingridge_dilemma)] (last visited Nov. 15, 2025); DAVID COLLINGRIDGE, *THE SOCIAL CONTROL OF TECHNOLOGY* (1980).

165. See 17 U.S.C. § 506(a); *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994); cf. *Dowling v. United States*, 473 U.S. 207 (1985) (holding that the sale of bootleg recordings were not “stolen, converted or taken by fraud” for purposes of the federal Stolen Property statute (18 U.S.C. § 2314) because copyrights have a character distinct from “goods, wares, [or] merchandise” such that interference with copyright does not easily equate with theft, conversion, or fraud).

166. *LaMacchia*, 871 F. Supp. at 536.

167. See *id.* at 544–45.

168. *Id.* at 545.

169. *Id.*

170. See STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (1984).

a. *Ramping Up Criminal Enforcement and Remedies*

Responding to the ruling in *United States v. LaMacchia*, Congress enacted the No Electronic Theft (“NET”) Act of 1997 to strengthen criminal prosecution and penalties against those who distribute copyrighted works without authorization.<sup>171</sup> The NET Act closed the “commercial advantage” loophole by criminalizing various intentional acts of copyright infringement without regard to whether the defendant received any financial benefit.<sup>172</sup> It also substantially stiffened the criminal penalties applicable to copyright infringement committed through electronic means.<sup>173</sup>

b. *The WIPO Copyright Treaties and the Digital Millennium Copyright Act*

In 1993, the Clinton Administration tapped Bruce Lehman, a former legislative aide and content industry lobbyist, to serve as Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.<sup>174</sup> Lehman co-chaired the National Information Infrastructure Task Force charged with developing a comprehensive strategy for adapting copyright protection for the digital age.<sup>175</sup> The Task Force’s September 1995 report called attention to the internet’s great potential to expand access to content while at the same time warning that content creators are wary of entering the digital marketplace due to piracy risks.<sup>176</sup> The Task Force recommended that Congress clarify that the Copyright Act’s distribution right extends to transmission of digital copies, expand library exemptions for digital copying, exempt reproduction and distribution of materials for the visually impaired by non-profit organizations, provide for criminal liability without regard to the motivation of persons distributing copyrighted works without authorization,<sup>177</sup> and prohibit circumvention of technical protection measures designed to prevent copyright infringement and falsification, alteration, or removal of copyright management information.<sup>178</sup>

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171. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

172. 17 U.S.C. § 506(a)(1)(B).

173. See 18 U.S.C. § 2319.

174. See *The Honorable Bruce A. Lehman*, INT’L INTELL. PROP. INST., <https://zoi.rmg.mybluehost.me/the-honorable-bruce-lehman/> [<https://web.archive.org/web/20251024213527/https://zoi.rmg.mybluehost.me/the-honorable-bruce-lehman/>] (last visited Nov. 15, 2025).

175. See BRUCE A. LEHMAN & RONALD H. BROWN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) (hereinafter “NII WHITE PAPER”).

176. See *id.* at 7–17.

177. This proposal addressed the circumstances brought to light in *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). See *supra* Section I(B)(2)(a).

178. See NII WHITE PAPER, *supra* note 175, at 211–36.

Professor Samuelson criticized the NII White Paper as a “flagrant giveaway” to “copyright maximalists” that undermined the public interest.<sup>179</sup> While her commentary usefully highlighted flaws in the process of developing the White Paper and raised legitimate concerns about the balance of control over copyrighted works in the digital environment, it downplayed copyright owners’ plausible concerns about digital piracy. She gave voice to the nascent ISP community’s fears of crushing copyright liability, but lacked a balanced framework for addressing the foreseeable problems of costless, unregulated, anonymous digital distribution systems.

In December 1996, Assistant Secretary Lehman led the U.S. delegation to the World Intellectual Property Organization’s (“WIPO”) December 1996 Diplomatic Conference on updating international copyright law for the digital age. In approving a special agreement under the Berne Convention for the Protection of Literary and Artistic Works, the conferees aimed to “maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.”<sup>180</sup> The resulting WIPO Copyright Treaty granted authors three new rights: (1) a right of distribution—to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership; (2) a rental right for computer programs, cinematographic works, and phonograms (sound recordings); and (3) a right of communication to the public, covering the power to authorize any communication to the public, by wire or wireless means, including “the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them.”<sup>181</sup> The WIPO Copyright Treaty also required parties to provide adequate legal protection and effective legal remedies” against circumvention of technologically based security measures used to prevent copyright infringement.<sup>182</sup>

Upon returning from the 1996 WIPO Diplomatic Conference with the WIPO Copyright Treaty in hand, the Clinton Administration and its Hollywood supporters went directly to Congress to pass implementing legislation. Content owners threatened to withhold distributing their works on the internet unless there were effective protections against piracy.<sup>183</sup> They encountered strong opposition from a wide range of interests—ISPs, telecommunications companies, consumer electronics manufacturers, library associations, computer scientists, and copyright professors—

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179. See Samuelson, *supra* note 131.

180. See WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121.

181. See *id.* at arts. 6, 7, 8.

182. See *id.* at art. 11.

183. See S. REP. NO. 105-190, at 8 (1998).

concerned about the chilling effects of expansive copyright liability for online activities.<sup>184</sup>

The resulting legislation—the Digital Millennium Copyright Act of 1998 (“DMCA”)<sup>185</sup>—achieved a grand compromise affording protections against circumvention of technological protection measures aimed at preventing unauthorized distribution of copyrighted works<sup>186</sup> in exchange for detailed and highly technical online service provider (“OSP”) safe harbors for transmitting, caching (making temporary copies), storing, and linking copyrighted works.<sup>187</sup>

While insulating OSPs from liability for infringing acts of their users of which the OSPs were unaware, Congress imposed various responsibilities on OSPs, including that they expeditiously remove infringing works from their servers upon gaining knowledge of infringement<sup>188</sup> and comply with an expanded subpoena provision enabling copyright owners to identify infringers.<sup>189</sup> As the legislative history notes,

Title II [of the DMCA] preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.<sup>190</sup>

“[T]he Committee believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the internet.”<sup>191</sup> In striking this balance, Congress was driven by the observation that unless copyright owners have the ability to protect their copyrights on the internet, they will be less likely to make their works available online:

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184. Recall that the Digital Future Coalition, *see supra* text accompanying notes 129–130, had been formed in response to the release of the Clinton Administration’s White Paper on Intellectual Property and the National Information Infrastructure. *See* Letter from Peter Jaszi, *supra* note 129.

185. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998).

186. *See id.*, Title I, codified at 17 U.S.C. §§ 1201–05. The anti-circumvention provisions include numerous limitations, exemptions, and a triennial exemption process for adapting the anti-circumvention bans.

187. *See id.*, Title II, codified at 17 U.S.C. § 512.

188. *See* 17 U.S.C. § 512(c)(1)(C).

189. *See* 17 U.S.C. § 512(h); *see generally* Alfred Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1881 (2000) (noting that “the DMCA affects [OSP’s] liability by insulating [providers] from liability as long as they comply with certain statutory requirements designed to facilitate content providers’ efforts to protect their copyrighted material”).

190. S. REP. NO. 105-190, at 20 (1998).

191. H.R. REP. NO. 105-551, pt. 2, at 21 (1998); *see also id.*, pt. 1, at 11 (noting that remedies “ensur[e] that it is possible for copyright owners to secure the cooperation of those with the capacity to prevent ongoing infringement”).

Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. . . . [This legislation] will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of the American creative genius.<sup>192</sup>

Congress also recognized that the internet created unprecedented opportunities for copyright infringement, and sought to provide assistance to copyright owners in light of the technological developments surrounding the internet:

Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's to the introduction of the VCR in the 1980's. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials. . . . Title II [of the DMCA] clarifies the liability faced by service providers who transmit potentially infringing material over their networks. In short, Title II ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.<sup>193</sup>

As Senator Leahy explained, “[t]he DMCA is a product of the Senate Judiciary Committee’s recognition that ours is a time of unprecedented challenge to copyright protection. . . . This bill is a well-balanced package of proposals that address the needs of creators, consumers and commerce in the digital age and well into the next century.”<sup>194</sup>

Although it was difficult to predict how the internet would evolve, failure to act could have led to chaos and the window for acting was tight. The legislative compromise struck me as plausible. Copyleft scholars bitterly opposed the legislation.<sup>195</sup>

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192. S. REP. NO. 105-190, *supra* note 183, at 8.

193. *Id.* at 1–2.

194. *Id.* at 69.

195. See, e.g., Jessica Litman, *The Tales that Article 2B Tells*, 13 BERKELEY TECH L.J. 931, 933 (1998) (“[The DMCA had] grown into a 30,000 word neoplasm that appears to have obfuscation as its primary purpose. The kindest thing one can say about such proposed laws is that someone responsible for part of the writing is more than a little confused about the laws’ intended effect.”); Glynn Lunney, *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814 (2001) (asserting that the DMCA “killed” copyright in the sense that it will destroy the public interest that copyright was intended to serve); Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1659 (2002) (“[I]t may be that the economic considerations underlying the DMCA rules are in irreconcilable conflict with values embodied in the First Amendment.”); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH L.J. 519, 533–34 (1999) (“[W]hat drove the debate was high rhetoric, exaggerated claims, and power politics from . . . frightened copyright industries . . . [t]he DMCA caters to their interests far more than to the interests of the innovative information technology sector or of the public.”); Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 LOY. U. CHI. L.J. 1, 7 (2003) (“The DMCA thus not only fails to balance the imbalance caused by changes in code; the DMCA plainly exacerbates it. This failure of policymaking is either a product of the failure to account for both technology and law together, or it manifests a decision by policymakers . . . to change the tradition of balance in copyright.”); Dan L. Burk & Julie E. Cohen, *Fair Use*

c. *Copyright Term Extension Act*

Unrelated to the digital revolution, a consortium of content owners had been pushing to extend the term of U.S. copyright protection to harmonize with the term in many European nations since 1990, leading to passage of the Sonny Bono Copyright Term Extension Act in 1998.<sup>196</sup> The law extended the term of copyright protection from life of the author plus fifty years to life plus seventy years (or ninety-five years in the case of entity authors), effectively freezing the release of works into the public domain for two decades.<sup>197</sup> The legislative history highlighted balance of trade benefits, fair compensation to American authors, and incentives to preserve and digitize older works.<sup>198</sup> Many copyright professors, including myself, signed onto Professor Dennis Karjala's testimony against the bill arguing that "extending the term of copyright protection would impose substantial costs on the United States general public without supplying any public benefit."<sup>199</sup>

d. *The Digital Theft Deterrence and Copyright Damages Improvement Act*

In 1999, in response to content industry fears of rampant digital piracy and the need for strong deterrence,<sup>200</sup> Congress raised the statutory damage range from \$750–\$30,000 per infringed work up to \$150,000 per work for willful infringement.<sup>201</sup> The potential exposure created by this legislation was enhanced by the Supreme Court's 1998 ruling that the Seventh Amendment to the U.S. Constitution required that the determination of statutory damages fell within the province of the jury in copyright cases.<sup>202</sup> This had the practical effect of thwarting Congress's intent to vest discretion

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*Infrastructure for Rights Management Systems*, 15 HARV. J.L. TECH 41, 78 (2001) ("The DMCA itself is a sobering example of an ill-conceived legislative decision to favor one technological trajectory over others.")

196. Sonny Bono Copyright Term Extension Act, Pub. L. 105–298, 112 Stat. 2827 (1998).

197. 17 U.S.C. § 302.

198. See S. REP. NO. 104-315, Copyright Term Extension Act of 1996.

199. See Dennis J. Karjala, Statement of Copyright and Intell. Prop. Law Profs. in Opposition to H.R. 604, H.R. 2589, and S. 505, "The Copyright Term Extension Act" (Jan. 28, 1998) (submitted to the S. & H. Comms. on the Judiciary).

200. See S. REP. NO. 106-216, at 3 (noting that "[b]y the turn of the century the Internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works. . . . Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action.")

201. See Digital Theft Deterrence and Copyright Damages Improvement Act, Pub. L. No. 106-160, 113 Stat. 1774 (1999) (amending 17 U.S.C. § 504(c)).

202. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

in awarding statutory damages in the hands of experienced judges, thereby increasing the uncertainty surrounding statutory damage awards.<sup>203</sup>

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These developments set the stage for a “Perfect Copyright Storm”—the confluence of a supercharged deterrent regime, a rapidly advancing internet ecosystem, and a growing hacktivist subculture. Yet the copyright scholarly community’s attention was drawn to another battle.

### 3. Challenging the CTEA and Stretching the Academic Role

Amidst this tumult, Professor Lawrence Lessig emerged as both internet Robin Hood and Pied Piper. His populist message and charismatic presentation style captivated hackers, digerati, academics, and college students like no other legal scholar. He preached a gospel of free culture and enlightenment through copyright-free online communities. Professor Lessig led the charge with confident technological predictions, daring legal theories, misleading characterizations of copyright history,<sup>204</sup> and clever slogans such as “free as in speech, not free beer”<sup>205</sup> “Free Mickey,” and “FREE THE MOUSE,” a mocking reference to Disney’s copyright “imprisonment” of Mickey Mouse for another twenty years.<sup>206</sup> He anticipated, and perhaps helped to popularize, memetic influencer culture.<sup>207</sup>

Professor Lessig’s 1999 book *Code: and Other Laws of Cyberspace* warned that computer code (or “West Coast Code,” referring to Silicon Valley software) would

203. See U.S. COPYRIGHT OFF., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 105 (July 1961) (hereinafter “REGISTER’S REPORT”).

204. See Michael Connor, *Free the Mouse! Lawrence Lessig on Disney, Copyrights, and the Creative Commons*, AUSTIN CHRONICLE (Mar. 11, 2002), <https://www.austinchronicle.com/screens/free-the-mouse-11711819/> [<https://web.archive.org/web/20260115022732/https://www.austinchronicle.com/screens/free-the-mouse-11711819/>] (quoting Professor Lessig’s keynote address: “In the past forty years, Congress has extended the terms of copyright eleven times.”). Professor Lessig skated over the fact that *nine* of those “extensions” were for the purpose of ensuring that copyrights subsisting at the outset of the general copyright revision project leading to the 1976 Copyright Act would not be lost due to the delay in bringing the omnibus reform to fruition. See REGISTER OF COPYRIGHTS, 80TH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1977 5 (1978). Thus, there were effectively two true term extensions: one in 1976 and one in 1998. That there were so many interim extensions merely reflected the challenges of passing such a wide-ranging copyright reform, something that has only been achieved four times in American history.

205. See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY XIV (2004). This phrase traces back to Richard Stallman’s characterization of open-source software. See *supra* text accompanying note 78.

206. See Jonathan Weber, *Copyright or Copywrong?*, STAN. LAWYER (Nov. 5, 2002), <https://law.stanford.edu/stanford-lawyer/articles/copyright-or-copywrong/> [<https://perma.cc/24BM-CESD>]; Connor, *supra* note 204.

207. The idea of cultural ideas spreading through memes, analogous to the transmission of biological information through genes, traces to Richard Dawkin’s 1976 book *The Selfish Gene*.



increasingly supplant legal code (or “East Coast Code,” referring to federal laws enacted in Congress).<sup>208</sup> His insight was that the architecture of networks and computer systems plays a key governance role. The principal copyright ramification drew on Professor Jessica Litman’s concern that cyberspace architecture (such as digital rights management) and licensing restrictions would trample users’ liberties and freedoms in the use of copyrighted works.<sup>209</sup> This fear, while plausible, overlooked economic logic. Copyright owners do not seek to maximize control; they seek to maximize profit in a competitive marketplace, which would ultimately turn on attracting consumers through attractive pricing, enticing technological capabilities and user interfaces, and choice. Time would tell how legal defaults, market competition, and social norms would play out, but it seemed unlikely that excessive and over-bearing metering would be sustainable.

Professor Lessig’s enigmatic personality took the academic world by storm. As journalist Steven Levy would remark, “[o]nce a ‘right-wing lunatic,’ [Lessig’s] become a fire-breathing defender of Net values”; “It’s not just a vision he’s promoting—it’s a cause”; “Writing *Code*, though, planted the seeds for an activist approach.”<sup>210</sup> Over the space of a few years, he would recast the digital piracy threat into a debate about civil liberties, bringing many copyright professors and legions of college students along behind him.

In January 1999, Professor Lessig broke new ground by launching a constitutional attack on the Copyright Term Extension Act on behalf of publisher Eric Eldred.<sup>211</sup> I was mystified by Professor Lessig’s decision to become lead attorney in a case that would require him to take positions that conflicted with his prior scholarship. In his desire to win Eric Eldred’s constitutional challenge, attorney Lessig built his argument around

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208. LESSIG, *supra* note 135, applies comparative institutional analysis—treating law, markets, social norms, and politics as governance institutions—to the internet. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990). Much of my early career was steeped in this analytic framework. See, e.g., Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599 (2002); Peter S. Menell, *Institutional Fantasylands: From Scientific Management to Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL’Y. 489 (1992). Professor Lessig’s application of the framework struck me as unconventional and inventive.

209. See LITMAN, *supra* note 158, at 111–21, 132–33, 138, 182–84.

210. See Steven Levy, *Lawrence Lessig’s Supreme Showdown*, WIRED (Oct. 1, 2002), <https://www.wired.com/2002/10/lessig-3/> [<https://web.archive.org/web/20251006032750/https://www.wired.com/2002/10/lessig-3/>].

211. See Carl S. Kaplan, *Online Publisher Challenges Copyright Law*, N.Y. TIMES: CYBER L.J. (Jan. 15 1999), <https://archive.nytimes.com/www.nytimes.com/library/tech/99/01/cyber/cyberlaw/15law.html> [<https://web.archive.org/web/20251010225019/https://archive.nytimes.com/www.nytimes.com/library/tech/99/01/cyber/cyberlaw/15law.html>]; Linda Greenhouse, *Justices to Review Copyright Extension*, N.Y. TIMES (Feb. 20, 2002), <https://www.nytimes.com/2002/02/20/business/justices-to-review-copyright-extension.html> [<https://web.archive.org/web/20251010224253/https://www.nytimes.com/2002/02/20/business/justices-to-review-copyright-extension.html>].

*United States v. Morrison*,<sup>212</sup> striking down the Gun Free School Zones Act, and *United States v. Lopez*,<sup>213</sup> striking down the Violence Against Women Act.<sup>214</sup> Attorney Lessig used these Commerce Clause cases to push the Supreme Court to apply greater scrutiny to the Intellectual Property Clause in apparent tension with his academic views.<sup>215</sup> Furthermore, his argument resurrected “a deeply countermajoritarian approach to judicial review.”<sup>216</sup> As Professor Lessig later lamented, perhaps he should have entrusted this case to someone not wearing two hats.<sup>217</sup>

Although Professor Lessig’s assault on the CTEA ultimately failed in a 7–2 Supreme Court decision,<sup>218</sup> his campaign garnered tremendous media attention just as the internet copyright war was heating up.<sup>219</sup> In 2001, Professor Lessig released *The Future of Ideas: The Fate of the Commons in a Connected World*, offering a bold critique of intellectual property protection. In December 2002, he launched Creative Commons, an alternative to the traditional copyright regime modeled in part on Richard Stallman’s Free Software Movement.<sup>220</sup>

With the publication of his third book—*Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004)—Professor Lessig emerged as the academic torchbearer of a “copyleft” populist movement, traveling to college campuses amidst the RIAA copyright “education” and enforcement

212. 529 U.S. 598 (2000).

213. 514 U.S. 549 (1995).

214. See Brief for Petitioners, *Eldred v. Ashcroft*, 534 U.S. 1126 (2002) (No. 02-618).

215. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 131 (1995) (concluding that “[w]hile *Lopez* properly stands within an important tradition of interpretive fidelity, my argument in the end will be that the techniques it has selected to this end of fidelity are poorly chosen”); *id.* at 214–15 (explaining that “*Lopez* launches a practice of limitation that will be unstable. The lines *Lopez* draws will not cut up the world of federal law in a predictable or usable manner. And as the inconsistencies increase, the feasibility of continuing this rule will be undermined.”).

216. See Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2332–33, 2394, 2409, 2412–14 (2003); see also Richard A. Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in Eldred v. Ashcroft*, 55 SUP. CT. REV. 143, 152–55, 161–62 (2003) (suggesting various ways a victory for *Eldred* based on *Lopez* could have backfired and concluding that “a decision invalidating the [CTEA] might well have opened a Pandora’s Box out of which would fly federal amendments and state enactments that would create a worse situation, from the standpoint of a sensible copyright regime, than the Act did”).

217. See Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFS. (Mar. 2004).

218. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

219. See Amy Harmon, *The Supreme Court: The Context; A Corporate Victory, But One That Raises Public Consciousness*, N.Y. TIMES (Jan. 16, 2003), <https://www.nytimes.com/2003/01/16/us/supreme-court-context-corporate-victory-but-one-that-raises-public-consciousness.html> [<https://web.archive.org/web/20251007032219/https://www.nytimes.com/2003/01/16/us/supreme-court-context-corporate-victory-but-one-that-raises-public-consciousness.html>].

220. See Lawrence Lessig, *CC in Review: Lawrence Lessig on How It All Began*, CREATIVE COMMONS (Oct. 12, 2005), <https://creativecommons.org/2005/10/12/ccinreviewlawrencelessigonhowitallbegan/> [<https://web.archive.org/web/20251008023900/https://creativecommons.org/2005/10/12/ccinreviewlawrencelessigonhowitallbegan/>]; *supra* Section I(B)(1)(a)(ii)(1).

campaigns to spread the copyleft gospel and foment an uprising against copyright owners' control over ideas and culture.<sup>221</sup> Notwithstanding occasional entreaties not to violate copyright law, Professor Lessig's critique of the copyright system and broad conception of freedom of speech flowed ambiguously into freedom to fileshare, hacking, and civil disobedience. The atmosphere at these events had more the feel of political rallies than academic presentations.<sup>222</sup> It was not difficult to see that high school and college music enthusiasts would embrace this charismatic Robin Hood.

Watching this unfold was both mesmerizing and disconcerting. There was no doubt that Professor Lessig was a public relations master, a modern-day Edward Bernays.<sup>223</sup> But his message was selective and misleading.<sup>224</sup> John Perry Barlow's hacktivist rhetorical style had spread to the copyright legal academy. And so did corporate funding of law school technology programs, further blurring the ethical lines.<sup>225</sup> Although Professor Lessig was not the first academic to argue for clients as

221. LESSIG, FREE CULTURE, *supra* note 205; *see, e.g., Students for Free Culture*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Students\\_for\\_Free\\_Culture](https://en.wikipedia.org/wiki/Students_for_Free_Culture) [[https://web.archive.org/web/20251008030517/https://en.wikipedia.org/wiki/Students\\_for\\_Free\\_Culture](https://web.archive.org/web/20251008030517/https://en.wikipedia.org/wiki/Students_for_Free_Culture)] (last visited Nov. 15, 2025).

222. *See* Dan Hunter, *Marxist-Lessigism*, LEGAL AFFS. (Nov./Dec. 2004).

223. Edward Louis Bernays, "the father of public relations," was one of the 100 most influential Americans of the twentieth century. *See* LARRY TYE, *THE FATHER OF SPIN: EDWARD L. BERNAYS AND THE BIRTH OF PUBLIC RELATIONS* (1998).

224. For example, Professor Lessig liked to tell audiences that Congress had extended the term of copyright *eleven* times between 1962 and 1998. *See* Jay Worthington & Lawrence Lessig, *Revisiting Copyright: An Interview with Lawrence Lessig*, CABINET (2002), [https://www.cabinetmagazine.org/issues/8/worthington\\_lessig.php](https://www.cabinetmagazine.org/issues/8/worthington_lessig.php) [[https://web.archive.org/web/20251010205025/https://www.cabinetmagazine.org/issues/8/worthington\\_lessig.php](https://web.archive.org/web/20251010205025/https://www.cabinetmagazine.org/issues/8/worthington_lessig.php)]. While this assertion is technically correct, and seemingly outrageous, it is misleading. It was well understood by 1961 that Congress planned to shift the term of copyright protection from a dual term of twenty-eight years plus twenty-eight years upon renewal to the international standard of life of the author plus fifty years. Due to inevitable delays in passing an omnibus reform, the legislative process ultimately dragged out for fifteen years. Congress passed nine stopgap measures so that the legislative delay would not deprive copyright owners of the anticipated term adjustment. The CTEA was the other term adjustment.

225. For example, shortly after Viacom sued Google for copyright infringement over its YouTube, the *New York Times* published an op-ed submitted by Professor Lessig defending YouTube's legality. *See* Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES (Mar. 18, 2007), <https://www.nytimes.com/2007/03/18/opinion/18lessig.html> [<https://web.archive.org/web/20251107182314/https://www.nytimes.com/2007/03/18/opinion/18lessig.html>]. Google had acquired YouTube a month earlier. *See* *Google Buys YouTube for \$1.65 billion*, NBC NEWS (Oct. 9, 2006) <https://www.nbcnews.com/id/wbna15196982> [<https://web.archive.org/web/20251010210043/https://www.nbcnews.com/id/wbna15196982>].

Professor Lessig's editorial did not disclose that Google had given Stanford's Center for Internet and Society, the organization that Professor Lessig founded and led, \$2 million several months earlier. Professor Lessig later denied any connection between the gift and his views. ROBERT LEVINE, *FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK* 79–80 (2011) (stating that Professor Lessig "says he didn't disclose the donation since the money didn't directly benefit him and he had no role in raising money at Stanford"). Nonetheless, it is difficult to ignore the appearance of bias, especially in view of Google's funding of many of Professor Lessig's organizations and centers. *See id.* at 80, 84; David C. Lowery, *Poker the Bear: The Sad Unraveling of Lawrence Lessig*, TRICHORDIST

counsel of record, the legal academy's integrity was at risk. The concern would soon deepen.

## II. THE DIGITAL DISTRIBUTION ENFORCEMENT WAR

As the turn of the millennium approached, I was struck by how my perception of the challenges and opportunities of the coming internet wave diverged from those of many of my colleagues. In my view, the copyright system, like the *Titanic*, was about to hit a massive digital distribution iceberg. If courts immunized Napster, the music marketplace would be devastated, and as Moore's Law continued to drive storage, bandwidth, and processing speed, the motion picture marketplace would not be far behind.<sup>226</sup>

I was cautiously optimistic that the DMCA had averted the Collingridge dilemma.<sup>227</sup> Congress had come up with a balanced solution before interests vested. The risks of piracy were real, as were the risks of chilling innovation in distribution channels. The DMCA encouraged symbiotic technological innovation which was critical for making the internet relatively safe for content distribution. Technological protection measures were essential to subscription services. Without limits on circumventing these measures, there would be little recourse against rampant piracy. The safe harbors were a constructive solution for web infrastructure and application developers.

Yet many within the copyright scholarly community viewed the DMCA as an unmitigated disaster threatening the internet's promise.<sup>228</sup> Soon after the DMCA was enacted, the motion picture industry tested the newly created anticircumvention prohibition.<sup>229</sup> A second battle, which would ultimately reach the Supreme Court, targeted peer-to-peer ("P2P") services being used to facilitate sharing of popular sound recordings.<sup>230</sup> As that battle languished, record companies initiated a litigation campaign against individual file sharers.<sup>231</sup> EFF and copyleft scholars took an active role

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(May 20, 2018), <https://thetrichordist.com/2018/05/20/poker-the-bear-the-sad-unraveling-of-lawrence-lessig/> [https://web.archive.org/web/20251115211442/https://thetrichordist.com/2018/05/20/poker-the-bear-the-sad-unraveling-of-lawrence-lessig/].

226. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y. L. SCH. L. REV. 63, 100, 109–18 (2003) (describing the principal characteristics of the emerging digital content platform and noting that “the instant popularity and rapid diffusion of Napster, the first widely distributed peer-to-peer software application, brought the digital piracy issue to the forefront of legal, economic, social, and political debate. Tens of millions of Internet users actively downloaded music over Napster’s peer-to-peer network during its relatively short lifespan, resulting in the unauthorized distribution of potentially billions of copies of sound recordings.”).

227. See *Collingridge Dilemma*, *supra* note 164164

228. See sources cited *supra* note 195.

229. See *infra* Section II(A).

230. See *infra* Section II(B).

231. See *infra* Section II(C).

defending this constellation of cases. Finally, copyright owners went back to Congress to seek additional tools to combat online piracy of films.<sup>232</sup> Several academics exaggerated technological effects in opposing these efforts.

#### A. CONSTITUTIONALITY OF THE ANTI-CIRCUMVENTION PROHIBITION

Soon after the DMCA was enacted, a computer hacker triggered a potentially devastating challenge to the motion picture industry's rollout of high-resolution digital video discs for the consumer marketplace. The case concerned the encryption code for protecting DVDs, the motion picture industry's digital format for watching movies at home introduced in the mid-1990s.<sup>233</sup> Seeking to avoid the music industry's piracy problems stemming from the CD format, an unencrypted format, the film industry collaborated with the consumer electronics industry to develop Content Scrambling System ("CSS"), a technological protection measure designed so that DVDs could only be played on hardware devices (DVD players and computers) equipped with software to unscramble CSS-encrypted content.<sup>234</sup> DVDs implementing CSS were rolled out in the United States in early 1997,<sup>235</sup> leading major motion picture studios to release thirty-two titles in the high-resolution DVD format on March 24, 1997.<sup>236</sup> The DVD marketplace—encompassing players and DVDs—quickly expanded and soon surpassed the video tape ("VHS") format.<sup>237</sup>

Revealing the challenge of implementing encryption technologies for consumer devices, Jon Johansen, a Norwegian teenager working with two unidentified individuals that he "met" online, succeeded in developing DeCSS, a program that unlocks CSS, in September 1999.<sup>238</sup> Two months later, Eric Corley, the publisher of *2600: The Hacker Quarterly*, posted the DeCSS code on his publication's website and provided links to other sites posting DeCSS.<sup>239</sup> Broad distribution of this code threatened widespread piracy of Hollywood's motion pictures.

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232. See *infra* Section II(D).

233. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000); *Content Scrambling System*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Content\\_Scramble\\_System](https://en.wikipedia.org/wiki/Content_Scramble_System) [[https://web.archive.org/web/20250531164213/https://en.wikipedia.org/wiki/Content\\_Scramble\\_System](https://web.archive.org/web/20250531164213/https://en.wikipedia.org/wiki/Content_Scramble_System)] (last visited Nov. 15, 2025).

234. See *Reimerdes*, 111 F. Supp. 2d at 310 (describing how Matsushita and Toshiba granted a royalty-free license to the DVD Copy Control Association, which in turn licenses this technology to hardware manufacturers and motion picture studios for a modest administrative fee).

235. See *DVD*, WIKIPEDIA, <https://en.wikipedia.org/wiki/DVD> [<https://web.archive.org/web/20251106072722/https://en.wikipedia.org/wiki/DVD>] (last visited Nov. 15, 2025).

236. See *id.*

237. See *id.*

238. See *Reimerdes*, 111 F. Supp. 2d at 311.

239. See *id.* at 312.

Major motion picture studios sued Corley, alleging that his posting of this code violated the DMCA's antitrafficking ban.<sup>240</sup> Corley, represented by EFF, defended on three principal grounds: (1) that his sole motivation for posting DeCSS was to allow people with computers running the Linux operating system to enable a Linux-based DVD player and hence fell within the DMCA's reverse engineering, security research, and security testing exceptions;<sup>241</sup> (2) that the purpose of DeCSS was to allow others to make fair use of the plaintiffs' copyrighted works (e.g., for educational use in comparing films, time shifting); and (3) that the DMCA violated his First Amendment freedom of expression by preventing him from speaking, namely posting and linking to DeCSS. A large contingent of copyright, First Amendment, and computer research scholars joined the battle as amici.<sup>242</sup>

The District Court rejected these defenses and issued an injunction blocking distribution of DeCSS, and the Second Circuit affirmed.<sup>243</sup> The District Court held that the reverse engineering exception did not apply.<sup>244</sup> The Second Circuit's opinion,

240. At the urging of the Motion Picture Association of America (MPAA), the Norwegian National Authority indicted Johansen in 2002 for violating a Norwegian criminal code "which prohibits the opening of a closed document in a way that gains access to its contents, or breaking into a locked repository. The law also prohibits the breaking of a protective device in a way that unlawfully obtains access to the data." See Ann Harrison, *DVD Hacker Johansen Indicted in Norway*, THE REGISTER (Jan. 10, 2002), [https://www.theregister.com/2002/01/10/dvd\\_hacker\\_johansen\\_indicted/](https://www.theregister.com/2002/01/10/dvd_hacker_johansen_indicted/) [web.archive.org/web/20251018013516/https://www.theregister.com/2002/01/10/dvd\_hacker\_johansen\_indicted/]. Johansen successfully defended the charges on the grounds that he had only developed the user interface for DeCSS, no illegal access was obtained to anyone else's information since Johansen owned the DVDs that he accessed, and Norwegian law allowed making copies for personal use. See *Teenager Wins DVD Court Battle*, BBC NEWS (Jan. 7, 2003), <http://news.bbc.co.uk/2/hi/technology/2635293.stm> [web.archive.org/web/20251018015121/http://news.bbc.co.uk/2/hi/technology/2635293.stm]; Jan Libbenga, *DVD Jon Wins Again*, THE REGISTER (Jan. 2, 2004) (affirming decision on appeal), [https://www.theregister.com/2004/01/02/dvd\\_jon\\_wins\\_again/](https://www.theregister.com/2004/01/02/dvd_jon_wins_again/) [web.archive.org/web/20251025001454/https://www.theregister.com/2004/01/02/dvd\_jon\_wins\_again/].

241. See 17 U.S.C. §§ 1201(f), 1201(g), 1201(j).

242. See, e.g., Brief Amicus Curiae of Intellectual Property Law Professors in Support of Defendants-Appellants, Supporting Reversal, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (No. 00-9185) (led by Professor Julie Cohen and signed by nineteen computer science professors); Brief of Amici Curiae Dr. Harold Abelson et al. in Support of Appellants and Reversal of the Judgment Below, *Corley*, 273 F.3d 429; Brief of Amici Curiae Professor Yochai Benkler and Professor Lawrence Lessig in Support of Appellants and Reversal of the Judgment Below, *Corley*, 273 F.3d 429; Brief of Amici Curiae Ernest Miller et al. in Support of Appellants and Reversal of the Judgment Below, *Corley*, 273 F.3d 429; Brief of Amici Curiae Dr. Steven Bellovin et al. in Support of Appellants and Reversal of the Judgment Below, *Corley*, 273 F.3d 429; Brief of Amici Curiae American Civil Liberties Union et al. in Support of Appellants and Reversal of the Judgment Below, *Corley*, 273 F.3d 429. (Prof. Peter Jaszi, Prof. Jessica Litman, Prof. Pamela Samuelson); but cf. Brief Amicus Curiae In Support of Plaintiff-Appellees and Affirmance of Law Professors Rodney A. Smolla et al., *Corley*, 273 F.3d 429 (contending that the DMCA is constitutional under the intermediate scrutiny standard).

243. *Reimerdes*, 111 F. Supp. 2d at 346.

244. See *id.* at 319-21.

authored by Judge Jon O. Newman, rejected the contention that § 1201(c)(1)'s savings clause allowed the circumvention of encryption technology protecting copyrighted material when the uses to which the material was put qualified as "fair uses," noting that the provision "simply clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials after circumvention has occurred."<sup>245</sup>

The bulk of the Second Circuit's opinion focused on the First Amendment challenges to the anti-circumvention prohibition provisions and their application to DeCSS.<sup>246</sup> While recognizing that computer code can constitute speech entitled to First Amendment protection, Judge Newman nonetheless ruled that the DMCA's anti-circumvention provisions only target nonspeech aspects of computer code—its use as a tool for circumventing encryption code, like a key to unlock doors.<sup>247</sup> Consequently, the court held that the speech restriction is content-neutral, "just as would be a restriction on trafficking in skeleton keys identified because of their capacity to unlock jail cells, even though some of the keys happened to bear a slogan or other legend that qualified as a speech component."<sup>248</sup>

As such, the DMCA anti-circumvention provisions are subject to a lower standard of scrutiny than speech: "the regulation must serve a substantial governmental interest, the interest must be unrelated to the suppression of free expression, and the incidental restriction on speech must not burden substantially more speech than is necessary to further that interest."<sup>249</sup> Applying that standard, the court ruled that prohibiting the posting of DeCSS unquestionably serves a substantial governmental interest (preventing unauthorized access to encrypted copyrighted material) that is unrelated to the suppression of free expression.<sup>250</sup> Furthermore, the defendants failed to suggest "any technique for barring them from making this instantaneous worldwide distribution of a decryption code that makes a lesser restriction on the code's speech component."<sup>251</sup>

As an example of the ways in which the First Amendment was being deployed to invalidate the DMCA's anti-circumvention prohibition, Professors Lawrence Lessig

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245. See *Corley*, 273 F.3d at 443 (emphasis in original).

246. The court brushed aside the constitutional challenge based on the Copyright Clause as not properly raised. See *id.* at 444–45 (noting that arguments raised only in a footnote are not entitled to appellate consideration).

247. *Id.* at 454.

248. *Id.*

249. *Id.*

250. See *id.*

251. See *id.* Along similar lines, the court held that prohibition of Corley's linking to other websites containing DeCSS code does not violate the First Amendment, emphasizing "the functional capacity of decryption computer code and hyperlinks to facilitate instantaneous unauthorized access to copyrighted materials by anyone anywhere in the world." *Id.* at 455–58.

and Yochai Benkler offered a vivid illustration of how prohibiting trafficking of decryption keys for CSS implicated freedom of expression:

Imagine a ten-year-old girl doing her homework on the history of the Holocaust. She includes in her multimedia paper a clip from Steven Spielberg's film, *Schindler's List*, in which a little girl in red, the only color image on an otherwise black-and-white screen, walks through the pandemonium of a deportation. In her paper, the child superimposes her own face over that of the girl in the film. The paper is entitled "My Grandmother."<sup>252</sup>

The hypothetical example was poignant and moving but overlooked the wider societal canvas that led Congress to implement the anticircumvention trafficking prohibitions as well as the ways in which users could comment on and remix DVD releases.

*Schindler's List* was widely considered a cinematic masterpiece that memorably conveyed the horrors of the Holocaust to new generations.<sup>253</sup> Such films require tremendous effort and expense to script, finance, produce, market, and distribute. Should they be freely and easily distributed on the internet without authorization, the incentives to develop them would be greatly diminished. That was, in Congress's view, the far greater societal loss than not being able to conveniently access the high-resolution digital version works for any number of ancillary uses. Affording such access for the occasional school project cannot be accomplished without making the film available to legions of film enthusiasts who might otherwise pay to see the film.

As the Second Circuit recognized, ten-year-old girls are still able to communicate tributes to their grandmothers, although less easily without unfettered access to a high-resolution version of Spielberg's film. They could capture the scene using a camcorder to similar, although less professional, effect.<sup>254</sup> Accordingly, the Second Circuit rejected what it characterized as the defendants' "extravagant claim" that the DMCA unconstitutionally "eliminates fair use" of copyrighted materials.<sup>255</sup> The court determined that there was no need to address whether the anti-circumvention prohibition contravenes such constitutional protection because the defendants did not assert that fair uses were being impaired, nothing in the injunction prohibited making fair use, and there was no support for the contention that fair use of DVDs is constitutionally required to be made by copying the original work in its original format.<sup>256</sup>

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252. See Brief of Amici Curiae Professor Yochai Benkler & Professor Lawrence Lessig in Support of Appellants and Reversal of the Judgment Below, *Corley*, 273 F.3d 429, at 20.

253. See *Schindler's List: Reception, Critical Response*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Schindler%27s\\_List#Reception](https://en.wikipedia.org/wiki/Schindler%27s_List#Reception) [[https://web.archive.org/web/20250914165144/https://en.wikipedia.org/wiki/Schindler%27s\\_List#Reception](https://web.archive.org/web/20250914165144/https://en.wikipedia.org/wiki/Schindler%27s_List#Reception)] (last visited Nov. 16, 2025).

254. See *Corley*, 273 F.3d at 459.

255. See *id.* at 458.

256. See *id.* at 459 (noting that the DMCA does not limit the "opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their

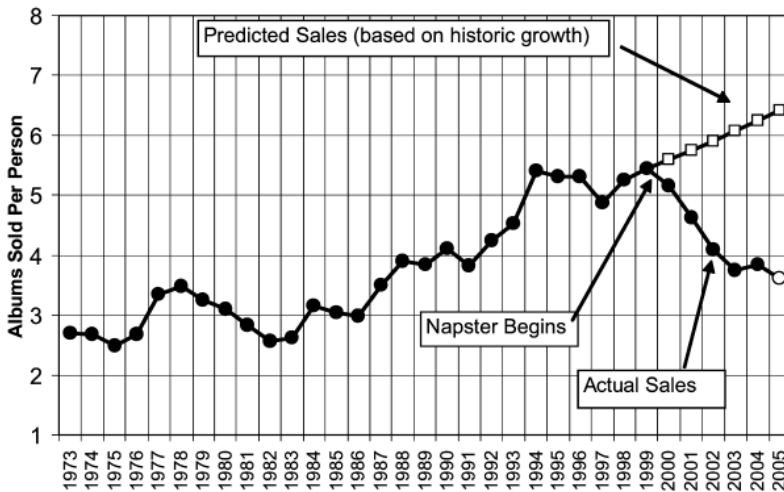


In upholding the constitutionality of the DMCA's anti-circumvention prohibition, the Second Circuit's decision enabled the physical digital video marketplace to flourish.<sup>257</sup> The motion picture industry still faced a mounting digital piracy challenge,<sup>258</sup> but the *Corley* decision shut down a significant risk to widespread distribution of high-resolution digital media and encouraged further technological progress and film production. The development of encrypted subscription-based streaming platforms has proven to be a robust ecosystem for distributing digital content.<sup>259</sup>

## B. THE FILESHARING DISRUPTION

With Napster's launch on June 1, 1999, the recording industry's worst fears were realized. Record labels, recording artists, and songwriters watched in dismay as record sales precipitously dropped.<sup>260</sup>

**Figure 2: Record Sales per Person 1973–2005**



screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie").

257. DVD sales overtook VHS sales in 2001. *See DVD*, *supra* note 235.

258. Enterprising hackers continued to traffic DeCSS and decrypted DVDs. And as more bandwidth and processor speed became available, new piracy threats emerged. *See infra* Section II(D).

259. *See infra* Section II(E).

260. *See* Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 14 (2006).

The release of peer-to-peer technology sparked the most consequential copyright battle in modern history,<sup>261</sup> culminating in the Supreme Court's historic 2005 *Grokster* decision<sup>262</sup> and tens of thousands of direct enforcement lawsuits against filesharers. These services were attractive nuisances:<sup>263</sup> digital playgrounds designed for the prime music-purchasing demographic that offered a false sense of security through the seeming anonymity of the internet and filled with malware dangers.

John Perry Barlow, EFF's patron saint, viewed peer-to-peer networking as a form of revolutionary civil disobedience paralleling the American revolution: "The colonists were obliged to cast off that power and develop an economy better suited to their new environment. . . . No law can be successfully imposed on a huge population that does not morally support it and possesses easy means for its invisible evasion."<sup>264</sup> The battle expanded the copyleft populist movement and further implicated copyright scholars in misleading advocacy.

### 1. Napster's Rapid Rise and Fall

In early 1999, Shawn Fanning, a recent high school graduate, developed a user-friendly computer network for anonymously transferring MP3 files over the internet.<sup>265</sup> Named Napster, after Shawn's nickname referencing his nappy hair, the program maintained a central database of connected users. Users could easily search the central database for song titles, link to another user hosting the file, and immediately download the file. Fanning teamed with Sean Parker, another young programmer/hacker Fanning met on the internet, who raised \$50,000 to seed the venture.<sup>266</sup> Napster launched on June 1, 1999, generating euphoria among internet-connected music fans and panic throughout the record industry. Tens of millions of

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261. See Wu, *When Code Isn't Law*, *supra* note 137, at 683 (observing that "P2P filesharing represents the most ambitious effort to undermine an existing legal system using computer code").

262. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

263. See *Attractive Nuisance Doctrine*, CORN. L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/attractive\\_nuisance\\_doctrine](https://www.law.cornell.edu/wex/attractive_nuisance_doctrine) [[https://web.archive.org/web/20251107190221/https://www.law.cornell.edu/wex/attractive\\_nuisance\\_doctrine](https://web.archive.org/web/20251107190221/https://www.law.cornell.edu/wex/attractive_nuisance_doctrine)] (last visited Nov. 16, 2025).

264. See John Perry Barlow, *The Next Economy of Ideas*, WIRED (Oct. 1, 2000), <https://www.wired.com/2000/10/download/> [<https://web.archive.org/web/20251019230237/https://www.wired.com/2000/10/download/>]; see also sources cited *supra* note 144.

265. See Georgi Dalakov, *Shawn Fanning (Napster)*, COMPUT. TIMELINE, <http://www.computer-timeline.com/timeline/shawn-fanning/> [<https://web.archive.org/web/20251116140751/https://www.computer-timeline.com/timeline/shawn-fanning/>] (last visited Nov. 16, 2025).

266. See *id.* Parker would go on to team with Mark Zuckerberg (and Peter Thiel) a few years later to help get Facebook launched. See Sean Parker, WIKIPEDIA, [https://en.wikipedia.org/wiki/Sean\\_Parker](https://en.wikipedia.org/wiki/Sean_Parker) [[https://web.archive.org/web/20251007105108/https://en.wikipedia.org/wiki/Sean\\_Parker](https://web.archive.org/web/20251007105108/https://en.wikipedia.org/wiki/Sean_Parker)] (last visited Nov. 16, 2025).

people downloaded Napster software.<sup>267</sup> Fanning quickly became a hacker cult hero, featured on the covers of national magazines.<sup>268</sup> The business, however, lacked a revenue model, and it was facilitating massive piracy of copyrighted works.

The Recording Industry Association of America (RIAA) filed suit in December 1999 alleging contributory and vicarious infringement,<sup>269</sup> followed a few months later by lawsuits filed by heavy metal band Metallica and rapper and producer Dr. Dre.<sup>270</sup> In April 2000, I organized the first of what would become an annual BCLT public roundtable discussion featuring the parties, recording artists, and NGOs, including EFF.

Four months later, Judge Marilyn Hall Patel granted the plaintiffs a preliminary injunction, shutting down the service.<sup>271</sup> The Ninth Circuit largely affirmed her decision, finding that the copyright owners demonstrated likelihood of success on its infringement claims, and rejecting Napster's fair use, AHRA, and DMCA safe harbor defenses.<sup>272</sup> The court remanded the case with instructions to narrow the scope of the injunction, which Judge Patel reissued shortly thereafter.<sup>273</sup> Napster was not able to comply with the conditions and shut down in July 2001.<sup>274</sup>

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267. See Karl Taro Greenfeld, *Meet the Napster*, TIME (Oct. 2, 2000), <https://time.com/archive/6954963/meet-the-napster/> [<https://web.archive.org/web/20260115001921/https://time.com/archive/6954963/meet-the-napster/>] ("Fanning's program already ranks among the greatest Internet applications ever, up there with e-mail and instant messaging. In terms of users, the Napster site is the fastest growing in history, recently passing the 25 million mark in less than a year of operation.").

268. See, e.g., *What's Next for Napster*, TIME, Oct. 2, 2000, at cover (asking "What's Next for Napster. How SHAWN FANNING, 19, upended music . . . and a lot more"), <https://content.time.com/time/covers/0,16641,20001002,00.html> [<https://web.archive.org/web/20251019233815/https://content.time.com/time/covers/0,16641,20001002,00.html>].

269. See *The Music Industry's Fight Against Napster—Part 1: Napster's Rise to Fame*, MUSIC BUS. RSCH. (Dec. 6, 2014) <https://musicbusinessresearch.wordpress.com/2014/12/06/the-music-industrys-fight-against-napster-part-1/> [<https://web.archive.org/web/20251116141131/https://musicbusinessresearch.wordpress.com/2014/12/06/the-music-industrys-fight-against-napster-part-1/>].

270. See Rapper Dr. Dre Sues Napster for Infringement, L.A. TIMES (Apr. 27, 2000), <https://www.latimes.com/archives/la-xpm-2000-apr-27-fi-23816-story.html> [<https://web.archive.org/web/20251116141308/https://www.latimes.com/archives/la-xpm-2000-apr-27-fi-23816-story.html>].

271. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal 2000).

272. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

273. *A&M Records, Inc. v. Napster, Inc.*, 2001 WL 227083 (Mar. 5, 2001); *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

274. See *Napster*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Napster> [<https://web.archive.org/web/20251006024526/https://en.wikipedia.org/wiki/Napster>] (last visited Nov. 16, 2025); see also *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (affirming the modified preliminary injunction and the shutdown order).

Napster hoped to leverage its large user base to force the record industry into a licensing deal, but that plan was doomed.<sup>275</sup> Napster would need to generate revenue by charging users to have any chance of bringing the record industry to the table. Imposing subscription or download fees, however, would attract copycat services into the market.<sup>276</sup> Without a clear liability holding, there would be no way to prevent other P2P companies from disrupting a Napster-record label licensing deal.

## 2. The Demise of Aimster

As Napster's fate hung in the balance, Aimster, a P2P network leveraging America Online's Instant Messaging network ("AIM"), entered the market.<sup>277</sup> Internet users initially could freely download the software.<sup>278</sup> Users could then search for and download files contained in share folders of other Aimster users. Like Napster, Aimster used a centralized index providing song titles, bit rate, and song length. Aimster also provided a tutorial demonstrating how to transfer and copy files. The tutorial used unlicensed copyrighted works for explaining how to use the app. Aimster also hosted chat rooms and message boards that specifically referenced searches for copyrighted works, as well as comments referencing migration from Napster due to its shutdown. Many of these comments acknowledged and promoted piracy, such as "LET'S ALL FUCK OVER THE MUSIC INDUSTRY . . . LETS CHEAT THE VERY ARTISTS WE LISTEN TO" and "I AM NOT GOING TO BUY CDS ANYMORE!"<sup>279</sup> Aimster also operated "Club Aimster," promising "All the Hot New Releases All the Time" for \$4.95 per month.<sup>280</sup>

In November 2001, eleven infringement actions against Aimster were consolidated in the Northern District of Illinois.<sup>281</sup> The record labels requested a preliminary injunction. Aimster defended the action on the grounds that its service was

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275. Hummer Winblad Venture Partners swooped in to pilot a deal, installing Hank Barry, a technology lawyer, as Napster's CEO in 2000. See Matt Richtel, *Napster Has a New Interim Chief and Gets a \$15 Million Investment*, N.Y. TIMES (May 23, 2000), <https://www.nytimes.com/2000/05/23/business/napster-has-a-new-interim-chief-and-gets-a-15-million-investment.html> [web.archive.org/web/20251024195006/https://www.nytimes.com/2000/05/23/business/napster-has-a-new-interim-chief-and-gets-a-15-million-investment.html].

276. New entrants were already circling. See *Madster*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Madster> [https://web.archive.org/web/20250829080030/https://en.wikipedia.org/wiki/Madster] (last visited Nov. 16, 2025) (Aimster, later renamed Madster, was released in August 2000.); *eDonkey2000*, WIKIPEDIA, <https://en.wikipedia.org/wiki/EDonkey2000> [https://web.archive.org/web/20250924115251/https://en.wikipedia.org/wiki/EDonkey2000] (last visited Nov. 16, 2025).

277. See *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 639–43 (N.D. Ill. 2002).

278. See *id.* at 645.

279. *Id.* at 644 (quoting user posts on Aimster bulletin boards) (capitalization in original).

280. See *id.* at 644–45.

281. See *id.* at 638.

capable of “substantial non-infringing uses” and hence immune from contributory liability.<sup>282</sup> Chief Judge Marvin Aspen granted a preliminary injunction, distinguishing *Sony* on the grounds that: (1) the defendants had provided no evidence on non-infringing uses (whereas *Sony* involved time-shifting of television programming, which the Supreme Court deemed fair use); (2) Aimster was not a “staple article of commerce” but an ongoing service; (3) *Sony* did not address the unauthorized and widespread distribution of infringing works; (4) there is authority to suggest that *Sony*’s protection is not available when the products at issue are specifically manufactured for infringing activity; and (5) “*Sony* approvingly cited the district court’s finding that Sony had not ‘influenced or encouraged’ the unlawful copies,” an inducement basis for liability.<sup>283</sup> The district court further found that the record labels had shown a reasonable likelihood of success on their vicarious infringement claim.<sup>284</sup> The court rejected the defendants’ assertion that the DMCA safe harbor immunized their activities, finding that they had failed to comply with the requirement to adopt and implement a policy to terminate repeat infringers.<sup>285</sup>

The Seventh Circuit affirmed the preliminary injunction.<sup>286</sup> In a wide-ranging opinion, Judge Richard Posner delved into the challenges of applying the Supreme Court’s analog age *Sony* decision to a highly parasitic internet filesharing service. Recognizing limitations on his power to address the limitations of the *Sony* precedent,<sup>287</sup> Judge Posner distinguished *Sony*, noting the distinction between “articles of commerce” and services, the Supreme Court’s reference to the motion picture studios’ evident purpose to leverage their copyright monopolies into a monopoly over video recorders, and Sony’s inability to prevent infringing uses once its devices were sold.<sup>288</sup> Judge Posner further noted that although the *Sony* majority did not discuss ways in which Sony could have designed the VCR to reduce the likelihood of infringement—for example, by eliminating the fast-forward capability<sup>289</sup>—“the ability of a service provider to prevent its customers from infringing is a factor to be considered in determining whether the provider is a contributory infringer.”<sup>290</sup>

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282. *See id.* at 653–54; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

283. *Id.* at 653–54 (citing *Sony*, 464 U.S. at 438).

284. *See id.* at 655.

285. *See id.* at 659 (citing 17 U.S.C. § 512(i)).

286. *In re Aimster Copyright Litig.*, 334 F.3d 643, 643 (7th Cir. 2003).

287. *See id.* at 649 (observing that the recording industry’s hostility to the *Sony* decision is “understandable” but “articulated in the wrong forum”).

288. *See id.* at 648 (citing *Sony*, 464 U.S. at 440, 441–42 and n.21, and 35 U.S.C. § 271(c) (Patent Act’s staple article of commerce provision)).

289. *See id.* Judge Posner read *Sony* to hold that archiving of television broadcasts (“library building”) and skipping commercials to avoid commercials were infringing acts. *See id.* at 647.

290. *Id.* at 648 (noting that Congress so recognized in the DMCA).

Judge Posner invoked tort law principles to find willful blindness to be a potential basis for infringement liability.<sup>291</sup> He specifically pointed to Aimster's encryption feature that hid knowledge of what songs were being copied by the users of the service as bearing on indirect liability, although he stopped short of saying that "the provider of an encrypted instant-messaging service or encryption software is ipso facto a contributory infringer should his buyers use the service to infringe copyright, merely because encryption, like secrecy generally, facilitates unlawful transactions."<sup>292</sup> Without definitively drawing the contributory liability line, Judge Posner pivoted to aiding and abetting and inducement liability,<sup>293</sup> finding sufficient basis to uphold the preliminary injunction.<sup>294</sup> The Supreme Court declined to review,<sup>295</sup> leading to Aimster's demise.<sup>296</sup>

### 3. Second-Generation Filesharing Technology and the *Grokster* Litigation

As Napster's and Aimster's cavalier ventures collapsed, EFF rolled out a plan for designing a second generation of P2P services to avoid Napster's fate. Based on a broad reading of *Sony* and a cramped interpretation of *Aimster*, Fred von Lohmann recommended that second-generation services design their systems to afford "plausible deniability" of "what your end-users are up to."<sup>297</sup>

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291. See *id.* at 650.

292. *Id.*

293. See *id.* at 650–54.

294. See *id.* at 655.

295. See *Deep v. Recording Indus. Ass'n of Am., Inc.*, 540 U.S. 1107 (2004) (denying writ of certiorari); Declan McCullagh, *High Court Turns Deaf Ear to Aimster*, CNET (Jan. 13, 2004), <https://www.cnet.com/tech/tech-industry/high-court-turns-deaf-ear-to-aimster/> [<https://web.archive.org/web/20251010170630/https://www.cnet.com/tech/tech-industry/high-court-turns-deaf-ear-to-aimster/>].

296. See Madster, *supra* note 276 (noting that Aimster changed its name to Madster out of concern for infringing AOL's Instant Messenger trademark).

297. See Fred von Lohmann, IAAL: What Peer-to-Peer Developers Need to Know about Copyright Law § V.7, Elec. Frontier Found. (Dec. 2003), <https://www.eff.org/pages/iaal-what-peer-peer-developers-need-know-about-copyright-law> [[https://web.archive.org/web/20040116040842/https://www.eff.org/IP/P2P/p2p\\_copyright\\_wp.php](https://web.archive.org/web/20040116040842/https://www.eff.org/IP/P2P/p2p_copyright_wp.php)], quoted in Brief of Professors Peter S. Menell et al., as Amici Curiae in Support of Petitioners, at 26–27, n.10, *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 545 U.S. 913 (2005) (cd Statement of Marybeth Peters, Register of Copyrights before the S. Comm. on the Judiciary, Intentional Inducement of Copyright Infringements Act of 2004 (July 22, 2004), at text accompanying n.38), <https://www.copyright.gov/docs/regstat072204.html>.

Have you built a level of “plausible deniability” into your product architecture and business models? If you promote, endorse, or facilitate the use of your product for infringing activity, you’re asking for trouble. . . . [S]oftware that sends back user reports may lead to more knowledge than you want. Customer support channels can also create bad “knowledge” evidence. Instead, talk up all the great legitimate capabilities, sell it (or give it away), and then leave the users alone.

Disaggregate functions . . . In order to be successful, peer-to-peer networks will require products to address numerous functional needs—search, namespace management, security, dynamic file redistribution, to take a few examples. There’s no reason why one entity should try to do all of these things . . . .

This approach may also have legal advantages. If Sony had not only manufactured VCRs, but also sold all the blank video tape, distributed all the TV Guides, and sponsored clubs and swap meets for VCR users, the Betamax case might have turned out differently. . . . A disaggregated model, moreover, may limit what a court can order you to do to stop infringing activity by your users.

. . . Give up the EULA. . . . Although end-user license agreements (“EULAs”) are ubiquitous in the software world, copyright owners have attempted to use them in P2P cases to establish “control” for vicarious liability purposes. . . .

No customer support. Any evidence that you have knowingly assisted an end-user in committing copyright infringement will be used against you. . . .<sup>298</sup>

This cynical advice—arguably amounting to willful blindness—advanced EFF’s mission of liberating internet services from copyright liability, but also undermined system efficiency and user privacy, EFF’s original mission.<sup>299</sup>

Several such services—including Grokster, Morpheus, and KaZaA—soon entered the market. Unlike Napster and Aimster, they employed decentralized network architectures that avoided files or file names passing through company-managed servers. Rather, the systems enabled users of the software to *search* for files directly from other users through a full process of peer-to-peer communications. By contrast, Napster directly routed users to file hosts listed in directories stored on Napster’s servers. The sharing of files would then occur directly between users, bypassing Napster’s servers.

Also unlike Napster, these second-generation services had a business model, albeit one that was meager and unsavory: They integrated software delivering pop-up advertisements into their P2P networks. As one software-savvy practitioner noted:

[I]f you have teenagers in the house and you’ve let them loose with your computer, chances are that they’ve eagerly down-loaded one of the peer-to-peer filesharing utilities like Kazaa, Grokster or Morpheus in order to score pirated music. It’s just what kids do. These products are riddled with ride-along malware that gets downloaded when installing the software. So intertwined is some of this noxious code that any attempt to remove the

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298. von Lohmann, *supra* note 297.

299. See *supra* Section I(B)(1)(b).

malware can actually disable the filesharing utility. But, hey, it's just filesharing companies trying to make a buck.<sup>300</sup>

Furthermore, P2P services were a form of spyware. Other P2P users could access and search other computers on the network. A user could search for Led Zeppelin's *Stairway to Heaven* as well as "1099," which could locate tax returns stored in a share folder.<sup>301</sup>

From a policy perspective, the parasitic effects of second-generation P2P services on the content industry were the same as Napster's, and the pop-up ads and spyware concerns made this generation of filesharing far more deleterious.<sup>302</sup> P2P offered some file storage and transfer speed efficiencies, but Moore's Law was rapidly advancing processor and network capabilities, effectively making such advantages less consequential. The celestial jukebox—using licensed central servers, integrating far better user interfaces, and compensating artists—was technologically possible, but economically sustainable only if rampant piracy on P2P services was curtailed.

300. See Mark Tamminga, *Invasion of the Computer Snatchers: Pestilential Programs Are Turning the Web into a Toxic Swamp for the Unwary*, 29 LAW PRAC. MGMT. 26, 26–27 (July/August 2003); see also Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 YALE L.J. 1472, 1500–01 (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (observing that “the untold story of peer-to-peer networking is spyware bundling. There is no such thing as a free lunch, at least not after Napster. Users who downloaded unlicensed copies of mp3 sound recordings were paying for those files just as iTunes users were. The latter paid with cash, the former paid with computing resources, and many a functional PC was rendered virtually inoperable by bundled spyware and malware.”).

301. See David Bowermaster, *Indictment Here Marks “New Age” of ID Theft*, SEATTLE TIMES (Sep. 7, 2007) <https://www.seattletimes.com/seattle-news/indictment-here-marks-new-age-of-id-theft/> [<https://web.archive.org/web/20251010184331/https://www.seattletimes.com/seattle-news/indictment-here-marks-new-age-of-id-theft/>] (reporting on the use of LimeWire to commit fraud against more than eighty victims).

302. EFF suggested that the loss to recording artists and songwriters could be adequately addressed through voluntary contributions, a virtual tip jar model. See *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELEC. FRONTIER FOUND. (Apr. 1, 2008) <https://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-filesharing> [<https://web.archive.org/web/20251011025243/https://www.eff.org/favicon.ico>] (noting that “[s]ince 2003, EFF has championed an alternative approach that gets artists paid while making file sharing legal: voluntary collective licensing”). Radiohead attempted a variation of this approach for its 2007 *In Rainbows* release, see Jon Pareles, *Pay What You Want for This Article*, N.Y. TIMES (Dec. 9, 2007), <https://www.nytimes.com/2007/12/09/arts/music/09pare.html> [<https://web.archive.org/web/20251116144600/https://www.nytimes.com/2007/12/09/arts/music/09pare.html>], with some success, but few others followed. Cf. Eric Garland, *The “In Rainbows” Experiment: Did It Work?*, NPR MUSIC (Nov. 16, 2009), [https://www.npr.org/sections/monitormix/2009/11/the\\_in\\_rainbows\\_experiment\\_did.html](https://www.npr.org/sections/monitormix/2009/11/the_in_rainbows_experiment_did.html) [[https://web.archive.org/web/20251116144616/https://www.npr.org/sections/monitormix/2009/11/the\\_in\\_rainbows\\_experiment\\_did.html](https://web.archive.org/web/20251116144616/https://www.npr.org/sections/monitormix/2009/11/the_in_rainbows_experiment_did.html)]. Radiohead abandoned this approach for subsequent releases. See *Radiohead Ditch “Pay What you Want” Release Style*, BBC NEWS (Feb. 14, 2011), <https://www.bbc.com/news/newsbeat-12448476#> [<https://web.archive.org/web/20251116144748/https://www.bbc.com/news/newsbeat-12448476#>].



The record industry promptly sued Grokster, Morpheus, and KaZaA, alleging indirect copyright infringement.<sup>303</sup> It was not surprising to see EFF step up to represent StreamCast Networks, developer of the Morpheus platform.<sup>304</sup> It was surprising, however, to see Professor Mark Lemley join the fray as counsel for Grokster. His approach to this case would blur the lines between interpretive and normative analysis as well as academic values and zealous advocacy. The copyright scholarly community's involvement in amicus briefs would further strain academic values and mark a shift in the copyright legal academy's approach to amicus brief writing for decades to come.

a. *The Scholarly Divide*

The copyright scholarship community divided sharply over the desirability and legality of P2P technology. The growing copyleft community engaged in some hand-wringing over the copyright infringement that such networks facilitated, but came down strongly on the side of second-generation P2P services being immunized from liability by the *Sony* staple article of commerce safe harbor.<sup>305</sup> Other copyright and law and economics scholars were more troubled by the piratic effects of P2P services and saw room for courts to hold these services indirectly liable for infringement by end-users.<sup>306</sup>

Bridging the divide, Professor Terry Fisher and Professor Neil Netanel separately proposed that Congress immunize P2P networks through a far-reaching compulsory licensing system.<sup>307</sup> These policy proposals would socialize much of the creative ecosystem as the internet expanded its capacity and reach. They viewed P2P technology as the principal means for distributing online content and largely dismissed voluntary

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303. See Scarlett Pruitt, *Recording, Movie Industries Sue Napster Progeny*, CNN (Oct. 7, 2001), <https://www.cnn.com/2001/TECH/industry/10/07/recording.sues.idg/#>. [<https://web.archive.org/save/https://www.cnn.com/2001/TECH/industry/10/07/recording.sues.idg/#>].

304. See *Media Release: EFF Asks Court to OK Morpheus Peer-to-Peer Software, Reject Hollywood Attempts to Stifle Innovation*, ELEC. FRONTIER FOUND. (Jan. 22, 2002), [https://w2.eff.org/IP/P2P/MGM\\_v\\_Grokster/20020122\\_eff\\_morpheus\\_pr.html#](https://w2.eff.org/IP/P2P/MGM_v_Grokster/20020122_eff_morpheus_pr.html#) [[https://web.archive.org/save/https://w2.eff.org/IP/P2P/MGM\\_v\\_Grokster/20020122\\_eff\\_morpheus\\_pr.html#](https://web.archive.org/save/https://w2.eff.org/IP/P2P/MGM_v_Grokster/20020122_eff_morpheus_pr.html#)].

305. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 418–29, 470–71 (2006) (applauding P2P's capacity to support recording artists and information dissemination while recognizing its facilitation of "outright illegality practiced by tens of millions of Internet users" and acknowledging that the recording industry's claims in P2P litigation "seemed the most morally compelling" for its efforts to curtail social production); *supra* section II(B)(3)(d)(iv).

306. See Menell & Nimmer, *supra* note 66; Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395 (2003).

307. See Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004).

licensing, which had successfully emerged decades ago to support radio, television, and venue licensing of public performance rights.<sup>308</sup>

I was surprised by the swiftness with which the scholarly community had come to firm conclusions about this nascent and rapidly unfolding technological landscape.<sup>309</sup> Even the greatest technological advances have been accompanied by adverse societal, economic, and ecological risks, some of which do not manifest immediately.<sup>310</sup> Yet in addressing the policy ramifications of the online distribution platform field, many legal scholars disregarded or downplayed the problems of rampant piracy, malware proliferation, and privacy violations. It appeared that they were swept off their feet by the public's rapid adoption of peer-to-peer technology, internet exceptionalism, and the internet's promise.

As the filesharing controversy was emerging, I was invited to speak at a symposium celebrating Judge Newman's first thirty years on the federal bench.<sup>311</sup> I took this opportunity to examine the technological, economic, industrial, and legal issues surrounding this dramatic shift in content distribution. The monograph-length article that I produced examined the characteristics of the emerging digital content platforms, the ramifications of digital distribution for the major content industries, the wave of digital copyright legislation, and the copyright enforcement challenges.<sup>312</sup> I predicted a copyright enforcement war of attrition, the emergence of private solutions and antitrust concerns, and the shift of copyright from a property rights regime towards a mixed regulatory regime<sup>313</sup>—all of which have been borne out.

This project enabled me to conceptualize the forces shaping copyright law. I continued to convene digital music roundtables with the key players and closely followed digital copyright developments. It was important to track this rapidly evolving

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308. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1328–40 (1996).

309. See, e.g., Lawrence Lessig, *End the War on Sharing*, FIN. TIMES (Jun. 19, 2002) (praising economist Professor Stan Liebowitz for questioning whether filesharing was harming record sales: “Guided by the integrity of scholars such as Prof. Liebowitz, policymakers should focus on where the real good can be done. Instead of demonizing our children, they should enact laws that ensure payment for artists while pushing innovators to develop better, cheaper, more competitive ways to get access to content.”). But when more and better data led Professor Liebowitz to conclude that filesharing was adversely affecting record sales, Professor Lessig stopped singing his praises.

310. The automobile, nuclear power, plastics, pesticides, leaded gasoline, and many other breakthrough technologies have resulted in adverse effects. Mobile phone technology and social media are good contemporary examples. See JONATHAN HAIDT, *THE ANXIOUS GENERATION: HOW THE GREAT REWIRING OF CHILDHOOD IS CAUSING AN EPIDEMIC OF MENTAL ILLNESS* (2024). The ramifications of generative artificial intelligence for humanity are far from clear. See YUVAL NOAH HARARI, *NEXUS: A BRIEF HISTORY OF INFORMATION NETWORKS FROM THE STONE AGE TO AI* (2024).

311. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 67 (2003).

312. See *id.* at 108–91.

313. See *id.* at 191–97.

ecosystem in order to understand the industrial shifts, politics, tradeoffs, and paths forward.

Like many other scholars, I was particularly interested in the effects of P2P services on music industry sales and the development of authorized distribution outlets. The emerging studies aligned with the basic intuition that teenagers and college students—the prime music purchasing demographic—would increasingly acquire music through P2P networks, thereby adversely affecting record sales.<sup>314</sup> As economics Professor Stan Liebowitz summarized at the time:

[T]he evidence . . . supports the current findings from almost all econometric studies that have been undertaken to date [that] file sharing has brought significant harm to the recording industry. . . . This conclusion, preliminary though it might be, should not be much of a surprise. . . . When given the choice of free and convenient high-quality copies versus purchased originals, is it really a surprise that a significant number of individuals will choose to substitute the free copy for the purchase? The conditions needed to override this basic intuition are demanding and seemingly not met in the case of file sharing.<sup>315</sup>

But just as the Grokster litigation was heading to the Supreme Court, an econometric study countering this conventional wisdom<sup>316</sup> swept the academic community and garnered outsized media attention.<sup>317</sup> Another surprising development was the circulation of a paper by Professors Mark Lemley and Anthony Reese

314. See David Blackburn, *On-line Piracy and Recorded Music Sales* (working paper, Harvard Univ. Dep't of Econ., Dec. 2004 draft); Seung-Hyun Hong, *The Effect of Napster on Recorded Music Sales: Evidence from the Consumer Expenditure Survey* (Stan. Inst. Econ. Pol'y. Rsch., Discussion Paper No. 03-18, 2004); Stan J. Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far*, 15 *ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION, & ECON. GROWTH* 229–60 (2004); Martin Peitz & Patrick Waelbroeck, *The Effect of Internet Piracy on Music Sales: Cross-Section Evidence*, 1 *REV. ECON. RSCH. ON COPYRIGHT ISSUES* 71 (2004); Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries*, 5 *TOPICS ECON. ANALYSIS & POL'Y*, art. 21, 1–15. Several of these papers circulated online before their official publication dates.

315. Liebowitz, *supra* note 260, at 24.

316. See Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of Filesharing on Record Sales: An Empirical Analysis* (working paper, Mar. 2004) (later published in 115 *J. POL. ECON.* 1 (2007)).

317. See Ben Fritz, *Study: File Sharing Doesn't Hurt Sales*, *VARIETY* (Mar. 29, 2004), <https://variety.com/2004/biz/markets-festivals/study-filesharing-doesn-t-hurt-sales-1117902507/> [<https://web.archive.org/web/20251024230241/https://variety.com/2004/biz/markets-festivals/study-filesharing-doesn-t-hurt-sales-1117902507/>]; John Schwartz, *A Heretical View of File Sharing*, *N.Y. TIMES* (Apr. 5, 2004), <https://www.nytimes.com/2004/04/05/business/a-heretical-view-of-filesharing.html> [<https://web.archive.org/web/20251024230610/https://www.nytimes.com/2004/04/05/business/a-heretical-view-of-filesharing.html>]; Daniel Gross, *Does a Free Download Equal a Lost Sale?* *N.Y. TIMES* (Nov. 21, 2004), <https://www.nytimes.com/2004/11/21/business/yourmoney/does-a-free-download-equal-a-lost-sale.html> [<https://web.archive.org/web/20251024230937/https://www.nytimes.com/2004/11/21/business/yourmoney/does-a-free-download-equal-a-lost-sale.html>].

contending that immunizing filesharing services from indirect copyright liability while aggressively enforcing copyright protection against end-users would be the best approach to combating internet piracy.<sup>318</sup> The fact that Professor Lemley represented Grokster in the P2P lawsuit raised concerns about the paper's independence and objectivity.

i. *Filesharing Freakonomics*

In March 2004, Professors Felix Oberholzer-Gee and Koleman Strumpf released an empirical paper (OGS paper) that came to the surprising conclusion that the 30% drop in record sales following Napster's introduction was attributable to economic forces other than P2P filesharing.<sup>319</sup> Unlike prior studies that used survey data, the OGS paper used proprietary download data from OpenNap, Napster's server. The econometric study used a regression model with instrumental variables to control for the endogeneity of unobserved factors that also influence music sales. It used German school vacation periods as an instrumental variable on the theory that German high school students, who are in the prime filesharing demographic, have more time to engage in filesharing during vacation periods, thereby making more downloadable supply available to U.S. users. Furthermore, school vacation periods are exogenous to album sales, and there was no reason to believe that German school vacation periods are correlated with economic conditions that affect album sales, such as marketing efforts or macroeconomic activity.

Professor Liebowitz went to work trying to reconcile these results with those of other economists (including himself) and identified numerous problems with the study design. He sought access to the underlying data to see if he could replicate the results but was refused.<sup>320</sup> Meanwhile, more numerous and transparent studies lent credence to the view that filesharing was cutting into record sales,<sup>321</sup> but received scant attention in briefing for the Supreme Court's *Grokster* decision. Subsequent studies cast greater doubt about the paper's validity, as well as the extent to which legal scholars have uncritically cited its findings.<sup>322</sup>

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318. See Mark A. Lemley & Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004).

319. See Oberholzer-Gee & Strumpf, *supra* note 316.

320. See Stan Liebowitz, *How Reliable Is the Oberholzer-Gee and Strumpf Paper on Filesharing?*, SSRN (Sep. 1, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1014399](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014399) [[https://web.archive.org/web/20251116151024/https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1014399](https://web.archive.org/web/20251116151024/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014399)] (noting that Oberholzer-Gee and Strumpf "have not made their data available[,] which prevents other researchers from directly examining the empirical details of their main regression results but using other publicly available data to show that the findings are not supported).

321. See *supra* references in note 314.

322. See Justin Hughes & Michael D. Smith, *Do Copyright Professors Pay Attention to Economists? How Empirical Evidence on Copyright Piracy Appears (or Not) in Law Literature*, 47 COLUM. J.L. & THE ARTS 165, 169,

ii. *Leveraging Academia*

The Lemley/Reese article contended that the best approach for addressing unauthorized distribution of copyright-protected sound recordings was to immunize filesharing services from indirect liability, thereby forcing copyright owners to sue end-users.<sup>323</sup> They argued that enforcing copyright violations at the end-user level would avoid the chilling of technological innovation while deterring infringement through monetary sanctions and jailing college students who share files illegally.<sup>324</sup> They further proposed that Congress establish a streamlined dispute resolution system.<sup>325</sup>

Their analysis surprisingly overlooked the foundational insight of the economics of enforcement: the principle of placing responsibility on the least cost avoider.<sup>326</sup> The least cost avoider principle internalizes the costs upon the actor(s) in the best position to address the problem, thereby encouraging socially efficient technology design and innovation. Furthermore, the immunization of filesharing services would likely forestall the emergence of authorized celestial jukebox services. The Lemley/Reese proposal also overlooked the harm caused by P2P services' use of malware.

Had Professor Lemley not been Grokster's counsel of record and Professor Reese not been of counsel at a firm representing another of the P2P services being sued, I might have chocked these oversights to sloppy scholarship. The biographical footnote disclosing the conflict—"we wish to make it even more clear than usual that our opinions are our own, do not represent those of our [law] firms or our clients"<sup>327</sup>—did little to ameliorate the strain on academic values. I struggled to see how this "scholarship" drop just as the *Grokster* case was heading to the Supreme Court was not leveraging the academic pedestal.

b. *MGM v. Grokster: The Lower Court Decisions*

The major record companies and motion picture studios sued Grokster, MusicCity (distributor of Morpheus), and Consumer Empowerment (distributor of KaZaA) for copyright infringement in the Central District of California in October 2001.<sup>328</sup> The

175–76 (2024) (documenting and examining "the skewing of law literature citations in favor of 'no harm' empirical studies," most notably the Oberholzer-Gee and Strumpf paper, *supra* note 316).

323. See Lemley & Reese, *supra* note 318.

324. See *id.* at 1396, 1399 ("The prospect of spending several years in prison or owing millions of dollars in damages is likely to serve as a substantial deterrent to copyright infringement by end-users.").

325. See *id.* at 1413.

326. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

327. See Lemley & Reese, *supra* note 318, at 1345, n.\*\*.

328. See Matt Richtel, *A New Suit Against Online Music Sites*, N.Y. TIMES (Oct. 4, 2001), <https://www.nytimes.com/2001/10/04/business/technology-a-new-suit-against-online-music-sites.html> [<https://web.archive.org/web/20251025010042/https://www.nytimes.com/2001/10/04/business/technology-a-new-suit-against-online-music-sites.html>].

case would test whether the decentralized architecture of these services qualify for the *Sony* staple article of commerce safe harbor. In April 2003, District Judge Stephen Wilson ruled on summary judgment that the services were immune from liability,<sup>329</sup> finding numerous examples of non-infringing uses: distributing movie trailers; distributing free songs or other non-copyrighted works; using the software in countries where it is legal; and sharing the works of Shakespeare.<sup>330</sup>

With regards to knowledge of infringing activity, the court noted that the plaintiffs have put forth a “massive volume” of evidence indicating that the defendants marketed themselves as “the next Napster,” performed their own search for copyrighted songs, and were generally aware of infringing conduct by users.<sup>331</sup> The court acknowledged that the defendants “clearly [knew] that many if not most of those individuals who download their software subsequently [used] it to infringe copyrights.”<sup>332</sup> Nonetheless, it credited the defendants’ assertion that they lacked “actual knowledge” of particular infringing acts, and therefore were immune from contributory liability.<sup>333</sup>

The court also rejected liability based upon vicarious infringement.<sup>334</sup> While finding that the defendants derived advertising revenue from the infringing activity of downstream users, Judge Wilson nonetheless determined that the P2P services lacked the right and ability to supervise the infringing conduct due to the decentralized nature of their systems.<sup>335</sup>

Upon appeal, the Ninth Circuit affirmed largely on the same grounds as the District Court,<sup>336</sup> setting up the petition for writ of certiorari to the Supreme Court.<sup>337</sup>

### c. *Solving the Interpretive Puzzle*

The importance of the Supreme Court’s consideration of the *Grokster* case for copyright protection could not be overstated. The viability of copyright depended fundamentally on whether copyrights could be enforced on the internet. The lower court *Grokster* decisions struck me as superficial and anachronistic. Judge Posner’s musings in the *Aimster* were closer to the mark and suggested that there was more to this interpretive puzzle than met the eye.

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329. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

330. *See id.* at 1035–36.

331. *See id.* at 1036–37.

332. *See id.* at 1037.

333. *See id.* at 1036–37, 1043.

334. *See id.* at 1043–46.

335. *See id.* at 1045.

336. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

337. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 543 U.S. 1032 (2004) (granting the petition for writ of certiorari).

I had long struggled to understand how the Supreme Court came to engraft § 271(c) of the 1952 Patent Act into the 1976 Copyright Act based on a vague “historic kinship” between the two regimes. Although both regimes emanate from the same constitutional authorization, they have notable differences, including foci—promoting technological advances as opposed to expressive creativity—and, most significantly, infringement modalities. The risk of viral infringement in the patent system is limited to a particular product or process. At worst, the selling of a “staple article of commerce” that contributes to infringement of a patent threatens only that particular technological application. By contrast, a P2P service threatens *nearly all* copyrighted works: all recorded music, books, and movies. About the only copyrighted works that are not threatened are architectural works and sculptures, yet reproductions of such works are also at risk. As consumers gravitate to online access, the filesharing threat is to the *entire copyright system*.

Furthermore, such engrafting conflicted with the “Congress knows how to say . . .” interpretive canon against reading statutory provisions of prior statutes into later statutes.<sup>338</sup> Congress clearly understood how to craft a staple article of commerce exception to contributory liability. To do so in the *Sony* case by judicial interpretation conflated judicial and legislative roles. While I understood how § 271(c) of the Patent Act could resolve all subsequent patent disputes, I failed to see how a copyright decision involving an analog era VCR, as opposed to a statutory provision, could resolve liability involving an entirely novel technology: an Internet Age P2P service capable of rampant viral piracy.

Accordingly, I set out to solve this puzzle. After scouring the record in the *Sony* case, the scholarly literature, the legislative history of the 1976 Act, and the *Sony* files contained in the papers of Justices Blackmun and Marshall, I concluded that the “historic kinship” rationale resulted from incomplete briefing and research.<sup>339</sup> A

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338. See, e.g., *Cent. Bank Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994) (explaining that “Congress knew how to impose aiding and abetting liability when it chose to do so,” it did not use the words “aid” and “abet” in the statute at issue, and hence did not impose aiding and abetting liability); *Franklin Nat’l Bank v. New York* 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances”); *Mehrig v. KFC W., Inc.*, 516 U.S. 479, 485 (1996) (“Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy.”); *FCC v. NextWave Pers. Commc’ns, Inc.*, 537 U.S. 293, 302 (2003) (holding that when Congress has intended to create exceptions to bankruptcy law requirements, “it has done so clearly and expressly”).

339. The basis for that conclusion is set forth at length in Menell & Nimmer, *supra* note 66, at 1024 (facing the unprecedented question of whether, and under what circumstances, the manufacturer of a consumer product with both infringing and non-infringing purposes should be held liable for its customers’ actions and lacking any roadmap from counsel, “the Court reached for a tantalizing patent law handhold.” The research files and correspondence of the justices confirm that the analysis and deliberations overlooked key aspects of the legislative context and copyright and instead displayed considerable jockeying to build a five-member coalition to shield Sony from liability.).

thorough review of the justices' drafts and correspondence<sup>340</sup> revealed that the quip about legislation and sausage making<sup>341</sup> applied to the drafting of the *Sony* opinions. As Justice Blackmun would later acknowledge, "we [the Supreme Court Justices] were all pretty ignorant of copyright law" at the time that the *Sony* case arose.<sup>342</sup> It was the Court's first encounter with the Copyright Act of 1976, a massive omnibus reform of copyright law.

One of the reasons that the Court failed to gain an adequate understanding of Congress's intention to incorporate indirect liability in the 1976 Act had to do with terminology. What we today (and in the early 1980s) referred to as indirect liability was referred to as "innocent infringement" in the key preparatory study on which the Copyright Office relied in drafting the 1976 Act.<sup>343</sup> A careful review of the legislative history would have uncovered this evidence. Yet the Respondents' brief makes no mention of this vital clue.<sup>344</sup>

The *Sony* Court's spotty attention to the text and context of the Copyright Act was out of step with the Court's emergent approach to statutory interpretation. Sensitive to criticism about judicial activism, the Court has been focusing on statutory text and pertinent legislative history. Chief Justice Burger reinforced this responsibility in interpreting the Patent Act four years earlier, cautioning that courts "should not read into the patent laws limitations and conditions which the legislature has not expressed."<sup>345</sup> That same year, the Court showed due deference to Congress, painstakingly parsing the text, legislative history, and jurisprudence of patent law, in determining legislative intent with regard to indirect patent liability.<sup>346</sup> In that case,

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340. See *id.* at 964–73 (tracing the justices' shifting theories, views, and votes with little attention to legislative materials, resulting in the case being argued twice over two Terms).

341. The maxim "Laws are like sausages. It is best not to see them being made." is often attributed to Otto von Bismarck, the nineteenth-century Prussian politician and first Chancellor of the German Empire. See *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984) (attributing the quotation to Bismarck). The original source, however, might be lawyer-poet John Godfrey Saxe. See Fred R. Shapiro, *Quote . . . Misquote*, N.Y. TIMES (Jul. 21, 2008), <https://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html> [<https://web.archive.org/web/20251025011639/https://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html>].

342. See Interview by Harold Hongju Koh with Harry A. Blackmun (Nov. 11, 1999), in THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT 351, 356 (1997).

343. See Alan Latman & William S. Tager, *Study No. 25: Liability of Innocent Infringers of Copyrights* (1958), as reprinted in GEORGE S. GROSSMAN, 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 135, 139 (2001).

344. See Menell & Nimmer, *supra* note 66, at 961.

345. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980) (citations omitted).

346. *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 180, 187 (1980).



unlike *Sony*, the lower court decisions and the parties' briefs provided detailed analysis of the pertinent text and legislative history.<sup>347</sup>

A thorough review of the Copyright Act of 1976 dispelled the historic kinship premise.<sup>348</sup> The most faithful interpretation appeared to be that Congress intended courts to continue to look to tort principles in developing the contours of copyright liability.<sup>349</sup> The Supreme Court should have looked to the "reasonable alternative design" jurisprudence to delineate the contours of liability in *Sony*. Even though that inquiry would likely have resulted in the same outcome in the *Sony* case—immunity for the early VCR machines—it would have provided a sounder jurisprudential framework for calibrating liability as new technologies, such as P2P services, emerged and developed. Applying *Sony's* tenuous logic to P2P services that threaten rampant copyright infringement struck me as unwise.

#### d. *The Supreme Court Briefing*

As the briefing deadline approached, I debated whether to weigh in. My solution to the puzzle would require touching the third rail of Supreme Court advocacy: asking the Court to correct a prior decision. Both the principle of *stare decisis* and the justices' aversion to acknowledging error stood in the way. Supreme Court counsel avoid such a strategy if at all possible. As a law professor, I was not similarly constrained and believe that it is a scholar's solemn responsibility to provide neutral, faithful, and scrupulous analysis. I realized, however, that this approach was a long shot, but it might get the Court to realize that the lower courts' simplistic application of the staple article of commerce safe harbor was inadequate to deal with Internet Age filesharing, perhaps opening up ways to distinguish or work around the *Sony* precedent.

#### i. *Petitioners*

As expected, the Petitioners' briefs took the safe route, arguing that *Sony* is good law, and we win.<sup>350</sup> They did not take on the questionable basis for engrafting the staple article of commerce doctrine into copyright law and instead contended that the P2P services were not capable of substantial non-infringing use.<sup>351</sup> They also argued for

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347. See *Rohm & Haas Co. v. Dawson Chem. Co.*, 191 U.S.P.Q. 691 (S.D. Tex. 1976), *rev'd*, 599 F.2d 685 (5th Cir. 1979); Brief for Respondent, *Rohm and Haas Co., Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (No. 79-669); Brief for Petitioners, *id.*

348. See Menell & Nimmer, *supra* note 66, at 993–1023.

349. See *id.* at 993–1024.

350. Brief for Motion Picture Studio and Recording Company Petitioners (hereinafter "Studio/Label Brief") at 17, 23, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 554 U.S. 913 (2005) (No. 04-480); Brief for Songwriter and Music Publisher Petitioners, *id.*

351. See Studio/Label Brief, *supra* note 350, at 30–38; see also Brief for the United States as Amicus Curiae Supporting Petitioners at 9, 11, *Grokster*, 545 U.S. 913 (emphasizing that *Sony* "demands 'effective—

imposition of inducement and vicarious liability.<sup>352</sup> The fact that the Petitioners needed to make this argument reinforced another shortcoming of the *Sony* decision.

Inducement and vicarious liability had long been established in copyright law, which drew from tort principles.<sup>353</sup> Yet the *Sony* majority opinion overlooked much of that jurisprudence and Congress' intent to fold it into the 1976 Copyright Act. The motion picture studios had in fact pressed inducement as a basis of liability in *MGM v. Sony*, pointing to Sony's advertising of cabinets for building libraries of video cassettes.<sup>354</sup> Since the Court declined to find that library building was fair use, Sony's marketing of archiving cabinets opened up inducement liability, a point that Justice Blackmun noted in his dissent.<sup>355</sup> Yet the majority opinion hastily downplayed the issue.<sup>356</sup>

Petitioners' reliance on an inducement theory might have resulted in liability for Grokster but exposed copyright owners to continued piracy risk. One of the elements of inducement liability is intent, which can be difficult to prove. Thus, even if the Court were to find that inducement liability was not absolved by the staple article of commerce doctrine and that the evidence established that Grokster had the requisite malintent, future highly parasitic P2P services could be created without telltale indicators of ill intent.

## ii. *Amicus Briefs Supporting Petitioners*

The brief that I drafted exposed the profound jurisprudential incongruity of applying the Supreme Court's 1984 *Sony* decision involving an analog device based on overt transplantation from the Patent Act to strikingly different technology that was

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not merely symbolic protection' against copyright protection" and that the Court of Appeals' approach would render the *Sony* standard virtually insurmountable).

352. See Studio/Label Brief, *supra* note 350, at 17–18, 23–25 (citing *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1161–62 (2d Cir. 1971) (holding that copyright liability applies to those who “induce[], cause[] or materially contribute[] to” infringing activity), 42–50; see also *id.* at 9, 41 (citing to Fred von Lohmann, *IAAL: Peer-to-Peer File Sharing and Copyright Law After Napster*, P2PANALYST.COM (2001), <https://gtamarketing.com/P2Panalyst/VonLohmann-article.html> [<https://web.archive.org/web/20081205102833/https://gtamarketing.com/P2Panalyst/VonLohmann-article.html>], as evidence of willful blindness).

353. See *Gershwin*, 443 F.2d at 1159; *Dreamland Ballroom, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929).

354. See Brief for Respondents, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1982) (No. 81-1687), at 70 (quoting specific factual findings that Sony induced infringement by “exhort[ing] Betamax purchasers to . . . ‘build a library’”).

355. See *Sony*, 464 U.S. at 458–59 (Blackmun, dissenting) (noting that Sony's advertisements suggested that Betamax users “build a library” of video tapes).

356. See *id.* at 438 (“[T]here was no evidence that any of the copies made by [the particular witnesses] in this suit were influenced or encouraged by [Sony's] advertisements.”). The mere fact of cabinet sales would seem to be indicative of library building. Had the majority taken the inducement issue seriously, it could have remanded the case for retrial based on a fuller evidentiary record.

unimaginable at the time that *Sony* was decided.<sup>357</sup> It fleshed out the Copyright Act's express statutory authority for indirect liability and copyright jurisprudence that supported a different approach to indirect liability than the Patent Act, emphasizing the need for a more cautious stance toward technology where a distribution platform threatens widespread piracy. The brief emphasized that the P2P risk to copyright protection was fundamentally different from the patent indirect liability context, dispelling the "historic kinship" rationale. It reinforced this point by showing that Congress viewed dual-use technologies differently within the context of copyright enforcement than it does in the patent realm. In an effort to guide the Court back to its proper constitutional role as interpreter of law, not legislative body, the brief proposed that unless and until such time as Congress established a staple article of commerce immunity to copyright liability, courts should continue to evolve balanced infringement standards that respond to new technologies guided by the text, structure, purposes, and jurisprudence of copyright law and the tort law underpinnings of copyright liability. It also urged the Court to clarify that copyright liability extends to acts inducing copyright infringement wholly apart from contributory liability.

I circulated the brief among a small group of colleagues for a reality check a few days before filing. David Nimmer responded that he did not join such briefs but offered to take a look. He called later that day to say how much he liked the brief and wanted to sign. Professor Robert Merges and Professor Justin Hughes also expressed interest.

Shortly after the brief was filed, I received a phone call from Professor Dennis Karjala, with whom I had collaborated on the LaST Frontier project and the *Lotus v. Borland* amicus briefs. Professor Karjala told me that although he was skeptical of Hollywood, he was illuminated and persuaded by the brief's analysis.

As the other Petitioner-side briefs flowed in, I was pleased to see that we were not alone in viewing as suspect the engrafting of a patent law statutory provision standard into copyright law without regard to the economic circumstances and the resulting adverse incentives to develop socially beneficial technologies.<sup>358</sup> Another brief submitted by sixteen economists, legal scholars, and commentators emphasized that the Ninth Circuit decision "gives technologists an incentive *not* to accommodate copyright law, but rather to purposely subvert it by intentionally avoiding design choices that would allow them to control or curtail infringement."<sup>359</sup>

I was also pleased to see recording artists and other creatives weighing in on the Petitioner side. I was aware of their concerns with how record labels treated them<sup>360</sup>

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357. See Menell et al, *Grokster* Brief, *supra* note 297, at 2.

358. See Brief of Amici Curiae Kenneth J. Arrow et al. in Support of Petitioners, *Grokster*, 545 U.S. 913.

359. See Brief of Amici Curiae Law Professors, Economics Professors, and Treatise Authors in Support of Petitioners at 13, *Grokster*, 545 U.S. 913 (emphasis in original).

360. See Nimmer & Menell, *supra* note 154 (chronicling the RIAA's backroom deal-making that resulted in a "technical amendment" to the Copyright Act that cut off recording artists' right to terminate transfers of copyrights and the decision to rescind the amendment when it came to light, just as Napster emerged and

and understood that they did not want to alienate their fans. Yet leading recording artists—including The Eagles, Jimmy Buffett, Mickey Hart and Bill Kreutzmann of the Grateful Dead, Sheryl Crow, Sam Moore, Billy Preston, and many others—were willing to have their names included on the National Academy of Recording Arts & Sciences (NARAS) amicus brief.<sup>361</sup> They expressed that “[t]he difficulties traditionally associated with succeeding in the music industry are becoming almost insurmountable for all but a few artists because of businesses like Grokster.”<sup>362</sup>

### iii. Respondents

Like the Petitioners’ briefs, the Respondents argued that *Sony* was good law, and that they should prevail.<sup>363</sup> “Only Congress is institutionally suited to consider the challenges presented by decentralized peer-to-peer file searching and sharing, to assess its real-world effects, to decide when legislative intervention in market experimentation is advisable, and to choose among possible context-specific legal regimes, as it has done throughout the Copyright Act.”<sup>364</sup> That same logic should have steered the *Sony* Court away from engrafting Section 271(c) of the Patent Act into copyright law. Respondents now contended, ironically, that only an act of Congress could alter it.

Notwithstanding Professor Lemley’s disclaimer,<sup>365</sup> Respondents’ brief (jointly filed by EFF) embraced his law review article’s suggestion that the recording industry should “attack illicit filesharing directly.”<sup>366</sup> The brief also refers to the “important study by economists from Harvard and the University of North Carolina [the OGS paper] [that] found no statistically significant negative correlation between levels of CD sales and filesharing,”<sup>367</sup> but neglects to cite any of the studies finding the opposite.<sup>368</sup> The brief

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labels needed artists’ support); see also Neil Strauss, *Filesharing Battle Leaves Musicians Caught in Middle*, N.Y. TIMES (Sep. 14, 2003), <https://www.nytimes.com/2003/09/14/us/filesharing-battle-leaves-musicians-caught-in-middle.html>

[<https://web.archive.org/web/20251013190736/https://www.nytimes.com/2003/09/14/us/filesharing-battle-leaves-musicians-caught-in-middle.html>] (“Many musicians privately wish file sharing would go away, though they are reluctant to admit it, because they do not want to seem unfriendly to their fans.”).

361. See Brief of Amici Curiae National Academy of Recording Arts & Sciences et al. in Support of Petitioners, *Grokster*, 545 U.S. 913.

362. *Id.* at 4.

363. See Brief for Respondents, *Grokster*, 545 U.S. 913.

364. *Id.* at 2.

365. See *supra* text accompanying note 327.

366. Brief for Respondents, *supra* note 363, at 45–47 n.29; see also *id.* at 32.

367. *Id.* at 44 (citing Oberholzer-Gee & Strumpf, *supra* note 316).

368. I appreciate that advocates are under no ethical responsibility to be thorough in addressing contrary studies, but scholars operate under more scrupulous norms. See *Devolution II*, *supra* note 4, at Section IV(A).

concluded that Congress is the appropriate forum to take up the Petitioners' concerns.<sup>369</sup>

*iv. Amicus Briefs Supporting Respondents*

I was not surprised to see many legal and computer science scholars weighing in on behalf of Grokster but was astounded by their technological pessimism. After all, Moore's Law was in full operation and these are scholars who were highly optimistic about the advancing digital revolution. Yet they predicted dire consequences for internet innovation if Grokster did not prevail.<sup>370</sup> It struck me as myopic. P2P services were hardly the panacea; in fact, they appeared to be getting in the way of the celestial jukebox ideal. Several of the briefs pushed the contraindicated and unverified empirical contention that P2P services were not responsible for the precipitous drop in record sales. Others simply suggested that it was unknowable and therefore should be discounted. And a small group of less well-known musicians, including John Perry Barlow, took the morally strained position that they benefited from unauthorized and highly parasitic P2P services because of the coattails of far more popular music being available on P2P services.<sup>371</sup> There was also a twinge of John Perry Barlow's hacktivist machismo: You can't stop P2P, so capitulate.<sup>372</sup>

Professor Pamela Samuelson's brief attracted sixty law professor signatories, a sizeable portion of the copyright legal academy.<sup>373</sup> The brief also represented the U.S. Public Policy Committee of the Association for Computing Machinery, which comprised 78,000 computing professionals.<sup>374</sup> The brief characterized the case as "fundamentally about technology policy, not about file sharing or copyright infringement."<sup>375</sup> It sidestepped the unusual interpretive and incomplete jurisprudential basis of the *Sony* decision other than to endorse the Court's borrowing from the Patent Act while contending that reversing the Ninth Circuit would "dramatically change the balance of power between the entertainment industry and the

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369. See Brief for Respondents, *supra* note 363, at 48–50.

370. See, e.g., Brief for Creative Commons as *Amicus Curiae* in Support of Respondents at 10, *Grokster*, 545 U.S. 913 ("[F]or an increasingly important class of Internet content, the client-server model of distribution is disabling."); *id.* at 12 ("[C]heap speech' for video will exist only if p2p technology is common."); *id.* at 16 ("[C]ontent owners would actually benefit from p2p filesharing since it could reduce the cost of distributing their content.").

371. See Brief of Amici Curiae Sovereign Artists on Behalf of Ann Wilson & Nancy Wilson (Heart) et al. in Support of Respondents, *Grokster*, 545 U.S. 913. Nothing stood in the way of these artists freely distributing authorized recordings on their own or collective websites.

372. See *supra* text accompanying notes 107–113, 264.

373. See Brief of Amici Curiae Sixty Intellectual Property and Technology Law Professors and the United States Public Policy Committee of the Association for Computing Machinery in Support of Respondents, *Grokster*, 545 U.S. 913

374. See *id.*

375. See *id.* at 2.

technology industry” “despite the absence of a statutory basis in copyright law for this change.”<sup>376</sup> It curiously predicted that regardless of what the Court ruled, “unauthorized peer-to-peer sharing of copyrighted works is likely to continue, much as many of us might wish otherwise.”<sup>377</sup> It was telling that not all of the signatories were troubled by “unauthorized peer-to-peer sharing of copyrighted works.”

I noticed that Professor Karjala had joined Professor Samuelson’s brief. Out of curiosity, I gave him a call to inquire about his change of view. His response was characteristically frank.<sup>378</sup> Professor Karjala explained that he was still fuming over the Copyright Term Extension Act and *Eldred*. He simply “hated” Hollywood. I was disappointed by his willingness to sign onto an amicus brief that he questioned. I half-seriously joked with him that academics don’t have special voting rights. Our influence should come from independent, scrupulous analysis, not political or personal preference.

Professor Lawrence Lessig also weighed in as counsel for and as Chairman of Creative Commons, an entity that he founded to enable artists and authors to preauthorize use of their works.<sup>379</sup> The footnote in their Brief relating to conflicts of interest notes that Professor Lessig was “executive director at the Stanford Center for Internet and Society, co-counsel for Respondent StreamCast.”<sup>380</sup> It seemed unusual for an amicus curiae to also represent a party to a litigation. As reflected in his representation of Eric Eldred,<sup>381</sup> Professor Lessig wore multiple hats. Citing the Supreme Court’s decision in *Eldred*,<sup>382</sup> Professor Lessig contended that the Petitioners were in the wrong forum: that “Congress, rather than the courts, should weigh the complex of interests involved in deciding how best to balance changes in technology against the continued need for copyright protection.”<sup>383</sup> This argument was, however, too clever by half. By that logic, the *Sony* decision was even more illegitimate.

Professor William Fisher, Berkman Center Executive Director John Palfrey, and Professor Jonathan Zittrain filed a policy-focused brief praising the application of the staple article of commerce defense,<sup>384</sup> contending that an alternative rule that balanced infringing and non-infringing uses would have doomed many technologies including

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376. *Id.*

377. *See id.* at 4 (footnote omitted).

378. Professor Karjala’s frankness contrasted with my experience with many in the copyleft community.

379. *See* Brief for Creative Commons as Amicus Curiae in Support of Respondents, *supra* note 370.

380. *See id.* at 1 n.1.

381. *See supra* Section I(B)(3).

382. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

383. *See* Brief for Creative Commons as Amicus Curiae in Support of Respondents, *supra* note 370, at 6.

384. *See* Brief Amici Curiae of Internet Law Faculty in Support of Respondents, *Grokster*, 545 U.S. 913.

CD burners, the iPod, and TiVo, an early digital video recording technology.<sup>385</sup> Their analysis, however, overlooked that those technologies were not commercialized through ongoing services designed for willful blindness. Nor did it confront the extreme piratical character of the P2P services at issue. Rather, it assumed without serious discussion that a contributory infringement standard based on tort principles would be unduly restrictive. They overlooked the potential for adaptive common law tests that have long been the foundation of copyright liability and limitations, such as the fair use doctrine. Their brief then contended that new business models might eliminate the piracy concern, a questionable prediction in a world that would include highly parasitic P2P services.<sup>386</sup> And finally, they endorsed the development of direct enforcement against end-users, a problematic solution that ignores upstream alternatives,<sup>387</sup> or ambitious compulsory licensing solutions.<sup>388</sup>

Curiously, the brief overlooked the substantial harms to user privacy and computer functioning wrought by the P2P services,<sup>389</sup> a policy project that would soon become a central focus of two of the signatories at the Berkman Center.<sup>390</sup> The first report of the Berkman Center's StopBadware.org, coming not long after *Grokster*, would identify KaZaA as a major source of the problem.<sup>391</sup> I had to wonder whether the brief authors were not aware of the defendants' revenue models.

Professor Charles Nesson, founder of the Berkman Center, filed a short brief extolling the virtues of P2P technology for preventing denial of service attacks and building digital libraries, while ignoring piracy concerns.<sup>392</sup> Professors Felix Oberholzer-Gee and Koleman Strumpf also weighed in to assert that filesharing did not cause the precipitous decline in record sales.<sup>393</sup> Another legal scholars' amicus brief contended that unauthorized filesharing is a fair use,<sup>394</sup> a surprising argument given

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385. See *id.* at 3–10.

386. See *id.* at 12–21.

387. See *id.* at 21–22.

388. See *id.* at 21–27.

389. See *supra* text accompanying note 300.

390. See *StopBadware*, WIKIPEDIA, <https://en.wikipedia.org/wiki/StopBadware> [<https://web.archive.org/web/20251002024026/https://en.wikipedia.org/wiki/StopBadware>] (last visited Oct. 24, 2025).

391. See Grant Gross, *Report Identifies Kazaa, SpyAxe as Malware*, COMPUTERWORLD (Mar. 21, 2006), <https://www.computerworld.com/article/1724666/report-identifies-kazaa-spyaxe-as-malware.html> [<https://web.archive.org/web/20251102204048/https://www.computerworld.com/article/1724666/report-identifies-kazaa-spyaxe-as-malware.html>]; Ryan Nariane, *Spyware Trail Leads to Kazaa, Big Advertisers*, EWEEK (Mar. 21, 2006), <https://www.eweek.com/security/spyware-trail-leads-to-kazaa-big-advertisers/>.

392. See Brief Amicus Curiae of Charles Nesson in Support of Respondents, *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 545 U.S. 913 (2005).

393. See Brief Amici Curiae of Felix Oberholzer-Gee and Koleman Strumpf in Support of Respondents, *Grokster*, 545 U.S. 913.

394. See Brief of Amici Curiae Law Professors in Support of Respondents, *Grokster*, 545 U.S. 913 (signed by eleven law professors).

that the issue was not addressed below and is a rather extreme position regarding the fair use doctrine.

The legal scholar community supporting Respondents contributed little on statutory interpretation or doctrinal analysis. Their policy analysis overlooked the extremely parasitic nature of the defendants' businesses and how the availability of such technology undermined the ability of copyright owners and enterprises to innovate authorized platforms and pursue a constructive path to a celestial jukebox.

*v. Amicus Briefs Supporting Neither Party*

Senators Orrin Hatch and Patrick Leahy, Chairperson and Ranking Member, respectively, of the Senate Judiciary Committee rebutted several assertions put forth by the Respondents.<sup>395</sup> The senators asserted that the "Court must decide properly presented cases (like this one), while Congress may choose which issues it addresses."<sup>396</sup> They explained that Congress has long and properly respected the role of the federal courts in articulating the traditional doctrines of secondary liability, noting that

the comprehensive 1976 amendments to the Copyright Act clearly contemplate that indirect infringers shall be liable: The "owner of the copyright under this title has the exclusive rights to do and to authorize any of the following" uses of the work. 17 U.S.C. § 106 (emphasis supplied). Ratifying the traditional doctrine of secondary liability in this regard, the Senate Judiciary Committee made clear at the time that Section 106 was drafted that "[u]se of the phrase 'to authorize' is intended to avoid any questions as to the liability of contributory infringers."<sup>397</sup>

They further referenced Congress's decision in drafting the 1976 Act to reject an exemption for dance halls and night clubs from indirect liability, illustrating that Congress considered statutory exemptions from indirect liability.<sup>398</sup>

Moreover, the legislators pointed out that copyright liability "is necessarily a fact-specific one, and courts, unlike Congress, are particularly well suited to determine individual cases, and to fashioning rules with both the clarity and the flexibility necessary to ensure that the purposes of the Copyright Act are fulfilled in changing factual circumstances."<sup>399</sup> They reinforced the importance of interpreting copyright law against the backdrop of common law and judicial interpretation of rights and

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395. See Brief Amici Curiae of United States Senator Patrick Leahy and United States Senator Orrin G. Hatch in Support of Neither Party, *Grokster*, 545 U.S. 913.

396. See *id.* at 4.

397. *Id.* at 7 (citing S. Rep. No. 94-473, at 57 (1975) and H.R. Rep. 94-1476, at 61 (1976)).

398. See *id.* at 7-8 (citing S. REP. NO. 94-473, at 141-42 (1975) and H.R. REP. NO. 94-1476, at 159-60 (1976)).

399. *Id.* at 8.



liabilities,<sup>400</sup> emphasizing the need for ongoing adaptation based on new circumstances: “The fact that the Court found no such liability for the mere sale of video tape recorders will not control the disposition in a different case with different facts. It certainly does not suggest that resolution of that different case should await legislative action.”<sup>401</sup>

Several other briefs in the neutral category pressed the Court to consider whether Grokster induced infringement.<sup>402</sup> Multiple developers of technologies for media identification, fingerprinting, and filtering submitted briefs informing the Court that means existed for detecting and preventing the unauthorized distribution of copyrighted works on P2P platforms.<sup>403</sup> Curiously, none of these companies went so far as to say that a robust marketplace for implementing such technology would not emerge unless Grokster were found liable. Perhaps they saw these defendants as potential clients in that eventuality and did not want to discourage technology licensing deals.

*e. The Supreme Court Decision*

The Supreme Court ruled unanimously against Grokster.<sup>404</sup> After weighing the competing policy arguments, the Court found that “[t]he argument for imposing indirect liability in this case is . . . a powerful one, given the number of infringing downloads.”<sup>405</sup> Rather than take on whether the defendants’ services were capable of substantial non-infringing use, the Court focused its analysis on whether the defendants induced copyright infringement.<sup>406</sup>

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400. See *id.* at 9 (citing *Astoria Fed. Savs. and Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law adjudicatory principles . . . Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply.”) and *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (noting that the Fair Housing Act “says nothing about vicarious liability” but that “the Court has assumed that . . . [Congress] legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules”).

401. *Id.* at 11.

402. See Brief for Amici Curiae the Intellectual Property Owners Association in Support of Neither Party, *Grokster*, 545 U.S. 913; Amici Curiae Brief of the American Intellectual Property Law Association in Support of Vacatur and Remand, *Grokster*, 545 U.S. 913.

403. See Brief Amici Curiae of Audible Magic, Digimarc Corporation and Gracenote, *Grokster*, 545 U.S. 913; Brief Amici Curiae of Bridgemar Services, Ltd. d/b/a iMesh.com in Support of Neither Party, *Grokster*, 545 U.S. 913; Brief Amici Curiae of Snocap, Inc. in Support of Neither Party, *Grokster*, 545 U.S. 913.

404. See *Grokster*, 545 U.S. 913.

405. *Id.* at 929.

406. See *id.* at 934 (“Because *Sony* did not displace other theories of secondary liability, and because we find below that it was error to grant summary judgment to the companies on MGM’s inducement claim, we do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit’s judgment rested on an erroneous understanding of *Sony* and to leave further consideration of the *Sony* rule for a day when that may be required.”); but cf. *id.*

To get to that doctrine without overruling *Sony*, the Court needed to deal with the fact that the *Sony* majority had not seriously considered inducement liability. “There was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping. Although Sony’s advertisements urged consumers to buy the VCR to ‘record favorite shows’ or ‘build a library’ of recorded programs, neither of these uses was necessarily infringing.”<sup>407</sup> This explanation was unconvincing, however, because building a library was not found to be fair use, and Sony was advertising and selling video cassette storage cabinets for that very purpose.<sup>408</sup>

In delineating the scope of inducement liability, the Court noted that *Sony* “limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product,” but leaves open other evidence of intent to induce.<sup>409</sup> The Court further ruled that the staple article of commerce doctrine does not extend to inducement liability.<sup>410</sup> The Court found sufficient evidence of inducement in Grokster’s advertisements and internal communications to remand the case for full consideration of inducement liability.<sup>411</sup>

The two concurring opinions commented on the application of the staple article of commerce doctrine. Justice Breyer, joined by Justices Stevens and O’Connor, interpreted the safe harbor to apply broadly so as to protect technological innovation, suggesting that immunity applies so long as the product is not used “almost exclusively to infringe copyrights.”<sup>412</sup> Justice Ginsberg, joined by Chief Justice Rehnquist and Justice Kennedy, disagreed, emphasizing that *Sony* recognized “copyright holder’s legitimate demand for effective—not merely symbolic—protection,” thus indicating a more balanced standard.<sup>413</sup> Her opinion rejected the Ninth Circuit’s focus on anecdotal evidence of non-infringing work shared on the defendants’ services. She instead called for courts to focus on the overall activity: “Even if the absolute number of noninfringing files copied using the Grokster and StreamCast software is large, it does not follow that the products are therefore put to substantial noninfringing uses and are

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at 939, n.12 (appearing to reinforce *Sony*’s contributory liability standard further by noting that “in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.”).

407. *Id.* at 931 (citations omitted).

408. *See supra* text accompanying notes 354–355.

409. *See Grokster*, 545 U.S. at 934–35.

410. *See id.*, n.10.

411. *See id.* at 937–40.

412. *See id.* at 957 (Breyer, J., concurring) (emphasis in original).

413. *See id.* at 943 (Ginsburg, J., concurring) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984)).

thus immune from liability. The number of noninfringing copies may be reflective of, and dwarfed by, the huge total volume of files shared.<sup>414</sup>

In limiting its core ruling to inducement liability and failing to address willful blindness of system operators, the majority *Grokster* decision left open a loophole for the next generation of P2P services. Such companies arguably could evade liability by avoiding the sorts of advertisements and internal communications revealing ill intent that doomed *Grokster* and *StreamCast*.

#### 4. *Grokster* Aftermath

*Grokster* settled with the plaintiffs shortly after the Supreme Court's decision and shut down in November 2005.<sup>415</sup> On remand, the district court held that *StreamCast* had induced copyright infringement.<sup>416</sup> In reaching this conclusion, the court found that *StreamCast*'s software was used overwhelmingly for infringement and that *StreamCast* particularly targeted *Napster* users, provided users with technical assistance for playback of copyrighted works, ensured that its technology had infringing capabilities, relied upon a business model that depended on massive infringing use, had not taken meaningful affirmative steps to prevent infringement, and could not reasonably claim ignorance of infringing activity.<sup>417</sup> Taken together, the court concluded that evidence of "StreamCast's objective of promoting infringement [was] overwhelming."<sup>418</sup>

Professor Lawrence Lessig viewed *Grokster* as calamitous, warning that it would result in ten years of chilled innovation.<sup>419</sup> I viewed the decision as a step in the correct direction and likely to encourage symbiotic technological innovation.<sup>420</sup> I worried, however, that the willful ignorance loophole could perpetuate highly parasitic, malware-supported P2P services, delay development of authorized services, and

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414. See *id.* at 948 (Ginsburg, J., concurring).

415. See Jeff Leads, *Grokster Calls It Quits on Sharing Music Files*, N.Y. TIMES (Nov. 8, 2005), <https://www.nytimes.com/2005/11/08/technology/grokster-calls-it-quits-on-sharing-music-files.html> [<https://web.archive.org/web/20251024184037/https://www.nytimes.com/2005/11/08/technology/grokster-calls-it-quits-on-sharing-music-files.html>].

416. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006).

417. See *id.* at 983–92.

418. *Id.* at 992.

419. Robert Hof, *Ten Years of Chilled Innovation*, BUS. WK. (June 27, 2005) (contending that "this intent standard . . . will invite sorts of strategic behavior that will dramatically increase the cost of innovating around these technologies"), [http://www.businessweek.com/print/technology/content/jun2005/tc20050629\\_2929\\_tc057.htm](http://www.businessweek.com/print/technology/content/jun2005/tc20050629_2929_tc057.htm).

420. See Peter S. Menell, *Design for Symbiosis: Promoting More Harmonious Paths for Technological Innovators and Expressive Creators in the Internet Age*, 55 COMM. OF THE ACM, May 2012, at 30–32; Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J. L. & THE ARTS 375 (2009) (showing a substantial increase in scientific articles and patenting relating to peer-to-peer technology and digital rights management from 2001 to 2008).

perpetuate what had been a chaotic ecosystem for professional creators and consumers. And with bandwidth expanding, filesharing was beginning to affect the film industry.

With the internet copyright war expanding in 2007, Professor Lessig announced his departure from the front lines.<sup>421</sup> In his farewell address, he explained that his foray into copyright law had sensitized him to a deeper problem: the insidious distortions of corporate money on public policy. It was more than a bit ironic in view of Google's substantial underwriting of his Center, EFF, and a growing swath of the academic community.<sup>422</sup> Professor Lessig was setting his sights on draining the swamp. While I shared his perception about Washington politics, I could not help but wonder if he was so naive to think that copyright politics were more extreme than countless other areas, such as the tax code, environmental protection, healthcare, or defense procurement.

Although the *Grokster* decision led to the demise of the Grokster and StreamCast P2P services, the Court's failure to correct *Sony's* questionable patent transplplantation enabled the P2P piracy epidemic to persist. EFF updated its willful blindness playbook,<sup>423</sup> and a new cast of P2P services—including LimeWire, isoHunt (a BitTorrent tracker),<sup>424</sup> and Grooveshark (a streaming P2P website)—picked up where Grokster left off. Copyright owners faced the difficult task of searching for inducement evidence. The climate for rolling out authorized services remained stormy.

The recording industry continued to pursue highly parasitic P2P services through takedown notices and lawsuits.<sup>425</sup> Proving inducement, however, was challenging,

421. See Dan Mitchell, *Tech Missionary Shifts Focus*, N.Y. TIMES (June 23, 2007), <https://www.nytimes.com/2007/06/23/technology/23online.html> [<https://web.archive.org/web/20251024184813/https://www.nytimes.com/2007/06/23/technology/23online.html>]; *Required Reading: The Next Ten Years*, LESSIG BLOG ARCHIVES (June 19, 2007), <https://archives.lessig.org/index87ad87ad.html?p=3397> [<https://web.archive.org/web/20251024185153/https://archives.lessig.org/index87ad87ad.html?p=3397>].

422. See Devolution II, *supra* note 4 (discussing the academic-NGO-industrial complex).

423. See von Lohmann, *supra* note 297, at 12–17.

424. See *isoHunt*, WIKIPEDIA, <https://en.m.wikipedia.org/wiki/IsoHunt> [<https://web.archive.org/web/20251024185513/https://en.wikipedia.org/wiki/IsoHunt>] (last visited Oct. 24, 2025); Ryan Paul, *MPAA Turns Attention to USENET, Takes on Torrentspy, Isohunt, Others*, ARS TECHNICA (Feb. 23, 2006), <https://arstechnica.com/uncategorized/2006/02/6253-2/> [<https://web.archive.org/web/20251024185736/https://arstechnica.com/uncategorized/2006/02/6253-2/>].

425. See *Music Publishers Sue Owner of Web Filesharing Program*, N.Y. TIMES (Aug. 5, 2006), <https://www.nytimes.com/2006/08/05/technology/music-publishers-sue-owner-of-web-filesharing-program.html> [<https://web.archive.org/web/20251102212226/https://www.nytimes.com/2006/08/05/technology/music-publishers-sue-owner-of-web-filesharing-program.html>] (suing LimeWire in S.D.N.Y.); Ben Sisario, *Grooveshark Shuts Down to Settle Copyright Infringement Suit*, N.Y. TIMES (Apr. 30, 2015), <https://www.nytimes.com/2015/05/01/business/media/grooveshark-shuts-down-to-settle-copyright-infringement-suit.html> [<https://web.archive.org/web/20251102215409/https://www.nytimes.com/2015/05/01/business/media/grooveshark-shuts-down-to-settle-copyright-infringement-suit.html>] (noting that Grooveshark began operations in 2006 and the recording industry sued for copyright infringement in 2009).

resulting in costly discovery battles. The enforcement litigation dragged on for years, all the while diverting millions of music and movie fans away from authorized distribution channels and hampering the development of legitimate online services.

LimeWire and isoHunt were eventually unmasked as unscrupulous filesharing services. Five years after LimeWire was first sued, Judge Kimba Wood found the company liable for inducing infringement on a massive scale.<sup>426</sup> isoHunt, also sued in 2006, was not taken down until 2013. As technology commentator Timothy Lee, no shill for content industries, wrote in the *Washington Post* at that time,

Hollywood is sometimes cast as the villain in debates over copyright, so it's important to give credit when it's due. Today the Motion Picture Association of America announced that filesharing search engine isoHunt would shut down and pay the studios \$110 million in damages. It was a well-deserved victory for the motion picture industry.<sup>427</sup>

The Ninth Circuit found that “isoHunt prominently featured a list of ‘Box Office Movies,’ containing the twenty highest-grossing movies then playing in U.S. theaters. When a user clicked on a listed title, she would be invited to ‘upload [a] torrent’ file for that movie.”<sup>428</sup> Gary Fung, the founder of isoHunt, “posted numerous messages to the isoHunt forum requesting that users upload torrents for specific copyrighted films; in other posts, he provided links to torrent files for copyrighted movies, urging users to download them.”<sup>429</sup>

The Grooveshark battle further illustrates the dishonest hacktivist culture behind some of the most prominent P2P services of that era. In search of the next great dot-com payday, Grooveshark’s founders played the cynical Napster ploy: Generate revenue in whatever ways you can (malware, advertising, venture investment) in the hope that you can force the recording industry to the table.<sup>430</sup> Even as the recording industry was submitting take-down notices as fast as they identified infringing content, Grooveshark maintained a constant supply of the popular songs available for

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426. See *Arista Recs. LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011).

427. Timothy B. Lee, *Here’s Why isoHunt Deserved to Die*, WASH. POST (Oct. 17, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/10/17/heres-why-isoHunt-deserved-to-die/> [<https://web.archive.org/web/20251024190614/https://www.washingtonpost.com/news/the-switch/wp/2013/10/17/heres-why-isoHunt-deserved-to-die/>].

428. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1036 (9th Cir. 2013).

429. *Id.*

430. Grooveshark got the closest, landing a deal with EMI, the fourth-largest record company. Such deals, however, required Grooveshark to actually pay royalties, which proved to be a stumbling block. See Greg Sandoval, *EMI, Grooveshark’s Only Major Label, Tears Up Contract*, CNET (Apr. 3, 2012), <https://www.cnet.com/culture/emi-groovesharks-only-major-label-tears-up-contract/> [<https://web.archive.org/web/20251102220416/https://www.cnet.com/culture/emi-groovesharks-only-major-label-tears-up-contract/>].

streaming.<sup>431</sup> At its height, Grooveshark had more than 35 million monthly users.<sup>432</sup> The resulting piracy of copyrighted works was staggering.

In 2011, Discipline Global Mobile, an independent record label founded by King Crimson guitarist and principal composer Robert Fripp and producer David Singleton,<sup>433</sup> began requesting that Grooveshark take down copies of King Crimson sound recordings.<sup>434</sup> “Grooveshark would remove the material which would then mysteriously pop up a day later and the process would start again. *Nothing to do with us*, they would claim and so it would go on . . .”<sup>435</sup> The case against Grooveshark started to gain traction when a whistleblower posted the following entry on the *Digital Media News* website:

I work for Grooveshark. Here is some information from the trenches:

We are assigned a predetermined ammount[sic] of weekly uploads to the system and get a small extra bonus if we manage to go above that (not easy). The assignments are assumed as direct orders from the top to the bottom, we don't just volunteer to 'enhance' the Grooveshark database.

All search results are monitored and when something is tagged as 'not available', it get's[sic] queued up to our lists for upload. You have to visualize the database in two general sections: 'known' stuff and 'undiscovered/indie/underground'. The 'known' stuff is taken care internally by uploads. Only for the 'undiscovered' stuff are the users involved as explained in some posts above. Practically speaking, there is not much need for users to upload a major label album since we already take care of this on a daily basis.

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431. See Mike Masnick, *Grooveshark Insists It's Legal; Points Out That Using DMCA Safe Harbors Is Not Illegal*, TECHDIRT (Apr. 20, 2011), <http://www.techdirt.com/articles/20110419/11434013962/grooveshark-insists-its-legal-points-out-that-using-dmca-safe-harbors-is-not-illegal.shtml> [<https://web.archive.org/web/20251024191810/https://www.techdirt.com/2011/04/20/grooveshark-insists-its-legal-points-out-that-using-dmca-safe-harbors-is-not-illegal/>]; See Peter S. Menell, *Jumping the Grooveshark*, MEDIA INST. (Dec. 21, 2011), <https://www.mediainstitute.org/2011/12/20/jumping-the-grooveshark/> [<https://web.archive.org/web/20251102220752/https://www.mediainstitute.org/2011/12/20/jumping-the-grooveshark/>].

432. See Lindsey Bever, *Grooveshark Once Had 35 Million Users. Now, the Music-Streaming Service Is Dead*, WASH. POST (May 1, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/01/grooveshark-once-had-35-million-users-now-the-music-streaming-service-is-dead/> [<https://web.archive.org/web/20251024192633/https://www.washingtonpost.com/news/morning-mix/wp/2015/05/01/grooveshark-once-had-35-million-users-now-the-music-streaming-service-is-dead/>].

433. See *Discipline Global Mobile*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Discipline\\_Global\\_Mobile](https://en.wikipedia.org/wiki/Discipline_Global_Mobile) [[https://web.archive.org/web/20250917213129/https://en.wikipedia.org/wiki/Discipline\\_Global\\_Mobile](https://web.archive.org/web/20250917213129/https://en.wikipedia.org/wiki/Discipline_Global_Mobile)] (last visited Oct. 24, 2025).

434. See Sid Smith, *Going, Going, Grooveshark Gone*, DGM LIVE (May 1, 2015), <https://www.dgmlive.com/news/going-going-grooveshark-gone> [<https://web.archive.org/web/20251024193046/https://www.dgmlive.com/news/going-going-grooveshark-gone>].

435. *Id.*

Are the above legal, or ethical? Of course not. Don't reply to give me a lecture. I know. But if the labels and their lawyers [sic] can't figure out how to stop it, then I don't feel bad for having a job. It's tough times.

Why am I disclosing all this? Well, I have been here a while [sic] and I don't like the attitude that the administration has aquired [sic] against the artists. They are the enemy. They are the threat. The things that are said internally about them would make you very very angry. Interns are promised getting a foot in the music industry, only to hear these people cursing and bad mouthing the whole industry all day long, to the point where you wonder what would happen if Grooveshark get's [sic] hacked by Anonymous one day and all the emails leak on some torrent or something.

And, to confirm the fears of the members of King Crimson, there is no way in hell you can get your stuff down. They are already tagged since you sent in your first complaint. The administration knows that you can't afford to sue for infringement.<sup>436</sup>

Notwithstanding this bombshell, the case dragged on for another three years. Grooveshark served *Digital Media News* with a subpoena seeking information about the identities of the poster as a well as correspondence with the major record labels.<sup>437</sup> *Digital Media News* refused to comply. It invoked California's shield law, which implements and extends First Amendment protections for the press, as a defense against compelled disclosure.<sup>438</sup> In 2015, Grooveshark finally shut down when Grooveshark founders Josh Greenberg and Sam Tarantino admitted to creating and operating an infringing music service.<sup>439</sup>

As discussed below, authorized services started to break through in 2010 and the tide eventually shifted to legal celestial jukeboxes.<sup>440</sup> Contrary to John Perry Barlow's warnings, and other copyleft naysayers who denied that P2P could be displaced and that it was vital for content distribution, a well-functioning market solution developed for

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436. *Id.*; see Ben Sisario, *Digital Notes: Grooveshark Copyright Suit and Its Unusual Evidence*, N.Y. TIMES (Jan. 18, 2012), <http://mediadecoder.blogs.nytimes.com/2012/01/18/digital-notes-grooveshark-copyright-suit-and-its-unusual-evidence> [<https://web.archive.org/web/20251024203924/https://archive.nytimes.com/mediadecoder.blogs.nytimes.com/2012/01/18/digital-notes-grooveshark-copyright-suit-and-its-unusual-evidence/>].

437. See Rochell Abonalla, *Grooveshark Subpoenas Digital Music News for Confidential Whistleblower Information* . . . , DIGITAL MUSIC NEWS (Jan. 17, 2012), <https://www.digitalmusicnews.com/2012/01/17/grooveshark-subpoenas/> [<https://web.archive.org/web/20251024204222/https://www.digitalmusicnews.com/2012/01/17/grooves-hark-subpoenas/>].

438. See Paul Resnikoff, *Digital Music News Officially Responds to Grooveshark's Subpoena Demands*, DIGITAL MUSIC NEWS (Jan. 19, 2012), <https://www.digitalmusicnews.com/2012/01/19/deargrooveshark/> [<https://perma.cc/WP26-6W9X>]; CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070; O'Grady v. Superior Ct., 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006) (discussing California's shield law).

439. See *Grooveshark to Shut Down*, HOLLYWOOD REP. (Apr. 30, 2015), <https://www.hollywoodreporter.com/business/business-news/grooveshark-shut-down-792717/> [<https://web.archive.org/web/20251010235517/https://www.hollywoodreporter.com/business/business-news/grooveshark-shut-down-792717/>]; Sisario, *supra* note 425.

440. See *infra* Section II(E).

music and film. Before getting there, it is useful to examine two more phases of the digital distribution war.

### C. END-USER ENFORCEMENT AND THE DISTRIBUTION RIGHT CONTROVERSY

The Napster litigation brought the debate over filesharing to the top of many copyright conference agendas. In addition to organizing an annual digital music conference drawing all sides of the controversy, I was invited to moderate a panel on filesharing at the Computers, Freedom, and Privacy conference in San Francisco in April 2002. The recording industry had focused its enforcement efforts on P2P services. It had not yet targeted end-users. The conference panel description read:

The P2P lawsuits are piling up: Napster, Scour, Aimster, Morpheus. Although the rhetoric is about piracy, the litigation is about technology. In every P2P case to date, copyright owners have targeted the technologists, instead of the end-users doing the infringing. What does this mean for the peer-to-peer industry, and what lessons should be drawn by other technology innovators? Are we entering a world where technologists will be held liable for the activities of their end-users?<sup>441</sup>

I was glad to explore these questions with the panelists: Fred von Lohmann from the Electronic Frontier Foundation, Sarah Deutsch from ISP Verizon, and Frank Hausmann from Centerspan, a company developing a walled (digital rights management), authorized, content distribution platform. In some respects, the panel anticipated the paper co-authored by Grokster counsel/Professor Mark Lemley and Grokster's Supreme Court brief.

Mr. von Lohmann began the discussion by noting that he was co-counsel for Morpheus (StreamCast) in the filesharing litigation case unfolding in Los Angeles.<sup>442</sup> He then sketched the state of litigation involving peer-to-peer technology, summarizing the Napster, Scour, Grokster/Morpheus/KaZaA, ReplayTV, MP3Board.com, and ISP-related notice and takedown and repeat infringer termination litigation. He concluded with the following observation:

Finally the last category, and strangely enough, the empty category is any lawsuits or legal action against end-users. We have not yet seen, at least I have not heard, any public,

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441. See Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 256 (2014) (hereinafter "Menell, Brace Lecture").

442. See Panel on Copyright and Innovation: the P2P Experience, Association for Computing Machinery (ACM), 12th Annual Computers, Freedom & Privacy Conference, San Francisco, California (Apr. 19, 2002), <http://www.cfp2002.org/program> [<https://web.archive.org/web/20251011002541/http://www.cfp2002.org/program/>]. An audio recording of the panel is available on the ACM's website under the "Source Materials" tab, <http://dl.acm.org/citation.cfm?id=543482.564564&coll=DL&dl=ACM&preflayout=tabs> [<https://web.archive.org/web/20240911113052/https://dl.acm.org/doi/10.1145/543482.564564>] [hereinafter "CFP 2002 Panel Recording"]. That litigation would eventually result in the Supreme Court's decision in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).



publicly disclosed lawsuits against actual peer-to-peer users, end-users of peer-to-peer software, even though everyone admits it's really they who are infringing copyright. Everyone else on this list that we see on this list, the most that you can say about them, is perhaps that they have some secondary or indirect liability because of their involvement. In none of the cases involved here, well with the exception of ReplayTV for some weird reasons that are not really that important, but all of these cases use copyright theories that involve so-called contributory or vicarious liability. In other words, you're going to be held responsible for what your end-users are up to. We have not seen any litigation yet against the actual end-users who are sharing Black Hawk Down or whatever it might be that is causing all this trouble.<sup>443</sup>

It seemed to me (and to reporters in attendance)<sup>444</sup> that Mr. von Lohmann was baiting the recording industry to sue end-users rather than P2P services, some of whom he represented and advised.

After Mr. Hausmann described Centerspan's technology and Ms. Deutsch discussed service providers' perspectives regarding peer-to-peer issues, I probed Mr. von Lohmann's comment about it being "strange" that content owners had not yet sued end-users for their P2P activity. I began by noting that the name of the organization sponsoring the conference was "Computers, Freedom, and *Privacy*." I then proceeded:

I can interpret [Mr. von Lohmann's] presentation as, well, the problem is people [content owners] are aiming at the deeper pockets, the intermediaries, the creators or inventors/innovators, and perhaps they should direct their energy down to the bottom [of the enforcement pyramid] or the decentralized [end-users]. But from a societal standpoint, I mean that is in some ways the greatest threat to privacy in that it would require discovery, it would require invading the household. And so it's not as if privacy problems could be solved. There's another side, perhaps a more cynical interpretation of your comment which is we dare them because we think that will shift the political balance and we'll be able to push some other objectives. But if I took your suggestion literally, it would be a disaster for personal privacy and could potentially, especially in this post-terrorism world, dramatically shift what we do consider our most sacred places. I don't feel so exposed with regards to our ISP, but I do feel very exposed with regards to my hard drive. And how do you resolve that?<sup>445</sup>

After acknowledging that this was a "fair point,"<sup>446</sup> Mr. von Lohmann proceeded to explain that content owners "are hunting the wrong target and in the course of doing so are going to cause enormous collateral damage" by chilling technology innovators.<sup>447</sup>

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443. See CFP 2002 Panel Recording, *supra* note 442, at 17:22.

444. See *Copyright*, WASH. INTERNET DAILY (Apr. 23, 2002) (quoting Fred von Lohmann's statement that search of alleged infringers' devices is "an invasion that's contemplated in the law . . . . A few targeted lawsuits would get the message across"); Brian Garrity, *Victory Eludes Legal Fight over File Swapping*, BILLBOARD (Apr. 13, 2002), at 86 (quoting Fred von Lohmann stating: "[i]f this fight were really about stopping piracy, you would have expected some pirate to actually be sued").

445. See CFP 2002 Panel Recording, *supra* note 442, at 57:21. As previously noted, EFF's origin traces to internet privacy concerns. See *supra* Section I(B)(1)(b).

446. See CFP 2002 Panel Recording, *supra* note 442, at 58:54.

447. See *id.*

He analogized suing P2P enterprises to holding Detroit automobile manufacturers “liable for every person that speeds in America because they sell cars capable of speeding.”<sup>448</sup> Mr. von Lohmann then addressed what he termed the “harder question”: Should content owners “be going after end-users?”

Well, you know frankly that is not in my mind such a radical statement—right, that’s always been the rule in copyright. If there are pirates, you find and, you know, go after the pirates. And that’s always been the rule and it’s certainly been true to have someone singled out and sued, whether criminally or civilly, for copyright infringement is absolutely an enormous invasion in that person’s life. However, it’s an invasion that has always been contemplated under the law.<sup>449</sup>

I was surprised to see him go down this path. I shifted to another angle—what the panel thought about a system whereby enforcement focused on the “middle layers [of the content distribution ecosystem] so that we as individuals in our homes don’t worry about the specter of government coming in and searching our files.”<sup>450</sup> Mr. Hausmann jumped in to talk about the importance of educating children not to steal copyrighted content, while noting that “if you are a thief, [the government] can get an order and come and search your hard drive and prosecute you for that, as Mr. von Lohmann was saying. I personally believe that the end-user should be prosecuted. I don’t think that the service provider should be dragged into this. . . .”<sup>451</sup>

Mr. von Lohmann then responded to my suggestion that suing end-users was a cynical strategy aimed at generating a political backlash at the cost of substantial invasion of privacy interests and disruption:

And I’ll say in response to Peter, I do have what he refers to as the more cynical view. I’m sure that I actually think of it as the more democratic view, which is that, you know, the last surveys that I have seen suggested that there are upwards of 40 million Americans are using the various filesharing, you know, software products that are available. And I first want to say let’s not leap to the conclusion that they’re all guilty of copyright infringement because I think that’s unfair as well. There are perfectly legitimate uses for technologies like this. There are. Small publishers have reasons to want access to this kind of efficiency as much as big publishers do. So, yeah, sure, a large number of them are probably infringers. Now, if we actually lived in a world where content owners had to decide—do I sue 40 million Americans or do I come with some other solution that more adequately balances my business needs with, you know, the reality of technology, I am pretty confident that either they would go and innovate as they did when the VCR arrived and find a way to deliver content that is compelling to consumers, that drives the pirates essentially out of business, which they did effectively with the VCR. And frankly, I think that they are in the midst of doing that with the DVD right now. Warner Home Video has said they’re going to sell all of their DVDs for less than \$10 per title, at that moment I

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448. *See id.*

449. *See id.* at 1:00:11.

450. *See id.* at 1:02:00.

451. *See id.* at 1:04:09.

don't think there's going to be as much need to spend eight hours downloading a low-quality film from a peer-to-peer filesharing network. You know, there are ways to do this and I'm confident that if the choice was to sue 40 million Americans or go out there and do the work to come up with compelling product, they would find compelling products.<sup>452</sup>

Mr. von Lohmann then noted that there are other solutions, such as compulsory licenses, to consider.<sup>453</sup> He then returned to the political catalyst theme: "I do think that the notion that 40 million Americans are nothing better than common thieves, you know, copyright law is a statute that is decided upon by a majority of our representatives in Congress. And, you know, it can be changed."<sup>454</sup> Ms. Deutsch interjected that content owners "rarely ever sue the end-user. Even just a few targeted suits, not that I would like to see this, but I think that it would at least send the message to 40 million people that it's illegal."<sup>455</sup> I suggested that Mr. von Lohmann might welcome suits against users to provoke a popular backlash against internet copyright enforcement.<sup>456</sup> Mr. von Lohmann concurred that "a few targeted suits would certainly clarify the message."<sup>457</sup>

It was not that surprising that Ms. Deutsch and Mr. Hausmann deflected attention from their clients and mentioned the possibility of suing end-users. But when EFF's senior copyright attorney publicly calls attention to the "strangely" "empty category" of lawsuits against end-users, comments that content owners "are hunting the wrong target," observes that suing end-users would not be "such a radical statement" in view of the fact that going after the pirates has "always been the rule" in the copyright field, expresses that the privacy invasion of suing end-users is "an invasion that has always been contemplated under the law," acknowledges that a "large number [of 40 million American filesharers] are probably infringers," and notes that "a few targeted suits would certainly clarify the message," the press takes notice.<sup>458</sup>

As we would later see, Grokster counsel/Professor Mark Lemley would float suing end-users as a way to deflect attention from his client. And in their jointly filed brief on behalf of Grokster and Mr. von Lohmann's client, SteamCast, they pushed this line of argument at the Supreme Court. As a copyright policy scholar, I was surprised by these statements. Just as I did not jump on the Napster bandwagon (as so much of the copyright academic community did), I was skeptical about the wisdom of suing end-

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452. *See id.* at 1:04:31.

453. *See id.* at 1:06:28.

454. *See id.* at 1:06:06.

455. *See id.* at 1:07:22.

456. *See id.* at 1:07:33.

457. *See id.* at 1:08:19.

458. *See* CFP 2002 Panel Recording, *supra* notes 442–457; press reports cited *supra* note 444.

users. But if the P2P services were not going to face responsibility for willful blindness, then the industry might have no other choice.<sup>459</sup>

As long as the P2P enforcement cases were going well, the industry stayed its hand. But after Judge Wilson ruled that Grokster was immune from liability on the basis of the staple article of commerce doctrine in April 2003,<sup>460</sup> the industry's patience was tested. Failure to pursue direct infringers could be perceived as a lack of seriousness regarding the threat. Moreover, notwithstanding the industry's success against Napster, the problem was growing worse, not better.

In September 2003, four months after Grokster prevailed in the Central District of California, the recording industry launched its first salvo of 261 cases against high volume P2P filesharers.<sup>461</sup> EFF immediately called foul and organized a defense/fundraising campaign entitled RIAA v. People.<sup>462</sup> Fred von Lohmann sought to use both edges of the sword, penning an editorial asking "Is Suing Your Customers a Good Idea?"<sup>463</sup> even as he signed onto the Grokster/StreamCast defendant brief with references to the Lemley/Reese article recommending end-user enforcement as a basis for immunizing his client from indirect liability.<sup>464</sup> EFF was now in the catbird seat, having immunized filesharing services while leading a populist campaign impugning copyright owners and the copyright system. John Perry Barlow's grand vision was coming to fruition, and many in the legal academy were cheering them on.

As some scholars soberly surmised, however, the recording industry did not have much of a choice about suing P2P filesharers.<sup>465</sup> The war of attrition was underway.

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459. See Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725 (2005).

460. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029 (C.D. Cal. 2003).

461. See Amy Harmon, *The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES (Sep. 9, 2003), <https://www.nytimes.com/2003/09/09/business/the-price-of-music-the-overview-261-lawsuits-filed-on-music-sharing.html> [<https://web.archive.org/web/20251116163208/https://www.nytimes.com/2003/09/09/business/the-price-of-music-the-overview-261-lawsuits-filed-on-music-sharing.html>].

462. See *RIAA v. People*, ELEC. FRONTIER FOUND., <https://w2.eff.org/IP/P2P/riaa-v-thepeople.html> [<https://web.archive.org/web/20250618055456/http://w2.eff.org/IP/P2P/riaa-v-thepeople.html>] (last visited Nov. 16, 2025).

463. Fred von Lohmann, *Is Suing Your Customers a Good Idea?*, LAW.COM (Sep. 29, 2004), <https://www.law.com/article/almID/900005540575/> [<https://perma.cc/GK34-SDR9>].

464. See Brief for Respondents, *Grokster*, supra note 363.

465. See generally Hughes, supra note 459 (offering a sober analysis of why the recording industry did not have much choice about suing filesharers); Matthew Sag, *Piracy: Twelve-Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 134 (2006) (contending based on a rational choice model that "rather than being 'commercial suicide,' end-user litigation actually makes perfect sense for the recording industry. Furthermore, far from treading lightly and targeting only high-volume up-loaders, the recording industry should deliberately target sympathetic defendants along with a broad spectrum of file sharers.").

Many lawyers would soon enter the P2P legal battlefield on both sides,<sup>466</sup> and judges' copyright dockets soon ballooned with filesharing cases.

Over the course of the next decade, EFF pilloried the recording industry for daring to sue end-users. The strategy complemented their P2P trial strategy but quickly developed into a larger political strategy aimed at expanding its base and shifting public opinion against copyright protection. As an alternative to copyright enforcement, EFF proposed that filesharers make voluntary contributions to artists.<sup>467</sup> When you clicked on the webpage image, however, it redirected to a page soliciting donations to EFF, not supporting artists.<sup>468</sup>

Copyleft advocates—including scholars through their collaboration with EFF, scholarship, and representation—appeared to view this battle as a means to cement P2P services as the inevitable distribution channel, discourage enforcement actions by raising the copyright owners' costs, and shift public attitudes on copyright policy. Three particular elements of the battle stand out: (1) the subpoena defense campaign; (2) the scope of the distribution right; and (3) the handling of the two end-user cases that went to trial.

### 1. Subpoena Defense Campaign

In planning its end-user campaign, the RIAA intended to use the DMCA's streamlined subpoena provision set forth in § 512(h) to determine the identity of filesharers seeding copyrighted sound recordings on P2P services. That provision provides that “[a] copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service

466. The recording industry hired numerous law firms and forensics investigators to bring these enforcement actions. See David Kravets, *Security: File Sharing Lawsuits at a Crossroads, After Five Years of RIAA Litigation*, WIRED (Sep. 4, 2008), <https://www.wired.com/2008/09/proving-filesh> [<https://web.archive.org/web/20251011024125/https://www.wired.com/2008/09/proving-filesh/>]. A cottage industry emerged of solo practitioners/small law firms to handle such matters. See, e.g., *TorrentSpy Lawyer Takes on Copyright Owners*, ABC NEWS (July 31, 2007) (characterizing Ira Rothken as “technology's answer to the radical lawyer, Silicon Valley's version of Johnnie Cochran or William Kunstler.”), <https://abcnews.go.com/Technology/story?id=3433682> [<https://web.archive.org/web/20251011024343/https://abcnews.go.com/Technology/story?id=3433682>]; Ray Beckerman, *Directory of Lawyers Defending RIAA Lawsuits, RECORDING INDUS. VS THE PEOPLE* (Apr. 26, 2020), <https://recordingindustryvspeople.blogspot.com/> [<https://web.archive.org/web/20250927221442/https://recordingindustryvspeople.blogspot.com/>]; Ray Beckerman, *Index of Litigation Documents Referred to in “Recording Industry vs. The People,” BECKERMAN LEGAL*, <https://beckermanlegal.com/Documents.htm> [<https://web.archive.org/web/2025042222324/https://beckermanlegal.com/Documents.htm>].

467. See *File Sharing: It's Music to our Ears—Making P2P Pay Artists*, ELEC. FRONTIER FOUND., <https://w2.eff.org/share/compensation.html> [<https://web.archive.org/web/20241210234424/https://w2.eff.org/share/compensation.html>] (last visited Nov. 16, 2025).

468. See *Support EFF by Donating Today*, ELEC. FRONTIER FOUND., <https://w2.eff.org/support/> [<https://web.archive.org/web/20251011025226/https://w2.eff.org/support/>] (last visited Nov. 16, 2025).

provider for identification of an alleged infringer” without the need to file a court action.<sup>469</sup> This procedure was intended to afford copyright owners a rapid, low-cost tool to police the internet.

As the end-user lawsuits got underway, EFF led a campaign to stifle copyright owners’ efforts to unmask filesharers. This campaign harkened back to EFF’s roots: protection of user privacy.<sup>470</sup> They and other NGOs participated in efforts to frustrate the RIAA’s effort to unmask filesharers.<sup>471</sup>

When copyright owners sought to invoke § 512(h) in pursuit of filesharers using P2P services, the D.C. Circuit found that the text of the statute did not allow this provision to be stretched beyond identifying those storing copyrighted materials on the online service providers’ servers to P2P end-users.<sup>472</sup> “Congress had no reason to foresee the application of § 512(h) to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along.”<sup>473</sup> The court concluded by noting that it was:

not unsympathetic either to the RIAA’s concern regarding the widespread infringement of its members’ copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries. The plight of copyright holders must be addressed in the first instance by the Congress . . . .<sup>474</sup>

This was a tactical victory in the effort to frustrate the end-user enforcement campaign. EFF assembled a list of attorneys to assist end-users and encouraged ISPs, college campuses, and other network operators to resist copyright enforcement.<sup>475</sup>

469. See 17 U.S.C. § 512(h).

470. See *supra* Section I(B)(1)(b).

471. The Electronic Frontier Foundation, American Civil Liberties Union, and Public Citizen opposed the ability of the RIAA and other companies to “strip Internet users of anonymity without allowing them to challenge the order in court.” See *Record Industry Cuts Corners in Crusade Against Filesharers*, PUB. CITIZEN (Feb. 2, 2004), <https://www.citizen.org/news/record-industry-cuts-corners-in-crusade-against-filesharers/> [<https://web.archive.org/web/20250427102527/https://www.citizen.org/news/record-industry-cuts-corners-in-crusade-against-filesharers/>].

472. See *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1234–37 (D.C. Cir. 2003) (finding that the “text of § 512(h) and the overall structure of § 512 clearly establish . . . that § 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others”).

473. See *id.* at 1238 (observing that “the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works. That is not surprising; P2P software was ‘not even a glimmer in anyone’s eye when the DMCA was enacted.” (quoting *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 38 (D.D.C. 2003)).

474. *Id.*

475. See *Subpoena Defense Resources*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/filesharing/subpoena-defense>

The victory arguably backfired, however, at least for the people most affected. The RIAA was not deterred from its enforcement campaign—ultimately suing 35,000 filesharers. The unavailability of § 512(h) meant that the extra cost of suing John and Jane Does fell upon the filesharers—the people whom Mr. Lohmann characterized as the real pirates<sup>476</sup>—through the recording industry’s settlement demands. These were not high value claims, and the industry wanted to ensure that filing and lawyer costs were covered.

The copyleft strategy was a form of civil disobedience intended to mock copyright owners for enforcing their rights. It portrayed the industry as Goliath seeking to crush thousands of Davids. For the 35,000 defendants—many of whom were college students—who were pressured to pay \$3,000 to put these cases behind them, these enforcement actions were a nightmare.<sup>477</sup>

From the industry’s standpoint, the goal was to channel filesharers into authorized services, which ultimately supported existing and future creators. The enforcement campaign was also seeking to construct conditions for a new era of online distribution that would be beneficial for consumers, artists, and record companies: authorized celestial jukeboxes. This was, after all, the DMCA’s goal.

## 2. Interpretation of the Distribution Right

Prior to the emergence of filesharing technology, the Copyright Act’s distribution right was largely dormant.<sup>478</sup> Most enforcement actions were premised on violations of the reproduction right. This status changed as a result of the direct enforcement actions against filesharers.

As part of its RIAA v. the People campaign, EFF pursued an argument that “P2P file sharing does not infringe a copyright owner’s ‘distribution right’<sup>479</sup> because § 106(3)<sup>480</sup> requires proof that shared files are downloaded by third parties. The nub of

[<https://web.archive.org/web/20251011033324/https://www.eff.org/issues/filesharing/subpoena-defense>] (last visited Nov. 16, 2025).

476. See *supra* Section II(C); CFP 2002 Panel Recording, *supra* notes 442–457.

477. See *Trade Group Efforts Against File Sharing*, WIKIPEDIA [https://en.wikipedia.org/wiki/Trade\\_group\\_efforts\\_against\\_file\\_sharing](https://en.wikipedia.org/wiki/Trade_group_efforts_against_file_sharing) [[https://web.archive.org/web/20251025031736/https://en.wikipedia.org/wiki/Trade\\_group\\_efforts\\_against\\_file\\_sharing](https://web.archive.org/web/20251025031736/https://en.wikipedia.org/wiki/Trade_group_efforts_against_file_sharing)] (last visited Nov. 4, 2025).

478. Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC’Y U.S.A. 1, 6 (2011).

479. Fred von Lohmann, *Transmission + Reproduction ≠ Distribution*, ELEC. FRONTIER FOUND. (Feb. 26, 2006), <https://www.eff.org/deeplinks/2006/02/transmission-reproduction-distribution> [<https://web.archive.org/web/20251025032729/https://www.eff.org/deeplinks/2006/02/transmission-reproduction-distribution>].

480. The copyright owner has “the exclusive rights . . . to do and to authorize . . . the following: (3) to distribute copies or phonorecords to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 106.

the argument was that when drafting the 1976 Act, Congress intended to *narrow* the historic “publish” and “vend” rights by substituting the term “distribute.”<sup>481</sup> The publish and vend rights were violated by making works available. If Congress’s substitution of a “distribution right” for those rights was intended to require proof of receipt, then merely placing a copyrighted work in a network accessible folder did not constitute distribution of the file absent proof of downloading by someone else.

Like the subpoena defense campaign, this argument was aimed at raising the copyright owners’ enforcement costs. The RIAA forensic investigators could readily determine the Internet Protocol address of those who made files available but could not easily determine whether the file had been downloaded by third parties (other than the forensic investigator). The partial anonymity of internet activities made that difficult to prove.

This was, however, double-edged. If courts adopted this narrow interpretation of the distribution right, then copyright owners would need to engage in much more intrusive discovery to trace file transfers.<sup>482</sup> Internet anonymity and digital privacy could be undermined. And furthermore, copyright owners could seek to impose these greater costs on the losing party. It appeared that EFF hoped that this wasteful speed bump would dissuade the record labels from enforcing its copyrights on the internet.

The two appellate cases invoking the distribution right prior to the rise of P2P services involved arcane scenarios.<sup>483</sup> District courts divided on whether copyright owners needed to prove that the file sharer both made the file available and that a third party downloaded it.<sup>484</sup> The leading copyright treatises did not provide insight on the rationale for the wording change from “publish” and “vend” to “distribute.”<sup>485</sup>

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481. See Act of May 31, 1790, ch. 15, 1 Stat. 124 § 6 (repealed 1831) (“[A]ny person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof . . . shall be liable . . .”); Copyright Act of 1909, ch. 320, § 1(a), 35 Stat. 1075, 1075 (repealed 1978) (according copyright owners the exclusive rights to copy, publish, and vend, among other rights).

482. Cf. *Capitol Recs., Inc. v. Alaujan*, Nos. 03CV11661-NG, 07cv11446-NG, 2009 WL 1292977 (D. Mass. May 6, 2009) (granting recording industry’s request to mirror (copy) the defendant’s hard drive, subject to a protective order condition).

483. See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (holding an inclusion of a copyrighted work within a public library collection “makes the work available” to the public and thereby constitutes “distribution to the public”); *Nat’l Car Rental Sys., Inc. v. Comput. Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (addressing the scope of the distribution right in the context of determining whether the Copyright Act preempts a state law breach of contract claim).

484. Compare *Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185, 190 (D. Me. 2006) (no proof of actual distribution required); *Arista Recs. LLC v. Greubel*, 453 F. Supp. 2d 961, 968 (N.D. Tex. 2006) (same); *Interscope Recs. v. Duty*, No. 05-CV-3744, 2006 WL 988086, at \*2 (D. Ariz. Apr. 14, 2006) (holding that the “mere presence of copyrighted [works] in [defendant’s] share file may constitute copyright infringement”); *with Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008) (proof of actual distribution required); *London-Sire Recs., Inc. v. Doe 1-27*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (same); and *Elektra Ent. Grp., Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (finding that distribution constitutes publication and is therefore sufficient for proving a violation of the distribution right).

485. See Menell, *supra* note 478, at 20–25.



To resolve this conundrum, I scoured the 1976 Act legislative history. Lo and behold, the drafters fully intended to incorporate the “terms ‘publish’ and ‘vend’” from the 1909 Act, but “broadened” “to avoid any questions as to whether ‘publish’ or ‘vend’ is used in such a narrow sense that there might be forms of distribution not covered.”<sup>486</sup> The word change was intended to avoid the “distorted” 1909 Act jurisprudence seeking to avoid the harsh effects—forfeiture of copyright—resulting from “publication” without proper notice.<sup>487</sup> Numerous other textual, legislative history, and international treaty clues reinforced the conclusion that Congress fully intended to perpetuate the historic rights to publish and vend in establishing a broad “making available” right.<sup>488</sup>

The effort to resolve this puzzle revealed that many of the key provisions of the 1976 Act, including the exclusive rights, were drafted by 1965 and, but for the controversy that arose over cable television around that time,<sup>489</sup> would have been enacted that year.<sup>490</sup> Thus, the Copyright Register’s 1965 SUPPLEMENTARY REPORT provides contemporaneous insight into the thinking behind the scope of the exclusive rights.<sup>491</sup> In describing the “Basic Approach of the Bill,” the Register explained the drafters’ intention to ensure that the provisions would remain robust against the backdrop of technological change:

[O]f the many problems dealt with in the bill, those covered by the exclusive rights sections are most affected by *advancing technology* in all fields of communications,

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486. See Transcript of Meeting on Preliminary Draft for Revised U.S. Copyright Law: Discussions of §§ 5–8, in COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (Comm. Print 1964), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976), at 109–10 [hereinafter “1963 Hearing Transcript”].

487. See Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 488–89 (1955) (lamenting that the “[t]he concept of publication has been seriously distorted and now bedevils much of the law of copyright”); 1963 Hearing Transcript, *supra* note 486, at 128 (presenting comments of Edward Sargoy, ABA representative: “I think that the use of the words ‘publication’ or ‘published,’ in hundreds of common law and statutory cases, dissertations, and otherwise, has made the terms archaic today in the light of our recent technological progress. Reference to such materials where the word derived its meaning from conditions existing in the eighteenth, nineteenth, and early part of the twentieth century, will only lead to confusion. I think it is an excellent idea to use the word ‘distribute’ and, just as the draft here has done, have ‘distribute’ expressly include the right ‘to sell,’ (which is strictly one of the rights of publication), ‘or otherwise transfer ownership of, rent, lease, or lend one or more copies or sound recordings of the work.”); Menell, *supra* note 478, at 41–42.

488. See Menell, *supra* note 478, at 43–63. At the time that the 1976 Act was being drafted, the United States joined efforts to develop an international “making available” treaty. See *id.* at 50–51.

489. See Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, 89th Cong. 33–36 (1966) [hereinafter “Hearings Before Subcomm. No. 3”] (statement of George D. Cary, Deputy Register of Copyrights) (describing the “controversy” surrounding community antenna television, which came to be known as cable television).

490. See H.R. Rep. No. 94-1476, at 46–49 (1976) (recounting the long gestation of the Copyright Act of 1976).

491. See H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW VIII (Comm. Print 1965) (hereinafter “SUPPLEMENTARY REPORT”).

including a number of future developments that can only be speculated about. It is not surprising, therefore, that these sections proved extremely controversial and difficult to draft.

In a narrow view, all of the author's exclusive rights translate into money: whether [the author] should be paid for a particular use or whether it should be free. But it would be a serious mistake to think of these issues solely in terms of who has to pay and how much. *The basic legislative problem is to insure that the copyright law provides the necessary monetary incentives to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions. The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try to foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.*

Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of [the] work that materially affect the value of [the] copyright. . . . *A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, [the] copyrights loses much of its value because of unforeseen technical advances.*

*For these reasons, we believe that the author's rights should be stated in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest. In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense. . . .*

. . . It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of 'fair use,' may severely curtail the copyright owner's market for copies of his work. Likewise, *it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit."*<sup>492</sup>

The drafters are notably direct regarding their approach to drafting the exclusive rights. As the italicized text makes clear, they weighed competing arguments about how copyright law can best promote progress in the face of evolving technology and concluded that authors' rights should be interpreted in such a way as to ensure that

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492. *Id.* at 13–14 (emphasis added).

unforeseen technological changes would not undermine the value of copyrighted works.

The Copyright Office concurred with my analysis,<sup>493</sup> and David Nimmer found this research persuasive. He asked me to draft revisions to *NIMMER ON COPYRIGHT* accordingly.<sup>494</sup> The Copyright Office noted that “nearly all of [the lower court decisions requiring proof of downloading] either cited directly, or relied on prior cases citing the *Nimmer on Copyright* language that Professor Nimmer has since retracted in light of Professor Menell’s recent legislative history scholarship.”<sup>495</sup> The Tenth Circuit Court of Appeals cited the article in adopting the “making available” interpretation.<sup>496</sup>

Beyond this interpretive analysis, policy analysis strongly supports a making available interpretation. There is no valid reason for fans to distribute copies of copyrighted works without authorization. The argument that “sharing” allows “sampling” is without basis. Potential fans can easily (and legally) sample music or movie trailers through ad-supported videos on various authorized websites. Furthermore, interpreting the distribution requirement so as to ensnare those who put copyrighted works into share folders without authorization in no way limits the defenses to liability. Filesharers would still be entitled to raise fair use or any other defense.

Second, effective deterrence of unauthorized distribution promotes progress in the creative arts (as viewed by the drafters of the Copyright Act) by allowing creators to determine whether and how to commercialize their works. It can also provide the basis for investing in new authors, recording artists, and filmmakers. Third, imposition of an actual distribution requirement substantially raises the costs of enforcement, jeopardizes users’ privacy interests, and imposes substantial burdens upon judicial administration. Finally, making P2P enforcement more difficult discourages investment in symbiotic technologies that can improve access and fairly compensate creators.

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493. See U.S. COPYRIGHT OFF., *THE MAKING AVAILABLE RIGHT IN THE UNITED STATES* 27, 29–35 (Feb. 2016).

494. See *The Scope of Copyright Protection: Hearing Before the Subcomm. on Cts., Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 114 (2014) (presenting statement of David Nimmer, Professor from Practice, UCLA Sch. of Law, Of Counsel, Irell & Manella, LLP, Los Angeles: “[Professor Menell’s] findings were so important that I invited him to co-author the next treatise revision, in order to include the comprehensive analysis of the proper interpretation of copyright law’s distribution right, as set forth in that landmark article”); *The Historic Right of Publication*, *NIMMER ON COPYRIGHT*, § 4.04[D] (Release 85, 2011); *Definition of “Publication,”* *NIMMER ON COPYRIGHT*, § 4.03 (Release 85, 2011); *The Distribution Right*, *NIMMER ON COPYRIGHT*, § 8.11 (Release 85, 2011).

495. See U.S. COPYRIGHT OFF., *supra* note 493, at 75.

496. See *Diversey v. Schmidly*, 738 F.3d 1196, 1202 n.7 (10th Cir. 2013) (citing Menell, *supra* note 478, at 52–66 (2011) (analyzing the legislative history regarding the distribution right and concluding that the requirement of actual distribution of an unauthorized copy is unwarranted).

EFF had no serious policy argument against a making available right. It pursued this argument as part of a cynical pandering campaign. In view of Mr. von Lohmann's comments about the logic of record companies suing filesharers,<sup>497</sup> EFF's position was deeply hypocritical.

By the time my research unearthed the legislative intention behind § 106(3), much of the Recording Industry Association of America ("RIAA")-led litigation had subsided.<sup>498</sup> The controversy would, however, arise again in the American Law Institute's Copyright Restatement Project.<sup>499</sup>

### 3. The Holdout Cases

As the filesharing lawsuits against end-users intensified in the 2003–2008 time period, I started getting phone calls from friends of friends whose college-aged children were targeted. I also encountered law students who knew college classmates who had been sued, so there was awareness of the RIAA campaign if not some deterrence.<sup>500</sup> The friends of friends were shocked that the industry was going after college students. They wondered why the industry did not pursue the P2P services that were luring college kids into this mess. I explained that the industry was pursuing this approach but encountering roadblocks. Unlike some of the parents, the students were well aware that filesharing was sketchy, but they thought that their activities were untraceable.

Both groups wanted to know what to do. I explained that I was not their lawyer, but offered to refer them to lawyers who handled these matters.<sup>501</sup> In most cases, however, they just wanted to get my thoughts on what I would do if one of my children were targeted.<sup>502</sup> I explained that the industry generally targeted people sharing a large number of copyrighted works. Although there had been a few identification errors during the enforcement campaign,<sup>503</sup> most targeted individuals did not have much of a

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497. See *supra* text accompanying notes 442–457.

498. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008), <https://www.wsj.com/articles/SB122966038836021137> [<https://web.archive.org/web/20251116171124/https://www.wsj.com/articles/SB122966038836021137>].

499. See *Devolution II*, *supra* note 4.

500. Deterrence and channeling filesharers into authorized channels, not revenue generation, were the goals of the enforcement campaign.

501. A cottage industry of solo practitioners/small law firms emerged to handle such matters. See sources cited *supra* note 466.

502. iPods and an iTunes allowance worked well. See STEVEN LEVY, *THE PERFECT THING: HOW THE IPOD SHUFFLES COMMERCE, CULTURE, AND COOLNESS* (2006).

503. See, e.g., Eric Bangeman, *Andersen Relentless in Quest to Nail the RIAA*, ARS TECHNICA (May 5, 2008), <https://arstechnica.com/tech-policy/2008/05/andersen-relentless-in-quest-to-nail-the-riaa/> [<https://web.archive.org/web/20251025053058/https://arstechnica.com/tech-policy/2008/05/andersen-relentless-in-quest-to-nail-the-riaa/>]; Antony Bruno, *RIAA to Pay over \$100K?*, BILLBOARD (May 16, 2008), <https://www.billboard.com/music/music-news/riaa-to-pay-over-100k-1308461/> [<https://web.archive.org/web/20251025053234/https://www.billboard.com/music/music-news/riaa-to-pay-over-100k-1308461/>].

defense. And even though the potential exposure was massive, the industry was more interested in sending a message and recovering their costs, not bankrupting college students. The typical settlement was in the \$3,000 to \$5,000 range, a large sum to a college student, but not much more than the costs of pursuing the cases. Just hiring a lawyer could cost that much. If it were my family member, I would have recommended settling. Our kids received a part of their allowance in iTunes dollars.

The overwhelming majority of the 35,000 people sued for filesharing settled their cases.<sup>504</sup> And in December 2008, five years after the campaign's launch and amidst mixed publicity, the RIAA announced that it was ending direct enforcement against filesharers and instead working out agreements with ISPs to send warning letters to filesharers. Under this strategy, the RIAA would forward its emails to the ISPs without demanding to know customers' identities.<sup>505</sup>

As the RIAA closed out its direct enforcement campaign, it faced two alleged filesharers who refused to settle: Jammie Thomas, a single mother living in rural Minnesota, and Joel Tenenbaum, a Boston University graduate student whose mother was an attorney. They and their self-selected lawyers sought to use their cases as causes célèbres. Berkman Center founder Professor Charles Nesson and others in the copyleft community saw these cases as opportunities to shame the record companies.

In Professor Nesson's view, these cases would vindicate netizen civil rights and bring about a "free" internet culture of sharing. In the spirit of the great civil rights impact litigations, these cases could bring about social change—standing up to copyright bullies, teeing up a constitutional challenge to the Copyright Act's statutory damages provision, liberating the sharing of copyrighted works, and expanding the free culture political movement. When the copyright owners stood their ground, Professor

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504. See *Music Industry Stops Suing Song Swappers*, L.A. TIMES (Dec. 20, 2008), <https://www.latimes.com/archives/la-xpm-2008-dec-20-fi-music20-story.html> [<https://web.archive.org/web/20260115005827/https://www.latimes.com/archives/la-xpm-2008-dec-20-fi-music20-story.html>] (reporting that the RIAA sued "about 35,000" people and that "virtually all of those hit with lawsuits settled," typically for around \$3,500).

505. See McBride & Smith, *supra* note 498; Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81 (2010). The RIAA appears to have exaggerated ISPs' embrace of the graduated response initiative. Many of the larger ISPs (BC, AT&T, Comcast, Verizon, CSC, and Time Warner Cable) formalized the plan by mid-2011. See Memorandum of Understanding Between Content Owners and Participating Internet Service Providers (July 6, 2011), <https://info.publicintelligence.net/CCI-MOU.pdf> [<https://web.archive.org/web/20250516181219/https://info.publicintelligence.net/CCI-MOU.pdf>]; Annemarie Bridy, *Graduated Response American Style: "Six Strikes" Measured Against Five Norms*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2012).

Nesson jumped at the opportunity to leverage these cases for what he considered the greater societal good.<sup>506</sup> Both cases produced courtroom and media spectacles.<sup>507</sup>

I became acquainted with Professor Nesson in the mid-1980s as a student in his Evidence Law class and as a law review editor.<sup>508</sup> He was at the time working on a historic toxic torts case involving groundwater contamination, which earned him the moniker Billion-Dollar Charlie.<sup>509</sup> I was writing a law review article on hazardous waste liability and remediation, and so looked forward to the opportunity to learn from Professor Nesson.<sup>510</sup> Like other green—in both senses of the term—law students, I was drawn to Professor Nesson's charismatic, quirky, outsized personality: a mathematically-inclined, pot-smoking, poker-playing, environmental crusader.<sup>511</sup>

The experience did not live up to the hype. Professor Nesson came off as disorganized and distracted. It was not unusual for him to arrive late to class

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506. See *RIAA v. Joel Tenenbaum*, CYBERONE: LAW IN THE COURT OF PUBLIC OPINION (updated Jan. 6, 2009), <https://archive.blogs.harvard.edu/cyberone/riaa/> [<https://web.archive.org/web/20260115010526/https://archive.blogs.harvard.edu/cyberone/riaa/>] (reporting that “Prof. Nesson and a crack team of CyberOne students is in the process of defending Joel Tenenbaum, a digital native, from the RIAA. . . . Joel Tenenbaum was a teenager at the time of the alleged copyright infringements, in every way representative of his born-digital generation. The plaintiffs and the RIAA are seeking to punish him beyond any rational measure of the damage he allegedly caused. They do this, not for the purpose of recovering compensation for actual damage caused by Joel’s individual action, nor for the primary purpose of deterring him from further copyright infringement, but for the ulterior purpose of creating an urban legend so frightening to children using computers, and so frightening to parents and teachers of students using computers, that they will somehow reverse the tide of the digital future.”).

507. See John Schwartz, *Tilting at Internet Barrier, a Stalwart Is Upended*, N.Y. TIMES (Aug. 10, 2009), <https://www.nytimes.com/2009/08/11/us/11download.html> [<https://web.archive.org/web/20251104191620/https://www.nytimes.com/2009/08/11/us/11download.html>] (observing that “Professor Nesson acted in ways that many observers found bizarre and even harmful to the case”); See *infra* Section II(C)(3).

508. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985); cf. Roger C. Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1057, 1062, 1072 (1986) (questioning Professor Nesson’s “unorthodox explanation for the existence and structure of the rules excluding hearsay evidence”).

509. See Charles Nesson, WIKIPEDIA, [https://en.wikipedia.org/wiki/Charles\\_Nesson](https://en.wikipedia.org/wiki/Charles_Nesson) [[https://web.archive.org/web/20251004024841/https://en.wikipedia.org/wiki/Charles\\_Nesson](https://web.archive.org/web/20251004024841/https://en.wikipedia.org/wiki/Charles_Nesson)] (last visited Nov. 4, 2025); JONATHAN HARR, A CIVIL ACTION 246–47 (1995). The case concerned a leukemia cancer cluster in the town of Woburn, Massachusetts, in close proximity to a W.R. Grace chemical factory.

510. See Peter S. Menell, Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986).

511. See Owen Alterman, *Is Charlie Nesson Our Very Own “Man on the Moon”?*, HARV. L. REC. (Mar. 24, 2003), <https://hlrecord.org/is-charlie-nesson-our-very-own-man-on-the-moon/> [<https://web.archive.org/web/20251116172619/https://hlrecord.org/is-charlie-nesson-our-very-own-man-on-the-moon/>]; Joseph P. Flood, *The Path Less Traveled*, HARV. CRIMSON (Apr. 19, 2002), <https://www.thecrimson.com/article/2002/4/19/the-path-less-traveled-it-is/> [<https://web.archive.org/web/20251104200253/https://www.thecrimson.com/article/2002/4/19/the-path-less-traveled-it-is/>]; *Poker Plays a Role in Harvard Classrooms*, NPR (Sep. 1, 2007), <https://www.npr.org/transcripts/14112450> [<https://web.archive.org/web/20251104200503/https://www.npr.org/transcripts/14112450>].

unprepared and launch into peculiar digressions. And his much-publicized prediction of a billion-dollar recovery for the plaintiffs did not pan out,<sup>512</sup> although the story became a successful motion picture and a best-selling indictment of how corporations could evade responsibility for toxic torts.<sup>513</sup> Although I admired his effort to support the plaintiffs in the case, he did not become a role model for my academic career.

This experience foreshadowed Professor Nesson's role in the filesharing trials that unfolded.<sup>514</sup> The Thomas-Rassett and Tenenbaum cases produced two of the most cringeworthy chapters in copyright legal history, adding a twist to the story that gave rise to the phrase "Dickensian tale."<sup>515</sup> The cases substantiate Mark Twain's quip that "truth is stranger than fiction, but it is because Fiction is obliged to stick to possibilities; Truth isn't."<sup>516</sup>

a. *Capitol Records v. Jammie Thomas-Rassett*

In 2005, Capitol Records accused Jammie Thomas of sharing over 1,700 copyrighted songs through the KaZaA filesharing network and offered to settle the case for \$5,000.<sup>517</sup> After Ms. Thomas declined the settlement offer, Capitol Records sued for willful violation of copyright law. The case pitted the RIAA seeking \$150,000 per work for the sharing of twenty-four copyrighted sound recordings against a defiant single mother of modest means represented by pro bono counsel. After the jury returned a

512. Bob Drogin, *Settlement Ends Pollution Trial: W. R. Grace Will Pay \$8 Million to Families*, L.A. TIMES (Sep. 23, 1986), <https://www.latimes.com/archives/la-xpm-1986-09-23-mn-9485-story.html> [<https://web.archive.org/web/20251116172923/https://www.latimes.com/archives/la-xpm-1986-09-23-mn-9485-story.html>] (noting that W.R. Grace settled the case for \$8 million).

513. See JONATHAN HARR, *A CIVIL ACTION* (1995); *A Civil Action*, WIKIPEDIA [https://en.wikipedia.org/wiki/A\\_Civil\\_Action](https://en.wikipedia.org/wiki/A_Civil_Action) [[https://web.archive.org/web/20251005015051/https://en.wikipedia.org/wiki/A\\_Civil\\_Action](https://web.archive.org/web/20251005015051/https://en.wikipedia.org/wiki/A_Civil_Action)] (last visited Nov. 4, 2025) (noting that the nonfiction book became a best-seller and won the National Book Critics Circle Award for nonfiction); *A Civil Action*, IMDB, <https://www.imdb.com/title/tt0120633/> [<https://web.archive.org/web/20251005021604/https://www.imdb.com/title/tt0120633/>] (last visited Nov. 4, 2025).

514. Professor Nesson viewed the Tenenbaum case as "A Civil Action II." See Schwartz, *supra* note 507.

515. See CHARLES DICKENS, *BLEAK HOUSE* (1853) (telling a story of long-running litigation depleting a vast estate). Ironically, Dickens's classic was modeled in part on his own frustrations seeking to enforce copyright protection on his earlier books. See *Bleak House*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Bleak\\_House](http://en.wikipedia.org/wiki/Bleak_House) [[https://web.archive.org/web/20251008134305/http://en.wikipedia.org/wiki/Bleak\\_House](https://web.archive.org/web/20251008134305/http://en.wikipedia.org/wiki/Bleak_House)] (last visited Nov. 4, 2025).

516. MARK TWAIN, *FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 156* (1897) (epigraph to Chapter 15).

517. See Nate Anderson, *Thomas Testimony Ends with Tears, Anger, Swedish Death Metal*, ARS TECHNICA (June 17, 2009), <https://arstechnica.com/tech-policy/2009/06/thomas-testimony-ends-with-tears-anger-swedish-death-metal/> [<https://web.archive.org/web/20251104202319/https://arstechnica.com/tech-policy/2009/06/thomas-testimony-ends-with-tears-anger-swedish-death-metal/>].

verdict of \$9,250 per work, totaling \$222,000, Chief Judge Davis ordered a new trial on the ground that he mis-instructed the jury as to the scope of the distribution right.<sup>518</sup>

At that point, Kiwi Camara, a recent graduate of Harvard Law School and protégé of Professor Nesson,<sup>519</sup> agreed to represent Ms. Thomas on a pro bono basis.<sup>520</sup> The retrial did not go well, with the second jury finding Ms. Thomas-Rasset<sup>521</sup> liable for willful copyright infringement of all twenty-four sound recordings and awarding the plaintiffs statutory damages of \$80,000 per song, resulting in a total award of \$1,920,000.<sup>522</sup> On post-trial motions, Chief Judge Davis determined that the damage award was “monstrous and shocking” and remitted the jury award to \$54,000 (treble the minimum willful statutory damage level (\$750 per work) times twenty-four works).<sup>523</sup> The plaintiffs offered Ms. Thomas-Rasset the opportunity to settle the matter by donating \$25,000 to a musician’s charity of her choosing, which she declined to do.<sup>524</sup>

In the third trial, Professor Charles Nesson filed an amicus brief on behalf of Ms. Thomas-Rasset seeking a jury instruction regarding constitutional limits of statutory damages.<sup>525</sup> Chief Judge Davis struck Professor Nesson’s “unsolicited brief” on the grounds that “Nesson is not a party in this action; nor does he represent any party in this action. Nesson has not asked for permission to intervene or to file an amicus brief.

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518. See *Capitol Recs., Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216–25 (D. Minn. 2008). My article, see Menell, *supra* note 478, on the interpretation of the distribution right was not yet available.

519. See Jason Hartman, *Meet the Disruptors: Kiwi Camara of “DISCO” on the Three Things You Need to Shake Up Your Industry*, MEDIUM (Dec. 8, 2020) <https://medium.com/authority-magazine/meet-the-disruptors-kiwi-camara-of-disco-on-the-three-things-you-need-to-shake-up-your-industry-c0b450feef5a> [<https://web.archive.org/web/20251116174422/https://medium.com/authority-magazine/meet-the-disruptors-kiwi-camara-of-disco-on-the-three-things-you-need-to-shake-up-your-industry-c0b450feef5a>] (presenting an interview with Kiwi Camara, in which Mr. Camara says that “Charles Nesson is the smartest person I’ve ever met. He was one of my professors in law school and has been my friend and mentor ever since.”). Mr. Camara apparently viewed the Thomas case as a great way to generate publicity for his recently formed law firm.

520. See Greg Sandoval, *Odd-Couple Lawyers Aim to Save Jammie Thomas*, CNET (Jul. 9, 2009) <https://www.cnet.com/tech/services-and-software/odd-couple-lawyers-aim-to-save-jammie-thomas/> [<https://web.archive.org/web/20251104203736/https://www.cnet.com/tech/services-and-software/odd-couple-lawyers-aim-to-save-jammie-thomas/>] (quoting Joe Sibley, saying that his law partner Kiwi Camara is “not the stereotypical sort of genius. He’s more like the evil genius.”).

521. Ms. Thomas was married in the interim.

522. *Capitol Recs. Inc. v. Thomas-Rasset*, 680 F.Supp.2d 1045 (D. Minn. 2010).

523. See *id.* at 1049, 1056.

524. See Greg Sandoval, *Jammie Thomas Rejects RIAA’s \$25,000 Settlement Offer*, CNET (Jan. 27, 2010), <https://www.cnet.com/culture/jammie-thomas-rejects-riaas-25000-settlement-offer/> [<https://web.archive.org/web/20251116174639/https://www.cnet.com/culture/jammie-thomas-rejects-riaas-25000-settlement-offer/>].

525. See Amicus Reply on the Issue of Jury Instruction, *Capitol Recs., Inc. v. Thomas-Rasset*, No. 0:06-cv-01497—MJD-LIB, 2010 WL 4596759 (D. Minn Nov. 1, 2010).



Moreover, he has filed a brief regarding a jury instruction issue that was already fully briefed, argued, and decided more than one week ago.<sup>526</sup>

The jury in the third trial awarded \$1,500,000 in statutory damages (\$62,500 per song at issue), which Chief Judge Davis again reduced to \$54,000 as the “maximum award consistent with due process.”<sup>527</sup> The Eighth Circuit Court of Appeals reversed the District Court’s reduction of the award, reinstated the award of \$222,000 amount awarded by the jury in the first trial, and declined to rule that the Copyright Act’s statutory damages provision was unconstitutional.<sup>528</sup>

Ms. Thomas-Rasset, represented by Mr. Camara and Professor Nesson, petitioned the U.S. Supreme Court to address whether “there [is] any constitutional limit to the statutory damages that can be imposed for downloading music online?”<sup>529</sup> The U.S. Supreme Court denied review.<sup>530</sup>

*b. Sony BMG Music Ent. v. Tenenbaum*

The second end-user filesharing trial unfolded in somewhat similar fashion, although it turned into even more of a judicial and media circus. In 2003, a consortium of record labels sent Joel Tenenbaum, then twenty years old, a demand for \$3,500 for sharing songs on P2P services.<sup>531</sup> Mr. Tenenbaum countered at \$500. The record labels declined the offer and filed a copyright infringement action.<sup>532</sup> In his answer, prepared with the assistance of his mother, a family law attorney, Mr. Tenenbaum denied the charges and moved to dismiss.<sup>533</sup> He later filed a motion for summary judgment

526. See Order Striking Unsolicited Brief, *Capitol Recs. Inc. v. Thomas-Rasset*, No. 0:06-cv-01497-MJD-LIB (D. Minn. Nov. 1, 2010).

527. See *Capitol Recs., Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1011, 1013 (D. Minn. 2011) (holding that an award above three times the statutory damages minimum of \$750 per work violates the Due Process Clause of the U.S. Constitution).

528. See *Capitol Recs., Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).

529. See *Thomas-Rasset v. Capitol Recs., Inc.*, Petition for Writ of Certiorari, 2012 WL 6206575 (U.S. Dec. 10, 2012).

530. *Thomas-Rasset v. Capitol Recs., Inc.*, 568 U.S. 1229 (2013).

531. *Sony BMG v. Tenenbaum*, Wikipedia, [https://en.wikipedia.org/wiki/Sony\\_BMG\\_v.\\_Tenenbaum](https://en.wikipedia.org/wiki/Sony_BMG_v._Tenenbaum) [[https://web.archive.org/web/20251007150550/https://en.wikipedia.org/wiki/Sony\\_BMG\\_v.\\_Tenenbaum](https://web.archive.org/web/20251007150550/https://en.wikipedia.org/wiki/Sony_BMG_v._Tenenbaum)] (last visited Nov. 4, 2025).

532. Complaint for Copyright Infringement, *Capital Recs., Inc. v. Alaujan*, Civil Action No. 03-11661-NG (D. Mass. Sep. 8, 2003) (identifying copyrighted files transferred within the judicial district through the Kazaa network as a prelude to unmasking defendants).

533. Mr. Tenenbaum filed his answer pro se. See Answer, *Sony BMG Music Ent. v. Tenenbaum*, Civil Action No. 07-CV-11446, Document 5 (D. Mass.) (filed Sep. 5, 2007). But later acknowledged that his mother advised him on the case. See Ben Sheffner, *Tenenbaum Takes the Stand: I Used P2P and Lied About It*, ars technica (Jul. 30, 2009), <https://arstechnica.com/tech-policy/2009/07/tenenbaum-takes-the-stand-i-used-p2p-and-lied-about-it/> [<https://web.archive.org/web/20260115011651/https://arstechnica.com/tech-policy/2009/07/tenenbaum-takes-the-stand-i-used-p2p-and-lied-about-it/>].

suggesting that other users of the computer in question might have been responsible for making the copyrighted works available, noting that a visitor to the family home, family friend (possibly a visitor from Burkina Faso), foster son, or burglar could have committed the alleged acts of infringement.<sup>534</sup> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Mr. Tenenbaum offered a \$300 settlement (with no admission of guilt).<sup>535</sup> He then filed several motions for sanctions against the copyright owners and a counterclaim for abuse of process. As the costs of the litigation escalated, the record labels increased their settlement amount to \$12,000.<sup>536</sup>

Sensing that Mr. Tenenbaum and his mother were out of their depth, Judge Gertner recommended that Professor Nesson represent Mr. Tenenbaum.<sup>537</sup> Judge Gertner knew Professor Nesson personally and was familiar with the Berkman Center. Professor Nesson made his appearance in the case in September 2008,<sup>538</sup> and soon thereafter launched a multi-faceted strategy in both the court of public opinion and in Judge Gertner's courtroom.<sup>539</sup> For the former, he enlisted a group of students to set up and run Joelfightsback.org, a website that pumped out a steady stream of posts and updates characterizing Mr. Tenenbaum's cause as a civil rights struggle. Professor Nesson also went to unusual lengths to have proceedings broadcast.<sup>540</sup>

For the court battle, Professor Nesson sought to assert a fair use defense, seeking to turn the trial into an "open-ended referendum on 'fairness.'"<sup>541</sup> His witness list included: John Perry Barlow; Professor Johan Pouwelse (technical and scientific director of the European research project P2P-Next); Professor Lawrence Lessig; Matthew Oppenheim (who had worked with the RIAA); Professor William Fisher; Wendy Seltzer (former staff attorney at EFF and founder of the Chilling Effects website); Berkman Center Executive Director Professor John Palfrey; Professor Jonathan Zittrain; and Andrew Grant (a former antipiracy specialist at digital rights management company Macrovision).<sup>542</sup>

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534. See Affidavit in Support of Motion to Dismiss and in Support of Motion for Summary Judgment at 2, *Sony BMG Music Ent. v. Tenenbaum*, Civil Action No. 07-CV-11446, Document 487 (D. Mass.) (filed Nov. 23, 2007).

535. See Fed. R. Civ. P. 68.

536. See Motion Hearing Transcript (June 17, 2008), at 10, *Capital Recs., Inc. v. Alaujan*, Civil Action No. 03-11661-NG (D. Mass. Sep. 8, 2003).

537. See *id.* at 4–5.

538. See *Sony BMG Music Ent. v. Tenenbaum*, Civil Action No. 07-CV-11446 (D. Mass.) (filed Sep. 22, 2008) (Document 659) (notice of appearance).

539. *Sony BMG Music Ent. v. Tenenbaum*, 672 F. Supp. 2d 217, 219 (D. Mass. 2009).

540. See *In re Sony BMG Music Ent.*, 564 F.3d 1 (1st Cir. 2009) (overturning Judge Gertner's order to webcast pretrial hearing). Given how the trial unfolded, see *infra* text accompanying notes 547–550, the failure of that effort may well have been a blessing in disguise.

541. *Tenenbaum*, 672 F. Supp. 2d at 226.

542. See Mike Masnick, *All-Star Witness List in Lawsuit over Constitutionality of RIAA Lawsuits*, TECHDIRT (Nov. 20, 2008), <https://www.techdirt.com/2008/11/20/all-star-witness-list-in-lawsuit-over-constitutionality-of-riaa-lawsuits/>

Professor Nesson's trial strategy began to unravel in February 2009, several months before the July trial date. In an effort to get the U.S. government to intervene in the case on the unconstitutionality of the statutory damages provision—a hubristic move—he publicly acknowledged that his client had downloaded copyrighted files from P2P networks.<sup>543</sup> Then at the end of March, he posted to his blog email communications with several of his proposed witnesses disclosing that they disagreed with the notion that filesharing of copyrighted works qualifies as fair use. Their comments were telling.<sup>544</sup>

*Professor Lawrence Lessig, Stanford Law School:*

I am surprised if the intent is to fight this case as if what joel did was not against the law. of course it was against the law, and you do the law too much kindness by trying to pretend (or stretch) "fair use" excuses what he did. It doesn't. But if you want to argue it does, then I should think it a big mistake to include Terry on the team, or me for that matter. I have given literally hundreds of speeches where I expressly say p2p filesharing is wrong, and kids shouldn't do it. I think FREE CULTURE says that more than a dozen times.

I should have thought instead this was a simple nullification case. Of course, it is practically impossible to frame and present a nullification case. despite the framers belief that nullification was an essential part of the jury right (at least in the context of criminal law), it has over the centuries been emaciated. but that's the only honest frame for joel's case—whatever the law requires, We, the Jury, won't allow it.

*Professor William (Terry) Fisher, Harvard Law School:*

I cannot, however, testify that Joel's activity constitutes a fair use under current copyright law, because I don't think it does. Thus, I'm worried by your statement that "our case is fair use." I fear that what I have to say will not contribute to that assertion. Moreover, I will be subject to cross examination, in which I will have to say the opposite. \* \* \*

My view is that it's not credible to argue that widespread P2P filesharing has not and will not give rise to "some meaningful likelihood of future harm" to the revenues of the holders of copyrights in sound recordings and musical works. . . . I think you need to engage more than you have as yet with the case law in this area, which is quite hostile to your assertion that ordinary P2P filesharing is fair use. The key decisions are Napster, Aimster, and Grokster. In answer to your question, yes, I fear that failure to address the holdings (or dicta) of those decisions will give rise to a directed verdict or summary judgment against you—and you will never get a chance to make your case to the jury.

*Wendy Seltzer, Practitioner in Residence, American University's Washington College of Law:*

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[<https://web.archive.org/web/20251104205553/https://www.techdirt.com/2008/11/20/all-star-witness-list-in-lawsuit-over-constitutionality-of-riaa-lawsuits/>].

543. See Ben Sheffner, *Nesson Admits: Tenenbaum "downloaded music for . . . own enjoyment,"* COPYRIGHTS & CAMPAIGNS BLOG (Feb. 18, 2009) <https://copyrightsandcampaigns.blogspot.com/2009/02/nesson-admits-tenenbaum-downloaded.html>

[<https://web.archive.org/web/20251104210636/https://copyrightsandcampaigns.blogspot.com/2009/02/nesson-admits-tenenbaum-downloaded.html>] (noting that "it's exceedingly unlikely that DOJ will intervene to concede the unconstitutionality of any part of the statutory damages scheme"; "In late 2007, DOJ filed a brief in the *Capitol v. Thomas* case that constituted a strong defense of statutory damages against a constitutional challenge").

544. Professor Nesson took the email communications down from his blog. The post, however, was republished on other blogs. See Ben Sheffner, *Copyleft Academics to Nesson: Fair Use Defense Is a Loser; Lessig Urges Jury Nullification; Mrs. Nesson Savages Naysayers,* COPYRIGHTS & CAMPAIGNS BLOG (Mar. 30, 2009) <https://copyrightsandcampaigns.blogspot.com/2009/03/copyleft-academics-to-nesson-fair-use.html> [<https://web.archive.org/web/20251104210902/https://copyrightsandcampaigns.blogspot.com/2009/03/copyleft-academics-to-nesson-fair-use.html>].

Add me to those puzzled by the “fair use” arguments. I understood the argument to be that statutory damages are inappropriate and unconstitutional in response to personal-use copying, not that such copying was within the bounds of existing law.

I think it would be more convincing to argue that Joel’s conduct was “fair” as an ethical matter than to claim that it meets the legally established category of “fair use.”

I fear that we do damage to fair use by arguments that stretch it to include filesharing—weakening our claims to fair use even for un-permissioned transformations. I am much more comfortable disagreeing with the law than claiming at this point in time that it already excuses filesharing.

Notwithstanding these warnings, Professor Nesson proceeded with the fair use defense.

Judge Gertner rejected the ploy. On the eve of trial, she granted the plaintiffs’ motion for partial summary judgment on the ground that Tenenbaum “proposes a fair use defense so broad that it would swallow the copyright protections that Congress has created. Indeed, the Court can discern almost no limiting principle: His rule would shield from liability any person who downloaded copyrighted songs for his or her own private enjoyment.”<sup>545</sup>

With that determination and the grant of several motions in limine,<sup>546</sup> the much-anticipated trial of *David v. Goliath* ended ingloriously. Mr. Tenenbaum confessed to uploading and downloading copyrighted sound recordings on various peer-to-peer networks even after he was sued,<sup>547</sup> and to lying in his discovery responses.<sup>548</sup> As a

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545. See Electronic Order Granting Motion for Partial Summary Judgment on Defendant’s Fair Use Defense, *Capital Recs., Inc. v. Alaujan*, Civil Action No. 1:03-cv-11661 (D. Mass. Sep. 8, 2003) (Docket Entry for July 27, 2009). In a subsequent opinion on Tenenbaum’s motion for summary judgment, Judge Gertner characterized Tenenbaum’s view of fair use as “not a legal doctrine tethered to the particular purposes of copyright, but a sweeping referendum on ‘fairness.’ It encompasses every possible inequity that might be found in the facts of this case, and owes little to precedent except—according to the defendant—its infinite elasticity.” *Sony BMG Music Ent. v. Tenenbaum*, 672 F. Supp. 2d 217, 237 (citation omitted). Judge Gertner was not wholly unsympathetic to Professor Nesson’s efforts. She expressed being “very, very concerned there is a deep potential for injustice in the Copyright Act,” particularly because it “routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood.” *Id.* She further implored Congress “to amend the statute to reflect the realities of file sharing.” *Id.*

546. See Docket Entry for July 26, 2009, *Capital Recs., Inc. v. Alaujan*, Civil Action No. 1:03-cv-11661 (D. Mass. Sep. 8, 2003) (granting Motion in Limine with regard to the expert witness, John Palfrey on relevance grounds); Docket Entry for Jul. 24, 2009, *Capital Records, Inc. v. Alaujan* (granting Motion in Limine with respect to Felix Oberholzer-Gee, who has been proposed as an expert only days before trial without any expert report offered whatsoever).

547. See Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment Re Defendant’s Fair Use Defense, *Sony BMG Music Ent. v. Tenenbaum*, Civ. Action No. 07-cv-11446-NG, Document 872 (filed Jul. 13, 2009) at 2 (stating that “[n]otwithstanding being caught and put on notice of his unlawful activity, Defendant persisted in his infringing behavior. Indeed, Defendant’s Gateway computer contains evidence that Defendant was using the LimeWire file sharing program in February 2007, and possibly as late as May 2008, long after this case was filed, to distribute thousands of music files to other LimeWire users.”)

548. See Ben Sheffner, *Tenenbaum Takes the Stand: I Used P2P and Lied About It*, COPYRIGHTS & CAMPAIGNS BLOG (Jul. 30, 2009), <https://copyrightsandcampaigns.blogspot.com/2009/07/tenenbaum-takes-stand-i-used-p2p-and.html>

result, Judge Gertner directed a verdict on liability, leaving only the issue of statutory damages for the jury.<sup>549</sup> Professor Nesson never secured an expert witness on damages, thereby exposing his client to whatever the recording industry's damages expert would testify to on behalf of the plaintiffs.<sup>550</sup> Professor Nesson might have wanted an outsize statutory damages award, thereby improving the chances to challenge the statutory damages provision on constitutionality grounds.

The jury awarded \$675,000 in damages based on \$22,500 for each of the thirty songs at issue.<sup>551</sup> This amount was within the ordinary statutory damages range of \$750 to \$30,000 per work,<sup>552</sup> well below the \$150,000 per work ceiling for willful infringement,<sup>553</sup> but still a very large sum. Nonetheless, the recording industry likely spent a comparable sum investigating and litigating the case. On a post-trial motion, Judge Gertner ruled that the jury's "award is wholly out of proportion with the government's legitimate interests in compensating the plaintiffs and deterring unlawful filesharing" and "cannot withstand scrutiny under the Due Process Clause."<sup>554</sup> Accordingly, she capped the statutory damage range at \$2,250 per work (or \$67,500 in total), treble the statutory damages minimum.<sup>555</sup>

The First Circuit reversed Judge Gertner's decision.<sup>556</sup> The appellate court dispelled suggestions that Tenenbaum's actions were not serious or mere youthful indiscretions, noting that he had continued to use P2P services to download and upload thousands of songs for at least four years after he had been identified by the plaintiffs.<sup>557</sup> The court also noted his attempts to shift blame to others, including "a foster child living in his family's home, burglars who had broken into the home, his family's house

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[<https://web.archive.org/web/20251104211432/https://copyrightsandcampaigns.blogspot.com/2009/07/tenenbaum-takes-stand-i-used-p2p-and.html>].

549. *Sony BMG Ent. v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011); *Sony BMG Music Ent. v. Tenenbaum*, 672 F. Supp. 2d 217 (D. Mass. 2009) (granting motion for summary judgment rejecting fair use defense).

550. See Ben Sheffner, *Team Tenenbaum's Biggest Mistake*, COPYRIGHTS & CAMPAIGNS BLOG (Jul. 28, 2009) <https://copyrightsandcampaigns.blogspot.com/2009/07/team-tenenbaums-biggest-mistake.html> [<https://web.archive.org/web/20251104211659/https://copyrightsandcampaigns.blogspot.com/2009/07/team-tenenbaums-biggest-mistake.html>] (reporting that the plaintiffs called Professor Stanley Liebowitz as their damages expert). Professor Nesson had intended to call Professor Felix Oberholzer-Gee as his damages expert, but apparently never called him. See *id.* It would have been interesting to hear the direct and cross-examinations of Professors Liebowitz and Oberholzer-Gee.

551. *Sony BMG Music Ent. v. Tenenbaum*, 721 F. Supp. 2d 85, 91 (D. Mass. 2010).

552. See 17 U.S.C. § 504(c)(1).

553. See 17 U.S.C. § 504(c)(2).

554. See *Sony BMG Music Ent. v. Tenenbaum*, 721 F. Supp. 2d 85, 121 (D. Mass. 2010).

555. See *id.* at 117.

556. See *Sony BMG Music Ent. v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011).

557. See *id.* at 493–96 ("At one point in time in 2004 alone, Tenenbaum had 1,153 songs on his 'shared-directory' on the Kazaa network."). He had also ignored stern warnings from his college and his father to stop illegal activity.

guest, and his own sisters.<sup>558</sup> Turning to the constitutional question, the court rejected the contention that the Supreme Court's *Feltner* decision—<sup>559</sup>which merely held pursuant to the Seventh Amendment that statutory damages are to be assessed by the jury—rendered the statutory damages provision unconstitutional.<sup>560</sup> The court also rejected two interpretive arguments, that statutory damages should not attach to consumer copying and require a showing of actual harm.<sup>561</sup> The Supreme Court denied review.<sup>562</sup> On remand before Judge Rya Zobel,<sup>563</sup> the court reinstated the \$675,000 award,<sup>564</sup> which the First Circuit affirmed.<sup>565</sup>

When asked about the Tenenbaum case after the jury verdict, Professor Lessig responded “we’ll see where I am in a year.”<sup>566</sup> After sixteen years, it does not appear that Professor Nesson’s ideas have aged well.

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The *Tenenbaum* saga illustrated the ethical problems of law professors wearing multiple hats and lawyers placing ideological motivations above a client’s best interests. By accounts from commentators on both sides of the copyleft/copyright divide, Professor Nesson’s handling of the case was deeply flawed.<sup>567</sup> Moreover, the suggestion

558. *See id.* at 495–96.

559. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

560. *Tenenbaum*, 660 F.3d at 496–97.

561. *See id.* at 497–503.

562. *Tenenbaum v. Sony BMG Music Ent.*, 566 U.S. 1017 (2012).

563. Judge Gertner retired from the bench in the interim.

564. *See Sony BMG Music Ent. v. Tenenbaum*, Civil Action No. 08-11447-RW/Z, 2012 WL 3639053 (D. Mass. Aug. 23, 2012).

565. *See Sony BMG Music Ent. v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013). Mr. Tenenbaum eventually discharged the debt in bankruptcy. *See Order of Discharge* (Doc. 14), Case 15-14315, U.S. Bankruptcy Court, D. Mass (filed Feb. 22, 2016), <https://archive.org/details/gov.uscourts.mab.462544/gov.uscourts.mab.462544.14.0.pdf>.

566. *See Schwartz*, *supra* note 507. Ironically, Professor Lessig dedicated the first edition of *Code* to “Charlie Nesson, whose every idea seems crazy—for about a year.” *See LESSIG, CODE*, *supra* note 135, at dedication page.

567. *See Debra Cassens Weiss, Harvard Law Prof Nesson on the Hook for Motion Cost in Downloading Trial*, ABA J. (Mar. 8, 2010) [https://www.abajournal.com/news/article/harvard\\_law\\_prof\\_nesson\\_on\\_the\\_hook\\_for\\_motion\\_cost\\_in\\_downloading\\_trial](https://www.abajournal.com/news/article/harvard_law_prof_nesson_on_the_hook_for_motion_cost_in_downloading_trial)

[[https://web.archive.org/web/20251104220054/https://www.abajournal.com/news/article/harvard\\_law\\_prof\\_nesson\\_on\\_the\\_hook\\_for\\_motion\\_cost\\_in\\_downloading\\_trial](https://web.archive.org/web/20251104220054/https://www.abajournal.com/news/article/harvard_law_prof_nesson_on_the_hook_for_motion_cost_in_downloading_trial)] (reporting that Judge Gertner ordered Tenenbaum and Nesson to pick up the costs of a motion to compel filed by the plaintiffs after Nesson posted the songs at issue in the case to the internet and that Judge Gertner accused Tenenbaum’s defense of leading a “chaotic trial, missing deadlines and ignoring rules, and tape-recording opposing counsel and the judge without permission”); Mike Masnick, *Judge Finalizes Tenenbaum Ruling, Trashes Nesson for Chaotically Bad Defense*, TECHDIRT (Dec. 7, 2009) <https://www.techdirt.com/2009/12/07/judge-finalizes-tenenbaum-ruling-trashes-nesson-for-chaotically-bad-defense/> [<https://web.archive.org/web/20251116193044/https://www.techdirt.com/2009/12/07/judge-finalizes-tenenbaum-ruling-trashes-nesson-for-chaotically-bad-defense/>] (Mike Masnick is a passionate copyleft

that immunizing or shielding filesharing from liability was akin to great civil rights struggles was open to question.<sup>568</sup> Mr. Tenenbaum was not interested in free speech; he was interested in free music.

#### D. RAMPANT PIRACY EXPANDS TO FILMS: THE CYBERLOCKER BATTLE

As greater internet bandwidth, processor speed, and storage capacity enabled the distribution of motion pictures quickly over the internet, new piracy channels emerged, notably rogue cyberlocker websites. MegaUpload became the most dominant and notorious such business.<sup>569</sup> Its activity proliferated as a result of its affiliate program, whereby MegaUpload offered uploaders commissions based on the number of downloads that their cyberlockers generated. Tech-savvy teenagers with time on their hands jumped at this opportunity by seeding links to their files on social media and chat networks. MegaUpload monetized downloads and streaming through advertising networks—such as Google’s AdSense—that served advertisements in conjunction with the pirated content.<sup>570</sup> At the height of its popularity, MegaUpload was the thirteenth most visited website (ahead of Netflix and the *New York Times*),

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journalist.); Mike Masnick, *Trainwreck From Team Tenenbaum*, TECHDIRT (Jul. 29, 2009) <https://www.techdirt.com/2009/07/29/trainwreck-from-team-tenenbaum/> [<https://web.archive.org/web/20251105190102/https://www.techdirt.com/2009/07/29/trainwreck-from-team-tenenbaum/>]; Mike Masnick, *No Surprise: Fair Use Rejected as Tenenbaum Defense*, TECHDIRT (Jul. 28, 2009) <https://www.techdirt.com/2009/07/28/no-surprise-fair-use-rejected-as-tenenbaum-defense/> [<https://web.archive.org/web/20221201011646/https://www.techdirt.com/2009/07/28/no-surprise-fair-use-rejected-as-tenenbaum-defense/>]; Howard Knopf, *The Tenenbaum Case: A Court Room Is Not a Class Room*, EXCESS COPYRIGHT (Aug. 9, 2009) <https://excesscopyright.blogspot.com/2009/08/tenenbaum-case-court-room-is-not-class.html> [<https://web.archive.org/web/20251105190721/https://excesscopyright.blogspot.com/2009/08/tenenbaum-case-court-room-is-not-class.html>] (concluding that “[g]iven the way things turned out, it’s probably just as well that nobody got to see this week of failure for Joel and the clearly shattered defense strategy that depended entirely on a far-fetched theory of fair use, Necker cubes, and crumbled styrofoam”); Nate Anderson, *Tenenbaum Fileswapping Case Gets Seriously Funky*, ARS TECHNICA (Feb. 27, 2009), <https://arstechnica.com/tech-policy/2009/02/while-the-bizarre-antics-and/> [<https://web.archive.org/web/20251105191000/https://arstechnica.com/tech-policy/2009/02/while-the-bizarre-antics-and/>]; Sheffner, *Copyleft Academics*, *supra* note 544 (“It has become a cliché of my coverage of the Joel Tenenbaum case to proclaim, ‘Just when you thought the Joel Tenenbaum case couldn’t get any wackier, Tenenbaum’s counsel, Harvard Law Professor Charles Nesson, has now gone off and done X . . .’ Well, just because it’s a cliché doesn’t mean it isn’t true.”).

568. See Peter S. Menell, *Filesharing Copyrighted Works Without Authorization: A Misguided Social Movement*, MEDIA INST. (Feb. 17, 2010) <https://www.mediainstitute.org/2010/02/17/filesharing-copyrighted-works-without-authorization-a-misguided-social-movement/> [<https://web.archive.org/web/20251105193107/https://www.mediainstitute.org/2010/02/17/filesharing-copyrighted-works-without-authorization-a-misguided-social-movement/>].

569. See *Megaupload*, WIKIPEDIA <https://en.wikipedia.org/wiki/Megaupload> [<https://web.archive.org/web/20251102041731/https://en.wikipedia.org/wiki/Megaupload>] (last visited Nov. 5, 2025).

570. Megaupload also monetized piracy through premium subscriptions that allowed users to bypass restrictions (such as slower download speeds or wait times) and gain faster, more convenient access to files.

hosting over twenty-five petabytes of user uploaded data and accounting for 4% of worldwide internet traffic.<sup>571</sup> Economics Professors Brett Danaher and Michael D. Smith determined that the MegaUpload shutdown in January 2012 resulted in a 6.8 to 8.5 percent increase in digital movie revenues.<sup>572</sup>

Rogue cyberlockers discouraged major motion picture studios from rolling out licensed content to the internet, reducing studios' revenue and limiting consumers' access to new films. The studios found it exceedingly difficult to combat this threat using existing tools. The DMCA safe harbors resulted in a game of whack-a-mole, with new rogue links appearing faster than the studios could file takedown notices. In addition, the foreign location of many rogue cyberlockers complicated direct enforcement actions.

Independent filmmakers were severely affected by rogue websites and the advertising networks used to monetize piracy. As a poignant example, in 2007, Ellen Seidler and Megan Siler financed and produced *And Then Came Lola*, a breakthrough lesbian romantic comedy that they believed could earn back their investment through DVD sales and authorized internet streaming and downloads. The film screened at more than 100 film festivals<sup>573</sup> and garnered glowing reviews.<sup>574</sup> Soon after its DVD release, however, sales quickly dried up as the film proliferated on pirate websites.

As a result of this piracy, Ms. Seidler shifted from filmmaker to anti-piracy forensics sleuth. Since she taught at UC Berkeley's Graduate School of Journalism, I reached out to hear her story.<sup>575</sup> When I met with Ms. Seidler in 2011, she explained

571. See Roger Parloff, *Megaupload and the Twilight of Copyright*, FORTUNE (Jul. 11, 2012) <https://fortune.com/2012/07/11/megaupload-and-the-twilight-of-copyright/> [<https://web.archive.org/web/20251105194738/https://fortune.com/2012/07/11/megaupload-and-the-twilight-of-copyright/>].

572. See Brett Danaher & Michael D. Smith, *Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales*, 33 INT'L J. INDUS. ORG. 1 (2014). Their data was available for peer review and replication studies.

573. See Joshua Johnson, *The Stop Online Piracy Debate*, KQED (Jan. 3, 2012), at 21:53–22:00, <https://www.kqed.org/forum/201201030900/the-stop-online-piracy-debate> [<https://web.archive.org/web/20251116193624/https://www.kqed.org/forum/201201030900/the-stop-online-piracy-debate>].

574. See Jim Teti, *Off to the Cinema: Q-Fest Arrives in Philly*, NBC PHILA. (Jul. 10, 2009) <http://www.nbcphiladelphia.com/the-scene/archive/One-of-a-Kind-Q-Fest-Opens-Today.html> [<https://web.archive.org/web/20251105201226/https://www.nbcphiladelphia.com/local/one-of-a-kind-q-fest-opens-today/1840195/>] (“[A] lesbian romp done right . . . Fast-paced, energetic and fun!”); Danielle Riendeau, *Review of “And Then Came Lola,”* AFTERELLEN (Aug. 24, 2009) <https://afterellen.com/review-of-and-then-came-lola/> [<https://web.archive.org/web/20251105202208/https://afterellen.com/review-of-and-then-came-lola/>] (“[A] sugar rush of a lesbian movie . . . [F]unny, campy and wildly imaginative.”).

575. Ms. Seidler was an accomplished filmmaker whose directing credits include the award-winning *Fighting for Our Lives—Facing AIDS in San Francisco*, narrated by Linda Hunt and appearing on PBS. See FAST GIRL FILMS, *Fighting for Our Lives—Facing AIDS in San Francisco* (YouTube, Feb. 22, 2011), <https://www.youtube.com/watch?v=IEAY03ZsiSs> [<https://web.archive.org/web/20251105202516/https://www.youtube.com/watch?v=IEAY03ZsiSs>];



that she was spending two to three hours per day ferreting out thousands of unauthorized links and using the DMCA's takedown system to stanch the unauthorized flow. She even found copies dubbed in foreign languages; such was the economic motivation for pirating films through cyberlockers. A lot of Ms. Seidler's efforts focused on Google, which was placing ads alongside unauthorized streams of her film. But no sooner did she request that a copy be taken down than more copies appeared on the same service. Ms. Seidler went from making independent films to speaking out about who profits from online piracy—developing videos about the economic drivers of piracy, blogging, maintaining a website devoted to the challenges facing filmmakers,<sup>576</sup> and appearing on radio talk shows to discuss the connection between piracy and profits.

After we met, Ms. Seidler appeared on National Public Radio's KQED Forum talk show along with Fred von Lohmann, then Senior Copyright Counsel at Google. Ms. Seidler expressed her frustration:<sup>577</sup>

[*Along Came Lola*] was quite successful in the film festival circuit. Then we released it on DVD and legitimate online outlets. Within twenty-four hours it was online in illegal form.

I was aware piracy was going to be a problem, but what shocked me was the extent and how rapidly that one link multiplied into hundreds then thousands. We stopped counting. I've documented over 50,000 download links and streams to our film thus far.

The thing that surprised me most was not just that the film was being pirated, but what I saw as driving the piracy—which is the monetization of stolen content. It's not the Pirate Bays of the world or the bit torrents, it's the cyberlockers and the business model that depends on stolen content.

With regard to Google, Mr. von Lohmann is talking about effort to cut off the money supply. But in the two years of dealing with this issue, every time I've approached Google about pirate web sites or ads by pirate web sites, they've done everything to avoid taking responsibility. They send DMCA notices to a web site called chillineffects.org, the implication that your DMCA notice is somehow chilling free speech, when the fact is that you as an artist are just asserting your legal rights. So I find it a little disingenuous to hear how concerned Google is about this when their ads are the most prominent across the web.

Fred von Lohmann responded:

We of course are very sorry that her film has suffered this fate. However, we've been very clear, including with the takedown notices we've received from Ms. Seidler, we take that

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Schuyler Velasco, *Pop-Up Piracy: Indie Filmmaker Speaks Out*, BACKSTAGE (Jul. 6, 2010), <http://www.backstage.com/news/pop-up-piracy-indie-filmmaker-speaks-out>.

576. See *Who Profits From Piracy?*, POP UP PIRATES, <http://popupirates.com/> [<https://web.archive.org/web/20251105203638/https://popupirates.com/>] (last visited Nov. 5, 2025); VOX INDIE: COPYRIGHT & CREATIVE CULTURE, <http://voxindie.org/> [<https://web.archive.org/web/20251026040555/http://voxindie.org/>] (last visited Nov. 5, 2025).

577. See Johnson, *The Stop Online Piracy Debate*, *supra* note 573, at 19:30–23:21.

material down. If someone tells us there's pirated content on a particular web page, we remove an ad from that page.

On our own initiative, we've blocked more than 25,000 web pages from receiving our ads. We did that without receiving a complaint. We get complaints for copyright infringement for far less, far far less than 1% of the pages that show our ads, and when we do we immediately take those ads down.

Jason Johnson, the Forum moderator, then asked Fred von Lohmann: "Would you be willing to connect with Ellen after the show is over? Maybe you can help her resolve whatever this is." To which Mr. von Lohmann responded: "Absolutely." When I followed up with Ms. Seidler several weeks later, she stated that she had not yet heard from Mr. von Lohmann.

Ms. Seidler's and the motion picture industry's chief complaint was that the profits for Google and other intermediaries from responding to whack-a-mole notices were worth more than implementing technology to address repeat offenders. The motion picture industry lobbied Congress to combat this new threat through stronger enforcement tools. The House's Stop Online Piracy Act ("SOPA") would have authorized federal prosecutors to seek court orders blocking foreign websites enabling or facilitating copyright infringement.<sup>578</sup> Such court orders could extend to online advertising networks and payment facilitators conducting business with such websites, as well as barring search engines from linking to such sites and requiring internet service providers to block access to such sites.<sup>579</sup>

The technology industry, as well as online enthusiasts, cyberlibertarians, and copyleft scholars, vehemently opposed this legislation. As in the *Grokster* case, Professor Mark Lemley took a leading role. He was quick to generate an academic paper, co-authored with Professors David Levine and David Post, asserting that SOPA would "break the Internet."<sup>580</sup>

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578. See H.R. 3261, 112th Cong. (2011); *Stop Online Piracy Act*, WIKIPEDIA [https://en.wikipedia.org/wiki/Stop\\_Online\\_Piracy\\_Act](https://en.wikipedia.org/wiki/Stop_Online_Piracy_Act) [[https://web.archive.org/web/20251011090250/https://en.wikipedia.org/wiki/Stop\\_Online\\_Piracy\\_Act](https://web.archive.org/web/20251011090250/https://en.wikipedia.org/wiki/Stop_Online_Piracy_Act)] (last visited Nov. 5, 2025).

579. See *id.* The legislation would also have established a notice and takedown process for intellectual property rights holders to seek similar relief if they were harmed by a website dedicated to infringement. As with the DMCA, payment facilitators and advertising networks could provide a counter notification, which would force the intellectual property rights holder to go to court to obtain relief. The Senate had a similar bill under consideration. See S. 968, 112th Cong. (2011); *PROTECT IP Act*, WIKIPEDIA [https://en.wikipedia.org/wiki/PROTECT\\_IP\\_Act](https://en.wikipedia.org/wiki/PROTECT_IP_Act) [[https://web.archive.org/web/20251012040747/https://en.wikipedia.org/wiki/PROTECT\\_IP\\_Act](https://web.archive.org/web/20251012040747/https://en.wikipedia.org/wiki/PROTECT_IP_Act)] (last visited Nov. 5, 2025).

580. See Mark Lemley, David S. Levine, & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (Dec. 19, 2011); see also Devin Coldewey, *Stanford Law Review: SOPA Unconstitutional, Would Break the Internet*, TECH CRUNCH (Dec. 19, 2011), <https://techcrunch.com/2011/12/19/stanford-law-review-sopa-unconstitutional-and-would-break-the-internet/> [<https://web.archive.org/web/20250313005143/https://techcrunch.com/2011/12/19/stanford-law-review-sopa-unconstitutional-and-would-break-the-internet/>].

The law firm with which Professor Lemley was associated represented Google at this time.<sup>581</sup> I am not aware that Professor Lemley billed Google or anyone else specifically for his work opposing SOPA and would not be surprised if he did not. That said, Google was funding a variety of Professor Lemley's research projects at the time.<sup>582</sup>

The "Don't Break the Internet" paper, as well as Professor Lemley's related activities,<sup>583</sup> were notable for exaggerated arguments and fearmongering.<sup>584</sup> The internet is based on the ARPANET, which was designed for the U.S. military in the late 1960s and early 1970s with a focus on ensuring that communication could continue even in the face of severe disruptions, such as a nuclear attack.<sup>585</sup> As Professor Paul Ohm noted, himself a staunch opponent of the legislation, "SOPA and PIPA probably would not have blown up the internet as we know it. . . . [T]he internet would've routed around [it]."<sup>586</sup> Furthermore, many of the anti-SOPA arguments were demonstrably wrong.<sup>587</sup> Many countries, including Australia, Austria, Finland, India,

581. See LEVY, *supra* note 124, at 366–67 (2011) (Professor Lemley was a partner at Durie, Tangri LLP at that time.).

582. See *Google Academics Inc., TECH TRANSPARENCY PROJECT* (Jul. 11, 2017) <https://www.techtransparencyproject.org/articles/google-academics-inc> [<https://web.archive.org/web/20251105211958/https://www.techtransparencyproject.org/articles/google-academics-inc>] (listing thirteen research projects involving Professor Lemley funded by Google). One of those projects is *Intellectual Property in the New Technological Age*, see *supra*, Section I(A)(5). I was unaware of any such funding until I came across this database. Just to be clear, I have never been funded by Google.

583. See Mark Lemley, *Don't Break the Internet*, HUFFINGTON POST (Dec. 21, 2011), [https://www.huffpost.com/entry/protect-ip-act\\_b\\_1162702](https://www.huffpost.com/entry/protect-ip-act_b_1162702) [[https://web.archive.org/web/20251105213840/https://www.huffpost.com/entry/protect-ip-act\\_b\\_1162702](https://web.archive.org/web/20251105213840/https://www.huffpost.com/entry/protect-ip-act_b_1162702)].

584. See Natalie Wolchover, *Could the Internet Ever Be Destroyed?*, LIVESCIENCE (Jan. 20, 2012) <http://www.livescience.com/18030-internet-destroyed.html> [<https://web.archive.org/web/20251105225604/https://www.livescience.com/18030-internet-destroyed.html>] (noting the redundancy and resilience of the internet); JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET: AND HOW TO STOP IT* 70–73 (2008) (emphasizing the Internet's adaptability).

585. See *ARPANET*, WIKIPEDIA <https://en.wikipedia.org/wiki/ARPANET> [<https://web.archive.org/web/20251028135005/https://en.wikipedia.org/wiki/ARPANET>] (last visited Nov. 5, 2025) (discussing the importance of a decentralized network architecture (no single point of failure and multiple paths for data), packet-switching technology (ensuring robustness and dynamic routing), and error detection and correction, distributed control, resilience to attack of breakdown, and redundancy in communication).

586. Paul Ohm, *We Couldn't Kill the Internet If We Tried*, 130 HARV. L. REV. F. 79 (2016).

587. See Jonathan Bailey, *The Not-So-Great SOPA Debate*, PLAGIARISM TODAY (Dec. 15, 2011), <https://www.plagiarismtoday.com/2011/12/15/the-not-so-great-sopa-debate> [<https://web.archive.org/web/20251116200158/https://www.plagiarismtoday.com/2011/12/15/the-not-so-great-sopa-debate/>] (observing that as a result of exaggerated rhetoric, "many believe that [SOPA] would be the end of sites like Reddit,[] YouTube and Twitter among others, even though all of these sites are based in the U.S. and wouldn't be targeted by the site blocking provisions at all" and could land Justin Bieber in jail).

Sweden, and the United Kingdom, blocked The Pirate Bay without breaking the internet.<sup>588</sup> In March 2019, the European Union passed site-blocking measures.<sup>589</sup>

I was sympathetic with concerns raised on both sides of the debate. The legislation was strong medicine for a serious problem. SOPA would have shifted more of the onus onto Google's search engine and advertising network, as well as other internet intermediaries, which might have been more effective, efficient, and equitable than the DMCA whack-a-mole approach. By that time, Google was one of the most successful firms in the world. Domain blocking of the most egregious actors might have deterred the rogue pirate sites without seriously impinging on legitimate activity or significantly raising intermediary costs. And it would have reduced the costs of dealing with takedown notices. But it would have cut into Google's robust web-based advertising business.

SOPA stalled following a historic "Web Blockout" orchestrated by a large coalition of websites in January 2012.<sup>590</sup> The concern abated as a result of the criminal seizure of MegaUpload shortly thereafter,<sup>591</sup> followed quickly by the curtailment of other cyberlocker websites.<sup>592</sup> Interestingly, Silicon Valley Representative Zoe Lofgren, one

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588. See *Countries Blocking Access to The Pirate Bay*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Countries\\_blocking\\_access\\_to\\_The\\_Pirate\\_Bay](https://en.wikipedia.org/wiki/Countries_blocking_access_to_The_Pirate_Bay) [https://web.archive.org/web/20251105164341/https://en.wikipedia.org/wiki/Countries\_blocking\_access\_to\_The\_Pirate\_Bay] (last visited Nov. 5, 2025).

589. See Jonathan Bailey, *EU Passes Copyright Reform—Five Reasons It Went Different from SOPA/PIPA*, PLAGIARISM TODAY (Mar. 26, 2019), <https://www.plagiarismtoday.com/2019/03/26/eu-passes-copyright-reform-5-reasons-it-was-different-from-sopa-pipa/> [https://web.archive.org/web/20251105231415/https://www.plagiarismtoday.com/2019/03/26/eu-passes-copyright-reform-5-reasons-it-was-different-from-sopa-pipa/].

590. See Amy Goodman, *The SOPA Blackout Protest Makes History*, GUARDIAN (Jan. 18, 2012), <http://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history>

[https://web.archive.org/web/20251105231746/https://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/sopa-blackout-protest-makes-history]; *Protests against SOPA and PIPA*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Protests\\_against\\_SOPA\\_and\\_PIPA](https://en.wikipedia.org/wiki/Protests_against_SOPA_and_PIPA)

[https://web.archive.org/web/20251001060453/https://en.wikipedia.org/wiki/Protests\_against\_SOPA\_and\_PIPA] (last visited Nov. 5, 2025). Congress did ultimately enact legislation picking up on another part of SOPA. See Protecting Lawful Streaming Act, Pub. L. No. 116-260, 18 U.S.C. § 2319C (increasing criminal penalties for those who, willfully and for commercial advantage or private financial gain, illegally stream copyrighted material).

591. See *Seizure of Megaupload*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Seizure\\_of\\_Megaupload](https://en.wikipedia.org/wiki/Seizure_of_Megaupload) [https://web.archive.org/web/20251004072125/https://en.wikipedia.org/wiki/Seizure\_of\_Megaupload] (last visited Nov. 5, 2025).

592. See Andy Maxwell, *Cyberlocker Ecosystem Shocked as Big Players Take Drastic Action*, TORRENT FREAK (Jan. 23, 2012), <https://torrentfreak.com/cyberlocker-ecosystem-shocked-as-big-players-take-dramatic-action-120123/>

[https://web.archive.org/web/20251105232401/https://torrentfreak.com/cyberlocker-ecosystem-shocked-as-big-players-take-dramatic-action-120123/].

of SOPA's staunchest opponents,<sup>593</sup> sponsored site blocking legislation in 2025,<sup>594</sup> indicating that the political climate has changed and Silicon Valley now favors subscription-based models over advertising-driven, piracy-based models.

I am not suggesting academic scholars should not participate in policy debates. That said, they should not exaggerate, especially when they or law firms for which they work represent clients who benefit from such exaggeration. The legal academy ought to be a source of reliable, independent, transparent, well-supported analysis, not zealous advocacy.

### E. THE COPYRIGHT LEVEE HOLDS: LICENSING, PAYWALLS, AND THE CELESTIAL JUKEBOX

After a decade of rampant piracy of copyrighted works, a constructive symbiosis between internet technology and content owners emerged.<sup>595</sup> Judicial adherence to the rule of law played a key role in the realization of the DMCA's goals. Spotify, introduced in parts of Europe in 2006 and launched in the United States in 2011, offered music fans a vast authorized catalog on a wide range of devices through a seamless, well-designed user interface featuring playlists, "radio" stations, and social media integration.<sup>596</sup> Spotify paid out a high percentage of the subscription and other revenue streams to copyright owners based on users' streaming of content. User growth has skyrocketed, with Spotify now serving 675 million monthly users comprising 263 million paying

593. See Anthony Falzone, *Opposition to SOPA Continues to Grow*, STAN. CTR. FOR INTERNET & SOC'Y (Nov. 15, 2011), <https://cyberlaw.stanford.edu/blog/2011/11/opposition-sopa-continues-grow/> [<https://web.archive.org/web/20251105235131/https://cyberlaw.stanford.edu/blog/2011/11/opposition-sopa-continues-grow/>] (contending that SOPA would cause "serious and long term damage to the technology industry").

594. See Jon Brodtkin, *Democrat Teams Up with Movie Industry to Propose Website-Blocking Law*, ARS TECHNICA (Jan. 29, 2025, 5:45 PM), <https://arstechnica.com/tech-policy/2025/01/movie-industry-loves-bill-that-would-force-isps-to-block-piracy-websites/> [<https://web.archive.org/web/20251105235809/https://arstechnica.com/tech-policy/2025/01/movie-industry-loves-bill-that-would-force-isps-to-block-piracy-websites/>]; Jonathan Bailey, *Site Blocking Returns: Is it the New SOPA/PIPA?*, PLAGIARISM TODAY (Jan. 30, 2025), <https://www.plagiarismtoday.com/2025/01/30/site-blocking-returns-is-it-the-new-sopa-pipa/> [<https://web.archive.org/web/20251106003632/https://www.plagiarismtoday.com/2025/01/30/site-blocking-returns-is-it-the-new-sopa-pipa/>].

595. See Peter S. Menell, *If Silicon Valley Builds Legal Celestial Jukeboxes, Will Music Fans Return to the Market?*, MEDIA INST. (Jul. 26, 2011), <http://www.mediainstitute.org/IPI/2011/072611.php> [<https://web.archive.org/web/20251106004003/https://www.mediainstitute.org/2011/07/26/if-silicon-valley-builds-legal-celestial-jukeboxes-will-music-fans-return-to-the-market/>]; Mark F. Schultz, *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 86–87 (2009); Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J.L. & ARTS 375 (2009).

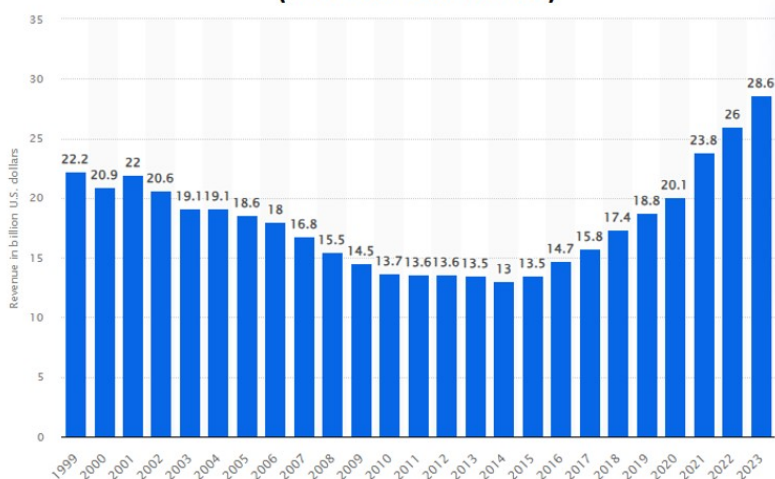
596. See *Spotify*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Spotify> [<https://web.archive.org/web/20251103111048/https://en.wikipedia.org/wiki/Spotify>] (last visited Nov. 5, 2025).

subscribers.<sup>597</sup> Other authorized streaming music platforms include Pandora, Apple Music, Amazon Music, and YouTube Music.<sup>598</sup>

Contrary to copyleft prognostications, celestial jukeboxes supplanted P2P services for the vast majority of music fans. The shift began in earnest as the enforcement efforts took hold, although it is likely that the authorized services would have gained traction sooner had the Supreme Court implemented a more easily provable indirect liability standard for dealing with willful blindness of parasitic services.<sup>599</sup> The delay in shutting down LimeWire, Grooveshark, and isoHunt delayed migration to authorized services and resulted in more end-user lawsuits. As reflected in Figure 3, global music revenue has rebounded from its 2014 nadir of \$13 billion to \$28.6 billion in 2023 (2023 dollars).<sup>600</sup>

Figure 3

Global recorded music revenue from 1999 to 2023  
(in billion U.S. dollars)



Source: statista

597. See *id.*

598. See *Comparison of Music Streaming Services*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Comparison\\_of\\_music\\_streaming\\_services](https://en.wikipedia.org/wiki/Comparison_of_music_streaming_services) [[https://web.archive.org/web/20250929003949/https://en.wikipedia.org/wiki/Comparison\\_of\\_music\\_streaming\\_services](https://web.archive.org/web/20250929003949/https://en.wikipedia.org/wiki/Comparison_of_music_streaming_services)] (last visited Nov. 5, 2025).

599. Cf. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011) (holding that willful blindness suffices to show actual knowledge of infringement).

600. Chart created using Statista, <https://www.statista.com>, (accessed Dec. 12, 2024).]

As the authorized music streaming marketplace took hold, record labels, music publishers, recording artists, songwriters, producers, and distribution platforms went to Congress to reform the legislative framework for music licensing.<sup>601</sup> The Music Modernization Act of 2018 updated statutory licensing to more fairly distribute licensing revenue to creators and make the administration of compulsory licensing more efficient for digital music providers.<sup>602</sup>

A similar symbiosis occurred in the audio-visual distribution marketplace. As broadband capacity expanded and enforcement against cyberlockers took hold, authorized video streaming services took off. As reflected in Figure 4, subscription video-on-demand grew from \$1.6 billion in 2011 to over \$37 billion in 2023. Netflix led the way, drawing on its DVD-by-mail movie rental service launched in 1997.<sup>603</sup> It now has over 300 million subscribers.<sup>604</sup> Studio-owned services (such as Hulu, Disney+, HBO Max), Apple, Amazon Prime, and YouTube Premium have filled out the top tier of such services, with over 100 million subscribers.<sup>605</sup> The development of the authorized video streaming marketplace fueled an explosion of scripted original series, growing from 288 in 2012 to 600 a decade later.<sup>606</sup> Authorized streaming platforms

601. See *Senate Passes Music Modernization Act*, VARIETY (Sep. 28, 2018), <https://variety.com/2018/music/news/senate-passes-music-modernization-act-1202947518/> [<https://web.archive.org/web/20251106151811/https://variety.com/2018/music/news/senate-passes-music-modernization-act-1202947518/>]. The legislation did not, and could not, satisfy all of the interested parties, but achieved a widely acceptable compromise. See Tanner J. Kramp, *Rage Against the Machine: Why the Music Modernization Act Is but the First Step in Musicians' Battle to Reclaim the Value of their Works*, 64 B.C. L. REV. 219, 238 (2023).

602. Title I established a blanket licensing system for digital music providers to make and distribute digital phonorecord deliveries (e.g., permanent downloads, limited downloads, or interactive streams). Title II brought pre-1972 sound recordings partially into the federal copyright system and provides federal remedies for unauthorized use of sound recordings fixed before February 15, 1972. Title III allowed music producers, mixers, and sound engineers to receive royalties collected for uses of sound recordings. See Music Modernization Act, Pub. L. 115–264, 132 Stat. 3676; U.S. COPYRIGHT OFF., *The Music Modernization Act*, <https://www.copyright.gov/music-modernization/> [<https://web.archive.org/web/20251003222320/https://www.copyright.gov/music-modernization/>] (last visited Nov. 16, 2025).

603. See *Netflix*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Netflix> [<https://web.archive.org/web/20251106152604/https://en.wikipedia.org/wiki/Netflix>] (last visited Nov. 6, 2025).

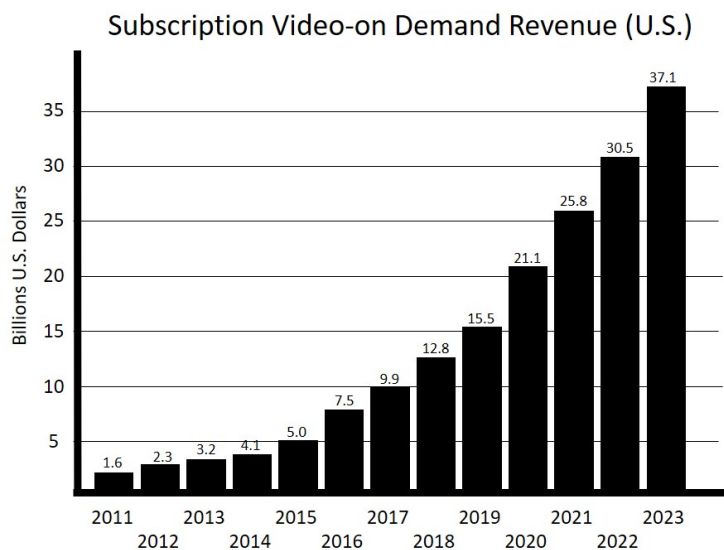
604. See *List of Streaming Media Services*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_streaming\\_media\\_services](https://en.wikipedia.org/wiki/List_of_streaming_media_services) [[https://web.archive.org/web/20251106152805/https://en.wikipedia.org/wiki/List\\_of\\_streaming\\_media\\_services](https://web.archive.org/web/20251106152805/https://en.wikipedia.org/wiki/List_of_streaming_media_services)] (last visited Nov. 6, 2025).

605. See *id.*

606. See Michael Schneider, *The End of Peak TV: 516 Original Scripted Series Aired in 2023, a 14% Dip, FX's John Landgraf Says*, VARIETY (Feb. 9, 2024), <https://variety.com/2024/tv/news/peak-tv-tally-original-scripted-series-aired-2023-1235902886/> [<https://web.archive.org/web/20251116201254/https://variety.com/2024/tv/news/peak-tv-tally-original-scripted-series-aired-2023-1235902886/>] (An industry expert opined that the 2023 production dip reflected “new business realities of th[e] maturing streaming age” as well as writer and actor strikes.); Katie Kilkenny, *Would You Do It Again? A Year After Strikes, Hollywood Reckons with the Aftermath*, HOLLYWOOD REP. (July 29,

have fueled massive increases in video production and vastly increased consumer access to a wide range of programming from around the world. The unleashing of this torrent of professional creativity vividly illustrates the way in which a well-functioning copyright system serves as an engine of free expression and consumer welfare.

**Figure 4**<sup>607</sup>



Source: statista

The development of authorized subscription-based content channels has also supported news media, a vital democratic, cultural, and social institution. During the first decade of the Internet Age, many newspapers pursued a free online distribution business model believing that online advertising revenue could support their revenue

2024), <https://www.hollywoodreporter.com/business/business-news/actors-writers-strikes-one-year-later-1235950418/>

[<https://web.archive.org/web/20251116201501/https://www.hollywoodreporter.com/business/business-news/actors-writers-strikes-one-year-later-1235950418/>].

607. Chart created using Statista, <https://www.statista.com>, (accessed Dec. 12, 2024).



base.<sup>608</sup> By contrast, the *Wall Street Journal* adopted a paywall approach.<sup>609</sup> As the internet revolution unfolded, the free distribution model lagged, causing even the *New York Times* to significantly cut its newsroom staff.<sup>610</sup> As Figure 5 illustrates, its stock price fell to a dangerously low level by 2009. In 2011, the publisher introduced a tiered paywall, which greatly enhanced the paper's economic viability.<sup>611</sup>

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608. Many in the copyleft movement believed that the “freemium” model, on which Google’s search engine and many other internet businesses were based, was the key to success in the Internet Age. See CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* (2009). Not everyone agreed. See Malcolm Gladwell, *Priced to Sell: Is Free the Future?*, *NEW YORKER* (June 29, 2009), <https://www.newyorker.com/magazine/2009/07/06/priced-to-sell> [<https://web.archive.org/web/20251116201638/https://www.newyorker.com/magazine/2009/07/06/priced-to-sell>].

609. See Jeremy W. Peters, *The Times Announces Digital Subscription Plan*, *N.Y. TIMES* (Mar. 17, 2011), <https://www.nytimes.com/2011/03/18/business/media/18times.html> [<https://web.archive.org/web/20251106182325/https://www.nytimes.com/2011/03/18/business/media/18times.html>].

610. See Richard Pérez-Peña, *Times Says It Will Cut 100 Newsroom Jobs*, *N.Y. TIMES* (Oct. 19, 2009), <https://archive.nytimes.com/mediadecoder.blogs.nytimes.com/2009/10/19/times-says-it-will-cut-100-newsroom-jobs/> [<https://web.archive.org/web/20251106170118/https://archive.nytimes.com/mediadecoder.blogs.nytimes.com/2009/10/19/times-says-it-will-cut-100-newsroom-jobs/>] (reporting that the *New York Times* was planning to cut 8% of its newsroom positions, mirroring a similar cut in 2008, and noting that the paper made “much deeper reductions in other, non-newsroom departments, where layoffs have occurred several times”).

611. See Peters, *supra* note 609.

Figure 5<sup>612</sup>

These trends demonstrate that effective copyright enforcement in conjunction with symbiotic technological change and fair pricing of content leads to a far better cultural, social, economic, and political ecosystem than a promiscuous filesharing regime. The judicial rejection of the copyleft legal strategy was critical to a balanced market-based equilibrium. It further shows the folly of the “information wants to be free” mantra.

Thus, by 2010, the premises on which the copyleft movement was based—that enforcing copyright in cyberspace would undermine freedom and was unworkable—had been discredited. Congress’s goals in enacting the DMCA were approaching fruition. Content owners had warmed to releasing their content through a growing marketplace of streaming services, and web businesses that observed the safe harbor guardrails were shielded from crushing liability. Had rampant piracy continued, this explosion of creative energy would have been stifled.

In addition, the emergence of digital jukeboxes led to a rapid and substantial shift in the enthusiasm for “free culture” among America’s youth. The “Students for Free Culture” movement, begun in 2003 near the height of P2P filesharing and following

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612. Source: New York Stock Exchange (accessed Mar. 7, 2025).

the release of Professor Lessig's *Free Culture* book,<sup>613</sup> vanished by the decade's end.<sup>614</sup> It appears that a sizable portion of America's youth were less enthusiastic about free as in speech than reasonably priced services for high-quality content with good user interfaces and no risk of malware and piracy enforcement.<sup>615</sup>

We can be thankful that the Supreme Court did not immunize Corley or Grokster, that the Copyright Office recognized the legislative basis for the making available right, and that filesharers faced non-trivial liability exposure. The celestial jukeboxes that emerged provided both access and incentives. Outside of legal academia and some online pockets, civil disobedience has largely abated.

### III. RECONCILING "FREE CULTURE" AND COPYRIGHT PROTECTION: FITTING PROFESSIONAL CREATORS AND USERS INTO THE DIGITAL ECOSYSTEM

Beyond the battle over the distribution of entire copyrighted works, the digital revolution generated a second battlefield over copyright law's effects on the control and autonomy of creators and users, including creators of user-generated content ("UGC"). It is in this area that I align more closely with copyleft institutional innovations (especially the Creative Commons) and normative insights. Nonetheless, I question conflation of interpretive and normative analysis and disregard for the rule of law and the legislative role by many copyright scholars.

In the Analog Age, technology constrained the ability of users to interact with expressive works. Vinyl records had one mode: playback. Movies were released to theaters. Television shows were viewed at designated times. As noted earlier, advances in consumer technologies beginning in the 1970s increasingly afforded users unprecedented capability to edit, repurpose, and remix copyrighted works.<sup>616</sup> The advent of home recording technology—audio and later video (home video cameras, and followed by camcorders and mobile phones with video cameras)—gave consumers control over when and how they experienced copyrighted works and empowered amateur musicians and filmmakers to produce their own sound recordings and films.

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613. See LESSIG, *FREE CULTURE*, *supra* note 205.

614. See *Students for Free Culture*, *supra* note 221; see also *YouTomb*, WIKIPEDIA, <https://en.m.wikipedia.org/wiki/YouTomb> [<https://web.archive.org/web/20251106182600/https://en.wikipedia.org/wiki/YouTomb>] (last visited Nov. 6, 2025) (describing a short-lived project undertaken by the MIT chapter of Students for Free Culture tracking videos taken down from YouTube).

615. The copyleft movement remains in various online communities but is no longer a focus for a wide swath of youth culture for which the celestial jukeboxes have sated their desires.

616. See *supra* Section I(B)(1)(a)(i).

Steven Spielberg, for example, developed his eye and passion for filmmaking at a young age using these technologies.<sup>617</sup>

Advances in digital technology—from the introduction of unencrypted CDs to microcomputer CD burners, audio compression technology (MP3),<sup>618</sup> portable digital music players, digital music recording and editing tools, advances in camcorders and video formats, graphics presentation tools, and video editing tools—accelerated the empowerment of both consumers and users to configure creative works.<sup>619</sup> The internet enabled users to share their works with vast audiences.

The dawning of this new age led commentators and scholars to see copyright protection as an impediment to cultural and social progress, self-realization, and self-actualization. Beyond John Perry Barlow's calls for defenestrating copyright in cyberspace, legal scholars formulated a new vision and path for copyright law. They explored ways in which copyright doctrines, such as fair use, and the First Amendment could be harnessed to support consumer and user interests, particularly in non-commercial activities. Professor Jessica Litman asserted that copyright law's complexity and rigidity resulted from non-commercial consumers and users of copyrighted works not being represented in the drafting of copyright law.<sup>620</sup> Rebecca Tushnet, while still in law school, questioned copyright restrictions on fan fiction.<sup>621</sup>

Synthesizing these themes, in 2004 Professor Lawrence Lessig published a broadside counter-narrative to copyright protection in the Internet Age.<sup>622</sup> With charismatic style, populist appeal, anecdotes, and exaggeration rivaling his "Free Mickey" campaign,<sup>623</sup> Professor Lessig embarked on a campaign espousing "free culture" and attacking "Big Media" for using technology to lock down culture and control creativity.<sup>624</sup> His popular press book began by analogizing the need to reconstitute copyright in the Internet Age to the invention of the airplane on the ancient common law doctrine that ownership of land extended to the heavens.

617. See Spielberg, IMDB, <https://www.imdb.com/title/tt7133092/> [<https://web.archive.org/web/20251106183009/https://www.imdb.com/title/tt7133092/>] (last visited Nov. 6, 2025) (2017 documentary about Spielberg's life); *The Fabelmans*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Fabelmans](https://en.wikipedia.org/wiki/The_Fabelmans) [[https://web.archive.org/web/20251106183258/https://en.wikipedia.org/wiki/The\\_Fabelmans](https://web.archive.org/web/20251106183258/https://en.wikipedia.org/wiki/The_Fabelmans)] (last visited Nov. 6, 2025) (dramatizing Spielberg's early life and beginnings as a filmmaker).

618. See STEPHEN WITT, *HOW MUSIC GOT FREE: A STORY OF OBSESSION AND INVENTION* (2016) (chronicling the story of audio compression technology).

619. See ARAM SINNREICH, *MASHED UP: MUSIC, TECHNOLOGY, AND THE RISE OF CONFIGURABLE CULTURE* (2010).

620. Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22–23 (1996).

621. See Tushnet, *supra* note 132 (articulating a fair use defense for non-commercial fan fiction authors).

622. See LESSIG, *FREE CULTURE*, *supra* note 205.

623. See *supra* Section I(B)(3).

624. See *supra* text accompanying notes 221–225.

Professor Lessig invoked Justice William O. Douglas's declaration that "[c]ommon sense revolts at the idea."<sup>625</sup>

This point of departure, however, was an analogy too far. The copyright protections that Professor Lessig revolted against were not obsolete common law doctrines. Congress had only recently updated copyright law for the digital millennium. Yet Professor Lessig viewed broad derivative works rights, the compromises surrounding digital rights management and ISP safe harbors, and permissions culture as anathema to creativity:

The focus of the [pre-internet] law was on commercial creativity. At first slightly, then quite extensively, the law protected the incentives of creators by granting them exclusive rights to their creative work, so that they could sell those exclusive rights in a commercial marketplace. . . . But in no sense was it dominant within our tradition. It was instead just one part, a controlled part, balanced with the free.

This rough divide between the free and the controlled has now been erased. The Internet has set the stage for this erasure and, pushed by big media, the law has now affected it. For the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the law, which has expanded to draw within its control a vast amount of culture and creativity that it never reached before. The technology that preserved the balance of our history—between uses of our culture that were free and uses of our culture that were only upon permission—has been undone. The consequence is that we are less and less a free culture, more and more a permission culture.<sup>626</sup>

As with Professor Lessig's attack on copyright term extension and support for P2P services, this populist polemic generated a lot of heat but shed little light on how the cultural and technological ecosystems would evolve. As in those battles, Professor Lessig's dire predictions were hasty, exaggerated, and largely unsound. His assertion that Hollywood was imperiling free culture was open to question even by his own account.<sup>627</sup> Professor Lessig doubled down on his pessimism four years later, even as new institutions, symbiotic technologies, robust licensing, and a norm of tolerated use for non-commercial fan works gained momentum.<sup>628</sup>

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625. See *U.S. v. Causby*, 328 U.S. 256, 261 (1946) (rejecting a takings claim based on the effects of air traffic over a chicken farm resulting from flights of military aircraft over respondents' land at low altitudes).

626. See LESSIG, *FREE CULTURE*, *supra* note 205, at 8 (footnotes omitted).

627. See Julia D. Mahoney, *Lawrence Lessig's Dystopian Vision*, 90 VA. L. REV. 2305, 2307–09 (2004) (reviewing LESSIG, *FREE CULTURE*, *supra* note 205) (commenting that Lessig's book "actually portrays a world that should elicit cautious optimism rather than fear of impending catastrophe," noting that "[b]y Lessig's own account, the expansion of the Internet has resulted in many examples that dispel his assertion "that American culture is in grave peril"); Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1267 (2008) (opining that "amateur culture . . . will thrive even in the presence of strong property rights").

628. See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

A key part of the problem was that Professor Lessig (and much of the copyleft community) viewed the internet from the standpoint of companies building technology, largely to the exclusion of those who create and the companies producing content that would be delivered over the internet. By contrast, the promise of the internet lay in mediating the Silicon Valley/Hollywood divide. A steady flow of high-quality entertainment, news, sports, and other cultural products was critical to the internet's success. Convergence through collaboration and licensing struck me as a promising path forward, although I also saw opportunities for copyright reform.<sup>629</sup>

A second and related problem with the copyleft's approach to the free culture/copyright protection controversy was the conflation of interpretive and normative analysis in both scholarship and amicus briefs. We see that most clearly in the battle over the scope of the fair use doctrine.

### A. MARKET INSTITUTIONS

The copyright law is built upon market institutions. The drafters of the 1976 Act stated the authors' rights in "broad terms" because "it is generally true . . . that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense."<sup>630</sup> Such licensing covers a broad spectrum of activity, from individual transactions—such as the licensing of a book for a film adaptation and authorization for the use of a photograph to prepare a derivative work—to blanket licensing of public performance rights of musical compositions, licensing enterprises (such as Getty Images and the Copyright Clearance Center), and celestial jukeboxes (such as Spotify and Netflix). In addition, market institutions operate through insurance, enforcement choices, and industry-wide best practices and norms.

#### 1. Pre-Authorization: PROs and the Creative Commons

The development of ASCAP and other performance rights organizations<sup>631</sup> illustrates the power of market forces to organize economic activity for the benefit of authors, performance venues, and the public.<sup>632</sup> ASCAP, BMI, SESAC, and a few other performance rights organizations grant licenses to dance halls, radio stations,

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629. See *infra* Section III(C).

630. See *supra* text accompanying note 491–492 (quoting the SUPPLEMENTARY REPORT).

631. See *Performance Rights Organisation*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Performance\\_rights\\_organisation](https://en.wikipedia.org/wiki/Performance_rights_organisation) [[https://web.archive.org/web/20251106184113/https://en.wikipedia.org/wiki/Performance\\_rights\\_organisation](https://web.archive.org/web/20251106184113/https://en.wikipedia.org/wiki/Performance_rights_organisation)] (last visited Nov. 6, 2025).

632. See *Merges*, *supra* note 308.

webcasters, restaurants, yoga studios, and countless other performance venues to publicly perform vast libraries of musical compositions. The venues do not need to negotiate the deal points, and the pricing is well-calibrated to work for the vast range of performance businesses. Judicial oversight provides additional safety valves. These collective rights organizations substantially reduce transaction costs while affording fair compensation to composers. Subject to antitrust constraints, such organizations avoid many of the problems of governmental allocation institutions. Such organizations, however, often take time to develop and have to guard against corrupting influences.

As discussed previously, the open source community innovated the use of pre-authorized licenses as a way of promoting its goals of open software development.<sup>633</sup> These licenses range from the Free Software Foundation's highly restrictive GPL model to permissive models such as the Apache, BSD, and MIT open source licenses.<sup>634</sup>

Drawing on such models, in 2001 Professor Lawrence Lessig, computer science Professor Hal Abelson, and Eric Eldred founded the Creative Commons (CC), a standardized system for tagging digital files with pre-authorized licenses.<sup>635</sup> Unlike the GPL model, the Creative Commons opted for a highly permissive approach, affording creators a broad range of default options: waiver of rights (CC0), attribution (BY), authorization for editing (or remixing) (preparation of derivative works) (ND), authorization for commercial use (NC), and requirement to share alike (SA).<sup>636</sup> There are currently over one billion works across the internet that use CC licenses, spanning text, audio, and images, although many are not pre-authorized for commercial derivative uses.<sup>637</sup> While owners of copyrighted works using CC licenses are often considered to be "copyleft," the majority of image works nonetheless require attribution and impose restrictions on how the content is used and for what purposes. It is more accurate to characterize the majority of these licenses as promotional: you may use these images for non-commercial purposes so long as you provide reasonable attribution, but you may not use these images for commercial purposes without express authorization.

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633. See *supra* Section I(B)(1)(b).

634. See *Open Source License Comparison Grid*, CARNEGIE MELLON U., <https://www.cmu.edu/cttec/forms/opensourcelicensegridv1.pdf> [<https://web.archive.org/web/20250709004029/https://www.cmu.edu/cttec/forms/opensourcelicensegridv1.pdf>] (last visited Nov. 6, 2025).

635. See *Creative Commons*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Creative\\_Commons](https://en.wikipedia.org/wiki/Creative_Commons) [[https://web.archive.org/web/20251106190544/https://en.wikipedia.org/wiki/Creative\\_Commons](https://web.archive.org/web/20251106190544/https://en.wikipedia.org/wiki/Creative_Commons)] (last visited Nov. 6, 2025).

636. See *About CC Licenses*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work/ccllicenses/> [<https://web.archive.org/web/20251206195643/https://creativecommons.org/share-your-work/ccllicenses/>] (last visited Dec. 6, 2025).

637. See Vinith Suriyakumar et al., *The Revealed Preferences of Pre-authorized Licenses and Their Ethical Implications for Generative Models*, *Proceedings of the 41st International Conference on Machine Learning, Vienna, Austria*, PMLR 235 (2024) (finding that well less than half of 700 million CC image works pre-authorize commercial derivative uses).

For this reason, the Creative Commons has been extremely valuable for academic and non-profit uses, such as Wikipedia, but less generative for commercial uses.

## 2. Insurance

Where filmmakers and other content creators need to raise funds for production, markets can restrict creative freedom due to the risk aversion of financiers. Typical content finance deals require producers to obtain errors and omission (E&O) insurance for these projects. Risk aversion is especially strong among independent artists who do not have the means to litigate expensive copyright claims.<sup>638</sup>

Prior to 2007, standard insurance policies for film projects specifically excluded coverage for the use of any copyrighted material for which the insured did not have a written release.<sup>639</sup> The major insurers began offering a “fair use rider” in 2007, although the coverage requires clearance of clips by an approved clearance attorney, can be expensive, and can come with additional restrictions.<sup>640</sup>

## 3. Social Norm–Based Institutions

Of perhaps greatest importance for UGC works, most content companies—including owners of the most popular commercial works—have implemented formal and informal permissive copyright enforcement policies, which Professor Tim Wu called “tolerated use.”<sup>641</sup> As all manner of websites emerged as the internet took off, copyright owners soon realized that there was no way for them to police the proliferation of fan websites and UGC works that technically infringed their

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638. See PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2004) (exploring the copyright-clearance challenges faced by documentary filmmakers); MICHAEL C. DONALDSON, *CLEARANCE AND COPYRIGHT* 29 (3d ed. 2008) (“Even documentaries, which are usually in the public interest, should not cavalierly incorporate uncleared footage from the films of others. Clear your film clips with a license or solid fair-use opinion from an attorney approved by the E&O insurance companies in advance because lawsuits are expensive. It can be even more expensive to remove a section of your film at some point in the future if a court rules against you.”); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882 (2007) (explaining that risk aversion and user caution create licensing customs that reduce the perceived scope of permissible uses).

639. See DONALDSON, *supra* note 638, at 29, 363–67.

640. See *id.* at 365 (noting that the Media/Professional policy requires a letter from the Stanford Fair Use Project stating that the use of unlicensed material meets the fair use criteria set forth in the Documentary Filmmakers’ Statement of Best Practices in Fair Use and that the Stanford Fair Use Project would defend any copyright infringement claim relating to the unlicensed materials on a pro bono basis).

641. See Tim Wu, *Tolerated Use*, 31 *COLUM. J.L. & ARTS* 617 (2008); see *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682 (2014) (observing that “[i]t is hardly incumbent on copyright owners . . . to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer’s exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it. Fan sites prompted by a book or film, for example, may benefit the copyright owner.” (citing Wu, *id.* at 619–20)).



copyrighted works, trademarks, and publicity rights. More importantly, they realized that enforcing such rights would be counterproductive. As Rebecca Tushnet recognized in her 1997 article, “fan fiction keeps its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters.”<sup>642</sup> One might even view this phenomenon as Grateful Dead ethics and economics.<sup>643</sup>

The explosion of unauthorized uses on user-created fan websites and user-supported websites, such as Pinterest, sparked a dire dilemma for copyright (and trademark) owners. Almost all public-facing copyright proprietors quickly realized that suing fans would be costly and futile and could generate substantial backlash. This led them to develop informal and formal policies to “tolerate” and even encourage fan activities, although most copyright owners drew a bright line at commercialization of various types. Thus, Lucasfilm did not tolerate the sale of *Star Wars* tee shirts, lightsabers, and stormtrooper costumes.<sup>644</sup> Warner Brothers tolerated an online *Harry Potter* encyclopedia, but blocked sales of a physical book covering the same terrain.<sup>645</sup>

The tolerated use social norm ecosystem that has emerged goes to the heart of the concerns raised by copyleft scholars. It would be best if copyright law had easier clearance mechanisms, exemptions, and better calibrated damages measures for dealing with damages provisions for noncommercial and speech-based follow-on uses,<sup>646</sup> but the tolerated use norms in conjunction with Content ID screening/monetization technology have gone far toward that end.<sup>647</sup>

There are, unfortunately and inevitably, some rogue examples of over-enforcement, with Universal Music Group’s effort to take down Stephanie Lenz’s playful video of her toddler boogying to a barely recognizable recording of Prince’s

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642. See Tushnet, *supra* note 132, at 669.

643. See STEVE GIMBEL (ED.), *THE GRATEFUL DEAD AND PHILOSOPHY: GETTING HIGH MINDED ABOUT LOVE AND HAIGHT* (2007).

644. See *Lucasfilm Ltd. v. Shepperton Design Studios Ltd.*, No. CV05-3434 RGK MANX, 2006 WL 6672241 (C.D. Cal. 2006) (default judgment against seller of *Star Wars* props, including Stormtrooper costumes) (disclosure: I served as an expert witness on U.S. copyright law for Lucasfilm in enforcing this judgment in the United Kingdom, see *Lucasfilm Ltd v Ainsworth*, [2008] EWHC 1878 (Ch)); *Lucasfilm Ltd. LLC v. Ren Ventures Ltd.*, No. 17-cv-07249-RS, 2018 WL 5310831 (N.D. Cal. 2018) (holding defendant’s mobile game Sabacc app, mimicking a fictional card game featured in *Star Wars* films and using images, dialog, and GIFs from the *Star Wars* franchise, infringed *Star Wars* copyrights and was not fair use, and infringed Lucasfilm trademarks).

645. See *Warner Bros. Ent. Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D.N.Y. 2008) (enjoining sale of a physical *Harry Potter* encyclopedia).

646. See *infra* Section III(C).

647. Professor Tushnet has acknowledged that Content ID alleviated the concerns of large copyright owners, but nonetheless contests that it is a substitute for fair use and complains that it “gives some copyright owners too great an ability to suppress disfavored uses, leaves other owners (including fair users) out in the cold, and hands Google too much power to structure creative markets.” See Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY TECH. L.J. 1447, 1467 (2014). She makes a fair point but does not fully appreciate the challenge of screening copious amounts of online content efficiently and the costs of dispute resolution.

“Let’s Go Crazy” topping the list.<sup>648</sup> This Dickensian tale, however, is an exception to the tolerated use norm. Even though EFF—which deserves credit for representing Stephanie Lenz in this decade-long battle<sup>649</sup>—touts this case as the poster child (literally) for rampant overenforcement, the reality is that this case is an outlier as proven by the billions of UGC videos and images (pins) on Pinterest. What is most telling is how few uses wind up being pursued in light of the millions of new and follow-on works being created and distributed each day.<sup>650</sup> Prince was one of the most quixotic artists,<sup>651</sup> and his insistence on controlling such incidental uses of his work is one such manifestation. The overwhelming majority of copyright owners have recognized the value of tolerated use.

Even in the rap, hip-hop, and music mashup domains, the emergence of improved clearance practices and tolerated use has enabled this genre to proliferate, although not without high transaction costs and litigation.<sup>652</sup> Some copyleft scholars and advocates contend that much if not all of this creativity qualifies as fair use or de minimis infringement, which exaggerates copyright law’s limiting doctrines.<sup>653</sup> As a practical middle ground, the cover license could be expanded to include high-intensity mashups. This would facilitate remixes, reduce transaction costs, afford fairer compensation to

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648. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (holding that copyright owners must consider fair use defenses and good faith activities by alleged copyright infringers before issuing takedown notices for content posted on the internet).

649. See Corynne McSherry, *After More Than a Decade of Litigation, the Dancing Baby Has Done His Part to Strengthen Fair Use for Everyone*, ELEC. FRONTIER FOUND. (Jun. 27, 2018), <https://www.eff.org/deeplinks/2018/06/after-more-decade-litigation-dancing-baby-ready-move> [<https://web.archive.org/web/20251106191915/https://www.eff.org/deeplinks/2018/06/after-more-decade-litigation-dancing-baby-ready-move>].

650. See Peter S. Menell, *Infringement Conflation*, 64 STAN. L. REV. 1551, 1556–57 (2012) (reviewing JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* (2011)) (“Tehrani seriously misleads the reader as to the scope of copyright liability. . . . None of Professor John’s activities are ones where enforcement would be even remotely likely. And even if the owner were to prevail, it is unlikely that the recovery would cover litigation costs, not to mention the wasted time and social/consumer backlash.”).

651. See Eriq Garner & Ashley Cullins, *Prince’s Legal Legacy: Contract Fights, Copyright Battles and Changing His Name*, HOLLYWOOD REP. (Apr. 21, 2016), <https://www.hollywoodreporter.com/business/business-news/princes-legal-legacy-contract-fights-886521/> [<https://web.archive.org/web/20251106192141/https://www.hollywoodreporter.com/business/business-news/princes-legal-legacy-contract-fights-886521/>] (noting that Prince “was so fiercely protective” that he “wanted to change the law to stop other artists from covering his songs”).

652. See KEMBLEW MCLEOD & PETER DICOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* (2011) (detailing the challenges faced and partially overcome within digital sampling genres).

653. See U.S. DEP’T OF COM., Roundtable Discussions on Remixes, First Sale, and Statutory Damages, Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, Berkeley, Cal. (July 30, 2014), at 16–18 (Comments of Corynne McSherry, Intellectual Property Director for EFF), [https://www.uspto.gov/sites/default/files/ip/global/copyrights/berkeley\\_transcript.pdf](https://www.uspto.gov/sites/default/files/ip/global/copyrights/berkeley_transcript.pdf) [[https://web.archive.org/web/20251116211124/https://www.uspto.gov/sites/default/files/ip/global/copyrights/berkeley\\_transcript.pdf](https://web.archive.org/web/20251116211124/https://www.uspto.gov/sites/default/files/ip/global/copyrights/berkeley_transcript.pdf)].

owners of sampled works, engage new generations of artists and fans, and channel disaffected music fans into authorized markets.<sup>654</sup>

As another example of social norm-based adaptations and institutional evolution, Professors Patricia Aufderheide and Peter Jaszi have played a constructive role in working with the film industry to develop a set of best practices for the use of copyrighted works in documentary films.<sup>655</sup> Although these norms do not immunize film producers, they have thoughtfully drawn upon the perspectives and knowledge of film industry professionals to educate the industry about best practices, develop communication networks within the industry, provide standardized forms to facilitate code development, and inculcate sensible practices. This pragmatic work has produced significant, tangible results in the documentary film industry and has spread to other fields.<sup>656</sup>

#### 4. Google's YouTube Evolution

Google's evolving attitude toward licensing professional content illustrates how one of the companies that most resisted permission culture shifted from licensing aversion toward embracing the 1976 Act drafters' vision for a well-functioning copyright system. For much of its early development, Google strongly opposed having to license copyrighted works. Its search projects obviously depended on a freedom to index the internet, and courts correctly (in my view) held that such use was fair.<sup>657</sup>

Following its YouTube acquisition,<sup>658</sup> Google embraced UGC and celebrated user freedom. Many UGC videos copied copyrighted works. Some qualified for distribution under the fair use doctrine, but many did not. YouTube's founders largely ignored copyright law during the service's development phase,<sup>659</sup> which attracted both

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654. See Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441 (2016).

655. See PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

656. PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 102–56, 187–98 (2nd ed. 2018).

657. See *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

658. See Andrew Ross Sorkin & Jeremy W. Peters, *Google to Acquire YouTube for \$1.65 Billion*, N.Y. TIMES (Oct. 9, 2006), <https://www.nytimes.com/2006/10/09/business/09cnd-deal.html> [<https://web.archive.org/web/20251011020718/https://www.nytimes.com/2006/10/09/business/09cnd-deal.html>].

659. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33–34 (2d Cir. 2012) (“YouTube founder Jawed Karim prepared a report in March 2006 which stated that, ‘[a]s of today[,] episodes and clips of the following well-known shows can still be found [on YouTube]: *Family Guy*, *South Park*, *MTV Cribs*, *Daily Show*, *Reno 911*, [and] *Dave Chapelle* [sic].’ . . . A reasonable juror could conclude from the March 2006 report that Karim knew of the presence of Viacom-owned material on YouTube, since he presumably located specific clips of the shows in question before he could announce that YouTube hosted the content ‘[a]s of today.’”; “[I]n a July 4, 2005 e-mail exchange, YouTube founder Chad Hurley sent an e-mail to his co-founders with the subject line ‘budlight commercials,’ and stated, ‘we need to reject these too.’ Steve Chen responded, ‘can we please leave these in a bit longer? another week or two can’t hurt.’ Karim also replied, indicating that he ‘added back

takedown notices and a lawsuit by Viacom alleging infringement of 79,000 copyrighted works.<sup>660</sup> In conjunction with its acquisition of YouTube, Google developed Content ID, a symbiotic digital fingerprinting technology used to identify copyright-protected content embedded in uploaded files.<sup>661</sup> It integrated this filtering system with an inventive pre-authorization licensing system.<sup>662</sup> When a video is uploaded to YouTube, Content ID checks whether it contains content from videos in its database of copyrighted works. Google authorized copyright owners to block the UGC or claim advertising revenue displayed in conjunction with the UGC.<sup>663</sup>

Seeing the rise of Netflix and consumer interest in professional content, in 2011 Google launched a licensed movie rental service through its Android ecosystem.<sup>664</sup> It evolved this venture through various rebranding efforts: from Google Movies to Google Play to Google TV.<sup>665</sup> In 2012, believing that it could supplant the Hollywood production model, Google disbursed \$100 million to the YouTube Original Channel Initiative as a way to generate content for Google TV.<sup>666</sup> The funds supported several

in all 28 bud videos.”; “And again, Karim agreed [about leaving a copyrighted video up], indicating that ‘the CNN space shuttle clip, I like. we can remove it once we’re bigger and better known, but for now that clip is fine.’”)

660. See *id.* at 26; Jeremy W. Peters, *Viacom Sues Google Over YouTube Video Clips*, N.Y. TIMES (Mar. 14, 2007), <https://www.nytimes.com/2007/03/14/business/14viacom.web.html> [<https://web.archive.org/web/20251011022145/https://www.nytimes.com/2007/03/14/business/14viacom.web.html>].

661. See *Content ID*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Content\\_ID](https://en.wikipedia.org/wiki/Content_ID) [[https://web.archive.org/web/20251011022807/https://en.wikipedia.org/wiki/Content\\_ID](https://web.archive.org/web/20251011022807/https://en.wikipedia.org/wiki/Content_ID)] (last visited Nov. 6, 2025).

662. Google’s ability to pursue this model relied on a questionable interpretation of the DMCA’s safe harbor red flag provision. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010), *aff’d in part, vacated in part, remanded*, 676 F.3d 19 (2d Cir. 2012); Menell, *Brace Lecture*, *supra* note 441, at 316–17; Peter S. Menell, *Judicial Regulation of Digital Copyright Windfalls: Making Interpretive and Policy Sense of Viacom v. YouTube and UMG Recordings v. Shelter Capital Partners*, U.C. BERKELEY PUB. L. RSCH. PAPER NO. 2049445 (May 1, 2012). I declined to file an amicus brief in that matter because of the misalignment of damage measures. Viacom was seeking a billion-dollar statutory damage remedy that was wholly disproportionate to the actual damages. I was calling for statutory reform of statutory damages to avoid judges distorting the substantive law. See Menell, *Brace Lecture*, *supra* note 441, at 302–07, 312–17.

663. Viacom’s lawsuit against Google did not challenge YouTube’s continuing operations with Content ID in operation. Rather, it sought statutory damages on 79,000 copyrighted works allegedly infringed prior to implementation of Content ID.

664. See Ben Parr, *Google Launches Movies for Android*, MASHABLE (May 10, 2011), [https://mashable.com/archive/google-movies-android#k3\\_6Nvharkqc](https://mashable.com/archive/google-movies-android#k3_6Nvharkqc) [[https://web.archive.org/web/20251011023916/https://mashable.com/archive/google-movies-android#k3\\_6Nvharkqc](https://web.archive.org/web/20251011023916/https://mashable.com/archive/google-movies-android#k3_6Nvharkqc)].

665. See *Google TV (Service)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Google\\_TV\\_\(service\)](https://en.wikipedia.org/wiki/Google_TV_(service)) [[https://web.archive.org/web/20251011024309/https://en.wikipedia.org/wiki/Google\\_TV\\_\(service\)](https://web.archive.org/web/20251011024309/https://en.wikipedia.org/wiki/Google_TV_(service))] (last visited Nov. 6, 2025).

666. See *YouTube Original Channel Initiative*, WIKIPEDIA, [https://en.wikipedia.org/wiki/YouTube\\_Original\\_Channel\\_Initiative](https://en.wikipedia.org/wiki/YouTube_Original_Channel_Initiative) [[https://web.archive.org/web/20251011024506/https://en.wikipedia.org/wiki/YouTube\\_Original\\_Channel\\_Initiative](https://web.archive.org/web/20251011024506/https://en.wikipedia.org/wiki/YouTube_Original_Channel_Initiative)] (last visited Nov. 6, 2025).

established celebrities, including Madonna, Pharrell Williams, retired NBA star Shaquille O'Neal, Ashton Kutcher, and Sofia Vergara to develop various forms of new programming. A year later, Google invested another \$200 million into this initiative. By November 2013, the project came to an unceremonious close.<sup>667</sup>

Following that failure, in 2014 Google launched Music Key (rebranded in 2015 as YouTube Red), a subscription-based music streaming service with licensed content from participating record labels.<sup>668</sup> Google rebranded the service in 2018 as YouTube Premium, a broader subscription service.<sup>669</sup> In 2016, Google introduced YouTube Originals, yet another production model that it believed could compete with and possibly displace Hollywood's production system.<sup>670</sup> The venture struggled, and Google wound down the project in early 2022.<sup>671</sup>

Coming full circle, Google in late 2022 began distributing content from other media companies, such as Paramount+ and Warner Bros. Discovery's HBO Max, through its YouTube app.<sup>672</sup> This initiative struggled, however, due to a glitchy user interface.<sup>673</sup> Google has now redesigned the service to mimic the on-screen guides used by Netflix, Disney+, and other major streaming services.<sup>674</sup> "YouTube executives have told media firms recently that expanding the Primetime Channels business is a top priority for this year and next."<sup>675</sup> According to a YouTube spokesperson, YouTube has now positioned itself as a big tent broadcast platform, featuring "everything from scripted dramas to podcasts, NFL games to the latest music. . . . We give users more ways to customize their experience and get all their favorite content in one place with

667. See Sam Gutelle, *YouTube Has Removed All References to Its Original Channels Initiative*, TUBEFILTER (Nov. 12, 2013), <https://www.tubefilter.com/2013/11/12/youtube-original-channels-initiative-experiment-end/> [https://web.archive.org/web/20251106203445/https://www.tubefilter.com/2013/11/12/youtube-original-channels-initiative-experiment-end/].

668. See *YouTube Premium*, WIKIPEDIA, [https://en.wikipedia.org/wiki/YouTube\\_Premium](https://en.wikipedia.org/wiki/YouTube_Premium) [https://web.archive.org/web/20251011025237/https://en.wikipedia.org/wiki/YouTube\_Premium] (last visited Nov. 6, 2025).

669. See *id.*

670. See *List of YouTube Premium Original Programming*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_YouTube\\_Premium\\_original\\_programming](https://en.wikipedia.org/wiki/List_of_YouTube_Premium_original_programming) [https://web.archive.org/web/20251011025441/https://en.wikipedia.org/wiki/List\_of\_YouTube\_Premium\_original\_programming] (last visited Nov. 6, 2025).

671. See Todd Spangler, *YouTube Shuts Down Original Content Group*, VARIETY (Jan. 18, 2022), <https://variety.com/2022/digital/news/youtube-original-content-group-shutdown-1235156299/> [https://web.archive.org/web/20251011030110/https://variety.com/2022/digital/news/youtube-original-content-group-shutdown-1235156299/].

672. See Sahil Patel, *YouTube Tries Again to Compete with Amazon to Become All-Video Hub*, THE INFORMATION (Mar. 3, 2025), <https://www.theinformation.com/articles/youtube-tries-again-to-compete-with-amazon-to-become-all-video-hub> [https://web.archive.org/web/20251116211829/https://www.theinformation.com/articles/youtube-tries-again-to-compete-with-amazon-to-become-all-video-hub].

673. See *id.*

674. See *id.*

675. See *id.*

products like Primetime Channels, NFL Sunday Ticket and YouTube Premium.”<sup>676</sup> YouTube TV now operates much like other “skinny bundle” subscription services featuring licensed content.<sup>677</sup>

Thus, over the course of two decades, we see Google’s shift from licensing skepticism toward grudging recognition that consumers crave professionally created video products. Accordingly, Google has vastly increased its professional content licensing. This in no way takes away from its success in developing a symbiotic platform for UGC distribution, but it calls into question Google’s reluctance to embrace content licensing and copyleft’s dogmatic skepticism of markets for creative content. It highlights the vast philosophical divide between EFF’s tip jar/voluntary licensing perspective and economic engines driving creative activity. And it also suggests that Google’s delay in recognizing the economic value of professional content caused it to miss out on a tremendous economic opportunity that catapulted Netflix to streaming dominance.

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As the drafters of the 1976 Act envisioned, licensing can and should play a vital role in promoting creativity and access to expressive works from public performance of musical compositions to website development, UGC (including fan fiction), and major motion pictures and long-form series. The Open Source Movement as well as Creative Commons illustrate that markets can be harnessed in inventive ways. Spotify, Netflix, and many other celestial jukeboxes demonstrate how symbiosis can fuel copyright’s expressive progress engine. And Google’s eventual embrace of symbiotic technology and content licensing shows the economic appeal of content licensing.

That said, the need to rely upon tolerated use for many cumulative creativity projects that do not pose significant harm is troubling. Furthermore, recording artists, filmmakers, and other creative professionals are unduly constrained by the uncertainty surrounding fair use. This is further exacerbated by understandable demands of film financiers to avoid undue risk, and the associated insurance complexities and unfortunate creative compromises that can result. As the following section explores, courts have limited capacity to address these concerns where expansive application of fair use runs up against clearly articulated exclusive rights. The Supreme Court’s *eBay* decision provides some flexibility at the remedial stage,<sup>678</sup> but many producers cannot

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676. See *id.*

677. See Sara Fischer & Tim Baysinger, *YouTube TV Says It Has More Than 8 Million Subscribers*, AXIOS (Feb. 6, 2024), <https://www.axios.com/2024/02/06/youtube-tv-subscribers-cable-satellite> [[https://web.archive.org/web/20251116211908/https://www.axios.com/2024/02/06/youtube-tv-subscribers-cable-satellite?\\_\\_cf\\_chl\\_rt\\_tk=.mRp.U0ma1oPqzUjmdzuMSwzbfQILGnXHNI9D4NAq4Q-1763327948-1.0.1.1-1Qq.LnORPF2BkUKQXf8Ot7SYpzMIHHRXxYvFaBhjnao](https://web.archive.org/web/20251116211908/https://www.axios.com/2024/02/06/youtube-tv-subscribers-cable-satellite?__cf_chl_rt_tk=.mRp.U0ma1oPqzUjmdzuMSwzbfQILGnXHNI9D4NAq4Q-1763327948-1.0.1.1-1Qq.LnORPF2BkUKQXf8Ot7SYpzMIHHRXxYvFaBhjnao)].

678. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); Peter S. Menell & Ben Deproeter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CAL. L. REV. 53, 75–79 (2014).

feasibly rely on predicting how a court will exercise its equitable discretion. Absent a license, their counsel often advise: “if in doubt, leave it out.”<sup>679</sup>

## B. RECONCILING THE DERIVATIVE WORK RIGHT AND FAIR USE

The free culture/copyright protection battle focused on the fair use doctrine. The development of digital tools for remixing copyrighted works in conjunction with internet distribution expanded the range of creators seeking to distribute user-generated content. Most of these follow-on creators lacked access to funding and counsel, and hence clearance culture did not work for them. But as noted above, tolerated use norms as well as Content ID screening and monetization enabled much of this creativity to reach the public.<sup>680</sup> In addition, the Creative Commons provided a growing archive of pre-authorized building blocks.<sup>681</sup> The resulting ecosystem was hardly the “cultural death grip” that commentators feared, but it was somewhat risky and unnerving, especially in the early Internet Age.<sup>682</sup>

Nonetheless, the scope of the fair use doctrine came to play a shadow role in upstream decisions and when litigation ensued. Copyright scholars increasingly viewed the scope of fair use as central to the free culture/copyright protection debate. When the Supreme Court’s *Campbell* decision adopted the “transformativeness” terminology, confusion naturally arose as to the interplay of fair use and the right to prepare derivative works.<sup>683</sup>

Although the *Campbell* decision was faithful to the legislative framing of the fair use doctrine and the jurisprudence,<sup>684</sup> some lower court decisions collapsed fair use analysis into a singular inquiry of whether a follow-on work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>685</sup> The tension with the right to prepare derivative works eventually came to the Supreme Court nearly three decades after *Campbell*.<sup>686</sup> This story

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679. See Schuyler Moore, *What You Can't Use in Your Movie*, FORBES (Aug. 27, 2022), <https://www.forbes.com/sites/schuylermoore/2022/08/27/what-you-cant-use-in-your-movie/> [<https://web.archive.org/web/20251011032029/https://www.forbes.com/sites/schuylermoore/2022/08/27/what-you-cant-use-in-your-movie/>]; Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CAL. L. REV. 53, 57-58 (2014).

680. See *supra* Section II(A)(3)–(4).

681. See *supra* Section II(A)(1).

682. See LESSIG, *FREE CULTURE*, *supra* note 205; AUFDERHEIDE & JASZI, *supra* note 638, at 31.

683. See Shyamkrishna Balganesh & Peter S. Menell, *Misreading Campbell: Lessons for Warhol*, 72 DUKE L.J. ONLINE 113 (2023).

684. See *id.*

685. See *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)); *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (same).

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

sheds light on the copyleft movement's conflating of interpretive and normative analysis.

### 1. Judicial and Scholarly Drift

About a decade after the *Campbell* decision, the fair use doctrine took a significant turn in the Second Circuit. In a case involving appropriation artist Jeffrey Koons,<sup>687</sup> the court held that Koons's cropping of a professional fashion photograph for inclusion in a painting depicting women's legs dangling into a pool of confections was transformative and fair use.<sup>688</sup> Judge Robert Sack's analysis emphasized that secondary works that "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . lie at the heart of the fair use doctrine's guarantee of breathing space."<sup>689</sup> The court gave little consideration to the commercial value of Koons's work ("Niagara"), emphasizing its substantial transformativeness and the benefits to the public from exhibition. On the issue of justification, the court credited Koons's assertion that "[a]lthough the legs in the Allure Magazine photograph . . . might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is central to my message. . . . By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary."<sup>690</sup>

Around that time, Professor Peter Jaszi and filmmaker and communications studies Professor Patricia Aufderheide embarked on a project to "reclaim fair use" and make it more accessible to documentary filmmakers and other creators.<sup>691</sup> As noted earlier, this project resulted in important institutional innovations, including the establishment of codes of best practices in fair use.<sup>692</sup>

Their book, *Reclaiming Fair Use*, chronicled the history of the fair use doctrine, social history, and technological change in diagnosing the challenges faced by follow-on creators.<sup>693</sup> In tracing the legal backdrop of the fair use doctrine, however, the book largely skips over the drafting of the fair use provision and the scope of the exclusive

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687. In a prior case involving a sculptural work commissioned by Koons based on a photograph (String of Puppies), the Second Circuit ruled that the secondary work did not qualify as a fair use. See *Rogers v. Koons*, 960 F.2d 301, 308–12 (2d Cir. 1992).

688. *Blanch v. Koons*, 467 F.3d at 256, 259.

689. *Blanch v. Koons*, 467 F.3d at 251 (quoting with emphasis *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) (quoting *Campbell*, 510 U.S. at 579 and adding emphasis)).

690. *Id.* at 255.

691. See AUFDERHEIDE & JASZI, *supra* note 638, at x–xiv. Professor Lessig took a more combative approach, assailing "fair use [as] the right to hire a lawyer." See LESSIG, *FREE CULTURE*, *supra* note 205, at 187. At a 2006 conference, he said: "I hate fair use. I hate it because it distracts us from free use." AUFDERHEIDE & JASZI, *supra* note 638, at 65.

692. See *supra* Section III(A)(2).

693. See AUFDERHEIDE & JASZI, *supra* note 638.



rights.<sup>694</sup> This led them to view the fair use doctrine as affording courts wide berth to “promote science and the arts” with ample “breathing space.”<sup>695</sup> This aspirational framing overlooks the more nuanced and limited character of the doctrine and its statutory grounding.

Professor Rebecca Tushnet also took great interest in exploring the contours of the fair use doctrine, particularly as it relates to First Amendment protection.<sup>696</sup> In 2007, Professor Rebecca Tushnet and other “fan fiction” enthusiasts co-founded the Organization for Transformative Works “to serve the interests of fans by providing access to and preserving the history of fanworks and fan culture in its myriad forms.”<sup>697</sup> Its website states: “We believe that fanworks are transformative and that transformative works are legitimate.”<sup>698</sup>

The fair use scholarship up to that point largely overlooked the Copyright Act’s text (the definition of derivative works and the fair use preamble and factors) and legislative history.<sup>699</sup> This was surprising in view of the explosion of interest in statutory interpretation in the courts and the broader scholarly community over the

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694. See *id.* at 35–38.

695. See *id.* at 80 (quoting Judge Pierre Leval).

696. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535, 538 (2004) (“modestly” asserting that “[t]he current version of copyright, in which free speech problems are solved by keeping copyright owners from controlling certain transformative uses but in which more ordinary unauthorized copying is prohibited, is incompatible with the First Amendment. This is true whether one understands the First Amendment as protecting political speech, promoting democracy or self-government, furthering the search for truth, or enhancing autonomy and enabling self-expression.”).

697. *Welcome!*, ORG. FOR TRANSFORMATIVE WORKS, <https://www.transformativeworks.org/> [<https://web.archive.org/web/20251024022041/https://www.transformativeworks.org/>] (last visited Nov. 6, 2025).

698. *Id.*

699. See, e.g., R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 *COLUM. J.L. & ARTS* 467 (2008) (basing analysis solely on case law). Professor Jessica Litman, who had earlier written about the legislative history of the Copyright Act, was a notable exception. In her critique of the Copyright Act of 1976 for succumbing to “negotiated” solutions, Professor Litman forthrightly acknowledged that the drafters enacted broad rights and narrow exceptions. See LITMAN, *supra* note 158, at 54–58 (2001); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 *CORN. L. REV.* 857, 875–77, 886 (1987) (noting the Act’s “expansively defined rights and rigid exemptions” and discussing the hammering out of the fair use compromise). The fair use amicus brief that she signed, however, omitted this background. See Brief of Amici Curiae Professors Mark A. Lemley et al. in Support of Defendants-Appellees and Affirmance, *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020) (No. 19-55348).

previous two decades.<sup>700</sup> As my foray into the distribution right revealed, careful review of such materials could illuminate the puzzles underlying statutory meaning.<sup>701</sup>

In 2013, Professor Pamela Samuelson undertook just such an exploration into the drafting of the derivative work right.<sup>702</sup> What she reported, however, was notably selective. The Copyright Act defines a derivative work as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”<sup>703</sup>

Based on her review of the legislative history, Professor Samuelson asserted that “[t]here is . . . no credible evidence that Congress intended to create a vast and open-ended expansion of derivative work rights by inserting [the clause ‘or any other form in which a work may be recast, transformed, or adapted’ at the end of the definition].”<sup>704</sup> Rather, she contended, “[t]he most reasonable way to interpret this clause when applying it to a novel type of derivative work claim is to examine the nine exemplary derivatives and consider whether the challenged work is analogous to one or more of the nine examples.”<sup>705</sup> This is the opposite of how Professor Samuelson asserts that courts should treat the examples set forth in the § 107 preamble,<sup>706</sup> a view that is supported by the statutory text and the legislative history.<sup>707</sup>

The text that Professor Samuelson contends is narrow—“or any other form in which a work may be recast, transformed, or adapted”—is anything but. As a matter of

700. See Gregory S. Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9, 11–12, 14, 23 (2000) (cataloging 132 statutory interpretation articles published between 1988 and 1997, many of which were cited by the courts, including Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (cited 21 times); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (16 cites); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (10 cites); Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, *supra* note 2 (10 cites) (highlighting the three dominant modes of statutory interpretation: intentionalism, purposivism, and textualism)).

701. See *supra* section II(C)(2).

702. See Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505, 1562 (2013).

703. 17 U.S.C. § 101.

704. See Samuelson, *supra* note 702, at 1562.

705. *Id.*

706. See Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2545, 2588–2615 (2009).

707. Section 107 identically introduces the examples with the term “such as.” Furthermore, the legislative history states the examples enumerated in the Register’s 1961 Report are “by no means exhaustive” and that “there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change” and “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” *Copyright Law Revision*, H.R. Rep. No. 94-1476, at 65 (1976).

legislative history, the SUPPLEMENTARY REPORT states that “the author’s rights [including the § 106(2) right to prepare derivative works] should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.”<sup>708</sup> It is difficult to understand why Professor Samuelson did not consider this legislative history statement pertinent. Professor Samuelson was very familiar with Professor Jessica Litman’s writings, including her 2001 *Digital Copyright* book,<sup>709</sup> where Professor Litman highlighted the significance of this passage in explaining the broad scope of the exclusive rights.<sup>710</sup> Furthermore, Professor Samuelson references the SUPPLEMENTARY REPORT—which directly and contemporaneously addresses the intent behind the exclusive rights—three times in her article,<sup>711</sup> but overlooks the pertinent language in that report relating to the breadth of the exclusive rights.<sup>712</sup> Finally, one of the “cardinal” canons of statutory interpretation states that courts not exclude language as mere surplusage,<sup>713</sup> yet that is precisely what Professor Samuelson is proposing: excising “or any other form in which a work may be recast, transformed, or adapted.”

The tension between the right to prepare derivative works and the fair use doctrine surfaced in the Second Circuit’s 2013 fair use holding in *Cariou v. Prince*.<sup>714</sup> As in *Blanch v. Koons*, a well-known appropriation artist (Richard Prince) copied professional photographs of Patrick Cariou, a photographer/ethnographic researcher, for use in large canvas works.<sup>715</sup> Prince cropped images of Jamaican Rastafarians and added cropped images of female nudes. In deposition testimony, Prince disclaimed any intention to comment on Cariou’s photographs.<sup>716</sup> Cariou presented evidence that his gallery show was canceled as a result of Prince’s show at the high-end Gagosian Gallery.

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708. See SUPPLEMENTARY REPORT, *supra* note 491, at 14.

709. See Pamela Samuelson, *Toward a “New Deal” for Copyright in the Information Age*, 100 MICH. L. REV. 1488 (2002) (reviewing LITMAN, *supra* note 158).

710. See *supra* note 699.

711. See Samuelson, *supra* note 702, at 1512 n.35, 1527 n.103, 1540 n.171.

712. See *supra* text accompanying note 491.

713. See Nat’l Ass’n of Mfrs. v. Dep’t of Def., 583 U.S. 109, 128–29 (2018) (“As this Court has noted time and time again, the Court is ‘obliged to give effect, if possible, to every word Congress used.’”) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)); see also *Tex. Educ. Agency v. U.S. Dep’t of Educ.*, 908 F.3d 127, 133 (5th Cir. 2018) (describing the canon as a “cardinal principle of statutory construction”) (quoting *Bennett v. Spear*, 520 U.S. 154, 173 (1997)).

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

715. See *Cariou v. Prince*, 784 F.Supp.2d 337, 343–44 (S.D.N.Y. 2011).

716. See *id.* at 349 (observing that the *Prince* test “has no interest in the original meaning of the photographs he uses”; “he doesn’t ‘really have a message’ he attempts to communicate when making art”; “Prince did not intend to comment on any aspects of the original works or on the broader culture”; “[Prince’s] purpose in appropriating other people’s originals for use in his artwork is that doing so helps him ‘get as much fact into [his] work and reduce[] the amount of speculation’”; “he chooses the photographs he appropriates for what he perceives to be their truth—suggesting that his purpose in using Cariou’s Rastafarian portraits was the same as Cariou’s original purpose in taking them: a desire to communicate to the viewer core truths about Rastafarians and their culture.”).

Judge Deborah Batts concluded that Prince's works did not make transformative use of Cariou's photographs, and that the other fair use factors favored Cariou.<sup>717</sup>

The case caused an uproar in the high-art community, where Prince's canvases garnered million-dollar prices.<sup>718</sup> Art collectors, gallery owners, copyleft scholars, and Google joined forces in briefing Richard Prince's and his gallery's appeal.<sup>719</sup> In reversing Judge Batts's opinion, the Second Circuit dispensed with the justification inquiry, disregarded Prince's intent and instead applied an objective standard, and further focused fair use analysis on a reductive transformativeness assessment. Writing for the court, Judge Barrington Parker emphasized that "alter[ing] the original with 'new expression, meaning, or message'" suffices to establish that a use is transformative.<sup>720</sup> Based on this simplification of *Campbell's* framework, the court concluded that twenty-five of Prince's thirty works were transformative.<sup>721</sup> In the court's view, these works "have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."<sup>722</sup>

As regards the fourth factor, the court rejected Judge Batts's concern with Cariou's loss of revenue resulting from the cancellation of a gallery showing. As regards other effects on the actual or potential markets for Cariou's photographs, Judge Parker focused the inquiry on "whether the secondary use usurps the market of the original work," not "damage to Cariou's derivative market."<sup>723</sup> Furthermore, the court noted that "[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original," even though "the fair use, being transformative, might well harm, or even destroy, the market for the original."<sup>724</sup> Based on this framing, the court concluded that "[a]lthough certain of Prince's artworks contain significant portions of certain of Cariou's photographs, neither Prince nor the Canal Zone show usurped the market for those photographs. Prince's audience is very

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717. See *id.* at 349–53.

718. See Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES (Dec. 28, 2011), <https://www.nytimes.com/2012/01/01/arts/design/richard-prince-lawsuit-focuses-on-limits-of-appropriation.html>

[<https://web.archive.org/web/20251025000207/https://www.nytimes.com/2012/01/01/arts/design/richard-prince-lawsuit-focuses-on-limits-of-appropriation.html>] (noting that the decision "set off alarm bells" in the contemporary art community).

719. See Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendants-Appellants and Urging Reversal, *Cariou v. Prince*, No. 11-1197-cv, 2011 WL 5517867 (2d Cir. Nov. 3, 2011); Brief for Amici Curiae the Association of Art Museum Directors et al. in Support of Appellants and Reversal, *Cariou v. Prince*; Brief of Amicus Curiae Google Inc. in Support of Neither Party, *Cariou v. Prince*.

720. *Cariou*, 714 F.3d at 706 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

721. *Id.* at 712.

722. *Id.* at 708.

723. *Id.* (quoting *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006)).

724. *Id.* at 709 (quoting *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998)).

different from Cariou's, and there is no evidence that Prince's work ever touched—much less usurped—either the primary or derivative market for Cariou's work.<sup>725</sup>

As empirical studies showed, lower courts have increasingly collapsed fair use analysis into a transformative determinative test since *Campbell*.<sup>726</sup> As the fair use doctrine veered dangerously close to swallowing the right to prepare derivative works, Seventh<sup>727</sup> and Ninth Circuits<sup>728</sup> panels questioned the reframing of fair use as a reductive transformativeness inquiry. These cases set the stage for the 2023 Supreme Court showdown.

## 2. *Dr. Seuss Enterprises v. ComicMix*

The dispute over ComicMix's *Oh, the Places You'll Boldly Go!* ("*Boldly*"), a remix of Dr. Seuss's perennial bestselling graduation gift *Oh, the Places You'll Go!* ("*Go!*") and the original *Star Trek* television series, directly addressed the tension between the right to prepare derivative works and the fair use doctrine.<sup>729</sup> The defendants made no bones about their intentions in slavishly adapting artwork from several Dr. Seuss books. As pre-trial discovery revealed, the defendants were motivated by a desire to profit from the sale of books, mugs, and other merchandise, not to comment on the Seuss books.<sup>730</sup> Furthermore, Dr. Seuss Enterprises ("DSE"), proprietor of the Dr. Seuss books, had long pursued licensing and collaboration projects. Nonetheless, Judge Janis Sammartino ruled on summary judgment that *Boldly* was "highly transformative" and unlikely to substantially harm the market for *Go!*.<sup>731</sup> The opinion effectively held that "mashups" are inherently "highly transformative" for purposes of fair use analysis, used the same transformativeness finding to downplay the other factors, and shifted to the copyright owner the burden of proving market harm for the fourth factor. The decision set up a direct test of the copyleft remix position.

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725. *Id.*

726. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 755 (2011); see also Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 167 n.19 (2019).

727. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 757–59 (7th Cir. 2014) ("To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every "transformative use" can be "fair use" without extinguishing the author's rights under § 106(2).").

728. *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020).

729. *Id.*

730. See *id.* at 452.

731. *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 372 F. Supp. 3d 1101, 1115, 1120, 1122–26 (S.D. Cal. 2019), *aff'd in part, rev'd in part and remanded*, 983 F.3d 443 (9th Cir. 2020).

Recognizing the collision of the derivative work right and fair use, I led an amicus brief for the Ninth Circuit appeal focusing on the derivative work/fair use tension.<sup>732</sup> The brief contended that the District Court's decision

destabilizes essential copyright law principles that have long supported markets for collaborations and derivative works. If this decision stands, competitors could flood publishing, television, film, and merchandising markets with unauthorized derivative works merely by "mashing" in other elements. Lucasfilm could produce Oh The Places Yoda'll Go! without obtaining a license from Dr. Seuss Enterprises. The developers of the Pokémon series could offer Oh The Places You'll Pokémon Go!. Castle Rock Entertainment could introduce Oh The Places You'll Yada Yada Yada!. Warner Bros. could freely mash together Bugs Bunny with Marvel Comic's Iron Man or Sesame Street's Kermit the Frog. Moreover, anyone could produce and distribute such works. . . .<sup>733</sup>

The academic battle was soon joined when Professors Mark Lemley, Jessica Litman, Lydia Loren, Pamela Samuelson, and Rebecca Tushnet filed an opposing brief.<sup>734</sup> With scant attention to the record in the case, their brief hypothesized ways in which a literary critic might characterize the defendants' follow-on work as commenting on the Dr. Seuss oeuvre.<sup>735</sup>

The Ninth Circuit recognized that fidelity to the Copyright Act required a reversal of the District Court's fair use determination. Drawing on *Campbell's* nuanced discussion of the first fair use factor, Judge Margaret McKeown rejected ComicMix's parody justification in holding that *Boldly* did not ridicule *Go!* or other Dr. Seuss works, and that mimicking Dr. Seuss's style did not amount to parody, criticism, or commentary.<sup>736</sup> Rather, *Boldly* paralleled *Go!*'s purpose, and in conjunction with its commercial nature, tipped the first factor "definitively against fair use."<sup>737</sup> ComicMix did not fare better on the other factors. According to the court, *Go!* is highly creative. *Boldly* copied slavishly. And on the fourth factor, on which ComicMix (and not DSE) bore the burden of proof, *Boldly* directly targeted *Go!*'s graduation market and would curtail *Go!*'s potential market for derivative works.<sup>738</sup>

732. See Brief Amici Curiae of Professors Peter S. Menell, Shyamkrishna Balganesh & David Nimmer in Support of Petitioners, Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020).

733. *Id.* at \*2.

734. Brief of Amici Curiae Professors Mark A. Lemley et al. in Support of Defendants-Appellees and Affirmance, *supra* note 699.

735. See *id.* at \*6-\*7 (suggesting that the defendants "used Seussian imagery as an interpretive tool by which to make the case for a hopeful future, achieved by collective efforts and not by unplanned individual wanderings alone, more persuasively than words alone, or unfamiliar images, could. The use of Seussian imagery thus has a new purpose: not merely to retell the same story or a sequel, but to create new meaning by juxtaposing two culturally significant works.").

736. See *Dr. Seuss Enters.*, 983 F.3d at 452-53.

737. *Id.* at 455.

738. See *id.* at 458-61.

The court rejected an expansive understanding of transformative use, noting that ComicMix failed to “address a crucial right for a copyright holder—the derivative works market, an area in which Seuss engaged extensively for decades.”<sup>739</sup> It went on to observe:

As noted by one of the amici curiae, the unrestricted and widespread conduct of the sort ComicMix is engaged in could result in anyone being able to produce, without [plaintiff’s] permission, Oh the Places Yoda’ll Go!, Oh the Places You’ll Pokemon Go!, Oh the Places You’ll Yada Yada Yada!, and countless other mash-ups. Thus, the unrestricted and widespread conduct of the sort engaged in by [defendant] could “create incentives to pirate intellectual property” and disincentivize the creation of illustrated books . . . [which] is contrary to the goal of copyright “[t]o promote the Progress of Science.”<sup>740</sup>

Thus, based on the legislative text, structure, and clear intention that broad rights subject to limited exceptions was the best way to effectuate the promote progress clause, the court flipped the copyleft proposition that the fair use doctrine is merely an open-ended proxy for judges to decide whether or not a use “promotes progress.” Nearly every follow-on work can be characterized as “transformative,” particularly in the post-modern age. The court’s decision also rejected copyleft scholars’ vague suggestion that “First Amendment interests” override the derivative work right whenever a follow-on author seeks to use a copyrighted work to communicate a different message.<sup>741</sup>

The Ninth Circuit’s decision presented a clear circuit split with the Second Circuit’s *Cariou* decision over the interplay of the derivative work right and the fair use doctrine. The Seventh Circuit had also questioned the Second Circuit’s transformativeness jurisprudence.<sup>742</sup> Nonetheless, the Supreme Court declined review.<sup>743</sup> That day, however, would come several years later.

### 3. *Andy Warhol Foundation for the Visual Arts v. Goldsmith*

The simmering battle over the interplay of the right to prepare derivative works and the fair use doctrine came to a head in the litigation over The Andy Warhol

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739. *Id.* at 460 (citing 17 U.S.C. § 106(2)).

740. *Id.* at 461 (citing Brief Amici Curiae of Professors Peter S. Menell, Shyamkrishna Balganesh & David Nimmer in Support of Petitioners, *supra* note 732, at \*2 and U.S. CONST., art I, § 8, cl. 8.)

741. *See* Brief of Amici Curiae Professors Mark A. Lemley et al. in Support of Defendants-Appellees and Affirmance, Dr. Seuss Enters., *supra* note 699 at \*8–\*11.

742. *See* *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758–59 (7th Cir. 2014) (“We’re skeptical of *Cariou*’s approach, because asking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do no[t] explain how every ‘transformative use’ can be ‘fair use’ without extinguishing the author’s rights under § 106(2).”).

743. *See* *ComicMix, LLC v. Dr. Seuss Enters., L.P.*, 141 S. Ct. 2803, 2803 (2021).

Foundation's ("AWF") licensing of a Warhol print based on a Lynn Goldsmith photograph to Condé Nast following the recording artist Prince's untimely death.

The story begins in the early 1980s when Prince Rogers Nelson, better known as Prince, broke onto the music scene. *Newsweek* magazine hired Lynn Goldsmith, who had by that time become an accomplished photographer of rock 'n' roll stars, to photograph Prince.<sup>744</sup> She took a series of portraits in her New York City studio, for which she retained copyright ownership. *Newsweek* published one of the concert photographs for an article entitled "The Naughty Prince of Rock" in 1981.

In 1984, by which time Prince had achieved superstardom following the release of the *Purple Rain* album, *Vanity Fair* licensed one of Goldsmith's studio portraits of Prince for an illustration to be prepared for the magazine. The license agreement provided that the illustration was "to be published in *Vanity Fair* November 1984 issue. It can appear one-time full page and one time under one quarter page. No other usage right granted." Goldsmith was to receive \$400 and a source credit.

*Vanity Fair* hired Andy Warhol to create the illustration for a feature story and provided him with Goldsmith's Prince portrait. Warhol produced the illustration—a silk screened image with a purple hue ("Purple Prince")—which appeared along with a credit to Goldsmith, in *Vanity Fair's* November 1984 issue. Unbeknownst to Goldsmith, Warhol produced fifteen other works based on Goldsmith's photograph. Following Prince's death in April 2016, Condé Nast, *Vanity Fair's* owner, reached out to AWF about reusing "Purple Prince" in a special edition magazine commemorating Prince. Upon learning of the additional prints, Condé Nast licensed "Orange Prince," one of the other fifteen prints, for the commemorative issue, "The Genius of Prince." It paid AWF \$10,000 for the license. Condé Nast did not obtain a license from Goldsmith nor provide her payment or attribution.

Upon seeing Orange Prince for the first time on *Condé Nast's* special edition cover, Goldsmith notified AWF that she believed that the image infringed copyright in her photograph. AWF filed a declaratory relief action asserting noninfringement or, in the alternative, fair use for all sixteen Warhol works. Goldsmith counterclaimed for copyright infringement.

Applying *Cariou's* reductive transformativeness framework, District Judge John Koeltl determined that Warhol's bold images presented Prince as "an iconic, larger-than-life figure," consistent with his representations of other celebrities ranging from Marilyn Monroe to Mao, in contrast to Goldsmith's photograph, which portrayed Prince as vulnerable and uncomfortable.<sup>745</sup> This transformative quality—"different character," "new expression," and "new aesthetics"—tipped the first fair use factor

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744. This summary of the case is adapted from Peter S. Menell & Lateef Mtima, *Exploring the Economic, Social, and Moral Justice Ramifications of the Warhol Decision*, 47 COLUM. J.L. & ARTS 449, 491–97 (2024).

745. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019).



“strongly in AWF’s favor,” notwithstanding their commercial nature.<sup>746</sup> Furthermore, the transformative nature of the works tipped the third and fourth fair use factors in AWF’s favor, leading to the conclusion that fair use “points decidedly” in AWF’s favor.<sup>747</sup>

On appeal, Judge Gerald Lynch’s opinion pulled back from the district court’s broad reading of *Cariou* (and other cases) that a secondary work is transformative as a matter of law “[i]f looking at the works side-by-side, the secondary work has a different character, a new expression, and employs new aesthetics with [distinct] creative and communicative results.”<sup>748</sup> Judge Lynch noted that the definition of “derivative works” encompassed “transformed” works,<sup>749</sup> leading him to conclude that “where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a ‘higher or different artistic use,’ is insufficient to render a work transformative.”<sup>750</sup> In place of the district court’s standard, Judge Lynch raised the transformativeness bar to require “a ‘fundamentally different and new’ artistic purpose and character, such that the secondary work stands apart from the ‘raw material’ used to create it.”<sup>751</sup>

Applying that standard, the Second Circuit concluded that the Prince Series was not transformative.<sup>752</sup> Nor did the other factors favor a fair use determination.<sup>753</sup> The court disagreed with AWF’s contention that “[d]enying fair-use protection to works like Warhol’s will chill the creation of art that employs pre-existing imagery to convey a distinct message,” explaining that concerns about public access to the works are better addressed at the remedy stage.<sup>754</sup>

The Second Circuit’s resolution of the controversy restored a faithful interpretation of the right to prepare derivative works and moved fair use back toward its statutory and traditional jurisprudential contours, begging the question of why the Supreme Court granted review of the Second Circuit’s handling of the first fair use factor.<sup>755</sup> With reconciliation of the derivative work right and the fair use doctrine

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746. *Id.*

747. *Id.* at 331.

748. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 38 (2d Cir. 2021) (quoting *Warhol*, 382 F. Supp. 3d at 325–26 (internal quotation marks omitted) (alterations adopted)).

749. *See id.* at 36.

750. *Id.* at 41 (quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992)).

751. *Id.* at 42 (quoting *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (internal quotation marks omitted)).

752. *See id.* at 42–44.

753. *See id.* at 44–52.

754. *See id.* at 51–52.

755. AWF limited its petition to “[w]hether a work of art is ‘transformative’ when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it

clearly in play, Professor Balganes and I decided to submit an amicus brief. Professor Jane Ginsburg joined our effort.<sup>756</sup>

As I had done in *Grokster*,<sup>757</sup> the making available issue,<sup>758</sup> the Supreme Court's *Aereo* case,<sup>759</sup> and other projects,<sup>760</sup> I focused first on researching the text, structure, and legislative history of the Copyright Act to illuminate the meaning of the pertinent provisions. This deep dive revealed that while the need for reconciling the derivative work right and fair use was not central to the drafting of the relevant provisions (since the conflict emerged from the transformativeness gloss put on fair use by *Campbell*), the drafters of the 1976 Act were nevertheless explicit about the underlying principles which were to guide interpretation of those provisions. The exclusive rights were "stated in broad terms, and [] the specific limitations on them should not go any further than is shown to be necessary in the public interest."<sup>761</sup> The drafters viewed the encouragement of licensing to be vital,<sup>762</sup> and were cautious about non-commercial uses getting a free pass.<sup>763</sup>

The evolution of the fair use provision revealed that the codification of the fair use doctrine was not intended to be a sprawling, open-ended, or eye-of-the-beholder exemption. Alan Latman's 1958 preparatory study on fair use summarized the

'recognizably deriv[es] from' its source material (as the Second Circuit has held)." Petition for a Writ of Certiorari at i, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869).

756. See Brief of Professors Peter S. Menell, Shyamkrishna Balganes & Jane C. Ginsburg as Amici Curiae in Support of Respondents, *Warhol*, 598 U.S. 508.

757. See *supra* Section II(B)(3)(c).

758. See *supra* text accompanying notes 486–492.

759. See Brief of Professors Peter S. Menell & David Nimmer as Amici Curiae in Support of Petitioners, *American Broad. Cos., Inc., et al. v. Aereo, Inc.*, 573 U.S. 431 (2014) (No. 13-641); *Aereo*, 573 U.S. 431 (2014); Peter S. Menell & David Nimmer, *Symposium: Aereo, Disruptive Technology, and Statutory Interpretation*, SCOTUSBLOG (June 26, 2014), <http://www.scotusblog.com/2014/06/symposium-aereo-disruptive-technology-and-statutory-interpretation/> [<https://web.archive.org/web/20251024163333/https://www.scotusblog.com/2014/06/symposium-aereo-disruptive-technology-and-statutory-interpretation/>].

760. See, e.g., Peter S. Menell & Ella Corren, *Design Patent Law's Identity Crisis*, 36 BERKELEY TECH. L.J. 1 (2021).

761. See SUPPLEMENTARY REPORT, *supra* note 491, at 14.

762. See *id.* ("In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense.")

763. See *id.* ("We are entirely sympathetic with the aims of nonprofit users, such as teachers, librarians, and educational broadcasters, who seek to advance learning and culture by bringing the works of authors to students, scholars, and the general public. Their use of new devices for this purpose should be encouraged. It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of 'fair use,' may severely curtail the copyright owner's market for copies of his work. . . Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is 'not for profit.'")

jurisprudence, identifying eight principal contexts in which courts had recognized fair use: (1) incidental use; (2) review and criticism; (3) parody and burlesque; (4) scholarly works and compilations; (5) personal or private use; (6) news; (7) use in litigation; and (8) use for nonprofit or governmental purpose.<sup>764</sup> It then explored fair use criteria, acknowledging “widespread agreement” that “it is not easy to decide what is and what is not a fair use.”<sup>765</sup> Nonetheless, drawing on Justice Joseph Story’s oft-quoted criteria in *Folsom v. Marsh*,<sup>766</sup> contemporary decisions, copyright scholarship, draft bills, foreign legislation, and international conventions, the Fair Use Study offered guideposts.<sup>767</sup>

In its initial proposal, the Register of Copyrights channeled Mr. Latman’s synthesis of the fair use doctrine, noting the principal examples and synthesizing four key factors that would, with some further explication and the drafting of a preamble setting forth illustrations, become Section 107 of the Copyright Act.<sup>768</sup>

The House Report explained the “general intention” behind § 107:

[T]he endless variety of situations and combinations of circumstances that can [a]rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.<sup>769</sup>

The final legislation channeled the relatively narrow examples that Register Abraham Kaminstein referenced in 1961, which were summarized in the preamble. Although Congress expressed the intention to perpetuate the doctrine’s case-by-case and common law character and not to “freeze” its development, the main thrust of the provision was to restate the fair use doctrine without any intention to alter the doctrine beyond ensuring that it could address unforeseen technological developments and address “particular situations on a case-by-case basis.”<sup>770</sup>

Based upon this tracing of the text, structure, and legislative history of the exclusive rights and fair use provision and the *Campbell* decision, our brief emphasized that in examining the transformativeness of the use in *Campbell*, the Court had “focused

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764. See ALAN LATMAN, STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS 18 (1958) [hereinafter FAIR USE REPORT], reprinted in SENATE COMMITTEE ON THE JUDICIARY, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86th Cong., 2d Sess. 1, 8–14 (1960).

765. *Id.* at 14.

766. 9 Fed. Cas. 342 (C.C.D. Mass 1841).

767. See FAIR USE REPORT, *supra* note 764, at 15–32.

768. See 17 U.S.C. § 107(1); REGISTER’S REPORT, *supra* note 203, at 24–25 (July 1961) (citing FAIR USE REPORT, *supra* note 764).

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

770. *Id.* at 65.

on the elements of the use that went beyond its character as a derivative work, separating out its parodic components from its elements that were just ‘rap music.’ In so doing, its logic was clear: ‘the licensing of derivatives is an important economic incentive,’ copyright’s very purpose.<sup>771</sup> We concluded that “for uses which result in the creation of a derivative work, the fair use inquiry must examine the level of transformativeness that *goes beyond* the transformation simply seen in a derivative.”<sup>772</sup>

As in *Grokster*, the copyleft community submitted numerous briefs (some with many signatories) urging reversal of the Second Circuit’s decision.<sup>773</sup> The briefs downplayed the right to prepare derivative works and defended the reductive, open-ended focus on transformativeness.

The U.S. Government’s brief sided with Goldsmith.<sup>774</sup> The brief interestingly framed the question presented as “whether petitioner established that its licensing of the silkscreen image was a ‘transformative’ use . . .,”<sup>775</sup> thereby focusing on the fairness of the *use* as opposed to the work.

Largely agreeing with the Second Circuit, the Supreme Court jettisoned the simplistic interpretation of *Campbell*, restoring a more nuanced and thorough balancing within the first fair use factor. Writing for a 7–2 majority, Justice Sotomayor confronted the tension between the derivative work right and the fair use transformativeness jurisprudence, explaining that:

the [copyright] owner has a right to derivative transformations of her work. Such transformations may be substantial, like the adaptation of a book into a movie. To be sure,

771. Brief of Professors Peter S. Menell, Shyamkrishna Balganesh & Jane C. Ginsburg as Amici Curiae in Support of Respondents, *supra* note 756, at 27–28 (citations omitted).

772. *Id.* at 28 (emphasis added). Several other scholars submitted briefs supporting Goldsmith. See Brief of Amicus Curiae Prof. Zvi S. Rosen in Support of Respondents, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (No. 21-869); Brief of Amici Curiae Institute for Intellectual Property and Social Justice and Intellectual-Property Professors in Support of Respondents, *Warhol*, 598 U.S. 508; Brief of Professor Terry Kogan as Amicus Curiae in Support of Respondents, *Warhol*, 598 U.S. 508; Brief of Professor Guy A. Rub as Amici Curiae in Support of Respondents, *Warhol*, 598 U.S. 508; Brief of Amicus Curiae Philippa S. Loengard, Executive Director, Kernochan Center for Law, Media and the Arts, Columbia Law School, in Support of Respondents, *Warhol*, 598 U.S. 508.

773. See Brief of Authors Alliance as Amicus Curiae in Support of Petitioner, *Warhol*, 598 U.S. 508, at 3, 7) (led by Professor Pamela Samuelson, contending that “[t]he Second Circuit’s decision inverts the relationship between the right to prepare derivative works and fair use’s limitation on that exclusive right”; the brief obliquely references the extravagant claim that “[t]here is . . . no credible evidence that Congress intended to create a vast and open-ended expansion of derivative work rights by inserting [the clause ‘or any other form in which a work may be recast, transformed, or adapted’ at the end of the definition]” by citing Samuelson, *supra* note 702, at 1562, and noting that “the nine exemplary derivatives inform the scope of the right to prepare derivative works,” but apparently not the final clause); Brief of Art Law Professors as Amici Curiae in Support of Petitioner, *Warhol*, 598 U.S. 508 (prepared by Professors Amy Adler and Mark Lemley); Brief of Amici Curiae Copyright Law Professors in Support of Petitioner, *Warhol*, 598 U.S. 508 (led by Professor Rebecca Tushnet); Brief of Amici Curiae Electronic Frontier Foundation and Organization for Transformative Works in Support of Petitioner, *Warhol*, 598 U.S. 508.

774. Brief for the United States as Amicus Curiae Supporting Respondents, *Warhol*, 598 U.S. 508.

775. *Id.* at 1.

this right is “[s]ubject to” fair use . . . The two are not mutually exclusive. But an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner’s exclusive right to create derivative works. To preserve that right, the degree of transformation required to make “transformative” use of an original must go beyond that required to qualify as a derivative [work].<sup>776</sup>

In so doing, the Court’s analysis aligned with our brief’s emphasis on the need to “go beyond” the transformativeness required for derivative works and the U.S. Government’s focus on the fairness of the use, as opposed to the work.<sup>777</sup>

Much of the majority opinion focused on explicating *Campbell*’s nuanced incorporation of transformativeness into the analysis of the “purpose and character” of the use. The Court harmonized the derivative work right and transformative uses that qualify as fair use by requiring that a secondary user: (1) provide an independent justification for its use of a copyrighted work; (2) explain a distinct objective purpose for the use that is different from the copyright owner’s purposes; and (3) establish that the transformativeness of the use outweighs the commerciality of that use.<sup>778</sup>

The majority opinion rectified the misunderstanding and oversimplification of *Campbell* in some lower court decisions. Justice Sotomayor reiterated the need to recognize *Campbell*’s “nuance” and complexity, and unambiguously jettisoned simplistic prior readings:

*Campbell* cannot be read to mean that [the first fair use factor] weighs in favor of any use that adds some new expression, meaning, or message. . . . Otherwise, “transformative use” would swallow the copyright owner’s exclusive right to prepare derivative works. Many derivative works, including musical arrangements, film and stage adaptations, sequels, spinoffs, and others that “recast, transfor[m] or adap[t]” the original, § 101, add new expression, meaning or message, or provide new information, new aesthetics, new insights and understandings. That is an intractable problem for AWF’s interpretation of transformative use.<sup>779</sup>

The Court cautioned against a rule that would allow any user to “make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use.”<sup>780</sup> It also reinforced that commentaries that have no critical bearing on a work are at *Campbell*’s “lowest ebb,” and that their “claim to fairness in borrowing’ . . . ‘diminishes accordingly (if it does not vanish).”<sup>781</sup>

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776. *Warhol*, 598 U.S. at 529 (alteration in original).

777. See Timothy J. McFarlin, *Infringing Uses, Not Works*, 76 S.C. L. REV. 103, 104 (2024).

778. See Shyamkrishna Balganesch & Peter S. Menell, *Going “Beyond” Mere Transformation: Warhol and Reconciliation of the Derivative Work Right and Fair Use*, 47 COLUM. J.L. & ARTS 411, 433–42 (2024).

779. *Warhol*, 598 U.S. at 541. The majority reinforced the importance of this reconciliation by pointedly criticizing the dissent for failing to “offer [any] theory of the relationship between transformative uses of original works and derivative works that transform originals.” *Id.* at 548.

780. *Id.* at 546.

781. *Id.* at 546–47 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994)).

Justice Kagan's dissent channeled the free culture movement's core precepts, emphasizing the reliance of all creators on those who came before<sup>782</sup> and the need for a permissive transformativeness standard to promote progress.<sup>783</sup> In response, Justice Sotomayor countered that licensing payments induce original works in the first place and that the Copyright Act's numerous escape valves provide "ample space for artists and other creators to use existing materials to make valuable new works."<sup>784</sup>

#### 4. *Warhol* Aftermath

Copyleft scholars had varying reactions to the *Warhol* decision. Professors Mark Lemley and Rebecca Tushnet asserted that *Warhol* "stomped the brakes on thirty years of jurisprudence involving copyright's fair use doctrine, under which providing a new purpose, meaning, or message was held to favor fair use."<sup>785</sup> Professor Pamela Samuelson downplayed the importance of the decision.<sup>786</sup> These commenters did not discuss *Warhol's* fidelity to the Copyright Act,<sup>787</sup> nor how their concerns might be addressed through legislative reforms. Rather, they conflated interpretive and normative perspectives.

Professor Shyamkrishna Balganesh and I observed that the *Warhol* majority opinion faithfully interpreted the Copyright Act and faithfully applied *Campbell*.<sup>788</sup> Professor Lateef Mtima and I observed that "Justice Sotomayor's vigorous, direct, and, at times, combative parrying with the dissent . . . drove a dagger into the free culture movement's critique of copyright law" and reinforced the economic and social empowerment purposes undergirding the 1976 Act.<sup>789</sup> We also suggested that more can be done to promote progress through legislative reforms.<sup>790</sup> Based on a qualitative survey of artists, Professor Xiyin Tang observed "that long-standing legal assumptions

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782. See *id.* at 568 (Kagan, J., dissenting).

783. See *id.* at 593 (Kagan, J., dissenting).

784. *Id.* at 549–50.

785. Mark A. Lemley & Rebecca Tushnet, *First Amendment Neglect in Supreme Court Intellectual Property Cases*, 2023 SUP. CT. REV. 85, 86 (2024).

786. See Pamela Samuelson, *Justifications for Fair Uses*, 2025 WISC. L. REV. 1047, 1118 (suggesting that *Warhol* "should not be construed as having brought about a sea change in fair use law"); Pamela Samuelson, *Did the Solicitor General Hijack the Warhol v. Goldsmith Case?*, 47 COLUM. J.L. & ARTS 513, 555 (2024) (observing that "[i]t remains to be seen how much influence the *Warhol* decision will have in subsequent fair use cases.>").

787. Professor Glynn Lunney purports to provide statutory interpretation analysis, but as with Professor Samuelson's exploration of the legislative history of the derivative work rights, see *supra* text accompanying notes 702–713, he overlooks the most pertinent legislative history. See Glynn S. Lunney, Jr., *Transforming Fair Use*, 14 N.Y.U.J. INTELL. PROP. & ENT. L. 169 (2024); cf. KATZMANN, *supra* note 2 at 35–39 (discussing the use of legislative history in interpreting statutes).

788. See Balganesh & Menell, *supra* note 683.

789. Menell & Mtima, *supra* note 744, at 449, 502–08.

790. See *id.* 509–11.

about the chilling effect of copyright, at least in the contemporary art world, may be overstated: both because artists work largely independently of the law and because artistic practice itself might be moving away from the appropriative art that has dominated the legal imagination.<sup>791</sup>

In the relatively short period of time since *Warhol* was handed down, it has had a substantial impact on fair use decisions. Relying heavily on *Warhol*'s reasoning and fair use framework in a case actively pursued by copyleft scholars and advocates,<sup>792</sup> the Second Circuit affirmed the district court's ruling that the Internet Archive's Free Digital Library project—whereby it scanned print copies of publishers' books to create digital copies and then lent those digital copies to users at a one-to-one ratio between printed books that the library owned and digital copies that it loaned to users—was not a fair use.<sup>793</sup> Judge Stephanos Bibas relied heavily on the *Warhol* decision in granting summary judgment for the plaintiff in the first case involving pretraining of large language models.<sup>794</sup> Several other lower court cases have similarly relied upon *Warhol* in finding unlicensed use of photographs and videos not to be transformative or fair use.<sup>795</sup>

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791. Xiyin Tang, *Art After Warhol*, 71 UCLA L. REV. 870, 880–81 (2024).

792. EFF represented the defendant. Numerous scholars submitted briefs on their behalf. See Brief of Jason M. Schultz et al. for Amici Curiae Copyright Scholars Jonathan Askin et al., in support of Defendant-Appellant, *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024) (No. 23-1260); Brief of Christopher T. Bavitz, Cyberlaw Clinic, Harvard Law School, Cambridge, Mass., for Amici Curiae Kevin L. Smith & William M. Cross, in support of Appellants, *Hachette*, 115 F.4th 163; Brief of Jennifer M. Urban, Samuelson Law, Technology & Public Policy Clinic, U.C. Berkeley School of Law, Berkeley, Cal., for Amicus Curiae Center for Democracy & Technology, Library Freedom Project, and Public Knowledge, in support of Defendant-Appellant, *Hachette*, 115 F.4th 163; Brief of Rachel Brooke Leswing, Authors Alliance, Inc., Berkeley, Cal., for Amicus Curiae Authors Alliance, Inc., in support of Appellant, *Hachette*, 115 F.4th 163; Brief of Rebecca Tushnet, Cambridge, Mass., for Amici Curiae Patricia Aufderheide et al., in support of Appellant, *Hachette*, 115 F.4th 163; Brief of Jef Pearlman, USC Gould School of Law, IP & Technology Law Clinic, Los Angeles, Cal., for Amici Curiae Wikimedia Foundation, Creative Commons & Project Gutenberg Literary Archive Foundation, in support of Defendant-Appellant, *Hachette*, 115 F.4th 163; Brief of Brandon C. Butler, Jaszi Butler PLLC, Washington, D.C., for Amicus Curiae American Library Association & Association of Research Libraries, in support of neither party, *Hachette*, 115 F.4th 163.

793. See *Hachette*, 115 F.4th at 196.

794. See *Thomson Reuters Enter. Ctr. GMBH v. Ross Intel. Inc.*, 765 F.Supp.3d 382, 397–99 (D. Del. 2025).

795. See, e.g., *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 258–260 (4th Cir. 2024) (rejecting fair use defense for use of a photograph in violation of Creative Commons license requiring attribution; relying on *Warhol* to hold that use of a cropped celebrity photograph in a new context (as part of a list of “Signs Your Daddy Was a Conservative”) was not transformative; noting that failure to make a profit does not equate with non-commercial use); *August Image, LLC v. AllWrite Commc'ns Inc.*, No. 1:23-CV-00910-SEG, 2024 WL 4505000, at \*7 (N.D. Ga. Sep. 10, 2024) (relying on the Supreme Court's observation that “[a] typical use of a celebrity photograph is to accompany stories about the celebrity, often in magazines” (quoting *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 534 (2023))) requires a “particularly compelling justification” for the use; emphasizing lack of “any critique, commentary, or news about the photographs”); *Shihab v. Source Digital, Inc.*, No. 23cv7266 (DLC), 2024 WL 3461351, at \*1 (S.D.N.Y. July 18, 2024) (granting summary judgment for plaintiff in case involving a photograph); *Dermansky v. Hayride Media, LLC*, No. 22-3491, 2023 WL 6160864, at \*16 (E.D. La. Sep. 21, 2023) (holding that use of photographs

That said, the fair use defense remains very much alive, as it should. Multiple cases have found transformative uses leading to fair use determinations.<sup>796</sup> We see, however, a far more nuanced assessment of the first fair use factor and less stampeding of factors since *Warhol*.<sup>797</sup>

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as illustrative aids for online news articles was not transformative); *Vogts v. Penske Media Corp.*, No. 2:22-cv-01153-FWS-PVC, 2023 WL 7107276, at \*15–\*16 (C.D. Cal. Aug. 30, 2023) (finding that “[AWF] is, at minimum, factually similar to this case,” and concluding that the first factor favored plaintiff, noting that the concern expressed in *Warhol* about minor changes leading to a fair use finding: “[a]s long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use” (quoting *Warhol*, 598 U.S. at 546)); *Eliahu v. Mediaite, LLC*, No. 23 Civ. 11015 (VM), 2024 WL 4266323, at \*6 (S.D.N.Y. Sep. 23, 2024) (holding that the first factor under *Warhol* analysis weighs strongly against fair use of a screenshot of a single frame of a video in a news article about a public figure; rejecting assertion that use was not commercial on the ground that the defendant for-profit news service “gain[ed] commercially from its use of the Screenshot ‘without paying the customary price’” (citation omitted)); *Lynk Media, LLC v. Peacock TV LLC*, No. 23-cv-5845 (JGK), 2024 WL 2057235, at \*5 (S.D.N.Y. May 8, 2024) (applying *Warhol* in rejecting motion to dismiss complaint in case alleging copyright infringement based on unauthorized use of videos in a documentary film).

796. See, e.g., *Keck v. Mix Creative Learning Ctr., LLC*, 116 F.4th 448, 452, 455 (5th Cir. 2024) (finding that defendant’s art kits, which used multi-media artist’s artwork for helping children to learn at home during the pandemic, was transformative (and that first fair use factor favored defendant) on ground that the kits had “educational objectives” which differed from the aesthetic/decorative objectives of the original works; noting that defendant discontinued sales immediately after learning of plaintiff’s objection and only selling six such kits); *American Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262, 1262 (D.C. Cir. 2023); *Cramer v. Netflix, Inc.*, No. 3:22-cv-131, 2023 WL 6130030, at \*8 (W.D. Pa. Sep. 18, 2023) (granting motion to dismiss on ground that mocking use of photograph of plaintiff’s tattoo as one part of an eight-way split screen montage for 2.2 seconds was transformative because of the very different purpose (showing public reaction to Joe Exotic after the first season of *Tiger King* versus advertising for plaintiff’s tattoo business)); *Larson v. Perry*, 693 F. Supp. 3d 59, 79 (D. Mass. Sep. 14, 2023) (applying the *Warhol* framework in concluding that defendant short story writer’s use of a letter from a kidney donor to a kidney recipient was transformative because of the different purposes of the two uses: whereas the letter author sought to “inform the kidney recipient . . . , as well as [the author’s] friends and family members, about her motivations for becoming a living kidney donor, and to express her emotions surrounding her own donation and her good wishes for the recipient,” the short story author was criticizing the “altruistic donor’s choice to reach out to a kidney recipient,” with the story’s narrator “harbor[ing] resentment and pity—bordering on contempt—for her donor’s act of charity.”).

797. See, e.g., *Markos v. BBG, Inc.*, No. 3:23-CV-02125-X, 2024 WL 3504546, at \*2 (N.D. Tex. July 22, 2024) (discussing how *Warhol* altered the analysis of the first fair use factor in denying motion to dismiss copyright infringement complaint); *Larson v. Perry*, 693 F. Supp. 3d at 83 (finding that three of the four factors favor fair use); *Thomson Reuters*, 765 F.Supp.3d at 399 (“[T]his case fits more neatly into the newer framework advanced by *Warhol*.”); *Nat’l Fire Protection Ass’n, Inc. v. UpCodes, Inc.*, 753 F.Supp.3d 933, 957–62 (C.D. Cal. 2024) (detailing how the *Warhol* Court reached its holding regarding the first fair use factor before then performing a four factor analysis under the *Warhol* framework); *Whyte Monkee Productions, LLC v. Netflix, Inc.*, 97 F.4th 699, 713–15 (10th Cir. 2024) (reconsidering the lower court’s holding under the new *Warhol* framework, which “clarified” the previous transformative test under *Campbell*; reversing the lower court’s decision, holding that the first fair use factor now weighs in favor of Whyte Monkee instead of Netflix).



### C. MISSED OPPORTUNITY: LEGISLATIVE REFORM

The most glaring missed opportunity in the free culture/copyright protection drama has been the failure of stakeholders to achieve socially and mutually beneficial statutory reforms through balanced compromise. The copyleft movement has resisted such efforts, favoring more absolutist resolutions through judicial interpretation and constitutional constraints.<sup>798</sup> This absolutist/idealist stance overlooks the pragmatic nature of real-world democracy. The nation's founders were not blind to the problems of special interests. They built the union on a necessarily imperfect compromise, which itself implements necessarily imperfect checks and balances.

Based on the copyleft leaders' view of the legislative process, every major legislative enactment is corrupt. Each has been shaped and skewed by lobbyists and special interests. Yet it is in that cauldron that progress is made. It should not mean that a self-appointed academic elite (especially one steeped in cyberlibertarian, hacktivist philosophy and closely aligned with Big Tech companies) or unelected judges should dictate copyright policy. Scholars have a vital role to play in producing independent, objective, transparent, scrupulous, and rigorous research, but they and courts lose their legitimacy as they drift out of their lanes. The rejection of legislative reform overlooks the core democratic values and the critical role of legislative processes in adapting society to political, economic, cultural, social, and technological change.

While Hollywood may have held outsized political power in copyright legislation and policy in prior eras,<sup>799</sup> that power has substantially eroded since the turn of the millennium. Big Tech has made tremendous in-roads into the halls of power and holds sway on Capitol Hill, as well as the White House. It would be absurd to suggest that Hollywood overshadows Big Tech in the economic or political world today. Like Hollywood, Big Tech seeks to maximize its profits and promote its interests. The two industry sectors have, in many respects, moved closer together, although there are still significant copyright-related issues dividing them.

In contrast to the copyleft movement, I have long advocated the interest in legislative reforms that promote symbiotic technological change: efforts to bridge differences in a balanced way so to promote the realization of an ecosystem that serves consumers/users of creative works, creatives (authors, musicians, filmmakers, artists), and technological innovators in a manner that promotes freedom of expression.

In contrast to the strong opposition from copyleft scholars,<sup>800</sup> the DMCA has been successful. As technological advances disrupted traditional music, film, publishing, and

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798. Professor Lessig has been particularly skeptical of legislative compromise. See LESSIG, *FREE CULTURE*, *supra* note 205, at ch. 11; see also LAWRENCE LESSIG, *AMERICA, COMPROMISED* at xi (2018) (viewing copyright law as a series of compromises that weaken the institution's public trust and draw away from its higher purpose).

799. See DECHERNEY, *supra* note 153.

800. See *supra* note 195.

software markets, the free culture movement was correct to question the ability of the existing copyright system and institutions to support a robust and free creative ecosystem. But their doomsday predictions of runaway copyright litigation and stifling of creativity were dubious, especially when the former problem was pushed by free culture advocates.<sup>801</sup> Making the world safe for filesharing was not the way to go.

As the aftermath of the Supreme Court's *Grokster* decision made plain, peer-to-peer filesharing was not the answer to society's prayers. By helping to stanch internet piracy, *Grokster* accelerated the path toward subscription services such as Spotify and Netflix, which have proven remarkably successful for creators, consumers, and technology companies. Reforming copyright law during the turmoil of the Web 2.0 revolution was unrealistic and would likely have missed the mark. We needed to see how society and technology would adapt.

By 2010, the dust had settled and the opportunity to reform copyright protection in balanced ways was in the offing. We were nearly half a century past the 1976 Act drafters' worry about designing the law to last "ten, twenty, or fifty years."<sup>802</sup> The 1976 Act was obsolete, leading me to pursue a series of projects aimed at moving the legislative process forward. As I outlined in the 2012 Brace Lecture, there are many constructive reforms that could better promote progress.<sup>803</sup> Yet apart from the Music Modernization Act and the small claims dispute resolution legislation, little reform has occurred.<sup>804</sup>

The problem lies in the unwillingness of the key constituents to compromise. The major content industries deserve some of the blame, but so do Big Tech and the copyleft movement. Hollywood has resisted giving up the statutory damages cudgel that it obtained in the 1990s, yet that weapon has arguably backfired.<sup>805</sup> And Silicon Valley does not want to moderate some of the safe harbors that it gained, even as its tools for addressing piracy efficiently have vastly improved.

In my view, the most promising reform path lies in recalibrating copyright law's statutory damages provisions in conjunction with shifting more policing responsibility onto distribution platforms.<sup>806</sup> This can both remove the threat of crushing liability while channeling customers into authorized distribution channels.

Many of the free culture concerns can be addressed through rolling these reforms into a broader compromise legislation package that addresses educational uses and

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801. See *supra* Section II(B)(3)(d)(iv) and text accompanying notes 362, 442–459.

802. See SUPPLEMENTARY REPORT, *supra* note 491, at 13.

803. See Menell, Brace Lecture, *supra* note 441, at 298–359.

804. Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018); Consolidated Appropriations Act, Pub. L. No. 116–260, 134 Stat. 2176 (2021).

805. See Menell, *Judicial Regulation of Digital Copyright Windfalls*, *supra* note 662.

806. See Menell, Brace Lecture, *supra* note 441, at 302–07.

documentary film safe harbors.<sup>807</sup> Congress can facilitate the production of these works by crafting exemptions, limitations of remedies, and other reforms to reduce the risks faced by educators and documentary filmmakers. More generally, Congress should consider a range of adjustments to reduce the transaction costs associated with licensing copyrighted works. These include establishing pre-clearance institutions,<sup>808</sup> discouraging fair use hold-outs,<sup>809</sup> and tailoring compulsory licensing regimes.<sup>810</sup> The controversy over artificial intelligence may well overshadow these concerns or possibly provide an opportunity to address them as part of an even more ambitious reform package.

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In contrast to the copyleft vision of “Information Wants to Be Free,” peer-to-peer filesharing as the future of content distribution, and “Free Culture” overriding the right to prepare derivative works, the federal judiciary interpreted copyright law relatively faithfully. Statutory interpretation, rather than conflation of interpretive and normative analysis, supported the rule of law. Congress’s intent, rather than a cyberlibertarian anarchist vision, carried the day. The DMCA proved to be an effective reform package for adapting copyright protection for the Internet Age. Symbiotic technological change brought about celestial jukeboxes supporting the flourishing of Silicon Valley and content industries. Licensing (formal and ex ante (Creative Commons)), tolerated use, and Content ID-based UGC monetization expanded a different vision of free culture, although, as noted above, more can and should be done to support free expression and follow-on uses.

Part II of this project examines the chasm between judicial interpretation of copyright law and the views of many in the copyright academy through an empirical examination of Supreme Court academic briefs and anthropological analysis of the copyright legal academy. As a baseline for assessing these patterns, it discusses academic values and the ethical tensions between attorney advocacy and academic scholarship. It then analyzes the performance of academic briefs in Supreme Court copyright cases, highlighting the divergence between the judiciary and much of the copyright legal

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807. See *id.* at 334–36; Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency*, 12 J. TECH. L. & POL’Y 395, 398 (2007); Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2d Sess. 2006) (limiting remedies against users who “performed a good faith, reasonably diligent search in good faith to locate the owner of the infringed copyright”); cf. U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS 127 (2006), <http://www.copyright.gov/orphan/orphan-report.pdf> [<https://web.archive.org/web/20250815123702/https://www.copyright.gov/orphan/orphan-report.pdf>].

808. See Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 B.U. L. REV. 967, 1013–42 (2016); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1123–27 (2007); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 12 (2006) (proposing a panel of “Fair Use Arbiters” appointed by the Register of Copyrights).

809. See Menell & Depoorter, *supra* note 679, at 54.

810. See Menell, *Brace Lecture*, *supra* note 441, at 302–07, 312–17.

academy. It shows that this rift is not due to political differences between judicial and academic views, but rather the result of zealous advocacy and conflation of interpretive and normative analysis by many academics. The article then explores causes and processes underlying this phenomenon, as well as the American Law Institute's Copyright Restatement Project. It concludes by discussing ramifications of the devolution of copyright scholarship for the judiciary, democratic institutions, the scholarly community, and society at large.

# Reconciling Copyright Originality for Photography and Generative Artificial Intelligence

Zoe B. Kaiser, Kanu Song, and Simon J. Frankel\*

## I.

Copyright protection requires creative choices—creative choices that manifest in the work for which protection is sought. We all understand this point in theory, but in practice it has proven difficult to apply to visual works. The contemporary treatment of photography and generative artificial intelligence (AI), two different technologies used to create images, illustrates this. Examples of courts holding photographs unprotected by copyright are few and far between; in contrast, the Copyright Office and federal courts have been reluctant to grant copyright protection to AI-generated elements of visual works. To sharpen the contrast with real-world examples: A photo of a sudden arrest, snapped without thought on a smartphone with default settings, has been found to be protected by copyright, while an AI-generated image refined over hundreds of prompts to illustrate a graphic novel has been denied protection. These seemingly incongruous outcomes may pose a challenge for copyright law as it seeks to regulate intellectual property rights across different media and technologies.

We do not argue here that the Copyright Office has been too harsh on a controversial emerging technology. Rather, we suggest that contemporary treatment of photography has become lax, prone to granting copyright with little or no analysis. Often, courts assume any photograph is protected by copyright and defer examination of what elements in the photograph (if any) might be protectable until forced to do so in connection with the infringement or fair use analysis. Instead, we suggest, courts should fully examine the originality of a work at the copyrightability stage. Recent Copyright Office actions on generative AI can provide a useful roadmap for a more rigorous originality analysis of visual works—specifically, by emphasizing the importance of tracing purported creative choices to an expressive result that manifests

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\* Simon J. Frankel is a Judge on the Superior Court of California in San Francisco and teaches Art and the Law at Stanford Law School. He is co-author, with Stephen K. Urice and the late John Henry Merryman, of *Law, Ethics, and the Visual Arts* (6th ed., Cambridge University Press 2025). Kanu Song is a lawyer with Covington & Burling LPP in its San Francisco office. The views expressed here do not reflect those of the firm or its clients. Zoe Kaiser is clerking at the Northern District of California. The views expressed here do not reflect those of the Court.

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in the final work. Existing doctrines designed for infringement analysis, such as “thin copyright” and “dissection,” also offer useful conceptual models. Just as not every element in an image will be deemed creative for purposes of determining infringement, not every human choice should necessarily be deemed creative for purposes of finding originality. By closely analyzing the connection between creative choice and resulting expression in photographs at the originality stage, courts can return coherence and rigor to copyright doctrine for visual works.

## II.

Proponents of copyrightability for AI-generated images have compared the technology to the camera, which similarly startled and upended traditional notions of artistic merit.<sup>1</sup> In fact, in the first case to consider the new medium of photography, the defendants argued that a photograph could not be copyrighted because photography was “merely mechanical, with no place for novelty, invention or originality.”<sup>2</sup>

It may surprise those of us familiar with modern copyright law that the Supreme Court did not dismiss this argument out of hand. The Court was receptive to the idea that the “ordinary production of a photograph” may lack originality.<sup>3</sup> But in the case before the Court, the photographer Napoleon Sarony had posed his subject, Oscar Wilde, “selecting and arranging the costume, draperies, and other various accessories,” and “arranging and disposing the light and shade.”<sup>4</sup> In other words, Sarony had made particular creative choices, the expressive results of which were identifiable in his photograph. These choices formed the basis for the Court’s finding that the photograph met the originality requirement.

The Court’s cautious originality analysis in *Sarony* morphed over time into the notion that virtually *all* photographs are copyrightable. Justice Holmes laid down the theoretical framework for this view in *Bleistein v. Donaldson Lithographing Co.* when he considered whether an advertisement for a circus could be copyrighted. Holmes mused that a copy is the “personal reaction of an individual upon nature. Personality always contains something unique.”<sup>5</sup> Holmes warned judges against the “dangerous undertaking” of judging “the worth of pictorial illustrations.”<sup>6</sup>

In 1921, Judge Learned Hand confronted the question of whether photographs of trademarked images in a jewelry trade periodical contained originality sufficient for copyright protection. Judge Hand said yes, writing, “. . . no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be

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1. See, e.g., Petitioner’s Motion for Summary Judgment and Memorandum in Support Thereof at 19, *Allen v. Perlmutter*, No. 1:24-cv-02665-WJM (D. Colo. Aug. 8, 2025) (comparing GenAI to “another revolutionary creative tool, the camera”); see also Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (1935), in *ILLUMINATIONS* at 9–16 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968).

2. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1984).

3. *Id.*

4. *Id.* at 55.

5. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

6. *Id.* at 251.

absolutely alike.”<sup>7</sup> And, he added, “[t]he suggestion that the Constitution might not include all photographs seems to me overstrained.”<sup>8</sup>

The strongest reading of Judge Hand’s opinion is a blunt per se rule: All photographs are copyrightable. Courts have been unwilling to go this far, aware that recognizing copyrightability means empowering the copyright holder to sue others for creating and distributing substantially similar works. Without guardrails, that ability can be abused. Two rare cases in which courts rejected photograph copyrightability illustrate the point; in both, the potential consequences for infringement featured heavily in the copyrightability analysis. In one case, a photographer made painstaking photo replications of two-dimensional public domain artworks.<sup>9</sup> The court found that these efforts did not warrant copyright protection, noting that the unthinking extension of copyright could “put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.”<sup>10</sup> In another case, a restaurant owner sought to protect menu photographs of common Chinese dishes.<sup>11</sup> There, too, the court declined to find copyrightability, observing that doing so “would secure plaintiffs the exclusive right of use in such photographs, which effectively would permit them to monopolize the market for printing menus that depict certain commonly served Chinese dishes. Such a result was not Congress’ intent.”<sup>12</sup>

But these cases are anomalies. While modern courts mostly run photographs through *Sarony*-esque originality analysis, the analysis is usually perfunctory. In one striking example, the Eleventh Circuit was confronted with a copyright claim concerning “before and after” photos of teeth, snapped in a dentist’s office. According to the district court, the photos had been taken in five minutes and required only “the most rudimentary and basic task[s] for photographers since the era of the daguerreotype.”<sup>13</sup> The district court held on summary judgment that they lacked “any modicum of creativity or originality.”<sup>14</sup>

The Eleventh Circuit Court of Appeals reversed. “While Dr. Pohl may not have carefully staged Belinda [the patient] and adjusted the lighting as a professional photographer might have, that is not the standard,” the court explained.<sup>15</sup> Any creative decisions counted: The enterprising dentist should get credit for “choosing what type of camera to use,” “instruct[ing] Belinda to look directly at the camera,” “tak[ing] the pictures close-up,” and choosing “to photograph Belinda smiling, instead of, for example, retracting her lips and photographing her teeth and gums only.”<sup>16</sup> The circuit

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7. *Jewelers’ Circular Publ’g Co. v. Key-Stone Publ’g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921), *aff’d*, 281 F. 83 (2d Cir. 1922).

8. *Id.* at 935.

9. *Bridgeman Art Libr. v. Corel Corp.*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999).

10. *Id.*

11. *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546 (S.D.N.Y. 2001).

12. *Id.* at 548.

13. *Pohl v. MH Sub I LLC*, 314 F. Supp. 3d 1225, 1231 (N.D. Fla. 2018), *rev’d and remanded*, 770 F. App’x 482 (11th Cir. 2019).

14. *Id.* at 1232.

15. *Pohl v. MH Sub I LLC*, 770 F. App’x. 482, 488 (11th Cir. 2019).

16. *Id.*

court was also wary of the district court's "utilitarian purpose" metric. Citing *Bleistein*, the court cautioned, "That the photographs were intended solely for advertisement has no bearing on their protectability."<sup>17</sup> The important point was that "Dr. Pohl had something in mind when he took the pictures."<sup>18</sup> But the Court did not elaborate on what that "something" was, or how Dr. Pohl's choices expressed it.

In *Pohl* the circuit court took pains to go through the motions of a *Sarony*-like analysis. But its purported identification of "creative" choices in practice resembles the per se rule suggested by Judge Hand. After all, there are only so many ways one can take a picture to display dental work. We are told that the dentist made creative choices when he instructed his patient to look directly at the camera and when he took the photo close up. But what else would a person trying to take a dental advertising photo have possibly done? The circuit court was wary of judging a work by its utilitarian purpose, but common sense dictates that a work taken for a utilitarian purpose has a smaller world of creative choices. Should the dentist have also been credited for his creative choice to take the photograph with the lights on, rather than off?

The *Pohl* court at least required a photographer to have "something in mind," even if framed at such a level of generality as to make the requirement meaningless, but other contemporary courts have extended copyright even to photographs and videos taken unintentionally or serendipitously. Consider three recent cases. In *Cruz v. Cox Media Grp., LLC*, a New Yorker on a walk with his girlfriend used his iPhone to photograph an arrest taking place on the street.<sup>19</sup> In *Otto v. Hearst Commc'ns, Inc.*, a guest at a private wedding on the Trump National Golf Club was surprised when the wedding was crashed by the club's eponymous owner, and quickly snapped a shot.<sup>20</sup> And in *Roe v. Bernabei & Wachtel PLLC*, a victim of sexual harassment recorded that encounter on her phone.<sup>21</sup>

For the courts considering them, none of these photographs failed the originality test. In *Roe*, the plaintiff's claim that her video reflected "quick creative judgments as to the sight and sounds the phone would likely record by leaving the phone in her purse" was accepted by the court as "barely" sufficient to "nudge the video across the (low) threshold of creativity," surviving a motion to dismiss.<sup>22</sup> In *Otto*, the defendants did not even bother to raise the question of originality.<sup>23</sup>

*Cruz* featured the fullest discussion of originality and the strongest language supporting the copyrightability of serendipitous photos. "As with almost any photograph," the court declared, "the Photograph reflects creative choices, including Cruz's timing for when he took the Photograph."<sup>24</sup> Cruz's "recognition" of a significant

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17. *Id.* at 489.

18. *Id.*

19. 444 F. Supp. 3d 457, 462 (E.D.N.Y. 2020).

20. 345 F. Supp. 3d 412, 420 (S.D.N.Y. 2018).

21. 85 F. Supp. 3d 89, 93 (D.D.C. 2015).

22. *Id.* at 98–99.

23. *Otto*, 345 F. Supp. 3d at 423–24.

24. *Cruz*, 444 F. Supp. 3d at 465 (citing *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005) (noting that timing is one of three main ways a photograph may be original)).



moment and “decision to take the Photograph when he did” were sufficiently creative acts to meet the originality threshold.<sup>25</sup>

In this way a single choice—the choice to take the photo (not even the precise moment of snapping, but simply the choice to try to capture in the moment)—becomes the tautological basis of the photograph’s originality. Return, for a moment, to Sarony and Oscar Wilde. Imagine that, after a long portraiture session, Sarony grows tired and rests in the armchair in which he was shooting Wilde. Wilde, restless, goes over to the camera, still calibrated by Sarony. Without reflection, he takes a shot. Is Wilde entitled to copyright in the resulting photograph? Wilde has not determined the drapings, the arrangement of the room, the light and shade. His singular choice is to take a photograph of Sarony at the moment he took it. Yet, under modern case law, it seems clear that Wilde would receive the copyright. That his only contribution was bringing down a shutter would place him in the same class as the plaintiffs in *Roe*, *Cruz*, and *Otto*. To borrow the language of tort law, while the photographers in these cases are certainly the actual causes of their photographs, the expression in the images seems formed not by their creative choices, but entirely by circumstances outside and beyond their control—the lighting that existed on that day, the smartphone they happened to have, with the settings it happened to have, and the actions taken by others; the person who snapped the “shutter” is not the proximate cause of any seemingly creative choices manifested in the resulting image.

### III.

The lenience courts have shown towards photography has not so far manifested in their treatment of generative AI, a technology as startling to a twenty-first century audience as the camera was in the nineteenth. Generative AI refers to a class of artificial intelligence models trained on vast amounts of data, such that they can produce new, seemingly creative content. Some AI models are designed to produce this new content in response to a prompt, with varying parameters within the prompter’s control. This means that a prompter may have to reformulate and iterate prompts a number of times to produce a satisfactory final product. As generative AI models have entered daily use, people have begun to seek copyright for their AI-generated images. But the Copyright Office and the U.S. Court of Appeals for the D.C. Circuit have so far rejected copyright for AI-generated aspects of pictorial works,<sup>26</sup> citing copyright’s human authorship

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25. *Id.*

26. The Copyright Office has explicitly indicated its willingness to grant copyright for human-created works that also contain AI-generated contributions, requiring only that applicants disclaim the AI-generated elements first. Use of an AI tool will not always raise questions about human authorship and in some cases may not need to be disclaimed. See Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190 (Mar. 16, 2023); *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025).

requirement (previously invoked only to defeat the copyright of a macaque monkey and supernatural spirits).<sup>27</sup>

In 2019, the Copyright Office received an application from Steven Thaler for the two-dimensional visual artwork, “A Recent Entrance to Paradise.” Thaler listed as the sole author: “Created autonomously by machine.”<sup>28</sup> The Copyright Office rejected the application on the grounds that the work failed to satisfy “the human authorship” criteria of copyright, noting that Thaler had “provided no evidence on sufficient creative input or intervention by a human author in the Work.”<sup>29</sup>

In *Thaler v. Perlmutter*, the district court upheld the Copyright Office’s decision.<sup>30</sup> While recognizing that “Copyright is designed to adapt with the times,” the court observed that “human creativity is the sine qua non at the core of copyrightability, even as that human creativity is channeled through new tools or into new media.”<sup>31</sup> The court distinguished the new technology of generative AI from photography. In *Sarony*, the *Thaler* Court explained, “recognition of the copyrightability of a photograph rested on the fact that the human creator, not the camera, conceived of and designed the image and then used the camera to capture the image.”<sup>32</sup> The photograph “represented the original intellectual conceptions of the author.”<sup>33</sup> To the extent a camera generates a mechanical reproduction, it does so “only after the photographer develops a ‘mental conception’ of the photograph.”<sup>34</sup> That mental conception is “given final form by the photographers’ decisions.” In photography, “ultimate creative control” lies with a human—in contrast, AI works lacked a “guiding human hand.”<sup>35</sup>

On appeal, Thaler attempted to argue that his choices in designing the AI tool and prompting it were sufficient to show that he was the author of the resulting work and accordingly entitled to copyright protection. At oral argument, appellant framed this argument in terms of but-for causation: Thaler was the author, because the work only existed because of him.<sup>36</sup> The panel pushed on this argument, positing a hypothetical in which a printer jams, creating a serendipitous smearing of ink. Under Thaler’s theory, copyright would lie with the individual who pressed the print button, even though that person made no intentional creative choice. Ultimately, the D.C. Circuit held that the Copyright Act of 1976 required human authorship, and that Thaler had

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27. *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018); *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997).

28. U.S. COPYRIGHT OFF., Letter re: *A Recent Entrance to Paradise* (Aug. 12, 2019) (initial letter refusing copyright registration “because it lacks the human authorship necessary to support a copyright claim”).

29. U.S. COPYRIGHT OFF., Letter re: *A Recent Entrance to Paradise*, at 1 (Mar. 30, 2020) (letter responding to a request for reconsideration and again refusing copyright registration).

30. *Thaler v. Perlmutter*, 687 F. Supp. 3d 140 (D.D.C. 2023), *aff’d*, 130 F.4th 1039 (D.C. Cir. 2025).

31. *Id.* at 146.

32. *Id.* at 148.

33. *Id.* at 146 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884)).

34. *Id.*

35. *Id.*

36. Oral Argument at 5:53, *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025), <https://media.cadc.uscourts.gov/recordings/docs/2024/09/23-5233.mp3> [<https://web.archive.org/web/20250814044638/https://media.cadc.uscourts.gov/recordings/docs/2024/09/23-5233.mp3>].

waived the argument that he, rather than the AI machine he used, was an author of the work.<sup>37</sup> Due to this waiver issue, the court did not address the thornier issue of when a human using an AI application might be treated by copyright law as an author of the resulting work.<sup>38</sup>

A subsequent generative AI application on its face presented a better case for the “guiding human hand” found lacking in *Thaler*. The Copyright Office’s decision about *Zarya of the Dawn* involved an eighteen-page graphic novel. The applicant, Ms. Kashtanova, wrote all text in the graphic novel herself and selected and arranged the final text and images.<sup>39</sup> But the images were generated by the AI model Midjourney.<sup>40</sup> Ms. Kashtanova described an intensive, “trial-and-error” process for each image in which she provided “hundreds or thousands of descriptive prompts to Midjourney until the hundreds of iterations created as perfect a rendition of her vision as possible.”<sup>41</sup>

But the Copyright Office was not convinced that Ms. Kashtanova’s contributions satisfied human authorship. The Office noted that, “Rather than a tool that Ms. Kashtanova controlled and guided to reach her desired image, Midjourney generates images in an unpredictable way.”<sup>42</sup> The prompt might “influence” the final image but does not dictate a “specific result,” and “[t]he fact that Midjourney’s specific output cannot be predicted by users makes Midjourney different for copyright purposes than other tools used by artists.”<sup>43</sup> Invoking *Sarony*, the Office explained that “[u]sers of Midjourney do not have comparable control over the initial image generated, or any final image.”<sup>44</sup> To the Copyright Office, the fact that Ms. Kashtanova took “over a year from conception to creation” in order to match the vision she had in mind did not support her copyright claim—it undermined her contention by showing just how little control over the process she had.<sup>45</sup> The “significant time and effort” Ms. Kashtanova spent was beside the point, since courts reject “the argument that ‘sweat of the brow’ can be a basis for copyright protection in otherwise unprotectable material.”<sup>46</sup>

While this is a correct statement of the “sweat of the brow” doctrine, it is simultaneously a novel application of it. The typical “sweat of the brow” case involves a creator arguing that their significant labor may transform a facially unexpressive work, like a telephone directory, into a copyrightable one.<sup>47</sup> Courts do not usually take issue with a photographer discussing their deliberation and repeated attempts as evidence of creative vision. Here, the Copyright Office’s qualm was not that the final work was unexpressive or a creative vision lacking, but that it was unconvinced that

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37. *Thaler*, 130 F.4th 1039.

38. See *id.* at 1050 (noting that “line-drawing disagreements over how much artificial intelligence contributed to a particular human author’s work are neither here nor there in this case”).

39. U.S. COPYRIGHT OFF., Letter re *Zarya of the Dawn* (Registration #VAu001480196) (Feb. 21, 2023).

40. *Id.*

41. *Id.* at 8.

42. *Id.* at 9.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 10.

47. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991).

there was a sufficient connection between the author's creative choices and the resulting expression. In its view, "sweat of the brow" could not bolster that missing link.

The Copyright Office concluded its opinion with a counterfactual. If Ms. Kashtanova had commissioned a visual artist to produce her images and given that visual artists identical prompts, "the author would be the visual artist who received those instructions and determined how best to express them," not Ms. Kashtanova.<sup>48</sup>

Let us return again to the Sarony and Wilde counterfactual raised above. Under the Copyright Office's analysis, Wilde would be comparable to the prompter—causing the final image without exercising any true control over its content. Just as the output of an AI model may be dictated by its various training inputs, Wilde's output would be attributable to choices he did not make. The Copyright Office's analysis would seem to dictate that, in this counterfactual, Wilde would *not* receive copyright for the photograph he took. Yet, as discussed, under modern copyright doctrine, Wilde would almost certainly be considered an author—and copyright owner.

Can this discrepancy be reconciled? The heft of the Copyright Office's analysis does not lie in its rejection of a machine as author (and to find otherwise would raise difficult issues as to when and why machines—including sophisticated cameras—might be recognized as authors of resulting works). Rather, the discrepancy enters in the way the Copyright Office parses out the contributions made by the human prompter and the way it scrutinizes the causal connection between those choices and the resulting image. The Copyright Office never disputes that *some* contribution is made by the prompter, without which the image, with its expressive properties, would not exist. But for AI-generated images, in contrast to photographs, the Copyright Office requires a more direct link between individual effort and apparently expressive result. Under this analysis, an individual appears to receive little or no credit for expressive elements that emerge from circumstances beyond their own choices. In other words, the Copyright Office has treated the watered-down "creative choice" analysis sufficient for copyright to attach to photographs, as insufficient with respect to AI.

Some critics have viewed the discrepancy between the copyright analysis for photographs and AI as evidence that the Copyright Office has erred.<sup>49</sup> But to the extent there is a discrepancy between the photography case law and the recent AI rulings, the discrepancy may be better found in how modern courts have adulterated the originality analysis for copyright with respect to photographs. In the recent AI-image rulings, we are offered a glimpse of what a robust originality analysis for visual arts could

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48. Letter re: *Zarya of the Dawn*, *supra* note 39, at 10. This assertion by the Copyright Office is not so clear cut. *See, e.g.*, *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) (when comic book artist drew distinctive characters based on a writer's verbal descriptions, the resulting comic book character was a joint work of the artist and the writer, even though the writer's "contribution may not have been copyrightable by itself"); *Moi v. Chihuly Studio, Inc.*, No. C17-0853RSL, 2019 WL 2548511, at \*3 (W.D. Wash. June 20, 2019), *aff'd*, 846 F.App'x 497 (9th Cir. 2021) (artist running studio holds copyright and is not joint author with studio employee who carried out artist's directions); *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609 at \*6 (S.D.N.Y. 1999) (individual who directed camera crew was sole author of the resulting footage).

49. *See, e.g.*, Brief of Legal Professors et al. as Amici Curiae in Support of Appellant and Urging Reversal, *Thaler v. Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025).

resemble—an analysis that demands creative choices to manifest foreseeably in the resulting image.

#### IV.

AI-image cases are not the only site where a more rigorous copyright doctrine may be developed. Recall the monopoly concerns raised in *Bridgeman* and *Oriental Art*. In those cases, the courts considered the downstream consequences of finding the works copyrightable at the originality stage and so denied originality.<sup>50</sup> But as originality analysis has weakened, substantial similarity has broadened in scope, and as photographs have grown ubiquitous, courts have developed scoping doctrines at the infringement stage, namely *thin copyright* and *dissection*. These scoping doctrines have acted as pressure release valves in a system flooded with photographs often taken with little deliberation.

Thin copyright is the concept that some works are more protected by copyright law than others because some works contain more protected elements—and some works, often photographs, contain less. *Ets-Hokin v. Skyy Spirits, Inc.* neatly illustrates this concept.<sup>51</sup> At issue in *Skyy* were two photographs of the same blue vodka bottle, taken for a commercial product shoot. As Judge Schroeder pithily began her opinion, “This long-running litigation is fundamentally about how many ways one can create an advertising photograph, called a ‘product shot,’ of a blue vodka bottle. We conclude there are not very many.”<sup>52</sup> While the photographer in *Skyy* could point to a number of choices—centering a product, lighting it well, and shooting it with an aesthetically pleasing shallow depth of field—these choices were all customary “constraints of the commercial product shoot.”<sup>53</sup> The choices were sufficiently “original” to grant copyright, but, the court found, *not* sufficient to sue another photographer who made almost identical choices while photographing an identical subject.<sup>54</sup> For a photo with a copyright that thin, the implication was that only copy and paste-style copying would infringe.

Thin copyright doctrine can be understood as an implicit admission by courts that recognizing copyright in practically every photograph means recognizing copyright in vast scores of images that do not merit the extensive scope of protection that copyright law currently grants. Accordingly, thin copyright allows Dr. Pohl to sue others for copy and pasting his teeth snapshots from his websites to their own but prevents him from suing someone else who takes a close-up of teeth, while instructing their subject to smile (no matter how similar the resulting image may be to one by Dr. Pohl).<sup>55</sup> One might ask why Dr. Pohl’s photographs receive even this degree of protection, when

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50. *Bridgeman Art Libr. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999); *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542 (S.D.N.Y. 2001).

51. 323 F.3d 763, 764 (9th Cir. 2003).

52. *Id.*

53. *Id.* at 766.

54. *Id.*

55. *See supra* Section II.

anyone can go out and produce a nearly identical photo to his by copying his “creative choices.” (The only observable difference may be whose teeth are shown.) Although copyright law purports not to reward “sweat of the brow,” it is difficult to escape the thought that thin copyright’s main function is to protect the labor of the photographer from the lazy copier—one who was not willing to do even that minimal work.

Dissection, like thin copyright, is a doctrine that limits the scope of copyright at the infringement stage. Courts that follow a dissection approach when evaluating substantial similarity ask which *protectable elements* in a work have been copied, discounting elements which are shared between works but are not themselves protectable. For example, in *Oriol v. H&M Hennes & Mauritz L.P.*, a photographer, whose photograph of ring-clad fingers spelling out the letters “LA” went viral, sued H&M after the company began to sell t-shirts with an image recreating the gesture.<sup>56</sup> The district court observed that the photographer “ha[d] no copyright to the idea of a person making the LA sign with their fingers.”<sup>57</sup> The court went on to dissect the ways that Oriol alleged the photographs were similar and found the following not protectable: shooting in black and white, “shooting an individual making a hand sign from directly in front,” and “simply the wearing of jewelry itself.”<sup>58</sup> With these unprotectable elements removed, nothing remained.

Courts have been understandably cautious about taking dissection too far. No element of a visual work, on its own, sounds that impressive, and in theory dissection could render any work a mere collection of unprotected elements. But this admitted difficulty has not stopped courts from trying to apply some degree of dissection.

Thin copyright and dissection are doctrines usually applied as part of the infringement analysis, not at the copyrightability stage. The photographer of the vodka bottle and “LA Fingers” lost their lawsuits against substantially similar works, but nobody disputed that their works were protected by copyright law—the only question was how far that protection extended.<sup>59</sup> Still, the mode of thinking applied in thin copyright and dissection analysis can be instructive for originality analysis. Just as not all expressive elements in a work are protectable elements at the infringement stage, not all choices give rise to originality in the first place.

## V.

We have suggested that current approaches to the analysis of visual works yield results that may be incongruous across different mediums, indicating that a more robust originality analysis for photographs may be needed. What would this more robust originality doctrine for photographs look like in practice? We offer the following observations.

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56. *Oriol v. H&M Hennes & Mauritz L.P.*, No. CV 13-05088-R, 2014 U.S. Dist. LEXIS 195340, at \*6 (C.D. Cal. Feb. 10, 2014).

57. *Id.* at \*2.

58. *Id.* at \*3–5.

59. *See id.*; *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763 (9th Cir. 2003).

## 1. ARTICULATION OF CREATIVE CHOICES AT THE PLEADINGS STAGE

One way to incorporate a more rigorous originality analysis at the pleading stage would be to require more specific pleading of originality by plaintiffs suing for copyright in visual works. In current practice, many copyright plaintiffs plead copyright infringement without elaborating on why originality is satisfied, possibly leaning on the statutory presumption of validity from registration as sufficient.<sup>60</sup>

However, courts interpret the originality requirement as a *constitutional* requirement, not just a statutory one.<sup>61</sup> Like the question of standing, it is something that every court has an obligation to consider regardless of what actions the Copyright Office has taken. Further, unlike in trademark and patent, where applicants must define the metes and bounds of their claims with precision, it is not always apparent from the face of a copyright registration what the author claims.

Other fields of intellectual property law recognize the importance of defining at the outset of the litigation the scope of the right claimed. In patent law, the patent-holder must submit infringement contentions at the outset of the case that specifically outline the novelty in their invention that has been infringed.<sup>62</sup> In trade secret law, the trade secret holder is typically required to identify with “particularity” (and at an early stage of the litigation) the alleged trade secrets taken.<sup>63</sup> In trade dress law, the holder must be “specific” in defining the trade dress.<sup>64</sup> And for trademarks generally, the holder must define the “good and services” it offers, limiting the scope of its mark.<sup>65</sup> By contrast, courts have rarely required any level of specificity in copyright pleadings beyond

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60. Compare Complaint, *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018) (not formally pleading that originality is met), Complaint, *Cruz v. Cox Media Grp.*, 444 F. Supp. 3d 457 (E.D.N.Y. 2020) (not formally pleading that originality is met), and Complaint at ¶8, *Pohl v. MH Sub I LLC*, 314 F. Supp. 3d 1225 (N.D. Fla. 2018), *rev'd and remanded*, 770 F. App'x 482 (11th Cir. 2019) (pleading only that “Dr. Pohl has extensively documented his work through the use of “before and after photographs that depict the transformational nature of his work”), with Complaint at ¶20–21, *Roe v. Bernabei & Wachtel PLLC*, 85 F. Supp. 3d 89, 98 (D.D.C. 2015) (pleading that Plaintiff “creatively” hid her phone in her purse and made “quick creative judgments as to the sights and sounds the phone would likely record by leaving the phone in her purse.”).

61. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (“Originality is a constitutional requirement.”).

62. See, e.g., N.D. Cal. Patent L.R. 3-1 (requiring identification of alleged infringement to be made as “specific[ally] as possible” at the outset of the lawsuit); accord E.D. Tex. P.R. 3-1.

63. See, e.g., *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 658 (9th Cir. 2020) (trade secret plaintiff must “describe the subject matter of the trade secret with sufficient particularity”).

64. See, e.g., *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 381 (2d Cir. 1997) (trade dress plaintiff must articulate the “specific elements which comprise its distinct dress” as courts will “be unable to shape narrowly-tailored relief if they do not know what distinctive combination of ingredients deserves protection.”).

65. See J. THOMAS MCCARTHY, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:48 (5th ed. 2025) (“One of the vital parts of an application is a specification of the particular goods or services on or in connection with which the mark is used or is intended to be used.”); *Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 971 (9th Cir. 2007) (“[T]he recitation of goods and services in the registration limits the scope of presumptions of validity”(quoting MCCARTHY at § 24:65)).

identifying the infringed work (and that it is registered). This makes copyright the outlier in areas of intellectual property law.

As all other fields of intellectual property law recognize, there are substantial practical benefits to requiring a plaintiff to state early and on the record what intellectual property they are claiming.<sup>66</sup> Doing so prevents gamesmanship (particularly claiming one's rights are broader than they are), a perennial concern in intellectual property law.<sup>67</sup> *Straight Path v. Cisco* demonstrates the problem of inconsistent claims by intellectual property holders at its extreme.<sup>68</sup> The patent holder in *Straight Path* had previously claimed an extremely narrow novel invention when arguing before the Federal Circuit for the validity of its patent in a related case.<sup>69</sup> The Federal Circuit pointed this out during oral argument, stating, "You've boxed yourself into a pretty narrow infringement argument, though, haven't you, with this claim construction?"<sup>70</sup> Despite telling the Federal Circuit that this was correct, once the patent holder had its validity ruling in hand, it turned around and sued for infringement on "an astonishingly overbroad theory."<sup>71</sup> The district court found the patent holder's "duplicitous machinations in telling the Federal Circuit one thing and telling this Court the opposite on a critical point" exceptional enough to justify a grant of attorney's fees.<sup>72</sup> But this finding was only possible because the patent holder had made its previous representations on the record with the Federal Circuit. In a typical copyright infringement case, the public record would not be so detailed.

In copyright, the staged nature of the analysis may raise additional gamesmanship concerns. The analysis of visual works traditionally occurs in two or three stages: originality, infringement, and, where applicable, fair use. At each stage, courts make a slightly different inquiry, but to the common end of understanding what is protected, what was taken, and whether that taking is justified under copyright law. These stages, in theory, logically build on one another. The scope of infringement should be limited by what the plaintiff has legitimately claimed as original in their work—a defendant should not be penalized for taking elements of a work that are not the plaintiff's protectable expression, as the various scoping infringement doctrines recognize. But it

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66. Practical benefits include requiring a claimant to "investigate its claims beforehand," discouraging the filing of "meritless complaints," enabling a court to "frame appropriate discovery and rule upon it," and enabling the other party to "develop defenses and not face surprise on the eve of trial." ERIC E. BENSON & ROGER M. MILGRIM, 1 MILGRIM ON TRADE SECRETS § 1.01 (1967).

67. See, e.g., *Jobscience, Inc. v. CVPartners, Inc.*, No. C 13-04519 WHA, 2014 U.S. Dist. LEXIS 64350, at \*5 (N.D. Cal. May 1, 2014) ("Experience has shown that it is easy to allege theft of trade secrets with vagueness, then take discovery into defendants' files, and then cleverly specify whatever happens to be there as having been trade secrets stolen from plaintiff. A true trade secret plaintiff ought to be able to identify, up front, and with specificity the particulars of the trade secrets without any discovery. This order will not allow this old trick of vague pleading with the blanks to be artfully filled in only after discovery.")

68. *Straight Path IP Grp., Inc. v. Cisco Sys., Inc.*, No. C 16-03463 WHA, 2017 WL 6372971 (N.D. Cal. Dec. 13, 2017), *aff'd sub nom. Straight Path IP Grp., LLC v. Apple Inc.*, 748 F. App'x 1027 (Fed. Cir. 2019).

69. *Samsung Elecs. Co., Ltd. v. Straight Path IP Grp., Inc.*, 696 F. App'x 1008, 1013 (Fed. Cir. 2017).

70. *Straight Path IP Grp.*, 2017 WL 6372971, at \*5 (quoting Oral Argument, Dkt. No. 131-19 at 28:25-29:9, *Samsung Elecs. Co.*, 696 F. App'x 1008).

71. *Straight Path IP Grp.*, 2017 WL 6372971, at \*5.

72. *Straight Path IP Grp.*, 411 F. Supp. 3d at 1031.



is far easier to properly demarcate scope at the infringement stage if originality has already been established in a focused manner. And as scholars have recognized, courts have lately demonstrated a tendency to breeze past not just the originality stage of analysis, but the substantial similarity inquiry as well, leaving fair use as the load-bearing inquiry.<sup>73</sup> But the evidentiary work done at the originality and infringement stages lay the groundwork for making fair use determinations.<sup>74</sup> If a plaintiff is not made to explain their creative choices at the originality stage, that plaintiff is free to make broader arguments at later stages of the analysis that might have been rejected had they come earlier.

Requiring copyright plaintiffs to explain why their works satisfy originality serves the affirmative purpose of forcing plaintiffs to articulate their creative choices. Once articulated, creative choices may serve as a touchstone in lawsuit against which evidence can be developed to either vindicate or disprove the alleged choices. Recall that, in *Otto*, the plaintiff was attending a wedding at Trump National Golf Club when Donald Trump made a surprise appearance; the plaintiff held up her smartphone over the crowd around her and snapped a quick shot.<sup>75</sup> Because originality was never challenged in that case, the plaintiff never articulated what creative choices underlay this photograph. Perhaps there were many. Or perhaps, if pressed, the plaintiff would have had little to say, opening originality as a battleground in that case. Pleadings shape the path of litigation, guiding initial discovery, which in turn creates the record for summary judgment and trial. Increased transparency at the pleading stage lays the foundation for informed judicial scrutiny of originality, and for more lucid judicial analysis at the subsequent stages of copyright analysis. The less courts discuss originality, the more likely defendants are to forego it as a futile argument (as in *Otto*), creating a vicious cycle by then depriving courts of the opportunity to consider the argument at all.<sup>76</sup>

## 2. DISSECTION OF WHETHER CREATIVE CHOICES RESULT IN FORESEEABLE EXPRESSION

Courts currently consider and filter out unprotectable elements in visual works when evaluating infringement. Courts could follow a similar process when analyzing visual works at the originality stage. Instead of simply asking whether choices were made, and accepting any answer, courts could do as the Copyright Office and the D.C. District Court have done in its AI image cases and examine whether these choices are

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73. Sandra M. Aistars, *Copyright's Lost Art of Substantial Similarity*, 26 VANDERBILT J. ENT. & TECH. L., 109, 112–13 (recognizing a “trend of courts de-emphasizing the substantial similarity analysis and shifting the work of infringement decisions almost entirely to the fair use defense”).

74. *Id.* at 148 (“Originality and substantial similarity analyses provide courts the opportunity to make crucial factual assessments about visual artworks at issue in infringement proceedings.”)

75. *Otto v. Hearst Comm'ns., Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018).

76. Deferral of copyright questions to later stages of litigation, such as fair use, also significantly raises the cost, and correspondingly, the risk of lawsuits, incentivizing defendants to settle early rather than putting the plaintiff to their proof.

of the sort that copyright law is intended to protect—whether the choice foreseeably results in an expressive element of the work.

A focus on foreseeability accepts timing as a potential creative choice, but not fortuity. A landscape photographer who patiently crouches in the same spot for days on end, hunting for the perfect shot of a jumping fish, has made a protectable choice because the spontaneous moment she ultimately captures will be a foreseeable result of her waiting. In contrast, a photographer who happens to press a button at the right time in the right place is more analogous to the AI prompter whose single prompt fortuitously generates an image with pleasing expressive elements. In neither case are the expressive elements traceable to the creator's choices other than through luck or happenstance.

This thinking is not alien to how courts currently decide copyright cases, even if the language is new. In *Thaler*, the court considered how the photographer's "mental conception" was "given final form by the photographer's decisions."<sup>77</sup> In *Roe*, where the plaintiff sued over video taken of her sexual assault, the court found that her allegation that her video was the result of "quick creative judgments as to the sight and sounds the phone would likely record by leaving the phone in her purse" would "just barely" save the video from an originality challenge at the motion to dismiss stage.<sup>78</sup> This pleading tied the plaintiff's actions to their expressive results. Whether the plaintiff could convince the court—or a jury—that these "creative judgements" really occurred is another story.

For example, in *Sands v. CBS Interactive Inc.*, when pressed, the photographer plaintiff was not able to confidently distinguish the photos he was suing over from photos taken that day by another photographer of the same subject.<sup>79</sup> In *Sands*, this testimony did not stop the court from making a finding of originality, but it is plausible that another judge might have found that this deposition testimony raised an issue of fact for the jury—or even established a lack of protectable elements.

## VI.

We have suggested that the current approaches to the analysis of photographs and AI-generated images are incongruous and discussed how courts troubled by this might apply a more robust originality analysis to photographs.

Of course, consistency could also be achieved by going in the other direction—extending the lenient standards of photographic originality to AI-generated images. The protection for such images would have to be exceedingly thin, only protecting against actual copying of the image itself. Images generated based on an identical prompt (which would not necessarily even be substantially similar to each other, as identical prompts to the same AI model may produce differing images) would most likely not be infringing, because the original prompter had no control of the process

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77. *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 146 (D.D.C. 2023), *aff'd*, 130 F.4th 1039 (D.C. Cir. 2025).

78. *Roe v. Bernabei & Wachtel PLLC*, 85 F. Supp. 3d 89, 98 (D.D.C. 2015).

79. *Sands v. CBS Interactive Inc.*, No. 18-cv-7345, 2019 WL 1447014, at \*6 (S.D.N.Y. Mar. 13, 2019).

that translated prompt into image. But the creator of an AI-artwork could plausibly protect the exact image generated by their prompt against complete, actual copying. This approach of “thin copyright for all” respects the intuition shared by many people that a photograph or AI-generated image belongs to the person that caused it to exist, and that this causal relationship between idea and expression should result in some property right, regardless of how thin.

However, this model of shallow but ubiquitous copyright is not a cure-all. Even copyrights with limited enforceability have the potential, in practice, to stifle creativity. And this model raises the risk of stifling development of copyright doctrine as a whole. Copyright has never protected ideas; copyright law’s generosity in granting protection relative to other fields of intellectual property which require some kind of external test<sup>80</sup> is justified by copyright’s narrower focus on how a creator has expressed an idea in tangible form. In actual copying situations, and particularly digital copy-and-pasting, our intuitions from property law are at their strongest—something has been taken, like an apple swiped from a shelf. But a system built on easy cases will find itself without the necessary doctrine to decide harder ones. The novel question of AI-generated images has led the Copyright Office back to first principles of originality analysis. Courts should consider taking this opportunity to follow suit.

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80. For patent, whether anyone else has had the idea; for trademark, whether consumers have formed associations with the mark; for trade secret, whether the particular information has been diligently kept secret.



## AI Influencers and a Right of Publicity

Victoria L. Schwartz\*

*The influencer industry has exploded over the past few decades with estimated valuations as high as hundreds of billions of dollars. Most influencers are humans who receive compensation for leveraging their social media followings to promote specific brands. More recently, however, so-called virtual influencers, such as Lil Miquela, who are CGI creations rather than actual people, have achieved success in the young influencer industry. Now, so-called AI influencers enter this rapidly developing field with artificial intelligence technology playing an increasing, but complicated role in the creation and curation of influencer content. This Article catalogs the diverse roles held by artificial intelligence in the influencer space situating its various uses within a broader spectrum of influencer use of technology.*

*This Article is the first to tackle a pair of important questions concerning whether the right of publicity applies to virtual and AI influencers, and whether it should apply. Descriptively, this Article examines state right of publicity regimes and analyzes whether these statutory or common law frameworks in their current form could apply to virtual or AI influencers. Normatively, the question of whether the right of publicity should apply to virtual or AI influencers is complicated by the fact that scholars and courts have not coalesced around a single theoretical justification for the right of publicity. By examining each of its possible theoretical justifications, the Article argues that there is a stronger case for applying the right of publicity to virtual and AI influencers under each justification than may immediately be apparent. Nonetheless, the strength and scope of the argument differ depending on the justification selected. Ideally this analysis will offer an opportunity for scholars, legislatures, and courts to sharpen their justifications for protecting the right of publicity into a theoretically defensible and coherent body, with broader implications not only for virtual and AI influencers, but the entire right of publicity doctrine.*

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\* Professor of Law, Pepperdine Caruso School of Law. J.D., 2007, Harvard Law School; B.S., B.A., 2004, Stanford University. Thank you to Natasha Spear for excellent research and editing assistance. Thanks also to participants at the Privacy Law Scholars Conference, M<sup>3</sup> IP Scholars Workshop, Works in Progress Intellectual Property, Intellectual Property Scholars Conference, Pepperdine Faculty Workshop, and Internet Law Works in Progress for feedback on various versions of this project.

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Introduction .....	357
I.From Human to Virtual to AI Influencers .....	360
A. Birth of the Modern Influencer Industry .....	361
B. The Influencer Technology Spectrum .....	364
1. Pure Authenticity .....	364
2. Shallow Fakes .....	364
3. Virtual Influencers.....	365
4. AI Influencers.....	370
C. Rethinking the Authenticity Rationale for Influencers .....	375
II.Do Existing Right of Publicity Laws Protect the Identities of Virtual and AI Influencers?.....	376
A. State Right of Publicity Protection Under Existing Regimes.....	377
1. States Requiring “Natural” or “Living” Persons .....	378
2. States with More Promising Statutory Language .....	380
3. Common Law Right of Publicity .....	385
4. Protection for Humans Behind Virtual or AI Influencers.....	386
B. Animals and Right of Publicity.....	388
C. Corporations and Right of Publicity.....	390
D. Characters and Right of Publicity .....	391
III.Should The Right of Publicity Apply to Virtual and AI Influencers?.....	392
A. Labor-Reward/Lockean Theory .....	393
B. A Consumer Confusion/Deception Justification .....	394
C. Unjust Enrichment .....	396
D. Exhaustion or Allocative Efficiency.....	398
E. A Privacy Justification .....	399
F. Moral/Natural Rights.....	400
G. Autonomy/Control.....	402
H. Incentive-Based Rationale .....	403
IV.Conclusion .....	404

## INTRODUCTION

In the decades since its inception, the influencer industry has quickly grown into a massive economic phenomenon with estimated valuations as high as hundreds of billions of dollars, and further rapid growth predicted.<sup>1</sup> After major social media companies developed mechanisms to pay content creators, independent creators who were not traditional celebrities, but who could achieve significant followings on social media, could now leverage those followings to get paid to drive consumer internet traffic to the products and services they promoted.<sup>2</sup> Creating social media content quickly became a potentially lucrative career.

With the influencer industry booming, Miquela Sousa, aka Lil Miquela, shared her first Instagram post in 2016.<sup>3</sup> Sousa appeared to be a nineteen-year-old Brazilian-American model and self-described social justice activist<sup>4</sup> and acquired millions of Instagram followers.<sup>5</sup> In June 2018, *Time Magazine* named her one of the “Twenty-five Most Influential People on the Internet.”<sup>6</sup> Lil Miquela has had brand deals with UGG and Calvin Klein, released music, and in 2020 even signed a talent agency deal with the Creative Artists Agency (“CAA”).<sup>7</sup> Early on, some of her social media followers debated

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1. See Danielle Chemtob, *The \$250 Billion Influencer Economy Is Booming*, FORBES (Oct. 28, 2024), <https://www.forbes.com/sites/daniellechemtob/2024/10/28/forbes-daily-the-250-billion-influencer-economy-is-booming/>

[<https://web.archive.org/web/20251009144714/https://www.forbes.com/sites/daniellechemtob/2024/10/28/forbes-daily-the-250-billion-influencer-economy-is-booming/>].

2. See Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 83 (2020) (noting that consumers follow and engage with influencers on social media and buy what they endorse).

3. See Miquela (@lilmiquela), INSTAGRAM (Apr. 26, 2016), <https://www.instagram.com/p/BErpKdVMmxF/> [<https://perma.cc/49LA-BKU5?type=image>] (displaying her first Instagram post); see also Sonia M. Okolie, *Stretching the Boundaries of Intellectual Property Governing Digital Creations*, 12 LANDSLIDE 52, 53 (2020) (noting Lil Miquela’s 2016 Instagram appearance as the “earliest identified use” of a virtual influencer).

4. See D’Shonda Brown, *Introducing Miquela, the Gen Z Loretta Modern*, LADYGUNN (Oct. 9, 2020), <https://www.ladygunn.com/music/miquela-interview/>

[<https://web.archive.org/web/20251009144920/https://www.ladygunn.com/music/miquela-interview/>] (briefly exploring Lil Miquela’s commitment to social activism); Madeline Schultz, *Virtual Influencer Miquela Is Back. This Time, Brands Are Metaverse Ready*, VOGUE BUS. (Aug. 12, 2022), <https://www.voguebusiness.com/technology/virtual-influencer-miquela-is-back-this-time-brands-are-metaverse-ready>

[<https://web.archive.org/web/20251009145159/https://www.voguebusiness.com/technology/virtual-influencer-miquela-is-back-this-time-brands-are-metaverse-ready>] (outlining Lil Miquela’s return to brand advertising).

5. See Samantha Favela, *Uncovering the “Realness” of CGI Influencers*, 24 SMU SCI. & TECH. L. REV. 325, 325 (2021) (noting that, as of 2021, Lil Miquela had over three million Instagram followers).

6. *The Twenty-five Most Influential People on the Internet*, TIME (June 28, 2018), <https://time.com/5324130/most-influential-internet/>

[<https://web.archive.org/web/20251009145308/https://time.com/5324130/most-influential-internet/>].

7. See Jim Masteralexis, Steve McKelvey & Keevan Statz, *#IAMAROBOT: Is It Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market?*, 12 HARV. J. SPORTS & ENT. L. 353, 366 (explaining that Lil Miquela partnered with Calvin Klein for a heavily criticized 2019 advertisement); Shyam Patel, *One of Ugg’s Most Followed Ambassadors Isn’t a Person at All*, PAPER (Oct. 17, 2018), <https://www.papermag.com/ugg-40-years-lil-miquela-campaign#rebellitem4>

whether she was real, but others insisted that she was a regular teenaged social media influencer, just perhaps with quite a bit of photoshop applied.<sup>8</sup> One Instagram user wrote “that she does actually exist: ‘It’s just the way she edits her photos.’”<sup>9</sup>

Two years after her social media debut, it was revealed that Lil Miquela is not a real person but rather was initially created using computer-generated imagery (“CGI”) technology by a secretive Los Angeles company called Brud.<sup>10</sup> After that disclosure, Miquela’s creators fully leaned into her non-human identity.<sup>11</sup> Her YouTube page boasts videos with titles such as “Top Ten Moments of 2021 (From a Robot),” in which she starts by saying that she is celebrating her nineteenth birthday for the sixth time, and that she received a USB with all of her programmed memories on it as her birthday present.<sup>12</sup> She still has millions of followers, has apparently finally aged from nineteen to twenty two, and most recently made headlines when she “posed” with politician Nancy Pelosi.<sup>13</sup> Lil Miquela represents one of the most famous examples of what came to be known as “virtual influencers,” which are best defined as human-created fictional influencers created using computer technology.

Fast forward a few years from Lil Miquela’s big reveal and generative artificial intelligence (“AI”) has quickly impacted just about everything. And if the popular press and internet is to be believed, the young influencer industry is not immune from AI’s encroachment. Article headlines proclaim that “AI Influencers” have exploded on and

[<https://web.archive.org/web/20251009145437/https://www.papermag.com/ugg-40-years-lil-miquela-campaign#rebellitem6>] (explaining that Ugg enlisted Miquela for their fortieth anniversary campaign); Todd Spangler, *Miquela, the Uncanny CGI Virtual Influencer, Signs with CAA*, VARIETY (May 6, 2020), <https://variety.com/2020/digital/news/miquela-virtual-influencer-signs-caa-1234599368>

[<https://web.archive.org/web/20251009145659/https://variety.com/2020/digital/news/miquela-virtual-influencer-signs-caa-1234599368/>] (describing the deal between talent agency CAA and Miquela).

8. See, e.g., Miquela (@lilmiquela), INSTAGRAM (Oct. 21, 2017), <https://www.instagram.com/p/Bahry16lqsm> (displaying comments on a Lil Miquela post, many of which question if she is a robot or a human).

9. See Rosy Cherrington, *Lil Miquela: Instagram’s Latest “It” Model Who’s Confusing the Hell Out of Everyone*, HUFFINGTON POST (Feb. 9, 2016), [https://www.huffingtonpost.co.uk/entry/lilmiquela-instagram\\_uk\\_57c94056e4b085cf1ecd0af](https://www.huffingtonpost.co.uk/entry/lilmiquela-instagram_uk_57c94056e4b085cf1ecd0af)

[[https://web.archive.org/web/20251007004919/https://www.huffingtonpost.co.uk/entry/lilmiquela-instagram\\_uk\\_57c94056e4b085cf1ecd0af](https://web.archive.org/web/20251007004919/https://www.huffingtonpost.co.uk/entry/lilmiquela-instagram_uk_57c94056e4b085cf1ecd0af)] (referencing the quoted Instagram user and the since-removed Lil Miquela Instagram post it was found under).

10. See Favela, *supra* note 5, at 325 (describing the 2018 Instagram hack that led to the revelation that Miquela Sousa is not human).

11. See generally Miquela (@lilmiquela), INSTAGRAM, <https://www.instagram.com/lilmiquela/> (last visited Oct. 1, 2024) (displaying various posts with “robot” references and the biography section reading, “22. LA. Robot”).

12. MIQUELA, “Top Ten Moments of 2021 (From a Robot),” (YouTube, Dec. 16, 2021), <https://www.youtube.com/watch?v=8ckHHhnpu8g> [<https://web.archive.org/web/20251030193204/https://www.youtube.com/watch?v=8ckHHhnpu8g>].

13. Jessica Roy, *They’re Famous. They’re Everywhere. And They’re Fake.*, N.Y. TIMES (Sep. 3, 2025), <https://www.nytimes.com/2025/09/03/style/ai-influencers-lil-miquela-mia-zelu.html> [<https://web.archive.org/web/20251009150030/https://www.nytimes.com/2025/09/03/style/ai-influencers-lil-miquela-mia-zelu.html>].



reshaped social media.<sup>14</sup> As is often the case, the reality is more nuanced than the sensational headlines, which appear to conflate CGI and AI technology.<sup>15</sup> It appears premature to declare that fully autonomous AI influencers have taken over. Instead, thus far humans are using technology in various complex ways in the influencer space, ranging from traditional photoshop and filtering tools to CGI technology like Lil Miquela's original creation, to generative AI.

This addition of virtual and AI influencers into the influencer industry raises a number of challenging legal and moral questions. This Article focuses on just one of them—the applicability of the U.S. right of publicity doctrine.<sup>16</sup> The U.S. right of publicity is currently a state law doctrine in which most states protect against unauthorized use of aspects of someone's identity either via statute, judicially-created common law, or both. Most states protect names and likenesses from commercial appropriation, whereas other states protect broader aspects of identity. If someone were to use the name or likeness of a celebrity or human influencer to promote their product or service without permission or compensation, in most states the person whose name or likeness was used could sue for a violation of their right of publicity. But what happens if someone takes the name or likeness of a virtual or AI influencer and uses it to promote a product or service without permission or compensation? Under existing state legal frameworks, does an unauthorized taking of the identity of a virtual or AI influencer violate the right of publicity? Should it?

Virtual and AI influencers are not the first non-humans to trigger these questions. In his early foundational work, renowned treatise author Melville Nimmer argued for extending the right of publicity to the human owners of animals, businesses, and other institutions.<sup>17</sup> By contrast, Thomas McCarthy's influential treatise covering the right of publicity opposed expanding the right of publicity beyond real humans living or dead.<sup>18</sup> Despite these early contrasting views, there has been a surprising dearth of caselaw or

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14. Max Zahn, *AI Influencers Explode on Social Media. Some Are Controlled by Teens*, ABC NEWS (Mar. 22, 2024), <https://abcnews.go.com/Business/ai-influencers-explode-social-media-some-controlled-by-teens/story?id=108346584>

[<https://web.archive.org/web/20251009150303/https://abcnews.go.com/Business/ai-influencers-explode-social-media-some-controlled-by-teens/story?id=108346584>]; Shira Lazar, *AI Influencers and Faceless Creators Are Reshaping Social Media*, LINKEDIN (Apr. 22, 2024), <https://www.linkedin.com/pulse/ai-influencers-faceless-creators-reshaping-social-media-shira-lazar-wg2gc/> [<https://web.archive.org/web/20251009150628/https://www.linkedin.com/pulse/ai-influencers-faceless-creators-reshaping-social-media-shira-lazar-wg2gc/>].

15. Lazar, *supra* note 14. Notably, news reports, including such reputable organizations as the *New York Times*, seem to not understand the difference between CGI and AI. As discussed further below, the terms are frequently used interchangeably, with more recent accounts calling Lil Miquela an “AI Influencer.” See, e.g., Roy, *supra* note 13. It is certainly possible that the people behind Lil Miquela are now using AI technology in addition to CGI technology, but the accounts of her creation and the team behind her make it sound like she is still a virtual rather than an AI influencer.

16. This Article focuses on the right of publicity doctrine within the United States. For an interesting comparison of the differences in protecting celebrity persona between the United States and the United Kingdom, see EMMA PEROT, *COMMERCIALIZING CELEBRITY PERSONA* (2023).

17. Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 216 (1954).

18. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4:37 (2d ed. 2025).

recent scholarship addressing whether the right of publicity does or should apply to nonhumans. This Article seeks to fill that gap through the lens of virtual and AI influencers.

Part I introduces a nuanced descriptive account of the full range of uses of technology within the influencer space. This robust account replaces the standard false and overly simplistic dichotomy between human and AI influencers with a more sophisticated understanding that permits careful thinking about the various legal implications of the growing use of technology in the influencer industry.

Part II offers a deep dive into the descriptive question of whether the existing diverse patchwork of state right of publicity protections could protect the identity of virtual and AI influencers by looking at the statutory language and common law discussions in various states. It then also looks at the sparse caselaw addressing whether the right of publicity applies to non-humans in the context of animals, fictional characters, and corporations.

Part III evaluates whether the right of publicity normatively should protect the identities of virtual and AI influencers. It considers the various normative theories that have been offered in defense of the right of publicity and concludes that although some provide stronger justifications than others, each is consistent with supporting some kind of right of publicity protection for virtual and AI influencers. Some theories even provide a stronger justification for protecting virtual and AI influencers than for protecting non-celebrity humans.

Part IV concludes by considering the broader implications of this analysis. Assessing the right of publicity's application to virtual and AI influencers may improve right of publicity doctrine overall by forcing analytical transparency of the normative goals for the right of publicity.

## I. FROM HUMAN TO VIRTUAL TO AI INFLUENCERS

While paying individuals to promote products and services is certainly nothing new, the modern social media influencer industry is only a few decades old. Yet even in its relative infancy, the influencer industry that began with bloggers and quickly moved to social media has expanded alongside the technology that makes it possible. The complicated reality is that there is not a clean divide between human, virtual, and AI influencers. While human influencers continue to dominate the industry, human influencers use technology in a plethora of ways that impact the way that an influencer is portrayed, such as pervasive use of photoshop technologies and other similar tools.<sup>19</sup> Technology caused a significant shift in the influencer industry nearly a decade ago with the introduction of virtual influencers, like Lil Miquela, whose images were created using CGI technology. Most recently, the media has proclaimed the birth of an

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19. See Albertina Antognini & Andrew Keane Woods, *Shallow Fakes*, 128 PENN ST. L. REV. 69, 74 (2023) (describing the harms from pervasive use of filters, posting photos out of context, and otherwise presenting fake versions of one's life on social media); Roberts, *supra* note 2, at 113 ("Influencers on Instagram and various other platforms are known for using filters, Photoshop, Facetune, and other means of post-production tweaking on their skin, hair, and curves.") (internal citation omitted).

AI influencer phenomenon.<sup>20</sup> As is often the case, this declaration appears premature. Nonetheless, it is worth taking a nuanced look at the ways in which AI plays a role in the influencer industry. Doing so rejects an artificial division of influencers into human, virtual, or AI in favor of a spectrum in which humans use a range of technology in various complex ways in order to create, enhance, and curate the influencers' identities and content.

### A. BIRTH OF THE MODERN INFLUENCER INDUSTRY

While the modern concept of social media influencers is quite new, influential people acting to sway consumer consumption is not new at all. Historically, members of royal families served as early influencers.<sup>21</sup> When a royal family would endorse a particular business or make it known that the royal family uses a particular dressmaker or porcelain, that endorsement would cause ordinary subjects to want to shop at the same stores and with the same merchants as the royals.<sup>22</sup> Then, in royalty-free countries such as the United States, celebrities from various entertainment industries began serving in a similar role—appearing in commercials or otherwise endorsing goods and services in exchange for payment.<sup>23</sup> Beginning in the 2000s, the growth of social media democratized the influencer concept, expanding the pool of influencers beyond royalty and entertainment celebrities to allow seemingly ordinary people to influence the purchasing decisions of those around them by harnessing the power of their social media networks.<sup>24</sup>

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20. See, e.g., Zahn, *supra* note 14 (describing AI influencers created by the company 1337); Lazar, *supra* note 14 (explaining the evolving landscape of AI influencers).

21. See Nadra Nittle, *The British Royals Were the Original Fashion Influencers*, RACKED (May 16, 2018), <https://www.racked.com/2018/5/16/17360792/british-royal-family-princess-diana-meghan-markle-fashion-influencers> [https://web.archive.org/web/20251009151001/https://www.racked.com/2018/5/16/17360792/british-royal-family-princess-diana-meghan-markle-fashion-influencers].

22. See *id.*

23. See Elizabeth Lee, *Celebrity Endorsements and Partnerships for Marketing Purposes*, USC GOULD'S BUS. L. DIG. (Apr. 24, 2023), <https://lawforbusiness.usc.edu/celebrity-endorsements-and-partnerships-for-marketing-purposes/> [https://web.archive.org/web/20251009151340/https://lawforbusiness.usc.edu/celebrity-endorsements-and-partnerships-for-marketing-purposes/] (mentioning that since the beginning of advertising, celebrities have been used to market products).

24. See *id.* (noting the advent of Instagram enabled the influencer market to rapidly develop and expand).

Many commentators credit bloggers, and specifically somewhat disparagingly so-called “mommy bloggers,”<sup>25</sup> with launching the modern influencer concept.<sup>26</sup> These accounts explain how, in the early 2000s, a wave of bloggers began to write “confessional, raw accounts” of their everyday struggles and experiences with motherhood.<sup>27</sup> These women “began creating online spaces where they could express their joys and frustrations, get help and forge connections in new digital villages.”<sup>28</sup> At that time most blogs did not have advertising, and the first major wave of social media consisting of Facebook (founded 2004), YouTube (founded 2005), and Twitter (founded 2006) had not yet implemented monetization strategies.<sup>29</sup> In 2010, the launch of Instagram accompanied the technical ability of web hosts to handle larger photos.<sup>30</sup> This allowed text-based blogs to become more visual, and caused bloggers to realize that they could make more money by posting visually appealing aspirational content about brands.<sup>31</sup> With this shift many blogs transitioned into “lifestyle” blogs, and bloggers transitioned into influencers based on the followers they had accumulated.

Before long, social media powerhouses YouTube, Facebook, Twitter, and Instagram developed mechanisms to pay content creators, leading to an explosion in influencers. With the monetization of social media, independent creators began to have a strong influence on public perception. They could drive traffic to the products and services they promoted online by leveraging their social media following and now had an effective mechanism to be compensated for it. As Alexandra Roberts explains, anyone who “receives payment, commission, free goods or services, or any other benefit that might affect the weight consumers give their endorsements in exchange for posting on social media or elsewhere online” is engaged in influencer marketing.<sup>32</sup> The

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25. See Lauren Apfel, *I’m a Mommy Blogger and Proud of It*, TIME (Nov. 14, 2014), <https://time.com/3592698/im-a-mommy-blogger-and-proud-of-it/> [<https://web.archive.org/web/20251009151629/https://time.com/3592698/im-a-mommy-blogger-and-proud-of-it/>] (recognizing that the term “mommy blogger” can be considered both patronizing and derogatory); see also Danielle Wiley, *How Mom Bloggers Helped Create Influencer Marketing*, AD WEEK (Mar. 19, 2018), <https://www.adweek.com/brand-marketing/how-mom-bloggers-helped-create-influencer-marketing/> [<https://web.archive.org/web/20251009151943/https://www.adweek.com/brand-marketing/how-mom-bloggers-helped-create-influencer-marketing/>] (“In retrospect, we see this as the dawn of ‘Mommy blogging,’ now considered an archaic, borderline-offensive, catch-all term for any woman who has written about parenthood.”).

26. See, e.g., Kathryn Jezer-Morton, *Did Moms Exist Before Social Media?*, N.Y. TIMES (Apr. 16, 2024), <https://www.nytimes.com/2020/04/16/parenting/mommy-influencers.html> [<https://web.archive.org/web/20251009152437/https://www.nytimes.com/2020/04/16/parenting/mommy-influencers.html>] (recognizing a shift from mommy blogs to mom blogging influencers); Wiley, *supra* note 25 (noting influencer marketing began with women in the mommy blogging days).

27. Jezer-Morton, *supra* note 26.

28. Wiley, *supra* note 25.

29. See Whitney Blankenship, *A Brief History of Social Media [Infographic]*, OKTOPOST (Aug. 16, 2022), <https://www.oktopost.com/blog/history-social-media/> [<https://perma.cc/WH3L-UJF8>] (noting that social media monetization began in 2007 when Facebook launched Facebook Ads).

30. See Mark Glick, Catherine Ruetschlin & Darren Bush, *Big Tech’s Buying Spree and the Failed Ideology of Competition Law*, 72 HASTINGS L.J. 465, 487–88 (2021) (noting that by 2009, Facebook “was the largest photo sharing service in the world,” and mentioning the 2010 launch of Instagram).

31. Jezer-Morton, *supra* note 26.

32. Roberts, *supra* note 2, at 89–90.

phenomenon further evolved with the 2018 launch of TikTok in the United States, which became the most downloaded app in 2020.<sup>33</sup> Despite recent legal controversies over its ownership,<sup>34</sup> TikTok is credited with further democratizing the influencer space because its unique algorithm doesn't necessarily prioritize the largest followings, allowing normal people to compete against larger influencers that dominate other platforms.<sup>35</sup> The influencer industry rose rapidly and Forbes estimated that it is worth \$250 billion in 2025, with Goldman Sachs predicting it will double to nearly \$500 billion by 2027.<sup>36</sup> Although the influencer marketing space includes both men and women, women continue to dominate the space both in terms of numbers and levels of engagement.<sup>37</sup>

Dictionary usage of the term "influencer" has similarly evolved. The Oxford English dictionary has long defined "influencer" as "[a] person who or thing which influences," in other words the noun created from the verb "to influence."<sup>38</sup> In 2022 it added two new entries for "influencer."<sup>39</sup> The first offers, "[a] person who has the ability to influence other people's decisions about the purchase of particular goods or services."<sup>40</sup> The second states, "[a] person who has become well-known through use of the internet and social media, and uses celebrity to endorse, promote, or generate interest in specific products, brands, etc., often for payment."<sup>41</sup> Lexicographer Jane Solomon notes that the original definition of the word "influencer" has been used in English since the mid-1600s just to mean someone with the ability to influence, but that the modern understanding of an influencer as leveraging social media strategically and for profit is much more recent.<sup>42</sup>

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33. *TikTok Named as the Most Downloaded App of 2020*, BBC (Aug. 10, 2021), <https://www.bbc.com/news/business-58155103>

[<https://web.archive.org/web/20251009152819/https://www.bbc.com/news/business-58155103>].

34. See generally *TikTok Inc. v. Garland*, 604 U.S. 56 (2025) (outlining recent controversy over TikTok's ownership).

35. Danielle Moskowitz, *How TikTok Created the "Everyday Influencer" and Why Brands Should Care*, LONG DASH (Oct. 27, 2022), <https://web.archive.org/web/20241015021500/https://www.longdash.co/alterd/how-tiktok-created-the-everyday-influencer-and-why-brands-should-care/>.

36. Chemtob, *supra* note 1.

37. See Haley Thorpe, *Seven Stats That Show Women Dominate Influencer Marketing*, FOHR (Feb. 9, 2024), <https://www.fohr.co/articles/7-stats-that-show-women-dominate-influencer-marketing> [<https://web.archive.org/web/20251010130930/https://www.fohr.co/articles/7-stats-that-show-women-dominate-influencer-marketing>] (noting "86% of women use social media for purchasing advice" and "77% of influencers monetizing their content are female"); Wiley, *supra* note 25 (noting that on Instagram women receive five times more likes than men).

38. *Influencer*, OXFORD ENG. DICTIONARY, [https://www.oed.com/dictionary/influencer\\_n?tab=meaning\\_and\\_use#409239](https://www.oed.com/dictionary/influencer_n?tab=meaning_and_use#409239) [[https://web.archive.org/web/20251010131506/https://www.oed.com/dictionary/influencer\\_n?tab=meaning\\_and\\_use&tl=true#409239](https://web.archive.org/web/20251010131506/https://www.oed.com/dictionary/influencer_n?tab=meaning_and_use&tl=true#409239)] (last visited Oct. 10, 2025).

39. *Id.*

40. *Id.*

41. *Id.*

42. Jane Solomon, *What Is an "Influencer" and How Has This Word Changed?*, DICTIONARY.COM (Jan. 7, 2019), <https://www.dictionary.com/e/influencer/> [<https://web.archive.org/web/20251010132838/https://www.dictionary.com/e/influencer/>].

## B. THE INFLUENCER TECHNOLOGY SPECTRUM

Rather than neatly dividing influencers into human, virtual, and AI categories, this section considers each of those characterizations as existing along a spectrum of interactions between humans and technology in developing an influencer's likeness/physical appearance, name, and the content that forms part of an influencer's identity.

### 1. Pure Authenticity

Human influencers who post raw content unedited and unfiltered by technology sit at one end of the influencer technology spectrum. Regarding appearance, these rare influencers post technologically unaltered and untouched photographs of themselves.<sup>43</sup> Yet, through the process of selecting which photos to post, wearing makeup, or engaging in cosmetic procedures, even the most "authentic" influencers do not reflect pure reality, although they do not use technology to alter their appearance. Presumably, these influencers also use their actual legal names and do not rely on technology to create their content, although of course all social media influencing necessarily uses technology to some extent.

### 2. Shallow Fakes

The next prong in the influencer technology spectrum are human influencers who use photoshop, filters, and other similar appearance-altering technology to make edits to their likeness. Most human influencers fall into this category to some degree. Albertina Antognini and Andrew Keane Woods catalog a variety of ways in which social media users, including influencers, post "filtered, edited, or otherwise enhanced images of themselves."<sup>44</sup> They call this phenomenon "shallow fakes," which they define as seemingly harmless, superficial, and commonplace online tweaks to one's image affecting one's self-presentation.<sup>45</sup>

Alterations can vary from fixing red eyes to filters that smooth out skin to entirely altering body shape. Some of this technology is nothing new. Back in 1997, before the explosion of social media, FotoNation patented the technology for software to detect

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43. See Patrick Landman, *The Unfiltered Feed: Influencers Trading Perfection for Authenticity*, HOSPITALITY NET (May 9, 2025), <https://www.hospitalitynet.org/opinion/4127105.html> [<https://web.archive.org/web/20251010133414/https://www.hospitalitynet.org/opinion/4127105.html>] (discussing the shift to unfiltered influencers).

44. Antognini & Woods, *supra* note 19, at 74.

45. *Id.* Admittedly, that term feels somewhat normative rather than purely descriptive of the phenomenon. Antognini and Woods document the potentially harmful impacts of the heavily altered and unattainable influencer appearance on body image and the mental health of social media followers, including concerns with body dysmorphia, mental health, pressure to sexualize, reinforcing traditional gender roles, racialized harms with appropriation and whitewashing, and democratic harms. They also acknowledge the arguments that such digital alteration of one's image can be autonomy-enhancing, allowing for a positive form of play, self-expression, or self-discovery. See *id.*

and correct the red-eye effect in photography, where people's eyes, especially light-colored eyes, appear red in flash photos as the result of reflected light from the blood vessels in the retina.<sup>46</sup> More recent technology takes image alterations to entirely new levels by altering one's appearance in more extreme ways. According to a recent survey cited by Antognini and Woods, 90% of women regularly apply filters to their selfie photos.<sup>47</sup> They point to the success of the billion-dollar app FaceTune, a digital tool that makes reshaping the appearance of one's body online extremely easy.<sup>48</sup> Many social media sites, including Instagram, have tools embedded to allow users, including influencers, to alter their images in various ways. Notably, the practice is so widespread that when Lil Miquela debuted, some of her followers believed her CGI-appearing features merely meant extensive use of photoshop or similar technology.

### 3. Virtual Influencers

In an impressive piece of prognostication, in 2001 the late Joseph Beard analyzed legal protection for what he called "virtual humans."<sup>49</sup> Beard's paper did not anticipate the influencer turn that virtual humans would take, and instead he focused "on the exploitation of virtual humans in film and television."<sup>50</sup> Nonetheless, he helpfully created a taxonomy of virtual humans, dividing them between "real virtual humans," which includes both digital clones of living individuals, and digital resurrections of deceased persons, and "imaginary virtual humans" who are not based on any particular human individual.<sup>51</sup> These categories are useful in considering the next band of the influencer spectrum consisting of various forms of virtual influencers.

Beard's subset of "real virtual humans" consisting of "digital clones of living individuals" represent the next step on the influencer technological spectrum. These digital influencers, also sometimes called digital avatars, are based on a particular human individual and designed to look like that human. They can range from basic avatars, simple icons or cartoon-like figures, to 3D avatars, more complex, three-dimensional representations, all the way to digitally generated avatars, which can be customized to look a great deal like the humans behind them.<sup>52</sup> In the context of

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46. Lonnie Brown, *Cameras Take Red Out Before Storing Photos*, LEDGER (Oct. 1, 2006), <https://www.theledger.com/story/news/2006/10/01/cameras-take-red-out-before-storing-photos/25925469007/>

[<https://web.archive.org/web/20251010133744/https://www.theledger.com/story/news/2006/10/01/cameras-take-red-out-before-storing-photos/25925469007/>].

47. Antognini & Woods, *supra* note 19, at 74.

48. *Id.*

49. See generally Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165 (2001).

50. *Id.* at 1169.

51. *Id.* at 1253–54.

52. See, e.g., Conor Dewey, *Virtual Avatars and Influencers*, CONORDEWEY.COM (Oct. 1, 2020), <https://www.conordewey.com/blog/virtual-avatars-and-influencers/>

[<https://web.archive.org/web/20251010134747/https://www.conordewey.com/blog/virtual-avatars-and-influencers/>] (observing that a popular account on Twitch called Pokimane streamed a virtual version of herself that resembled what she would look like as a cartoon).

influencers this could mean a regular human influencer engaging on social media in all the typical ways except that the normal posting of photographs, even photoshopped ones, are replaced with technologically created images of a digital clone.

Closely related is Beard's "digital resurrection of a deceased person," which in the influencer space could be an influencer consisting of a digital resurrection designed to look like someone who has passed away.<sup>53</sup> Unlike the former category, the humans underlying these influencers are deceased, so someone other than the deceased person depicted is necessarily making decisions regarding the content posted by the digital resurrection of the deceased person. For both digital clone and digital resurrection forms of real virtual influencers, the virtual influencer's name would likely be the real name (or nickname) of the associated human. Similarly, for both digital clones and digital resurrections, aspects of the influencer's life story would likely be drawn from the associated individual's real-life story, although for digital resurrections the person's death may mean fictionalization of elements past the underlying human's death.

Beard's next category of "imaginary virtual humans" can be further subdivided for purposes of the influencer space between imaginary virtual influencers meant to represent (but not look like) an individual person and imaginary virtual influencers not tied to a particular individual.<sup>54</sup> Thus, one type of imaginary virtual influencer is imaginary in the sense that they do not particularly physically resemble the single human influencer behind it. The human behind the imaginary virtual influencer may have created it as a low stakes way to play with what it could be like to be an influencer of a different gender, race, physical appearance, etc. than their own. Given this freedom, the imaginary virtual influencer does not necessarily share the name or other life-story aspects of identity with the human behind it, but rather those could be entirely fictional just like the person's image. Nonetheless, this could be a way to experiment with identity by taking on a new persona.

By contrast, the most famous virtual influencers do not appear linked to a single individual as a form of playing with identity. For example, Trevor McFedries and Sara DeCou of Brud seemingly created Lil Miquela, the first known and most prominent example of virtual influencers, to create new models for storytelling—not to play with aspects of their own identity.<sup>55</sup> Two years after her social media debut, the 2018 revelation that Lil Miquela was not in fact a human influencer, but rather was created using CGI technology by Brud, generated a great deal of media attention to the virtual influencer phenomenon more broadly.<sup>56</sup> Lil Miquela's millions of followers, inclusion

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53. Beard, *supra* note 49, at 1171, 1226–29.

54. See generally *id.*

55. Emilia Petrarca, *Body Con Job*, THE CUT (May 14, 2018) <https://www.thecut.com/2018/05/lil-miquela-digital-avatar-instagram-influencer.html> [<https://web.archive.org/web/2025108191521/https://www.thecut.com/2018/05/lil-miquela-digital-avatar-instagram-influencer.html>].

56. See, e.g., Emilia Petrarca, *Everything We Know About the Feud Between These Two Computer-Generated Instagram Influencers*, THE CUT (Apr. 18, 2018), <https://www.thecut.com/2018/04/lil-miquela-hack-instagram.html> [<https://web.archive.org/web/20251010135427/https://www.thecut.com/2018/04/lil-miquela-hack-instagram.html>] (discussing the drama that ensued following the big reveal that Lil Miquela is not a real person).



in the *Time Magazine's* 2018 "Twenty-five Most Influential People on the Internet," high profile brand deals, and CAA talent agency deal increased attention.<sup>57</sup>

According to *the New York Times*, tech company Dapper Labs acquired Brud, and Lil Miquela's account is now run by a team that "creates the story lines, images and captions that bring Miquela to life."<sup>58</sup> The company's vice president elaborated, "We think it's healthy to have multiple people thinking through Miquela's voice, analyzing what we're seeing her audience care about, worry about, think about, and also understand what are the problems in the world today that Miquela can have a voice on."<sup>59</sup> These problems include Lil Miquela's claims that she has leukemia, supposedly to raise awareness for the illness, and somewhat ironically becoming a victim of deepfakes.<sup>60</sup>

Within the United States, Lil Miquela may be the most famous "virtual influencer" but she is not the sole example of a successful virtual influencer.<sup>61</sup> Rather, virtual influencers are an international phenomenon. For example, Shudu Gram is a black South African Instagram model with hundreds of thousands of followers.<sup>62</sup> She wears and promotes lipstick and clothing.<sup>63</sup> Like Lil Miquela, she is also not a real person.<sup>64</sup> She is the CGI creation of white male British photographer Cameron-James Wilson,<sup>65</sup> who refers to her as an "art piece."<sup>66</sup> In an interview, Wilson explained, "I use a 3D modeling program. It's like virtual photography, so once I create her, I can kind of pose her in certain ways."<sup>67</sup> He went on to describe his vision of Shudu Gram by saying, "I

57. See *supra* notes 4–6 and accompanying text.

58. See Roy, *supra* note 13.

59. *Id.*

60. *Id.*

61. See Sean Sands et al., *False Idols: Unpacking the Opportunities and Challenges of Falsity in the Context of Virtual Influencers*, 65 BUS. HORIZONS 777, 778–79 (noting that Lil Miquela is likely the most famous virtual influencer and naming various other virtual influencers who occupy social media spaces).

62. See Ifeoma Ajunwa, *Artificial Intelligence, Afrofuturism, and Economic Justice*, 112 GEO. L.J. 1267, 1288 (2024) (introducing Shudu Gram as a "Black model" who, upon introduction to Instagram, amassed many followers and landed modeling deals with some of the biggest names in fashion); Sinead Bovell, *I Am a Model and I Know That Artificial Intelligence Will Eventually Take My Job*, VOGUE (July 21, 2020), <https://www.vogue.com/article/sinead-bovell-model-artificial-intelligence> [<https://web.archive.org/web/20251010141553/https://www.vogue.com/article/sinead-bovell-model-artificial-intelligence>] (identifying Shudu Gram as South African).

63. See generally Shudu (@shudu.gram), INSTAGRAM, <https://www.instagram.com/shudu.gram/> (last visited Oct. 1, 2024) (displaying Shudu Gram's pictures and promotions).

64. See Ajunwa, *supra* note 62, at 1288 (identifying Shudu Gram as "not a real person," but instead "an AI-created image").

65. Jonathan Square, *Is Instagram's Newest Sensation Just Another Example of Cultural Appropriation?*, FASHIONISTA (Mar. 27, 2018), <https://fashionista.com/2018/03/computer-generated-models-cultural-appropriation>. There are undoubtedly challenging racial, historical, and cultural misappropriation questions raised when individuals from traditionally advantaged groups create virtual influencers with the racial and/or gender characteristics of traditionally disadvantaged groups. See *id.* At the same time, experiencing what it may be like to interact and "live" on social media as a member of a traditionally disadvantaged group may allow for individuals to see what it can be like for others of different backgrounds. See generally *id.*

66. Jenna Rosenstein, *People Can't Tell If This Fenty Model Is Real or Fake*, HARPER'S BAZAAR (Feb. 9, 2018), <https://www.harpersbazaar.com/beauty/makeup/a16810663/shudu-gram-fenty-model-fake/> [<https://web.archive.org/web/20251010150155/https://www.harpersbazaar.com/beauty/makeup/a16810663/shudu-gram-fenty-model-fake/>].

67. *Id.*

am a photographer anyway, so it's just a way of exploring my creativity when I'm not shooting."<sup>68</sup>

Imma is a virtual influencer whose "home" is in Tokyo, Japan, but whose work and influence have global reach.<sup>69</sup> She was created by Aww Inc. and ModelingCafe and debuted in 2018.<sup>70</sup> Imma has distinctive pink hair and expressive eyes, and, like Lil Miquela, promotes modern societal themes in addition to her partnerships with brands such as Valentino, Chanel, Adidas, and The North Face.<sup>71</sup> Other social media biographies from around the world read, "Virtual girl in [Japan],"<sup>72</sup> "24-year-old virtual girl living in Helsinki,"<sup>73</sup> and "Korea's First Virtual Influencer."<sup>74</sup>

A *Forbes* article identifies benefits for brands in working with virtual influencers including accessibility, the possibility of maintaining more control over the projects, the ability of the teams behind virtual influencers to create content around the clock, and the opportunity to reach a new, younger audience who is particularly interested in new media content.<sup>75</sup> In support of the younger audience point, the article notes that a 2022 survey found that 58% of respondents followed at least one virtual influencer and 35% had purchased a product promoted by a virtual influencer, with those aged 18–44 most likely to have done so.<sup>76</sup>

Relatedly, there is another category of virtual influencers who are created by a company, primarily to be the spokesperson for their brand. For example, Lu Do Magalu is a virtual influencer who is a sensation in Brazil.<sup>77</sup> Lu appeared on Brazil's *Dancing with the Stars*, fights violence against women, creates content on major social media platforms, and partners with international brands such as Adidas, Samsung, Red Bull and McDonald's.<sup>78</sup> She appeared on the cover of fashion magazine *Vogue Brasil*, and

68. *Id.*

69. Gloria Maria Cappelletti, *The Rise of Imma: A Virtual Model Who Redefines Fashion in the Web3 Era*, RED EYE (Feb. 20, 2023), <https://red-eye.world/c/the-rise-of-imma-a-virtual-model-who-redefines-fashion-in-the-web3-era> [<https://web.archive.org/web/20251010150510/https://red-eye.world/c/the-rise-of-imma-a-virtual-model-who-redefines-fashion-in-the-web3-era>].

70. *Id.*

71. *Id.*

72. imma (@imma.gram), INSTAGRAM, <https://www.instagram.com/imma.gram/> (last visited Nov. 8, 2025).

73. Milla Sofia (@millasofiafin), TIKTOK, [https://www.tiktok.com/@millas\\_sofia?lang=en](https://www.tiktok.com/@millas_sofia?lang=en) [[https://web.archive.org/web/20251030195403/https://www.tiktok.com/@millas\\_sofia?lang=en](https://web.archive.org/web/20251030195403/https://www.tiktok.com/@millas_sofia?lang=en)] (last visited Oct. 24, 2025).

74. Rozy Oh (@rozy.gram), INSTAGRAM, <https://www.instagram.com/rozy.gram/> (last visited June 17, 2024).

75. Alison Bringé, *The Rise of Virtual Influencers and What It Means for Brands*, FORBES (Oct. 18, 2022), <https://www.forbes.com/councils/forbescommunicationscouncil/2022/10/18/the-rise-of-virtual-influencers-and-what-it-means-for-brands/> [<https://web.archive.org/web/20251108194051/https://www.forbes.com/councils/forbescommunicationscouncil/2022/10/18/the-rise-of-virtual-influencers-and-what-it-means-for-brands/>].

76. *Id.*

77. *How Lu from Magalu Became the Biggest Virtual Influencer in the World*, LITTLE BLACK BOX (May 17, 2022), <https://lbbonline.com/news/how-lu-from-magalu-became-the-biggest-virtual-influencer-in-the-world> [<https://web.archive.org/web/20251010151640/https://lbbonline.com/news/how-lu-from-magalu-became-the-biggest-virtual-influencer-in-the-world>].

78. *Id.*

even commented on a football (soccer) game in Brazil live on TikTok.<sup>79</sup> In 2022, Lu amassed over thirty million followers on social media.<sup>80</sup> Lu was created by Brazilian retail giant Magazine Luiza (known as Magalu), from which she gets her last name, and is designed as a virtual spokeswoman specifically for the company.<sup>81</sup>

Virtual influencers like Lil Miquela and Lu Do Magalu introduced numerous legal and ethical questions, and both the popular press<sup>82</sup> and the law review literature have begun to grapple with some of these issues.<sup>83</sup> A number of works have focused on the role of the Federal Trade Commission (“FTC”) in addressing concerns about deception

79. *Id.*

80. *Id.*

81. *Id.*

82. See generally Bernard Marr, *How Online Influencers and Idols Are Using Generative AI*, FORBES (Dec. 1, 2023), <https://forbes.com/sites/bernardmarr/2023/12/01/how-online-influencers-and-idols-are-using-generative-ai/?sh=190d904f720c>

[<https://web.archive.org/web/20251010210207/https://www.forbes.com/sites/bernardmarr/2023/12/01/how-online-influencers-and-idols-are-using-generative-ai/>] (discussing AI influencer marketing); *What Are AI Influencers? And Should Your Brand Care?*, GOAT (Dec. 21, 2023), <https://goatagency.com/blog/influencer-marketing/ai-influencers/#page-jump-1>

[<https://web.archive.org/web/20251010210916/https://goatagency.com/blog/ai-influencers/>] (discussing the history of AI influencers, how they are currently used, and what their future looks like); Astrid Hiort, *Understanding the Role of AI and Virtual Influencers Today*, VIRTUAL HUMANS (Feb. 8, 2023), <https://www.virtualhumans.org/article/understanding-the-role-of-ai-and-virtual-influencers-today>

[<https://web.archive.org/web/20251010211445/https://www.virtualhumans.org/article/understanding-the-role-of-ai-and-virtual-influencers-today>] (explaining AI and how it is used for virtual influencers like Kuki AI); Mai Nguyen, *Virtual Influencers: Meet the AI-generated Figures Posing as Your New Online Friends—as They Try to Sell You Stuff*, THE CONVERSATION (Sep. 19, 2023), <https://theconversation.com/virtual-influencers-meet-the-ai-generated-figures-posing-as-your-new-online-friends-as-they-try-to-sell-you-stuff-212001>

[<https://web.archive.org/web/20251010212116/https://theconversation.com/virtual-influencers-meet-the-ai-generated-figures-posing-as-your-new-online-friends-as-they-try-to-sell-you-stuff-212001>] (discussing virtual influencers and whether they pose a threat to human influencers); Brooke Steinberg, *Gen Z Has a Surprising Opinion About AI Influencers on Social Media, Study Finds*, N.Y. POST (May 8, 2024), <https://nypost.com/2024/05/08/tech/gen-z-has-a-surprising-opinion-about-ai-influencers-on-social-media-study-finds/>

[<https://web.archive.org/web/20251010212404/https://nypost.com/2024/05/08/tech/gen-z-has-a-surprising-opinion-about-ai-influencers-on-social-media-study-finds/>] (discussing Gen Z’s acceptance of AI influencers); *Unveiling the Power of Generative AI Influencers: Shaping the Future of Social Media*, MODERN DIPLOMACY (Apr. 23, 2024), <https://modern diplomacy.eu/2024/04/23/unveiling-the-power-of-generative-ai-influencers-shaping-the-future-of-social-media/>

[<https://web.archive.org/web/20251010213135/https://modern diplomacy.eu/2024/04/23/unveiling-the-power-of-generative-ai-influencers-shaping-the-future-of-social-media/>] (considering the benefits of using AI influencers in marketing and noting some successes).

83. See generally Favela, *supra* note 5 (discussing concerns with CGI influencers and possible solutions); Kelly Callahan, *CGI Social Media Influencers: Are They Above the FTC’s Influence?*, 16 J. BUS. & TECH. L. 361 (2021) (calling on the FTC to consider CGI influencers and begin regulating them in the context of deceptive advertising); Masteralex, McKelvey & Statz, *supra* note 7 (proposing different paths for the FTC to handle robots); Okolie, *supra* note 3 (examining the impending legal implications of virtual influencers); Katherine B. Forrest, *The Ethics and Challenges of Legal Personhood for AI*, 133 YALE L.J. 1175, 1179 (2024) (“set[ting] forth legal and ethical frameworks to address the status of sentient AI”); Alexander Plansky, *Virtual Stardom: The Case for Protecting the Intellectual Property Rights of Digital Celebrities as Software*, 32 U. MIAMI BUS. L. REV. 150 (2024) (analogizing imaginary virtual human performers to software).

from virtual influencers.<sup>84</sup> These discussions center on two problems posed by virtual influencers: that consumers are unaware that the influencer promoting a particular product or service is not a real person, and, relatedly, that some of the “influencers” promoting a particular product or service are really the creation of that brand or company.<sup>85</sup> Just as the FTC has made clear that human influencers need to disclose that they have been paid/compensated for promoting a brand, scholars argue that there should be similar mandatory disclosures for these creations.<sup>86</sup> Along these lines, in July 2023, the FTC adopted changes to its “Guides Concerning Use of Endorsements and Testimonials in Advertising” and made clear that virtual influencers are subject to the FTC’s overall disclosure requirements for endorsements, but did not offer additional virtual influencer-specific guidance.<sup>87</sup>

#### 4. AI Influencers

Finally, Beard predicted that just like Geppetto wished that his wooden puppet Pinocchio would someday become a real boy, that early in the twenty-first century there would be “virtual humans who can see, speak, hear, touch and be touched, exhibit behavior, and think just as we do.”<sup>88</sup> He forecasted that “[I]ike Pinocchio, virtual humans will shed their ‘strings’” and “be virtually autonomous.”<sup>89</sup> Most recently, the media has seemingly proclaimed the fulfilment of Beard’s prediction with so-called “AI Influencers.”<sup>90</sup> A March 2024 *ABC News* article declared, “AI Influencers Explode on

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84. See generally Favela, *supra* note 5 (discussing the lack of regulations for CGI influencers); Masteralexis, McKelvey & Statz, *supra* note 7 (discussing how, at the time of writing, the FTC had not offered any guidance regarding regulation of CGI influencers); Callahan, *supra* note 83 (calling on the FTC to regulate CGI influencers).

85. See Masteralexis, McKelvey & Statz, *supra* note 7, at 363 (noting the confusion CGI influencers can cause).

86. See, e.g., *id.* at 381 (“[W]e propose one approach in which Robots would be required to disclose any material connections, but through a specific set of tactics designed to clearly and unequivocally identify them as Robots so as to eliminate the potential of misleading or deceiving the consumer.”).

87. FED. TRADE COMM’N, *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements* (June 29, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements> [<https://web.archive.org/web/20251010223703/https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements>].

88. Beard, *supra* note 49, at 1167.

89. *Id.*

90. See generally *Seventeen Expert Insights into the Rise of AI Influencers*, FORBES (May 23, 2024), <https://www.forbes.com/councils/forbesagencycouncil/2024/05/23/17-expert-insights-into-the-rise-of-ai-influencers/> [<https://web.archive.org/web/20251010223906/https://www.forbes.com/councils/forbesagencycouncil/2024/05/23/17-expert-insights-into-the-rise-of-ai-influencers/>] (discussing how “AI Influencers could revolutionize brand representation”); *AI Influencers: How Virtual Personalities Are Shaping the Future of Marketing*, INFLUENCITY (Jan. 3, 2025), <https://influencity.com/blog/en/ai-influencer> [<https://web.archive.org/web/20251010224101/https://influencity.com/blog/en/ai-influencer>] (discussing the new relationship between AI influencers and brand marketing); *The Digital Revolution of AI Influencers on Instagram*, LEFTY (Nov. 6, 2024), <https://lefty.io/blog/ai-influencers-on-instagram>

Social Media.”<sup>91</sup> A second headline pronounced, “AI Influencers and Faceless Creators are Reshaping Social Media.”<sup>92</sup> Another headline teased, “AI Influencers secretly outearn their human counterparts.”<sup>93</sup> Most recently, a September 2025 *New York Times* headline for an article about AI Influencers proclaimed, “They’re Famous. They’re Everywhere. And They’re Fake.”<sup>94</sup> Looking to social media, influencers have biographies in which they refer to themselves as “AI girl”<sup>95</sup> and “India’s first AI Influencer.”<sup>96</sup>

Scrutinizing more closely, however, it appears that the coronation of AI influencers may be premature, at least if what is meant by the term is an influencer autonomously created by generative AI. Instead, the media seems to use the term “AI influencer” to refer to a wide variety of roles for generative AI, and often include CGI virtual influencers.<sup>97</sup>

For example, the *ABC News* article discusses a number of influencers created by a company called 1337 (pronounced “Leet”) that “designs and operates artificial intelligence-generated online influencers.”<sup>98</sup> Jenny Dearing, the co-founder and CEO of 1337, explains that the company designs a new influencer by identifying a community of people with a specific interest or trait who may take an interest in the influencer, but “then the firm fills out the details” such as “how they might live their lives, where they reside, what does their room look like, what are their hobbies.”<sup>99</sup> Dearing admits that “humans are involved at multiple points to moderate the creation process,” and she

[<https://web.archive.org/web/20251010224251/https://lefty.io/blog/ai-influencers-on-instagram>] (discussing the rise and impact of AI Influencers); Amanda Longa, *AI Influencers: A New Phenomenon*, THE AGENCY (Jan. 20, 2024), <https://web.archive.org/web/20241209055738/https://theagency.jou.ufl.edu/post/ai-influencers-a-new-phenomenon>; Rosebud-Benitez, *The Rise of AI Influencers: How Virtual Celebrities Are Taking Over Social Media*, PHL MENU (Feb. 15, 2025), <https://phlmenus.org/the-rise-of-ai-influencers-how-virtual-celebrities-are-taking-over-social-media/> [<https://web.archive.org/web/20251010224826/https://phlmenus.org/the-rise-of-ai-influencers-how-virtual-celebrities-are-taking-over-social-media/>] (discussing the rise of AI Influencers, some of the ethical considerations, and the future).

91. Zahn, *supra* note 14.

92. Lazar, *supra* note 14.

93. Priyanka Dadhich, *AI Influencers Secretly Outearn Their Human Counterparts*, WIRE19 (Feb. 14, 2024), <https://wire19.com/ai-influencers-secretly-outearn-their-human-counterparts/> [<https://web.archive.org/web/20251011010212/https://www.wire19.com/ai-influencers-secretly-outearn-their-human-counterparts/>].

94. Roy, *supra* note 13.

95. See *supra* note 15 (explaining the difference); see Victor Tangermann, *Fully Generated AI Influencers Are Getting Thousands of Reactions Per Thirst Trap*, FUTURISM (July 19, 2023), <https://futurism.com/ai-generated-influencers> [<https://web.archive.org/web/20251010225854/https://futurism.com/ai-generated-influencers>] (referring to various AI influencers’ social media descriptors, including “AI girl” and “AI model”).

96. Kyra Onig (@kyraonig), INSTAGRAM, <https://www.instagram.com/kyraonig/> (last visited Nov. 8, 2025).

97. Lazar, *supra* note 14 (“This isn’t the first time we are seeing AI influencers going viral. Shout out to Lil Miquela, who was one of the first. Lil Miquela is a fictional CGI character. . . .”); Roy, *supra* note 13 (describing Lil Miquela as an AI influencer, when she appears to be CGI).

98. Zahn, *supra* note 14.

99. *Id.*

refers to those humans as the “creators.”<sup>100</sup> The human creators help filter out flawed AI images such those with extra limbs or missing fingers.<sup>101</sup> The human creators also select posts that fit the given influencer’s persona. This suggests that even when the term “AI influencer” is being used, there is still a good deal of human control.

Similarly, IZEA, a marketing technology company that helps brands collaborate with social influencers and content creators, has a page on its website titled “The Rise of AI Influencers on Instagram: Check Out These Creators.”<sup>102</sup> The page defines AI influencers as “influencers on social media who are created by artificial intelligence.”<sup>103</sup> The page then goes on to list a number of supposed AI influencers on Instagram along with images of them.<sup>104</sup> Except that the first two listed are Lil Miquela and Shudu Gram, who, as discussed above, have human creators even if they use CGI technology to help with that creation, and therefore do not seem to fit IZEA’s own definition of being “created by artificial intelligence.”<sup>105</sup>

Given the slipperiness of the term “AI influencer,” it may be useful to examine more closely how generative AI can be used in the influencer industry. In a December 2023 *Forbes* piece, Bernard Marr—self-described futurist and author of *Generative AI in Practice: 100+ Amazing Ways Generative Artificial Intelligence Is Changing Business and Society*—describes some of the varied ways AI is being used by influencers.<sup>106</sup>

The first category, at one end of the AI influencer technological spectrum, is the “AI Personal Assistant.”<sup>107</sup> This involves a human influencer using generative AI to help with behind-the-scenes aspects of the day-to-day work of an influencer, almost like a human personal assistant.<sup>108</sup> Marr explains that generative AI can help a human influencer with data analytics, analyzing content success, finding brands to collaborate with, and completing business tasks such as scheduling.<sup>109</sup> For this category, both the name and images depicted remain those of the human influencer.

In the second category, “AI Content Creation for Human Influencer,” the generative AI moves from a background supporting role to an active role in creating actual content

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100. *Id.*

101. *Id.*; see also Meg Matthias, *Why Does AI Art Screw Up Hands and Fingers?*, BRITANNICA, <https://www.britannica.com/topic/Why-does-AI-art-screw-up-hands-and-fingers-2230501> [<https://web.archive.org/web/20251011010626/https://www.britannica.com/topic/Why-does-AI-art-screw-up-hands-and-fingers-2230501>] (last visited Mar. 8, 2025) (“An AI-generated hand might have nine fingers or fingers sticking out of its palm. In some images hands appear as if floating, unattached to a human body. Elsewhere, two or more hands are fused at the wrists.”); see also *How to Remove Extra Limbs with Stable Diffusion inpainting*, STABLE DIFFUSION ART (Feb. 27, 2023), <https://stable-diffusion-art.com/inpainting-remove-extra-limbs> [<https://web.archive.org/web/20251011011128/https://stable-diffusion-art.com/inpainting-remove-extra-limbs/>] (discussing frequent problems with AI generation, like extra limbs appearing, and instructing how to fix the problems).

102. *The Rise of AI Influencers on Instagram: Check Out These Creators*, IZEA (Aug. 30, 2023), <https://izea.com/resources/ai-influencers-on-instagram/> [<https://perma.cc/X896-43ZJ>].

103. *Id.*

104. *Id.*

105. *Id.*

106. Marr, *supra* note 82.

107. *Id.*

108. *Id.*

109. *Id.*

for a human influencer.<sup>110</sup> Influencers need to create constant written and audiovisual content to keep their audiences engaged.<sup>111</sup> Human influencers can use generative AI as a tool to help satisfy the never-ending need for new content.<sup>112</sup> Similarly, many human influencers expend significant amounts of time attempting to interact with their fans/followers.<sup>113</sup> As Marr explains, these human influencers can use “generative AI for help with carrying out engagement activity.”<sup>114</sup> The AI can help respond to messages and engage with the human influencer’s followers.<sup>115</sup> This second category, like the first, still involves an underlying human influencer, whose name and image are used.<sup>116</sup>

Once human influencers are using AI to help with content creation, the second category can quickly blur into a third category consisting of AI-generated digital replicas. The human influencer who was using generative AI to help engage with fans/followers and create new content, might decide that, for efficiency reasons, it makes sense to use an AI-generated avatar of themselves to do some of that engagement, as well as new content creation.<sup>117</sup> Marr offers the example of popular Twitch streamer Amouranth, who created an AI version of herself that responds to fans’ messages in her own voice generated by AI.<sup>118</sup> Similarly, Marr explains that DreamGF is a platform that creates AI versions of real human models and influencers that can chat as if they are actual people.<sup>119</sup> These digital replicas are based entirely upon a real human influencer and meant to duplicate that human influencer’s various characteristics to the extent possible, while reducing the heavy workload that it takes to keep up with fan engagement as an influencer.<sup>120</sup> This third category, like the first two, has a real human influencer at its root, but is different from the first two categories

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110. *Id.*

111. See Sam Blum, *The Fatigue Hitting Influencers as Instagram Evolves*, BBC (Oct. 21, 2019), <https://www.bbc.com/worklife/article/20191022-the-fatigue-hitting-influencers-as-instagram-evolves> [<https://web.archive.org/web/20251109125044/https://www.bbc.com/worklife/article/20191022-the-fatigue-hitting-influencers-as-instagram-evolves>] (describing the appetite for constant content as influencing becomes more popular and the toll that takes on human influencers).

112. Marr, *supra* note 82.

113. See, e.g., Harriet Shepherd, *Pokimane Is the Most-Followed Female Twitch Streamer. How Did She Get There?*, TEEN VOGUE (Aug. 22, 2024), <https://www.teenvogue.com/story/pokimane-twitch-streamer-interview> [<https://web.archive.org/web/20251109125129/https://www.teenvogue.com/story/pokimane-twitch-streamer-interview>] (describing the dedication of one Twitch player-turned-influencer and the time spent building a following).

114. Marr, *supra* note 82.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The creation and use of digital replicas were a big topic of debate in the recent Hollywood SAG-AFTRA strikes, resulting in a settlement on the specific terms for their use in TV/theatrical productions. See *Digital Replicas 101: What You Need to Know About the 2023 TV/Theatrical Contracts*, SAG-AFTRA (2023), [https://www.sagaftra.org/sites/default/files/sa\\_documents/DigitalReplicas.pdf](https://www.sagaftra.org/sites/default/files/sa_documents/DigitalReplicas.pdf) [[https://web.archive.org/web/20250722112634/https://www.sagaftra.org/sites/default/files/sa\\_documents/DigitalReplicas.pdf](https://web.archive.org/web/20250722112634/https://www.sagaftra.org/sites/default/files/sa_documents/DigitalReplicas.pdf)].

in that an AI-generated digital clone of the human influencer is what users are seeing and hearing.

After these first three human-centered uses of generative AI, the next category shifts to using generative AI to create a fictional influencer character who is not primarily based on a real human person and not meant as a digital avatar for a real human influencer. This is the AI version of Beard's imaginary virtual humans, only using AI technology rather than earlier technology such as CGI.<sup>121</sup> As discussed above, virtual influencers such as Lil Miquela and Shudu Gram were created using computer-generated imagery (CGI) technology, which has been around for a long time.<sup>122</sup> CGI technology involved a considerable amount of time and skill by the human-creator behind it, almost like using a set of art tools.<sup>123</sup> With the shift to AI technology, a human creator can input a few relatively simple prompts and ask generative AI to, for example, create numerous images of a young, attractive, stylish influencer with certain defined characteristics.<sup>124</sup> Thus far much of the use of generative AI in this space is to create a universe of possible images for the influencer, with the human then making selections, or "AI influencers with human filters."<sup>125</sup> The AI can create large amounts of content of various quality in terms of possible names, images, and content, but it is still ultimately humans deciding which to choose.

The final category is "fully autonomous AI influencer," where, theoretically, generative AI makes all decisions for the influencer: generating, selecting, and posting name, images, and content without any human involvement, perhaps beyond the initial prompts setting the process in motion. While the sensational article titles suggest this final category has arrived, under closer examination, it seems this is not the case.<sup>126</sup> Regardless, even if fully autonomous AI influencers are not yet here to the degree the media is suggesting, there is good reason to believe the technological ability for such a phenomenon is on its way. Additionally, a *New York Post* article reports the result of a

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121. See *supra* Section I.B; Beard, *supra* note 49.

122. See *What Is CGI?—Everything You Need to Know*, NASHVILLE FILM INST., <https://www.nfi.edu/what-is-cgi/> [<https://web.archive.org/web/20251011012352/https://www.nfi.edu/what-is-cgi/>] (last visited Mar. 8, 2025) (describing the history of CGI and noting that the technology dates back to the 1950s).

123. See Giovanni Scippo, *What Is CGI? A Look at Its History*, 3D LINES (Jan. 23, 2025), <https://www.3dlines.co.uk/a-short-history-of-cgi/> [<https://web.archive.org/web/20251011012738/https://www.3dlines.co.uk/a-short-history-of-cgi/>] ("Computer generated imagery for artistic purposes has of course found its biggest outlet in film, but that has in turn spawned an entire category of artists who work primarily with animated visual content. The technical know-how and artistic skills spent perfecting the ripples in a pool of water are equally at home in a movie production studio and an artist's digital canvas.")

124. See *What Is Generative AI?*, NVIDIA, <https://www.nvidia.com/en-us/glossary/generative-ai/> [<https://web.archive.org/web/20251011013149/https://www.nvidia.com/en-us/glossary/generative-ai/>] (last visited Mar. 8, 2025) ("Stable Diffusion allows users to generate photorealistic images given a text input.")

125. Zahn, *supra* note 14.

126. See, e.g., *supra* note 82 and accompanying text (listing examples of some article titles that may make it seem like generative AI influencers have arrived).



poll finding that Gen Z was 46% more likely to be interested in “companies and brands using AI Influencers instead of humans.”<sup>127</sup>

The legal implications of these uses of generative AI vary tremendously depending on which category is being used. And besides the challenges of imprecise terminology in which all uses of AI are lumped together into “AI influencers,” the challenge is exacerbated by the secrecy that shrouds the companies involved.<sup>128</sup> Returning to the Lil Miquela example, the role of humans versus technology in the creation of her visual appearance is not entirely transparent even since her big reveal as not being human. It does not appear that she was initially created using generative AI, and given the timing of her creation, that would not make sense.<sup>129</sup> Rather, the visual depictions of Miquela appear to be created using CGI technology, while the content she shares appears to be written for her by her very human creators at Brud.<sup>130</sup> Of course it is possible that in more recent years that some of the images of her are created and perhaps even curated using AI technology. Due to the secretive nature of the companies behind her, there is no way to know for sure whether AI tools play any role in creating Lil Miquela or her content, or whether there has been any shift over the years.

### C. RETHINKING THE AUTHENTICITY RATIONALE FOR INFLUENCERS

The rapid explosion of the influencer industry begs the question: Why? Brands utilize influencer marketing because research suggests that it is effective.<sup>131</sup> But why do consumers follow influencers on social media and buy what they promote? As Alexandra Roberts explains in her work on false influencing, the dominant view is that “[a]uthenticity lies at the core” of the influencer model, with consumers pointing to “authenticity as driving their engagement with influencer content.”<sup>132</sup>

The existence of openly virtual and AI influencers, and the fact that they continue to have large numbers of followers and ink brand deals even after their virtual/AI status is known, suggests that the authenticity explanation for the influencer phenomenon is

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127. Steinberg, *supra* note 82.

128. See Christina Schmidt, *Lil Miquela—the New “It-Girl” That Received \$6M in Funding*, MEDIUM (Jan. 13, 2019), [https://medium.com/@christina\\_39925/lil-miquela-the-new-it-girl-that-received-6m-funding-8dfd80febd05](https://medium.com/@christina_39925/lil-miquela-the-new-it-girl-that-received-6m-funding-8dfd80febd05) [[https://web.archive.org/web/20251025201858/https://medium.com/@christina\\_39925/lil-miquela-the-new-it-girl-that-received-6m-funding-8dfd80febd05](https://web.archive.org/web/20251025201858/https://medium.com/@christina_39925/lil-miquela-the-new-it-girl-that-received-6m-funding-8dfd80febd05)] (noting that Brud, the company behind Lil Miquela, is shrouded in secrecy).

129. See Kaitlyn Tiffany, *Lil Miquela and the Virtual Influencer Hype, Explained*, VOX (June 3, 2019), <https://www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups> [<https://web.archive.org/web/20251025202145/https://www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups>] (noting that Brud does not hold any patents in AI or robotics and concluding that Lil Miquela is excellent imagery).

130. See Favela, *supra* note 5, at 332 (“The most popular CGI influencers, such as Miquela, are still run by people, meaning the captions, the replies, and the image itself are all done by a person.”).

131. *Understanding Influencer Marketing and Why It Is So Effective*, FORBES: COUNCIL POST (July 30, 2018), <https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and-why-it-is-so-effective/> [<https://perma.cc/V23T-HDKG>].

132. Roberts, *supra* note 2, at 84.

incomplete. If authenticity was the sole driver of the influencer industry, then once Lil Miquela was revealed to be a virtual influencer, her followers and brand deals would evaporate. That does not appear to be what happened. This suggests that there is more to the influencing phenomenon than authenticity.

Scholars in other disciplines have begun to study and opine on the virtual influencer phenomenon. For example, experts in business and advertising have studied the impact and effectiveness of human and virtual influencer marketing.<sup>133</sup> This research seems to suggest that, despite what the authenticity rationale would predict, virtual influencers can be nearly as effective as human influencers.<sup>134</sup> Perhaps a piece of the explanation is that consumers are not only drawn to authenticity, as the dominant view suggests, but also to an aspirational lifestyle. Therefore, even if the consumer knows that a human is being paid to promote a product, or, in the case of virtual or AI influencers, knows the influencer is not even a real person, the product or service promoted by the influencer can represent an aspirational lifestyle that is attractive to the consumer even in the absence of authenticity.

## II. DO EXISTING RIGHT OF PUBLICITY LAWS PROTECT THE IDENTITIES OF VIRTUAL AND AI INFLUENCERS?

Before turning to the challenging normative questions in Part III, this Part first considers whether existing formulations of state right of publicity law can apply to protect the identities of non-human virtual and AI influencers. To date, there do not appear to be any court decisions addressing this question. Nor do the various state

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133. See David Belanch, Luis V. Casaló & Marta Flavián, *Human Versus Virtual Influencers, A Comparative Study*, 173 J. BUS. RSCH. 1, 1 (2024) (discussing research pertaining to effectiveness of human and virtual influencer marketing and concluding that “virtual influencers should endorse utilitarian products” and “human influencers should be hired to endorse hedonic products”); Jiemin Looi & Lee Ann Kahlor, *Artificial Intelligence in Influencer Marketing: A Mixed-Method Comparison of Human and Virtual Influencers on Instagram*, 24 J. INTERACTIVE ADVERT. 107, 122–23 (2024) (considering the effectiveness of virtual influencers as compared to human influencers in Instagram marketing and determining that virtual influencers are not as persuasive as human influencers on Instagram but may still be useful if carefully designed); Oihab Allal-Chérif, Rosa Puertas & Patricia Carracedo, *Intelligent Influencer Marketing: How AI-Powered Virtual Influencers Outperform Human Influencers*, 200 TECH. FORECASTING & SOC. CHANGE, 1, 10 (2024) (discussing research findings regarding the high effectiveness of virtual influencers compared to humans, including that (1) people recognize virtual influencers lack human flaws, (2) storytelling is integral to credibility, (3) constant and complete commitment of virtual influencers is a plus, and (4) virtual influencers are capable of being more believable and reliable than humans); Lennart Hofeditz et al., *Trust Me, I’m an Influencer!—A Comparison of Perceived Trust in Human and Virtual Influencers*, ASSOC. INFO. SYS.: ECIS 2022 PROCEEDINGS 1, 7 (June 18, 2022) (examining the rise of virtual influencer Miquela Sousa and discussing a study conducted by the authors on trustworthiness between virtual and human influencers, ultimately concluding that people generally “perceived trust, social presence, and humanness” more in human influencers); Sean Sands et al., *False Idols: Unpacking the Opportunities and Challenges of Falsity in the Context of Virtual Influencers*, 65 BUS. HORIZONS, 777, 784 (2022) (outlining opportunities and challenges of utilizing virtual influencers in branding); Ozan Ozdemir et al., *Human or Virtual: How Influencer Type Shapes Brand Attitudes*, 145 COMPUTS. HUM. BEHAV. 1, 9 (2023) (finding that when virtual influencers use rational language rather than emotional language as brand endorsers, they become nearly as effective as human influencers).

134. See *supra* note 133 and accompanying text.

statutory right of publicity frameworks appear to explicitly contemplate their application to virtual or AI influencers. This is unsurprising given the relative infancy of the phenomenon. Many state statutes do have language limiting their protections to “natural” or “living” persons. There have been discussions regarding whether virtual or AI influencers can themselves violate a human’s right of publicity, but not whether they can have their own right of publicity.<sup>135</sup> Indeed, there is even surprisingly little resolution of the broader question of whether the right of publicity can protect the identity characteristics of any non-humans such as animals, corporations, or characters.<sup>136</sup>

### A. STATE RIGHT OF PUBLICITY PROTECTION UNDER EXISTING REGIMES

The right of publicity is protected by a hodgepodge of state statutory and common law regimes. Some states only have statutory protection for the right of publicity,<sup>137</sup> some states only have common law protection,<sup>138</sup> and some states have both.<sup>139</sup> Nearly

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135. See, e.g., Carly Kessler, *Pixel Perfect: The Legal Implications of Virtual Influencers and Supermodels*, ROBINS KAPLAN (July 1, 2019), <https://www.lexology.com/library/detail.aspx?g=91ec38c5-d656-42f3-9544-df1c8016d7fc> [<https://web.archive.org/web/20251109131651/https://www.lexology.com/library/detail.aspx?g=91ec38c5-d656-42f3-9544-df1c8016d7fc>] (“[V]irtual influencers may actually be liable under various states’ right of publicity laws for misappropriation.”).

136. See Andrew W. Eaton, *We’re Not Gonna Take It!: Limiting the Right of Publicity’s Concept of Group Identity for the Good of Intellectual Property, The Music Industry, and the People*, 14 J. INTELL. PROP. L. 173, 195 (2006) (claiming that “[c]ourts generally conclude that the right of publicity is limited to natural persons”). The only support provided for that broad claim, however, is a single case—discussed further below—concluding in a single sentence that New York’s statutory right of privacy “concededly does not cover the case of a dog or a photograph of a dog,” where that statute uses the term “living person” to describe the requirement for triggering the right. *Lawrence v. Ylla*, 55 N.Y.S. 2d 343, 345 (Sup. Ct. 1945). This does not appear sufficient to support that courts generally have concluded that the right of publicity is limited to natural persons. See *id.*

137. ALA. CODE § 6-5-770 to § 6-5-774 (1975); ARK. CODE ANN. §4-75-1104 (West 2025); HAW. REV. STAT. ANN. §§ 482P-1–482-8 (West 2024); 765 ILL. COMP. STAT. ANN. 1075/1–1075/60 (West 2024); IND. CODE ANN. § 32-36-1-0.2 (West 2024); LA. REV. STAT. ANN. 14:102.21 (West 2024); NEB. REV. STAT. ANN. §§ 20-201, 20-202, 20-207 (West 2025); NEV. REV. STAT. ANN. §§ 597.770–597.810 (West 2025); N.Y. CIV. RIGHTS LAW §§ 50(f)–51 (McKinney 2015); 9 R.I. GEN. LAWS ANN. §§ 9-1-28 (West 2024); S.D. CODIFIED LAWS § 21-64 (2015); VA. CODE ANN. §§ 8.01-40, 18.2-216.1 (West 2024).

138. See *Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods.*, 296 S.E.2d 697, 703 (Ga. 1982) (holding that a common law right of publicity exists in Georgia for public figures); *Arnold v. Treadwell*, No. 283093, 2009 WL 2136909, at \*4 (Mich. Ct. App., July 16, 2009) (recognizing a common law right of publicity in Michigan); *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir. 1995) (recognizing a common law right of publicity in Minnesota); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (recognizing a common law right of publicity in Missouri); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013) (recognizing a common law right of publicity in New Jersey); *Moore v. Sun Publ’g Corp.*, 881 P.2d 735, 743 (N.M. 1994) (recognizing a common law right of publicity in New Mexico); *Gignilliat v. Gignilliat, Savitz & Bettis L.L.P.*, 684 S.E.2d 756, 760 (S.C. 2009) (holding that South Carolina recognizes a common law right of publicity); *Curran v. Amazon.com, Inc.*, No. 2:07–0354, 2008 WL 472433, at \*3 (S.D. W. Va., Feb. 19, 2008) (recognizing a common law right of publicity in West Virginia).

139. CAL. CIV. CODE § 3344 (West 2024) (recognizing a statutory right of publicity for California); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Cal. 2001) (recognizing a common law right of publicity for California); OHIO REV. CODE ANN. § 2741.02 (West 2024) (recognizing a statutory right of

a dozen states have no right of publicity protection.<sup>140</sup> As a result of this federalist system, the scope, length, transferability, and applicability of the right of publicity can vary substantially across states.<sup>141</sup> Despite extensive discussion of the possibility, currently there is no federal right of publicity.<sup>142</sup> Perhaps unsurprisingly, given the plethora of applicable regimes, the short answer to the descriptive question of whether the various existing right of publicity laws can protect the identities of virtual and AI influencers is an unsatisfying “it depends.”

### 1. States Requiring “Natural” or “Living” Persons

The statutory language for the right of publicity in numerous states clearly limits protection to natural persons thus preventing applicability to many virtual and AI

publicity for Ohio); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (recognizing a common law right of publicity for Ohio); OKLA. STAT. ANN. tit. 12 § 1449 (West 2024) (recognizing a statutory right of publicity for Oklahoma); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996) (recognizing a common law right of publicity for Oklahoma); 42 PA. STAT. & CONS. STAT. ANN. § 8316 (West 2025) (recognizing a statutory right of publicity for Pennsylvania); *Lewis v. Marriott Int’l, Inc.*, 527 F. Supp. 2d 422, 428 (E.D. Pa. 2007) (recognizing a common law right of publicity for Pennsylvania); TEX. PROP. CODE ANN. § 26.002 (West 1987) (recognizing a statutory right of publicity for deceased persons in Texas); *Brown v. Ames*, 201 F.3d 654, 657 (5th Cir. 2000) (recognizing a common law right of publicity in Texas); WIS. STAT. ANN. § 995.50 (West 2024) (recognizing a statutory right of publicity for Wisconsin); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 389 (1979) (recognizing a common law right of publicity in Wisconsin).

140. See Jennifer Rothman, *Rothman’s Roadmap to the Right of Publicity*, <https://rightofpublicityroadmap.com> [<https://web.archive.org/web/20251109150105/https://rightofpublicityroadmap.com/>] (last visited Mar. 17, 2025) (noting that Alaska, Idaho, Kansas, Maine, Maryland, Mississippi, Montana, North Carolina, North Dakota, Vermont, and Wyoming have not explicitly recognized a common law or statutory right of publicity).

141. Compare ARIZ. REV. STAT. ANN. § 12-761 (2007) (outlining a statutory right of publicity only for soldiers in Arizona), with CAL. CIV. CODE § 3344 (West 2024) (outlining a broad statutory right of publicity in California).

142. See Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM’NS L. 14, 14 (2011) (“[P]roviders should not be required to navigate a hodgepodge of right of publicity laws . . . . The best solution to this problem is a federal right of publicity statute that expressly preempts state law and brings uniformity and predictability to right of publicity law.”); Mark Roesler & Joey Roesler, *Patchwork Protections: The Growing Need for a Federal Right of Publicity Law*, 16 LANDSLIDE 38, 39 (2024) (“[I]t is time to harmonize the law in this area by means of a federal right of publicity statute . . . that . . . would alleviate many unnecessary burdens and transaction costs that businesses currently face . . . .”); Toni-Ann Hines, *The Right of Publicity in the Age of Technology, Social Media, and Heightened Cultural Exchange*, 23 WAKE FOREST J. BUS. & INTELL. PROP. L. 164, 166 (2022) (“This article contends that there is an emerging need for federal law to recognize the right of publicity, particularly considering this country’s history of cultural theft among people of color.”); Nanci K. Carr, *Social Media and the Internet Drive the Need for a Federal Statute to Protect the Commercial Value of Identity*, 22 TUL. J. TECH. & INTELL. PROP. 31, 36 (2020) (“Due to the incongruities in state law protection and the pervasive use of social media and the Internet for international distribution of sponsored content, a federal right of publicity statute . . . is needed now more than ever.”); see also Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2024 (NO FAKES Act), S.J. Res., S. 4875, 118th Cong. (2024) (proposing legislation at the intersection of AI and right of publicity at the federal level); No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024 (No AI Fraud Act), H.R. 6943, 118th Cong. (2024) (proposing a specific federal right of publicity to combat new AI issues).

influencers, at least where there is not a natural person whose interests can be asserted. Some states directly define the right as applying to a “natural person.” For example, Florida’s statutory framework directly limits protection to “the name, portrait, photograph, or other likeness of any natural person.”<sup>143</sup> Similarly, Pennsylvania gives the right of publicity to “[a]ny natural person whose name or likeness has commercial value.”<sup>144</sup>

Other states make clear in their definitions sections that the right is limited to “natural persons.” For example, Alabama’s right of publicity statute covers the “indicia of identity of a person,” and “person” is defined as a “natural person or a deceased natural person.”<sup>145</sup> Similarly, Arkansas’s statute protects “an individual,” and defines that term as “a natural person, alive or dead.”<sup>146</sup> Illinois also recognizes the right of publicity for “an individual’s identity” and defines “individual” as “a living or deceased natural person.”<sup>147</sup> Indiana’s statute prohibits use of a “personality’s right of publicity for a commercial purpose,” and defines personality as “a living or deceased natural person.”<sup>148</sup> Whether directly in the rights section or in the definitions section, these natural person requirements pose a challenge for applying the right of publicity to protect the identities of virtual or AI influencers in most circumstances.

Some other states do not specify that the right be held by a “natural person,” instead referencing a “living person,” which likely will impose a similar barrier to protection for the identities of virtual and AI influencers. Notably, both New York and Wisconsin’s statutes prevent unauthorized use of the “name, portrait or picture of any living person.”<sup>149</sup> This language was likely originally drafted as “living person” to clarify that the right of publicity in both states only extended to living persons and not to deceased persons, although New York added a postmortem right in 2020.<sup>150</sup> Nonetheless, the plain meaning of the term “living person” is likely to foreclose successful claims for protecting the name, portrait, or picture of virtual or AI influencers under New York’s and Wisconsin’s existing statutory frameworks.

Nevada’s right of publicity statute provides a remedy for “[a]ny commercial use of the name, voice, signature, photograph or likeness of another by a person, firm or corporation without first having obtained written consent for the use.”<sup>151</sup> The term “another” is used with regard to the rightsholder in the remedy provision.<sup>152</sup> And because the term “person” is used in the second half of the clause in reference to the infringing party, as a matter of statutory interpretation, there is a strong argument that

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143. FLA. STAT. ANN. § 540.08 (West 2024).

144. 42 PA. STAT. & CONS. STAT. ANN. § 8316 (West 2025).

145. ALA. CODE § 6-5-772 (1975).

146. ARK. CODE ANN. §§ 4-75-1104, 4-75-1103 (West 2025).

147. 765 ILL. COMP. STAT. ANN. 1075/5, 1075/10 (West 2024).

148. IND. CODE ANN. §§ 32-36-1-6, 32-36-1-8 (West 2024).

149. N.Y. CIV. RIGHTS L. § 50 (West 2022); WIS. STAT. ANN. § 995.50 (West 2024).

150. N.Y. CIV. RIGHTS L. § 50(f) (West 2022).

151. NEV. REV. STAT. ANN. §§ 597.770–597.810 (West 2025).

152. *Id.*

Nevada's legislature could have used "person" had they wanted to.<sup>153</sup> However, a different provision titled "Scope" states that a number of provisions, including the remedy provision referenced above, applies to "any commercial use within this state of a living or deceased person's name, voice, signature, photograph or likeness" thus appearing to limit its scope to living or deceased persons, foreclosing virtual or AI influencers.<sup>154</sup>

Similarly, Hawaii's existing statutory right of publicity initially appears to be a strong contender for protecting virtual or AI influencers.<sup>155</sup> That statute states: "Every individual or personality has a property right in the use of the individual's or personality's name, voice, signature, and likeness," which seems open to interpretation as encompassing virtual and AI influencers.<sup>156</sup> "Personality" is defined by the Hawaii statute in relevant part as "any individual whose name, voice, signature, likeness, or other attribute of their personality has commercial value."<sup>157</sup> However, the term "individual" is further defined as limited to "a natural person, living or dead" thus undermining protection for virtual or AI influencers.<sup>158</sup>

Along the same lines, Tennessee's statutory right of publicity broadly states that "[e]very individual has a property right in the use of that individual's name, photograph, voice, or likeness in any medium in any manner[,] " which appears broad enough to cover the right of publicity for virtual or AI influencers.<sup>159</sup> The definitions provision, however, limits the definition of an individual to "human being, living or dead."<sup>160</sup> Tennessee is especially interesting because it has updated its right of publicity law to account for artificial intelligence with the ELVIS act.<sup>161</sup> That update considered the fact that artificial intelligence could be the defendant infringing upon a person's right of publicity, but did not expressly discuss whether the individual rightsholder ought to be similarly expanded to include virtual or AI influencers.<sup>162</sup>

## 2. States with More Promising Statutory Language

Right of publicity protection in California would be very significant given the prominence of the entertainment industry there. California has both a statutory and

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153. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 25 (2023) ("Often, a statutory dispute will turn on the meaning of only a few words. Courts will interpret those words, though, in light of the full statutory context. To gather evidence of statutory meaning, a judge may turn to the rest of the provision, to the act as a whole, or to similar provisions elsewhere in the law." (internal citations omitted).)

154. NEV. REV. STAT. ANN. § 597.780 (West 2025).

155. See HAW. REV. STAT. ANN. § 482P-2 (West 2024) (lacking a definition of "individual" or "personality" in this specific provision).

156. *Id.*

157. *Id.* at § 482P-1.

158. *Id.*

159. TENN. CODE ANN. § 47-25-1103 (West 2024).

160. *Id.* at § 47-25-1102.

161. *Id.* at § 47-25-1101 et seq.

162. *Id.*

common law right of publicity.<sup>163</sup> To be more specific, California has two statutory rights of publicity, and the earlier of the two has some potential for protecting the identities of virtual and AI influencers.<sup>164</sup> California's initial right of publicity statute codified in Section 3344 states:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>165</sup>

California's first statutory reference to the subject of the right of publicity protection is to "another," and specifically with respect to their "name, voice, signature, photograph, or likeness."<sup>166</sup> Virtual and AI influencers typically will have names, photographs, and likenesses, and may even have voices and signatures.<sup>167</sup> They also can easily be described as "another."<sup>168</sup> Later, however, the California statutory language modifies the behavior that results in damages as being only when those activities are done "without such person's prior consent," thus suggesting that the rightsholder in the first clause is also a "person."<sup>169</sup> This reference to person is not necessarily fatal as, without a modifier such as "living" or "natural," "person" does not preclude protection for the identities of virtual or AI influencers.<sup>170</sup> There does not appear to be a statutory definition that narrows the scope of California's initial right of publicity statute codified in Section 3344 to living or natural persons.<sup>171</sup> Furthermore, California courts have held that the right of publicity protected by Section 3344 is assignable.<sup>172</sup>

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163. CAL. CIV. CODE § 3344 (West 2024) (recognizing a statutory right of publicity in California); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001) (recognizing a common law right of publicity in California).

164. CAL. CIV. CODE § 3344 (West 2024) (outlining the statutory right of publicity for use of another's name, voice, or likeness); CAL. CIV. CODE § 3344.1 (West 2024) (outlining the statutory right of publicity for use of a deceased person's name, voice, or likeness).

165. CAL. CIV. CODE § 3344(a) (West 2024).

166. See *supra* notes 163–64 (outlining both of California's right of publicity statutes); NEV. REV. STAT. ANN. § 597.770 (West 2025) (outlining Nevada's right of publicity, which refers to "another" and does not define the term).

167. See Marr, *supra* note 82 (noting that some AI Influencers have started using AI to generate their voice and music).

168. See CAL. CIV. CODE § 3344 (West 2024) (referring to the protected entity as another).

169. *Id.*

170. Compare ARK. CODE ANN. § 4-75-1103 (2016) (defining an individual as a "natural person, alive or dead" and therefore ultimately precluding protection of AI Influencers), with CAL. CIV. CODE § 3344 (West 2024) (neglecting to provide a comprehensive definition for the term "another," leaving open the possibility for AI Influencer protection).

171. See CAL. CIV. CODE § 3344 (West 2024) (illustrating some definitions in the statute, where others are left out).

172. See *e.g.*, *Timed Out, LLC v. Youabian, Inc.*, 229 Cal. App. 4th 1001, 1008 (2014) (finding that the statutory right of publicity is assignable); *Upper Deck Co. v. Panini Am., Inc.*, 469 F. Supp. 3d 963, 984 (S.D. Cal. 2020) (upholding the finding in *Timed Out* that rights under § 3344 are assignable); Milton H. Green

Despite this statutory ambiguity and the absence of a narrowing term, California courts have described the statutory right in Section 3344 as the right of publicity for a “living person.”<sup>173</sup> A careful reading of these cases, however, reveals that this description has not taken the form of an explicit holding that the original statutory right of publicity is limited to living or natural persons.<sup>174</sup> Instead, these cases refer to a right of publicity for a living person to emphasize a contrast with a second, later-enacted right of publicity statute, Section 3344.1, which California passed in 1984.<sup>175</sup> Section 3344.1 provides protection against “a person who uses a deceased personality’s name, voice, signature, photograph, or likeness” in prohibited ways and provides protections for heirs.<sup>176</sup> Unlike its predecessor, the second statute specifically defines “deceased personality” as meaning any natural person.<sup>177</sup> The latter statute was passed in response to case law that stated the initial statute did not apply if the rights holder had failed to exploit their own right of publicity during their lifetime, thus making clear that the heirs of deceased personalities also have an interest.<sup>178</sup>

For example, in 2001 the California Supreme Court, in the background section of an opinion, writes that Section 3344 “enacted in 1971, authoriz[es] recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent.”<sup>179</sup> The court goes on to discuss the addition of the second statutory right of publicity in 1984, and it is that second statute that forms the basis of the court’s discussion and analysis in that case.<sup>180</sup> Although the court refers in passing to Section 3344 as authorizing recovery of damages “by any living person,” the statute itself does not have that limitation, and the court does not cite any support for limiting it to living persons.<sup>181</sup> Similarly, the earliest case referring to Section 3344 as governing “a living person’s right of publicity in his or her own identity” is a federal district court case focusing on a choice of law analysis arising out

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Archives, Inc. v. CMG Worldwide, Inc., No. CV 05-02200 MMM (MCx), 2008 WL 655604, at \*3 (C.D. Cal. Jan. 7, 2008); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 409 (Ct. App. 2001).

173. See *Gionfriddo*, 94 Cal. App. 4th at 408 (“In 1971, the Legislature enacted section 3344, which authorized recovery of damages by any living person whose name, photograph, or likeness was used for commercial purposes without his or her consent.”); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001) (“The statutory right originated in California Civil Code Section 3344 (hereafter Section 3344), enacted in 1971, authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent.”); *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1028 (C.D. Cal. 1998) (“Cases applying California Civil Code § 3344, which governs a living person’s right of publicity in his or her own identity, have not addressed § 946, and the Court need not consider the relationship between § 3344 and the property choice of law statute.”).

174. See *supra* note 173 and accompanying text (using the language of living person, but distinctly not holding that the statute only applies to living persons).

175. CAL. CIV. CODE § 3344.1 (West 2024).

176. *Id.*

177. *Id.*

178. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) (holding that publicity rights are not assignable post-mortem).

179. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

180. *Id.* at 799–800.

181. *Id.* at 799; see also CAL. CIV. CODE § 3344 (West 2024) (neglecting to limit the language in the statute to living persons).



of claims by the executors of the estate of Princess Diana.<sup>182</sup> This case too does not cite any support for the idea that Section 3344 is limited to a living person's right of publicity.<sup>183</sup> This pattern appears to be true for every case describing the Section 3344 coverage as a right of publicity for a living person without any citation, support, or analysis.<sup>184</sup> Other cases quote from earlier cases, which had made the claim without support.<sup>185</sup> Therefore, it appears that courts are using "living person" in reference to Section 3344 as short hand to distinguish it from the 3344.1 right of publicity, which was added for posthumous rights, but not because there has been an actual holding that limits the Section 3344 California statutory right of publicity to natural or living persons.<sup>186</sup>

Oklahoma's statutory regime appears to track the duality of California's statute.<sup>187</sup> Like in California, Title 12, Section 1449 imposes liability on "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person's prior consent . . ."<sup>188</sup> Just as with California, the reference to "person" is not modified by a term such as "natural" or "living" that would limit protection for virtual or AI influencers.

Additionally, beginning in 2016, Oklahoma added a new statutory provision prohibiting using "another's name, voice, signature, photograph or likeness through social media to create a false identity" without consent.<sup>189</sup> As with Oklahoma's original statutory provision, the statutory language does not explicitly modify "person" with a limiting term such as "natural" or "living." Therefore, it should be possible to argue that using the name or likeness of a virtual or AI influencer on social media without consent may violate the statute.

Beyond California and Oklahoma, both Massachusetts and Rhode Island provide right of publicity protection to a person, without a definition limiting "person" to natural or living beings.<sup>190</sup> Massachusetts protects "[a]ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the

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182. Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1028 (C.D. Cal. 1998).

183. *Id.* (lacking citations to authority holding that § 3344 applies only to living persons).

184. See Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (Ct. App. 2001) (lacking a citation to authority, even though the opinion refers to living persons as the protectable class under § 3344).

185. See, e.g., Geragos v. Borer, No. B208827, 2010 WL 60639, at \*5 (Cal. Ct. App. Jan. 11, 2010) (citing *Gionfriddo*, 94 Cal. App. 4th at 408); *Melendez v. Sirius XM Radio, Inc.* 50 F.4th 294, 299 (2d Cir. 2022) (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001)).

186. Compare CAL. CIV. CODE § 3344 (West 2024) (outlining the statutory right of publicity for the non-deceased), with CAL. CIV. CODE § 3344.1 (West 2024) (outlining the statutory right of publicity for the deceased).

187. See OKLA. STAT. tit. 12, § 1449 (1986) (refraining from defining the terms "another" or "person").

188. *Id.*

189. OKLA. STAT. tit. 12, § 1450 (2016).

190. See MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2024) (outlining Massachusetts's statutory right of publicity); 9 R.I. GEN. LAWS ANN. §§ 9-1-28 (West 2024) (outlining Rhode Island's statutory right of publicity).

purposes of trade without his written consent.”<sup>191</sup> “Person” is not defined in the statute as limited to a natural or living person, and, in fact, a federal district court sitting in diversity jurisdiction recognized in an unpublished order that “Massachusetts courts have not yet decided whether or not [the state’s right of publicity statute] applies to the commercial use of a corporation’s name.”<sup>192</sup> If the right of publicity could potentially be asserted by a corporation, which the federal court acknowledged remains an open question, then it certainly could apply to virtual and AI influencers, as it means the statute is not limited to natural or living persons.<sup>193</sup> The same federal district court assumed “without deciding that [Massachusetts’ statutory right of publicity] applies to the commercial use of a corporation’s name[,]” despite the fact that it acknowledged that an earlier district court “expresse[d] grave doubt.”<sup>194</sup> Looking to the earlier published federal district court opinion that had expressed “grave doubt,” it appears that court’s grave doubt was linked to the following sentence where the court noted “that the Massachusetts legislature has already provided ample remedies for” protecting against use of a corporation’s name, namely through deceptive trade practices and trademark infringement statutes.<sup>195</sup> That same concern would be less applicable for virtual and AI influencers who are less likely to be protected by trademark law. Despite this policy-based doubt, the court implicitly conceded that the statutory language of Massachusetts’s right of publicity statute does not in any way limit the cause of action to natural or living persons.<sup>196</sup> Rhode Island’s right of publicity statute also provides remedies for “any person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent.”<sup>197</sup> Without any caselaw or statutory definitions limiting the term person to living or natural persons, Rhode Island also remains a possibility for protecting the identities of virtual or AI influencers.

Admittedly, these statutes are at best ambiguous regarding their application to virtual and AI influencers. Joe Miller has argued when a court encounters an ambiguous statute it is better to interpret it narrowly so that the legislature can correct it more easily.<sup>198</sup> If Miller is correct, it would be better to interpret these ambiguous statutory provisions narrowly as not covering virtual and AI influencers and leaving it to the legislatures to consider expansion. But for courts not persuaded by Miller’s thesis, the statutory language in the states above provide enough leeway for courts to apply them to virtual and AI influencers.

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191. MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2024).

192. *Bonacorso Constr. Co. v. Master Builders, Inc.*, CIV.A. No. 87-1827-WF, 1991 WL 72796, at \*8 (D. Mass. Apr. 24, 1991).

193. *See id.* (recognizing an open question as to whether corporations can have a right of publicity claim).

194. *Id.*

195. *Pump, Inc., v. Collins Mgmt., Inc.*, 746 F. Supp. 1159, 1172 (D. Mass. 1990).

196. *See id.* (refraining from limiting the statutory protection to living persons).

197. 9 R.I. GEN. LAWS ANN. § 9-1-28 (West 2024).

198. Joseph S. Miller, *Error Costs & IP Law*, 2014 U. ILL. L. REV. 175, 176 (2013).

### 3. Common Law Right of Publicity

As noted, several states offer common law right of publicity regimes, some of which may protect virtual or AI influencers. For example, California courts and federal courts applying California law have held that California's common law right of publicity cause of action "may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."<sup>199</sup> By referring more generally to plaintiff's identity and plaintiff's name or likeness rather than more limiting language such as a "living person" or "natural person," this formulation of California's common law right of publicity is broad enough to potentially cover the identity of virtual or AI influencers.

The Sixth Circuit interpreted Michigan's common law right of publicity broadly holding that it developed "to protect the commercial interest of celebrities in their identities" under the theory that "a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity."<sup>200</sup> Virtual and AI influencers can similarly have valuable identities as shown by their ability to get paid to promote products and services. The court went on to say that under the right of publicity "a celebrity has a protected pecuniary interest in the commercial exploitation of his identity."<sup>201</sup> The same logic could apply to virtual or AI influencers. Therefore, the logic of Michigan's common law right of publicity applies equally to virtual or AI influencers.

Similarly, the Eighth Circuit held that Minnesota would likely recognize a right of publicity that is different from the right to privacy in that its purpose is to "protect[] the ability of public personae to control the types of publicity that they receive" so that it "protects pecuniary, not emotional, interests."<sup>202</sup> With that justification, it seems Minnesota's common law right of publicity could equally apply to protect the pecuniary interests of virtual and AI influencers.

The Missouri Supreme Court has also recognized a common law right of publicity cause of action designed to "protect a person from losing the benefit of their work in creating a publicly recognizable persona."<sup>203</sup> Virtual and AI influencers also have created publicly recognizable personas that might be protected under Missouri's common law right of publicity. Missouri requires that the plaintiff prove that the defendant used the plaintiff's name without consent to obtain a commercial advantage.<sup>204</sup>

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199. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (quoting *Eastwood v. Superior Ct.*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983)).

200. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

201. *Id.*

202. *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir. 1995).

203. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (quoting *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. App. 1998)).

204. *Id.*

Similarly, the Wisconsin Supreme Court concluded that the “right of a person to be compensated for the use of his name for advertising purposes or purposes of trade . . . protects primarily the property interest in the publicity value of one’s name.”<sup>205</sup> This suggests that a virtual or AI influencer might be able to recover in Missouri or Wisconsin if their name was used without consent to obtain a commercial advantage, or for advertising purposes or purposes of trade, both of which would be true when promoting a product or service on social media. Similar logic would likely apply in other states with similar common law right of publicity protections.<sup>206</sup>

#### 4. Protection for Humans Behind Virtual or AI Influencers

One subset of the spectrum of influencers discussed in Part II may have another path to protection under the right of publicity in some states—namely, virtual and AI Influencers who are the creation of a single human individual may be able to claim that aspects of the virtual or AI Influencer are protected by that individual’s right of publicity. This is not limited to virtual and AI Influencers who are digital replicas of the human individual, but even potentially virtual influencers who have a different name or face than the human individual. Even McCarthy notes in a footnote to his treatise that “if a pet or animal ‘mascot’ is always clearly associated with the persona of its master, then some commercial uses of the animal might in fact identify the persona of the human master.”<sup>207</sup> An even stronger argument could be made for virtual or AI Influencers who fit that criteria.

Turning first to the ability to protect the name of a virtual or AI Influencer, under the right of publicity of the human behind that virtual or AI Influencer, the existence of the underlying human would solve the problem in the many states discussed above that expressly limit the right of publicity to natural or living persons.<sup>208</sup> So now the question is: What can be included when the statutory right of publicity refers to a “name”?<sup>209</sup> Numerous courts have interpreted the protection of an individual’s name in a right of publicity statute broadly as protecting names beyond legal or birth names.<sup>210</sup>

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205. *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 387 (1979).

206. *See Gignilliat v. Gignilliat, Savitz & Bettis L.P.*, 684 S.E.2d 756, 760 (S.C. 2009) (holding that South Carolina recognizes a common law right of publicity); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013) (recognizing a common law right of publicity in New Jersey); *Moore v. Sun Publ’g. Corp.*, 881 P.2d 735, 743 (N.M. 1994) (recognizing a common law right of publicity in New Mexico).

207. 1 MCCARTHY & SCHECHTER, *supra* note 18, § 4:37 n.8.

208. *See supra* notes 155–62 and accompanying text (citing some examples of statutes that specifically define person, individual, and another to preclude AI Influencer protection).

209. *See* VA. CODE ANN. §§ 8.01-40, 18.2-216.1 (West 2024) (using the term “name” in the statutory language); CAL. CIV. CODE § 3344 (West 2024) (using “name” in the language); HAW. REV. STAT. ANN. § 482P-2 (West 2024) (employing “name” in the language); KY. REV. STAT. ANN. § 391.170 (West 2025) (using “name” in the language); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2024) (using “name” in the language); OHIO REV. CODE ANN. § 2741.01 (West 2024) (using “name” in the “Definitions” section); OKLA. STAT. ANN. tit. 12, § 1449 (West 2024) (using “name” in the language); 9 R.I. GEN. LAWS ANN. § 9-1-28 (West 2024) (using “name” in the language).

210. *See Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996) (“We have frequently held that California’s common law right of publicity protects celebrities from appropriations of

For example, one unpublished California court decision expressly held that California's statutory right of publicity in Section 3344 "will protect a pseudonym such as a nickname or pen name, so long as the pseudonym has become widely known to the public as closely identified with the plaintiff."<sup>211</sup> The court reasoned that the statute includes the term "names" and that language is broad enough to encompass both "pen names" and "nicknames" in the absence of a limiting modifier such as "birth name" or "legally adopted name."<sup>212</sup> Without any statutory limitations or legislative history restricting the meaning of "name" to birth name or legally adopted names, the court found that a pseudonym could be covered by the statute.<sup>213</sup>

By contrast, New York courts have interpreted its right of publicity statute more narrowly, construing the use of a person's name under the statute "nearly literally such that only use of a 'full' name, not just a surname, is actionable."<sup>214</sup> The court went on to explain that the use of the name under New York law must be the "true" name of the claimant, rather than a business, partnership, or assumed name.<sup>215</sup> Additionally, in New York, nicknames fail to qualify for statutory protection, with the exception of "stage, theatrical or fictitious names that have 'become known to the public and identifies its bearer virtually to the exclusion of his true name.'"<sup>216</sup>

Several courts have also interpreted the state's common law right of publicity broadly enough to cover nicknames or other names beyond legal names. For example, the Wisconsin Supreme Court held that plaintiff Elroy Hirsch could recover under Wisconsin common law for the unauthorized use of his nickname, "Crazylegs" on a shaving gel.<sup>217</sup> The court wrote "[t]he fact that the name, 'Crazylegs,' used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person."<sup>218</sup> The court quoted Prosser's law review article, stating "that a stage or other fictitious name can be so identified with the plaintiff that he is entitled to protection against its use."<sup>219</sup> Furthermore, the Wisconsin Supreme Court pointed out Prosser had written that "it would be absurd to say that Samuel L. Clemens" would not have a cause of action for the use of "Mark Twain."<sup>220</sup>

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their *identity* not strictly definable as 'name or picture.'" (citations omitted); *Ackerman v. Ferry*, No. B143751, 2002 WL 31506931, at \*19 (Cal. Ct. App. Nov. 12, 2002) ("It was clear to Prosser that a fictitious name can become so identified with an individual that he is entitled to protection against its use.") (citation omitted); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) ("The fact that the name, 'Crazylegs,' used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action.").

211. *Ackerman*, 2002 WL 31506931, at \*19.

212. *Id.* at \*18.

213. *Id.* at \*19.

214. *Champion v. Take Two Interactive Software, Inc.*, 100 N.Y.S.3d 838, 846 (Sup. Ct. 2019) (citation omitted).

215. *Id.*

216. *Id.*

217. *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979).

218. *Id.*

219. *Id.* (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 385 (1960)).

220. *Id.*

Regarding likeness, the strongest argument would be protection for digital replicas/avatars that resemble the actual human, whether created using CGI technology (virtual influencers) or AI technology (AI influencers). Most states that protect the right of publicity include protection for one's "likeness," which may extend to digital replicas/avatars that resemble the actual human. Most notably, in the famous Ninth Circuit case of *White v. Samsung*, the court held that a robot wearing a blonde wig and a dress was not Vanna White's likeness for purposes of California's right of publicity statute, but in so holding noted that the robot had "mechanical features, and not, for example, a manikin molded to White's precise features."<sup>221</sup> Although the court expressly refused to decide "for all purposes when a caricature or impressionistic resemblance might become a 'likeness,'" its analysis strongly suggests that a close enough digital replica of a real person would likely meet the statutory criteria for "likeness."<sup>222</sup> Indeed a few years later, the Ninth Circuit revisited a similar question, again mentioning they had previously noted a "manikin molded to [a person's] precise features, or one that was a caricature or bore an impressionistic resemblance to [a person] might become a likeness for statutory purposes."<sup>223</sup> Therefore, the court concluded that summary judgment on a statutory right of publicity claim was inappropriate because there remained genuine issues of material fact as to the degree with which animatronic robots that were based on actors' likenesses and placed in airport bars resembled, caricatured, or bore an impressionistic resemblance to appellants.<sup>224</sup> Furthermore, the Ninth Circuit held that even for the robot with mechanical features, Vanna White had "alleged facts showing that Samsung . . . had appropriated her identity" such that summary judgment was inappropriate on her common law right of publicity claim.<sup>225</sup> If someone were to use the digital replica/avatar without permission then the actual human behind that digital replica/avatar could sue for a violation of their own right of publicity. Therefore, there is a strong argument for protecting the name and likeness of virtual and AI influencers associated with a single human.

## B. ANIMALS AND RIGHT OF PUBLICITY

While not a perfect analogy, looking to see whether courts have held that animals have a right of publicity might lend some useful insights into the related question of whether courts are likely to hold that the right of publicity can extend beyond living humans. Somewhat surprisingly, given the long history of celebrity animals from Lassie to Beethoven, to the modern-day Grumpy Cat, the case law answering this question is extremely sparse.<sup>226</sup>

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221. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992).

222. *Id.*

223. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 810 (9th Cir. 1997).

224. *Id.*

225. *White*, 971 F.2d at 1399.

226. See Crissy Froyd, *Why Was Lassie Actually a Male Dog?*, SHOWSIGHT MAG. (Aug. 14, 2024), <https://showsightmagazine.com/why-was-lassie-actually-a-male-dog/>

Prominent treatise authors have also disagreed as to what the answer to this question ought to be. In his early foundational work on the right of publicity, Melville Nimmer ardently argued for a right to publicity for the human owners of animals, businesses, and other institutions.<sup>227</sup> By contrast, Thomas McCarthy's influential treatise has consistently opposed expanding the right of publicity beyond real humans to other categories, including animals.<sup>228</sup>

McCarthy's latest treatise update with Roger E. Schechter on the rights of publicity and privacy contains a section titled, "Do animals and pets have a right of publicity?"<sup>229</sup> Although the treatise devotes a few paragraphs to opining on what the authors feel ought to be the correct answer, ultimately they acknowledge that "there is no case law on a common law right of publicity for animals" and "there is probably still a clean slate as to their possible right of publicity."<sup>230</sup>

As McCarthy's treatise notes, there is a single New York case from 1945 that suggests that a human cannot invoke New York's right of publicity statute on behalf of her pet dog when her dog's photo was used without permission in an advertisement for the National Biscuit Company.<sup>231</sup> The majority of the extremely short decision focuses on the contractual relationship between the dog's owner and the photographer she had hired to photograph that dog.<sup>232</sup> With regard to her attempted lawsuit against the advertising agency that sold the photos of her dog, the National Biscuit Company that used the photograph in an ad campaign for their product, and the *New York Times* and *News Syndicate*, who had published the advertisement, the court simply stated in a single sentence: "[S]tatutory right of privacy concededly does not cover the case of a dog or a photograph of a dog."<sup>233</sup> While the court does not offer additional support for its

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[<https://web.archive.org/web/20251108021903/https://showsightmagazine.com/why-was-lassie-actually-a-male-dog/>] (noting that Lassie was not a single dog, but actually a series of dogs); Juliet Iacona, *Behind Closed Curtains: The Exploitation of Animals in the Film Industry*, 12 J. ANIMAL & NAT. RES. L. 25, 28–30 (2016) (detailing a brief history of animal actors in the film industry); Paula Stewart, *A History of the Evolution of Animals in Film and TV*, THE ANIMAL TALENT (Nov. 10, 2024), <https://theanimaltalent.agency/the-evolution-of-animal-actors-in-film-and-advertising-then-vs-now/> [<https://web.archive.org/web/20251109162105/https://theanimaltalent.agency/the-evolution-of-animal-actors-in-film-and-advertising-then-vs-now/>] (describing the landscape of animal actors from the early days of film and TV to modern day, including how AI is impacting animal actors); Sanjana Varghese, *How Grumpy Cat Went From Feline Obscurity to Internet Sensation*, WIRED (May 17, 2019), <https://www.wired.com/story/grumpy-cat-dead-history/> [<https://web.archive.org/web/20251109162310/https://www.wired.com/story/grumpy-cat-dead-history/>] (discussing the phenomenon that was Grumpy Cat); Elena Sokolova, *Lights, Camera, Bark! The Eight Stories of Famous Dog Actors*, FILMSTAGE (Sep. 3, 2024), <https://filmstage.com/blog/the-8-stories-of-famous-dog-actors/> [<https://web.archive.org/web/20251108031638/https://filmstage.com/blog/the-8-stories-of-famous-dog-actors/>] (discussing some of the most famous dog actors, including Chris, the St. Bernard who played Beethoven).

227. Nimmer, *supra* note 17, at 216.

228. 1 MCCARTHY & SCHECHTER, *supra* note 18, at § 4:37.

229. *Id.*

230. *Id.*

231. *Lawrence v. Ylla*, 55 N.Y.S.2d 343, 345 (Sup. Ct. 1945).

232. *Id.* at 343–46.

233. *Id.* at 345.

cursory conclusion, New York's statutory right of privacy at issue applies explicitly to a "living person," and therefore presumably not plaintiff's dog.<sup>234</sup>

The only other American case referenced in the McCarthy treatise's discussion is a Missouri case where the court reversed a \$5,000 jury award to the plaintiff in a case involving taking a photograph of the plaintiff's horse and using it in an advertisement.<sup>235</sup> The court found that there was no invasion of plaintiff's privacy because there was nothing in the photograph to indicate that the horse belonged to the plaintiff.<sup>236</sup>

Therefore, while there is no definitive case law on the applicability of a common law right of publicity to animals, some related cases sound skeptical. Nonetheless, the question likely remains an issue of first impression in those jurisdictions identified above that do not specifically limit the right to "living persons."

### C. CORPORATIONS AND RIGHT OF PUBLICITY

Unlike for animals, there is case law analyzing whether corporations can have a right of publicity, which may also provide some insight as to whether courts would extend the right of publicity beyond natural persons. Some of the language in these decisions suggests that the right of publicity ought to be limited to natural persons. For example, in 2015, the federal district court for the Northern District of California considered in an unpublished decision whether VIRAG, an Italian commercial flooring business that sponsors car races, had a California common law right of publicity that could be violated by a videogame showing the corporation's branding.<sup>237</sup> The district court dismissed the claim because it agreed with defendants that a corporation does not have a common law right of publicity under California law.<sup>238</sup>

The court began by noting that California's common law right of publicity derives from the fourth common law privacy tort of appropriation.<sup>239</sup> The court went on to rely heavily on McCarthy's treatise's statement that the "right of publicity is the inherent right of every *human being* to control the commercial use of his or her identity and that it is an "inherent right of *human identity*."<sup>240</sup> The court pointed out that "no court has held or even suggested that the right of publicity extends to non-human beings."<sup>241</sup> The phrasing of this dicta certainly calls into question whether the right of publicity can apply to non-humans. While the statement appears accurate, notably no court has held that the right of publicity does not extend to non-human beings.

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234. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2003).

235. *Bayer v. Ralston Purina Co.*, 484 S.W.2d 473, 473, 475 (Mo. 1972).

236. *Id.*

237. *VIRAG, S.R.L. v. Sony Comput. Ent. Am. LLC*, No. 3:15-CV-01729-LB, 2015 WL 5000102, at \*4-6 (N.D. Cal. Aug. 21, 2015).

238. *Id.* at \*4.

239. *Id.*

240. *Id.* (emphasis added) (quoting 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (4th ed. 2015)).

241. *Id.* at \*5.



The *VIRAG* court notes that the few courts faced with the argument about extending the right of publicity to non-human beings have rejected it, but the two cases it cites in support of this claim both involve rejecting attempts by corporations to substitute the right of publicity for trademark law.<sup>242</sup> In the first, the Eastern District of Pennsylvania granted defendant's motion to dismiss an attempt to claim a violation of Pennsylvania's common law right of publicity for a corporation that holds the trademark.<sup>243</sup> The court concluded that "it is clear that the right of publicity inures to an individual who seeks to protect and control the commercial value of his name or likeness. This is to be distinguished from the facts at bar, in which a right of publicity is alleged to inhere in a corporate trademark."<sup>244</sup> The emphasis in this brief rejection of the claim appears to be that the corporation is trying to use the right of publicity to protect its name in a way that traditionally trademark law is supposed to do. Similarly, in the second case cited by the *VIRAG* court, a Missouri Court of Appeals found, without much analysis, that there is "no right of publicity in a corporation."<sup>245</sup> Thus, while this dictum may predict how courts are likely to treat such claims, it does not conclusively answer the question.

#### D. CHARACTERS AND RIGHT OF PUBLICITY

Right of publicity protection for fictional characters could also provide helpful insight into the question of whether the existing right of publicity doctrine can provide protection for virtual or AI influencers. In many ways, virtual or AI influencers are fictional characters, in that someone (with various degrees of input from AI) is creating the fictional story behind the person. One series of cases looks at whether actors can assert a right of publicity claim for characteristics associated with a fictional character that they played.

For example, in a California Supreme Court case involving the right of publicity for the comedy act known as The Three Stooges, the court found that under California law there is a right of publicity for "personalities," which includes actors portraying themselves and developing their own characters.<sup>246</sup> Similarly, in a concurring opinion in an earlier California Supreme Court decision, Justice Mosk discussed the circumstances under which an actor could have a right of publicity claim to a character played by that actor.<sup>247</sup> He rejected plaintiff's claim to the rights to the character Count Dracula, played by numerous actors over the years, but clarified "I do not suggest that an actor can never retain a proprietary interest in a characterization. An original creation of a fictional figure played exclusively by its creator may well be protectible."<sup>248</sup> He provided the examples of Groucho Marx, Red Skelton's self-devised roles, and the

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242. *Id.*

243. *Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc.*, 627 F. Supp. 856, 862 (E.D. Pa. 1985).

244. *Id.*

245. *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998).

246. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800 (Cal. 2001).

247. *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring).

248. *Id.* (Mosk, J., concurring).

“unique personal creations of Abbott and Costello, Laurel and Hardy and others of that genre.”<sup>249</sup>

Additionally, the Third Circuit held that under New Jersey law an actor may have a right of publicity in a character that is “so associated with him as to be indistinguishable from him in public perception.”<sup>250</sup> The court explained that the test is whether the actor is “inextricably linked” to the name and image of the character.<sup>251</sup> This would limit protection for virtual and AI influencers to those that have been inextricably linked to the human associated with the influencer. The court went on to hypothesize, however, that the studio “may be able to claim that they were entirely responsible for the value of the name and image or, by assignment, own the right to exploit the publicity value of the name and image of Spanky,” but that the court need not resolve that question because the studio was not before the court.<sup>252</sup>

### III. SHOULD THE RIGHT OF PUBLICITY APPLY TO VIRTUAL AND AI INFLUENCERS?

In Joseph Beard’s 2001 prognosticating article predicting the rise of virtual humans, he assumes without much explanation that virtual humans require legal protection “for the same reasons humans do.”<sup>253</sup> Unfortunately, his prescient article does not dive deeper into this conclusion, and it seems far from obvious that rights given to living humans automatically ought to extend to virtual humans. This section seeks to unpack that normative question that has not yet been considered in the law review literature of whether the right of publicity ought to apply to virtual and AI influencers.

The answer is complicated by the fact that courts, legislators, and scholars have not coalesced around a consensus for the policy justifications for having a right of publicity in the first place. As Stacey Dogan and Mark Lemley put it, there is “an absence of any clear theoretical foundation for the right of publicity,” which rests “upon a slew of sometimes sloppy rationalizations.”<sup>254</sup> Dogan and Lemley argue that “[t]he need for a normative account is critical, not only to explain why we have the right, but also to understand its scope.”<sup>255</sup> Answering the question of whether the right of publicity ought to apply to virtual and AI influencers supports this urgent need for a normative account for the right of publicity. However, this Article will not attempt to resolve that normative debate. Instead, this section identifies the plethora of policy justifications for protecting a right of publicity and then examines the implications of each justification for whether it makes sense to apply the right of publicity to virtual and AI influencers.

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249. *Id.* (Mosk, J., concurring).

250. *McFarland v. Miller*, 14 F.3d 912, 914 (3d Cir. 1994).

251. *Id.*

252. *Id.* at 921.

253. Beard, *supra* note 49, at 1170.

254. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1162 (2006).

255. *Id.* at 1180.

Roberta Kwall has catalogued a number of justifications for the right of publicity, dividing them into avoiding harms to right of publicity plaintiffs and avoiding harms to society that would occur in its absence.<sup>256</sup> By contrast, Stacey Dogan and Mark Lemley place the explanations offered for the publicity right into four buckets: the moral or natural rights story, the exhaustion or allocative-efficiency account, the incentive-based rationale, and—the rationale they advocate—the consumer confusion trademark rationale.<sup>257</sup> Jennifer Rothman and Robert Post divide right of publicity cases into four categories: vindicating the right of performance, the right of commercial value, the right of control, and the right of dignity, although the right of commercial value is further subdivided into the three categories of protecting against confusion, diminishment, and unjust enrichment.<sup>258</sup> The Tenth Circuit placed the justifications offered for the right of publicity into two categories: economic and noneconomic.<sup>259</sup> None of these taxonomies resolve the question posed here. Thus this section individually considers each possible justification for the right of publicity beginning with those that appear to offer the strongest and most straightforward case for extending the right of publicity to virtual and AI influencers before moving to the more challenging justifications.

#### A. LABOR-REWARD/LOCKEAN THEORY<sup>260</sup>

In his influential article, *The Right of Publicity*, Melville Nimmer articulated a labor-reward rationale for the right of publicity.<sup>261</sup> He wrote: “It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors.”<sup>262</sup> But in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court seemed to recognize that labor theory alone was not enough of a rationale to root the right of publicity, writing, “petitioner’s right of publicity here rests on *more than* a desire to compensate the performer for the time and effort invested in his act.”<sup>263</sup>

Many scholars have expressed concerns with this labor theory approach. Notably, the theory rests on the idea that one should possess the rights to something that requires hard work.<sup>264</sup> However, Michael Madow has considered whether becoming a celebrity is actually the result of hard work, or at least in part a matter of luck, and if so

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256. Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 69 (1994).

257. Dogan & Lemley, *supra* note 254, at 1180–1190.

258. See generally Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86 (2020).

259. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996).

260. See Dogan & Lemley, *supra* note 254, at 1163, 1180–84 (grouping moral and natural rights into a single “category”).

261. Nimmer, *supra* note 17, at 216.

262. *Id.*

263. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (emphasis added).

264. See Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481, 503 (2012).

whether celebrities should be afforded a right of publicity under the labor theory justification.<sup>265</sup> Further, F. Jay Dougherty noted that artists tend to build upon other work, not necessarily creating completely from scratch, therefore, the labor theory may support opposing claims by artists because of this common practice, making the labor theory an inadequate rationale for right of publicity.<sup>266</sup>

A labor-reward Lockean theory counterintuitively provides a stronger justification for right of publicity protection for virtual and AI influencers than for non-celebrity humans who are given right of publicity protection in many states. As explained above, many of the human creators involved with virtual and AI influencers do a great deal of work in designing, creating content for, and carefully refining the personas of the influencers.<sup>267</sup> To the extent that the right of publicity is intended as a reward for such hard work, there is nothing about the fact that the result of the work is a virtual or AI influencer rather than the identity of the creator itself that ought to change the analysis for the worse. The selection of the names, likenesses, and other aspects of identity of virtual and AI influencers are very much the result of work on the part of the creator(s). By contrast, the names and likenesses of most ordinary humans are the result of forces outside of their control, and did not require hard work. Names are often given by parents, and likenesses are (at least initially) the result of genetic factors. Therefore, a Lockean theory for the right of publicity provides stronger support for protecting the identities of virtual and AI influencers than it does for protecting the identities of many humans who do not put work into creating their own likenesses or names.

## B. A CONSUMER CONFUSION/DECEPTION JUSTIFICATION

Both courts and scholars have identified the societal concern with the potential for consumer confusion and deception as a prominent justification for protecting the right of publicity.<sup>268</sup> For example, Kwall writes that tolerating unauthorized uses of persona would cause a harm to society in the form of the increased potential for consumer deception.<sup>269</sup> She explains that if advertisers were given legal permission to appropriate someone's identity "in an explicitly false endorsement, consumers are misled and society as a whole suffers."<sup>270</sup>

Many right of publicity cases fit the fact pattern of a defendant who used the celebrity's identity in a manner that caused the viewers to believe that the celebrity had

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265. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 18 CAL. L. REV. 125, 188–89 (1993).

266. F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 63–64 (2004).

267. See discussion *supra* Section I.B.4.

268. See James Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973); Post & Rothman, *supra* note 258, at 110–11.

269. Kwall, *The Right of Publicity vs. The First Amendment*, *supra* note 256, at 74.

270. *Id.* at 76.

endorsed the product being advertised.<sup>271</sup> Some scholars have pointed to various court holdings they see as unambiguously asserting an underlying confusion theory, but this Article is unconvinced by their readings of those cases.<sup>272</sup>

Because consumer confusion also forms the primary justification for trademark law,<sup>273</sup> scholars such as Dogan and Lemley have focused on the similarities between trademark and the right of publicity and how trademark law doctrine may be instructive for right of publicity doctrine.<sup>274</sup> They see trademark law, which aims to protect business names, as akin to the right of publicity, which aims to protect celebrity names and likenesses.<sup>275</sup> They state that confusion surrounding “affiliation or sponsorship” is likely the most parallel principle between trademark and right of publicity.<sup>276</sup> Nonetheless, scholars recognize the dangers of taking the comparison too far. In McCarthy’s treatise *The Rights of Publicity and Privacy*, he emphatically noted that “the right of publicity is only *analogous*, not *identical*, to the law of trademarks.”<sup>277</sup> Dogan and Lemley would likely agree, maintaining that the two should remain separate, and the right of publicity should not be absorbed into trademark law.<sup>278</sup>

Some courts have embraced this trademark analogy.<sup>279</sup> In *Hepp v. Facebook*, the Third Circuit recognized the right of publicity as analogous to trademark law because they both seek to “secure commercial goodwill,” yet did not mention confusion specifically.<sup>280</sup> Interestingly, the Third Circuit has also admonished the idea of consumer confusion as an underlying theory for right of publicity, stating: “[W]e do agree with the *Rogers* court in so far as it noted that the right of publicity does not implicate the potential for consumer confusion and is therefore potentially broader than the protections offered by the Lanham Act.”<sup>281</sup> Differently, in *Toney v. L’Oreal USA, Inc.*, the Seventh Circuit explained that the right of publicity concerns messaging,

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271. See, e.g., *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 589 (N.D. Tex. 1999) (blocking defendant from selling shirts with the phrase “this is Don’s henley” because consumers would be confused into thinking musician Don Henley was associated with the shirts); *Nat’l Bank of Com. v. Shaklee Corp.*, 503 F. Supp. 533, 541–42 (W.D. Tex. 1980) (prohibiting uses of “Hints from Heloise” that misled consumers into believing defendant was associated).

272. See Dogan & Lemley, *supra* note 254, at 1193–94 (asserting that three cases—*Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), and *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974)—demonstrate an underlying confusion principle in a right of publicity claim without the court expressly saying so); Post & Rothman, *supra* note 258, at 110 (inferring that the court in *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) considered consumer confusion in deciding the case).

273. 15 U.S.C. § 1114(1)(a).

274. Dogan & Lemley, *supra* note 254, at 1166.

275. *Id.* at 1164.

276. *Id.* at 1192.

277. 1 MCCARTHY & SCHECHTER, *supra* note 18, § 5:6.

278. Dogan & Lemley, *supra* note 254, at 1210–13 (noting that unlike trademark law, the right of publicity should not require use in commerce and mentioning that trademark dilution cases are markedly different from right of publicity dilution cases).

279. See, e.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 879 (S.D.N.Y. 1973) (calling the right of publicity “somewhat akin” to trademark law).

280. *Hepp v. Facebook*, 14 F.4th 204, 213–14 (3d Cir. 2021).

281. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 158 (3d Cir. 2013).

principally whether a product is endorsed, or seems to be endorsed, by the plaintiff, similar to trademark law which aims to clarify endorsements.<sup>282</sup> Dogan and Lemley interpreted this to mean the Seventh Circuit was pointing to consumer confusion.<sup>283</sup> But like the Third Circuit in *Hart*, the Second and Sixth Circuits have both refused to import consumer confusion into the right of publicity.<sup>284</sup>

The consumer confusion/deception justification for the right of publicity offers strong theoretical support for protecting virtual and AI influencers using the right of publicity. Consumers who follow virtual and AI influencers and who are familiar with their image and brand endorsements would be confused if someone else were permitted to use the name and likeness of the virtual influencers to suggest an endorsement. Admittedly, this argument is tricky because virtual and AI influencers are not really endorsing products at all, in the sense that Lil Miquela is not truly walking around wearing Calvin Klein. However, as noted above, the virtual and AI influencer phenomenon undermines the idea that consumers pay attention to influencer endorsements solely because they believe that the influencer really wears the clothes or drives the car. After all, even after it was revealed that Lil Miquela was a virtual influencer, she continues to have a huge following and continues to represent brands. This suggests that consumers may be paying attention to a particular lifestyle or image that the consumer wants to be a part of. False associations with the identities of virtual or AI influencers that would be permitted absent right of publicity protection, can still confuse consumers into thinking that the lifestyle associated with the virtual or AI influencer had expanded into an area not part of that influencer's identity.

### C. UNJUST ENRICHMENT

Both courts and scholars have identified a concern with unjust enrichment as an alternative rationale for right of publicity laws.<sup>285</sup> The basic idea is that absent right of publicity laws, others could usurp someone's name, image, or identity for their own commercial advantage in a way that would constitute unjust enrichment. In other words, the party using someone else's identity without permission would "effectively appropriate[] whatever economic value he would otherwise have had to pay for the use of that identity."<sup>286</sup> Although later cases have limited its reach to its precise facts, in the

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282. *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) ("The basis of a right of publicity claim concerns the message—whether the plaintiff endorses, or appears to endorse the product in question.").

283. *See, e.g., Dogan & Lemley, supra* note 254, at 1194 ("The use of a celebrity's name or likeness to falsely suggest she is affiliated with or has sponsored the defendant's goods seems problematic for the same reasons as false designation of origin in the trademark context, and it provides a valid justification for the right of publicity.").

284. *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) ("Because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement, it is potentially more expansive than the Lanham Act."); *Parks v. LaFace Recs.*, 329 F.3d 437, 460 (6th Cir. 2003) ("However, a right of publicity claim does differ from a false advertising claim in one crucial respect; a right of publicity claim does not require any evidence that a consumer is likely to be confused.").

285. *See Post & Rothman, supra* note 258, at 114–16.

286. *Id.* at 115.

Supreme Court's only case addressing the right of publicity, *Zacchini*, the Court included in a list of possible justifications for right of publicity laws that "[t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will."<sup>287</sup> The Tenth Circuit also recognized the prevention of unjust enrichment in a long list of possible justifications for publicity rights that it examined before finding them all insufficient to overcome First Amendment concerns for a parody.<sup>288</sup> The court explained that under the unjust enrichment view, "whether the commercial value of an identity is the result of a celebrity's hard work, media creation, or just pure dumb luck, no social purpose is served by allowing others to freely appropriate it."<sup>289</sup>

Kwall posits that "unjust enrichment is one of the fundamental rationales underlying the right of publicity."<sup>290</sup> She argues that unjust enrichment harms not only the right of publicity plaintiff and her relatives and assignees, but less obviously also harms society as a whole.<sup>291</sup> Other scholars have questioned whether unjust enrichment offers an adequate justification for the right of publicity.<sup>292</sup> Wee Jin Yeo addressed the various concerns scholars have raised regarding applying an unjust enrichment rationale, and reasoned that the problems scholars have with the unjust enrichment theory speak to the "scope of the right" rather than its very existence, concluding that unjust enrichment remains a compelling justification for the existence of right of publicity law.<sup>293</sup>

An unjust enrichment justification for the right of publicity offers a strong rationale for extending the right of publicity to virtual and AI influencers. Just as usurping the identity of human influencers without compensation constitutes unacceptable unjust enrichment, the same is true for usurping the identity of virtual or AI influencers without compensation. The would-be-infringer in this circumstance is unjustly enriched by free-riding on the developed identity of the virtual or AI influencer in much the same way as they would be by free-riding on a human influencer. The normative desire to prevent unjust enrichment is in no way diminished because the person or company being unjustly enriched did so by using the identities of virtual or AI influencers. This is because the normative core of this rationale is not focused on

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287. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (quoting Harry Kalven Jr., *The Right of Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331 (1966)).

288. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 976 (10th Cir. 1996).

289. *Id.*; see also *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998) (distinguishing between a right of privacy and a right of publicity by noting that "the right of publicity is not intended to protect a person's feelings, but provides a cause of action where a defendant has been unjustly enriched by misappropriation of the person's valuable public persona or image").

290. Kwall, *The Right of Publicity vs. The First Amendment*, *supra* note 256, at 62.

291. *Id.* at 85.

292. See, e.g., *Dogan & Lemley*, *supra* note 254, at 1182–83 (critiquing the unjust enrichment rationale on the basis that it assumes without justification that someone must have property rights in the value of an identity, and, if so, the property right ought to be assigned to the identity holder rather than a third party).

293. Wee Jin Yeo, *Disciplining the Right of Publicity's Nebulous First Amendment Defense with Teachings from Trademark Law*, 34 CARDOZO ARTS & ENT. L.J. 401, 411–14 (2016).

either consumer confusion or harm to the person whose identity was taken, but rather on disgorging the unfair benefits received.

#### D. EXHAUSTION OR ALLOCATIVE EFFICIENCY

Allocative efficiency theory suggests that to ensure a persona is not overused and quickly tossed aside, “the law should grant an individual exclusive rights in her identity so that she can control uses of the identity and maximize its advertising value.”<sup>294</sup> Mark F. Grady is an advocate of this perspective.<sup>295</sup> To illustrate this rationale, Grady explained this theory through *White v. Samsung Electronics America*.<sup>296</sup> He hypothesized that the reason the court was inclined to protect Vanna White’s image was because the value of her image was so great, that it was highly susceptible to dissipation of value if her image were to be overused without her permission.<sup>297</sup> Additionally, Richard Posner articulated this idea by saying, “[T]he multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero.”<sup>298</sup> Vincent M. de Grandpré expanded this theory of efficiency by agreeing with his colleagues regarding protection to prevent dilution, and proposing new economic rules to promote efficiency and combat the over broadness.<sup>299</sup>

Turning to case law, at least two circuits—the Fifth and Tenth Circuits—have explicitly articulated this theory of efficiency, with the Fifth Circuit stating: “Without the artificial scarcity created by the protection of one’s likeness, that likeness would be exploited commercially until the marginal value of its use is zero.”<sup>300</sup> Moreover, the Tenth Circuit reasoned that this justification was persuasive in the context of advertising, but not necessarily in other circumstances.<sup>301</sup> But some scholars are skeptical. For example, Mark McKenna argued that identities and physical resources are necessarily different because identities are not “rivalrous [or] exhaustible.”<sup>302</sup> Further, he argued that while certain physical commodities can be exhausted from

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294. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 269 (2005).

295. See Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 126 (1994) (“Under this theory the courts create liability in publicity cases so as to prevent too rapid a dissipation of the value of socially valuable publicity assets.”).

296. *Id.* at 117–18; see generally *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (evaluating a right of publicity claim for Vanna White over Samsung’s use of a robot resembling White next to a game board).

297. Grady, *supra* note 295, at 117–18.

298. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978).

299. See Vincent M. de Grandpré, *Understanding the Market for Celebrity: An Economic Analysis for the Right of Publicity*, 12 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 73, 101–08, 114–22 (2001) (outlining a robust efficiency argument as a driving force for right of publicity); see also Dustin Marlan, *Unmasking the Right of Publicity*, 71 HASTINGS L.J. 419, 453 n.246 (2020) (“A lesser-used alternative economic justification for the right of publicity is allocative efficiency, a variation on the “tragedy of the commons” argument for private property” (citing Grady, *supra* note 295, at 99)).

300. *Matthews v. Wozencraft*, 15 F.3d 432, 437–38 (5th Cir. 1994).

301. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 975 (10th Cir. 1996).

302. McKenna, *supra* note 294, at 269.



overuse, most cultural phenomena fizzle out because something more compelling comes along—not because of exhaustion.<sup>303</sup> Similarly, Michael Madow takes issue with Posner’s claims—and seemingly the Tenth Circuit’s perspective—in the advertising context, citing various instances where over-advertising proved to be economically beneficial.<sup>304</sup>

This scarcity theory appears to apply equally to the use of identities of virtual or AI influencers as well. If Lil Miquela were to be perceived as endorsing thousands of products, it would necessarily dilute the value of her endorsement and therefore likely what collaborators would be willing to pay for that endorsement.

### E. A PRIVACY JUSTIFICATION

A privacy justification is one of the most supported theories of right of publicity in the literature, historically, and through case and statutory law. In her paradigm-challenging book, Jennifer Rothman notes the right of publicity was born out of the right of privacy and the split was “not driven by essential differences.”<sup>305</sup> Moreover, she has made the case that the right of publicity ought to be considered a privacy-based cause of action, arguing that “[t]he right of publicity got off track when it transformed from a personal right, rooted in the individual person (the ‘identity-holder’), into a powerful intellectual property right, external to the person, that can be sold to or taken by a non-identity-holding ‘publicity-holder.’”<sup>306</sup> William L. Prosser, in his influential article *Privacy*, broke the privacy tort into four subsections, with the right of publicity stemming from the fourth.<sup>307</sup> Later, Robert T. Thompson III argued that infusion of a privacy rationale is necessary to legitimize the right of publicity.<sup>308</sup>

It took courts a while to accept a right of publicity, instead sticking with the familiar right of privacy.<sup>309</sup> Many courts continue to consider the right of publicity as stemming from privacy. For example, in *Lugosi v. Universal Pictures*, the California court, seemingly skeptical of the right of publicity and its power, found that because the right of publicity’s roots are in privacy law, those rights cannot extend beyond death.<sup>310</sup> But after *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* was decided, finding that the

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303. *Id.* at 270.

304. Madow, *supra* note 265, at 221–23.

305. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 30 (2018).

306. *Id.* at 7.

307. Prosser, *supra* note 219, at 389, 406–07.

308. Robert T. Thompson, III, *Image as Personal Property: How Privacy Law Has Influenced the Right of Publicity*, 16 UCLA ENT. L. REV. 155, 170–72, 175–77 (2009).

309. See ROTHMAN, *supra* note 305, at 75 (“From 1953 to 1970 few cases actually held that there was an independent right of publicity. The vast majority of cases during this era . . . continued to be considered under privacy law.”).

310. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) (using language like “[t]he so-called right of publicity[,]” seemingly suggesting skepticism with the right on its face).

right of publicity might be transferable,<sup>311</sup> the right of publicity began to take on a more property-based rationale, stepping away from its roots in privacy law.<sup>312</sup>

However, some statutory rights of publicity continue to have an underlying privacy rationale simply by the way they are situated. For example, New York's right of publicity law is categorized under "Article 5—Right of Privacy," even though, functionally, it is a right of publicity and is titled "Right of Publicity."<sup>313</sup> Therefore, it appears that the right of privacy and the right of publicity might be intertwined through language and placement for some states.

At first glance, it seems a privacy-based justification is inconsistent with right of publicity protection for virtual and AI influencers. After all, virtual and AI influencers are not human and do not have their own privacy concerns. It is worth considering, however, that right of publicity protection for virtual and AI influencers may be beneficial to protect the privacy considerations of the humans behind them. Some subcategories of virtual and AI influencers, as discussed above, may be ways for human influencers to experiment with their own identities in ways that would not be possible absent the digital space. Allowing protection for their digital identities even when they have not publicly linked the virtual or AI influencer to their human identity, protects the human's privacy and the ability to experiment with identity in ways that may be societally beneficial. Furthermore, to the extent that social media users cannot tell who is a human versus a non-human influencer, a rule that allows the identities of virtual and AI influencers to be freely exploited without legal consequence would likely lead to accidentally violating the rights of the human influencers as well. This would suggest that it may make sense to extend right of publicity protection to virtual and AI influencers to protect the privacy interests of humans, even while continuing to hold the line regarding corporations or animals where such a slippery slope is far less likely.

## F. MORAL/NATURAL RIGHTS

Another related justification offered for protecting the right of publicity is a "moral rights" or natural rights based theory.<sup>314</sup> Moral or natural rights refer to rights that are considered inherent to humans by virtue of their very nature, and which exist independently of any specific laws or societal customs.<sup>315</sup> They are considered universally applicable, and are used to justify claims about universally held human

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311. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

312. ROTHMAN, *supra* note 305, at 86.

313. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2022).

314. See Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-first Century*, 2001 U. ILL. L. REV. 151, 158 (2001). Kwall points out that translating the concept of *droit moral* as "personal rights" is more accurate than "moral rights" because it is more reflective of the theoretical basis underlying the concept based on protection of reputation and personality. *Id.*

315. See 1 MCCARTHY & SCHECHTER, *supra* note 18, § 1:3 (describing the right of publicity as the inherent right of every human being to control the commercial use of his or her identity, which suggests that such a right is inherent in their humanity).

rights such as the right to life and liberty.<sup>316</sup> This normative justification seems to be envisioned by the McCarthy treatise when he defines the right of publicity as “the inherent right of every human being to control the commercial use of his or her identity.”<sup>317</sup> Kwall is one the leading proponents for moral rights as a rationale for right of publicity and has argued that moral rights provide a theoretical framework for right of publicity that balances First Amendment issues, eliminates confusion regarding “commercial/noncommercial distinction,” and provides “much needed uniformity” in the law.<sup>318</sup> Lemley and Dogan reject this moral rights theory, arguing, “[t]he fact that people who claim ownership rights over their personalities are willing to sell their dignity for a fairly low price in many cases should make us skeptical of a claim that this is really a form of paternalism designed at protecting individuals from commercialization.”<sup>319</sup>

Courts have been hesitant to apply a moral or natural rights rationale in their right of publicity holdings. In fact, in *Zacchini*, the Supreme Court seemed to decidedly push against a moral right underlying the right of publicity, writing that “the State’s interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having *little to do with protecting feelings or reputation*.”<sup>320</sup> Additionally, the Tenth Circuit considered McCarthy’s advocacy for natural rights as an underlying theory for right of publicity, and expressly rejected the notion because he “offer[ed] little reason for [his] assertion.”<sup>321</sup>

Along with privacy, natural/moral rights initially appear to be one of the weakest theoretical justifications for extending right of publicity protection to virtual and AI influencers. The very nature of this category of justifications presupposes rights inherently linked to a human. However, as with the privacy rationale, for the subset of virtual or AI influencers who represent a way for humans to experiment with identity in a digital format, there may be a stronger argument under a natural/moral rights theory. To the extent that this theory suggests that every human has the inherent right to control the commercial use of his or her identity, that ought to still apply when that identity takes the form of a digital avatar.

Furthermore, as with the privacy rationale, even under a natural/moral rights justification, there may be prophylactic reasons to extend right of publicity to

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316. See Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 SAN DIEGO L. REV. 1105, 1132 (2012) (“One feature of Locke’s theory is crucial to note. Locke believes that in the state of nature one has a moral right to defend oneself against threatened violations of one’s moral rights to life, liberty, and property.”).

317. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (5th ed. 2015).

318. Kwall, *Preserving Personality*, *supra* note 314, at 159, 170.

319. Dogan & Lemley, *supra* note 254, at 1182.

320. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (emphasis added).

321. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 975 (10th Cir. 1996); *but see Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Cal. 2001) (“[S]ociety may recognize . . . that a celebrity’s heirs and assigns have a legitimate protectible interest in exploiting the value to be obtained from merchandising the celebrity’s image, whether that interest be conceived as a kind of natural property right or as an incentive for encouraging creative work.”).

virtual/AI influencers. As demonstrated by the early days of Lil Miquela, individuals operating in the social media space cannot always tell which influencers are human, virtual, or AI.<sup>322</sup> To the extent that natural/moral rights suggest that the names, likenesses, and identities of human influencers ought to be protected, there may also be good reason to protect the names, likenesses, and identities of all influencers in order to avoid challenging questions such as how users are supposed to know which influencers' names and likenesses are fair game for exploitation and which are not.

### G. AUTONOMY/CONTROL

Scholars have also suggested autonomy/control as another underlying theory of right of publicity that is closely related to, but nonetheless distinct from privacy. For example, in 1999, Alice Haemmerli proposed an autonomy-based theory, rooted in "idealist philosophy."<sup>323</sup> Haemmerli believed this theory balances and merges other justifications—labor, economic, property, moral—which alone fall short of providing a comprehensive rationale for a right of publicity.<sup>324</sup> Additionally, Mark McKenna asserted that the right of privacy theory is inadequate to support the right of publicity, and instead argued for an autonomy theory.<sup>325</sup> He wrote, "[B]ecause an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning."<sup>326</sup> Further, Kwall stated: "[T]he right of publicity safeguards the right-of-celebrity personas to control the commercial contexts in which their images are used and allows them to decide how their images are presented to the public."<sup>327</sup> The Restatement (Third) of Unfair Competition, in describing the rationale for a right of publicity, notes that it "protects an individual's interest in personal dignity and autonomy."<sup>328</sup> Moreover, in the Restatement (Second) of Torts, the right of publicity is defined as an "interest of the individual in the exclusive use of his own identity," speaking to a theory of control and autonomy.<sup>329</sup> Some cases have cited the Restatements as justification for right of publicity, yet do so while also mentioning other underlying theories such as property rights and unjust enrichment.<sup>330</sup>

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322. See *supra* note 9 and accompanying text.

323. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 411, 413 (1999).

324. See *id.* at 411–13 ("[The idealist philosophy] views the individual as an autonomous being preceding the creation of property, a notion that resonates fairly strongly with our cultural mores.").

325. McKenna, *supra* note 294, at 279.

326. *Id.*

327. Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 19 (1997).

328. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (A.L.I. 1995).

329. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (A.L.I. 1977).

330. See, e.g., *In re Estate of Reynolds*, 327 P.3d 213, 215, 217 (Ariz. Ct. App. 2014) (defining the right of publicity under the Restatement, and noting the autonomous justification cited therein, but also specifically calling the right of publicity a "property right"); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1089–90 (E.D. Mo. 2006) (mentioning that the right of publicity is justified by the Restatement under an autonomy theory, but also citing other justifications like efficiency and unjust enrichment); *Hebrew Univ. of Jerusalem v. Gen. Motors LLC*, 903 F. Supp. 2d 932, 937 (C.D. Cal.

Like the natural rights and privacy justifications, the autonomy justification for the right of publicity does not initially appear to support extending protection to virtual or AI influencers. There is not as strong of an inherent idea that virtual and AI influencers ought to have the autonomy to make decisions about their own identity. There is in fact an autonomy rationale for extending protection to virtual and AI influencers that comes out of slippery slope arguments regarding the blurry line between a human and a virtual influencer. For example, an exact photograph of a human would be protected. Presumably, so would a photograph where the human is wearing makeup. Almost certainly so would a photograph where the human has used some photoshop to enhance their appearance. Presumably no one would argue that a human would lose right of publicity protection just because they have chosen to engage in plastic surgery. In a virtual world, the autonomy right of individuals to develop and explore aspects of identity are not limited by photoshop or plastic surgery, but only by the imagination. Avatars that do not resemble the underlying person can be a critical part of the autonomy to explore notions of self in ways not as limiting as the real world.<sup>331</sup> This spectrum can continue until we reach the point where the virtual influencer may have minimal resemblance to the humans behind it. Rather than try and determine where on that spectrum identity ends, protecting the identities of all influencers would allow for full protection for the human influencers and their rights to autonomy in experimenting with aspects of identity beyond those available in the real world.

#### H. INCENTIVE-BASED RATIONALE

Whereas incentive theory constitutes the dominant justification for American copyright and patent law, it is also a justification offered for the right of publicity. Incentive theory suggests that people will only invest in cultivating their own commercially valuable identities if there is an economic incentive to do so.<sup>332</sup> David Franklyn and Adam Kuhn argue that incentive theory is an especially compelling justification for the right of publicity because it has roots in the Progress Clause of the Constitution.<sup>333</sup> However, they identify three problems with incentive theory—it necessitates the notion that people do not seek fame for a noneconomic reason; it assumes “fame and celebrity status is not a sufficient reward in and of itself”; and it fails to consider non-famous people into its justification.<sup>334</sup>

The Supreme Court discussed incentive theory in its *Zacchini* decision, writing that the right of publicity “provides an economic incentive for him to make the investment

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2012), *vacated pursuant to settlement*, No. CV-10-3790-AB (JCX) 2015 WL 9653154 (C.D. Cal. Jan. 12, 2015) (affirmatively recognizing autonomy as an underlying rationale for right of publicity and quoting the Restatement as support, but also noting the right is wrapped up in a property theory).

331. See Antognini & Woods, *supra* note 19, at 95 (“[T]here might be real value in protecting the decision to assume a virtual identity as an important aspect of self-discovery or self-control.”).

332. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

333. David Franklyn & Adam Kuhn, *Owning Oneself in a World of Others: Towards a Paid-for First Amendment*, 49 WAKE FOREST L. REV. 977, 991 (2014); U.S. CONST. art. I, § 8, cl. 8.

334. *Id.* at 991–92.

required to produce a performance of interest to the public.”<sup>335</sup> Moreover, in *Comedy III Productions v. Gary Saderup, Inc.*, the California Supreme Court noted that an incentivization theory is as legitimate as a “natural property right” in rationalizing the right of publicity.<sup>336</sup>

Incentive theory is more of a natural fit for providing right of publicity protection to virtual influencers or AI influencers with human involvement than for pure autonomous AI influencers. The individuals and/or businesses behind virtual/AI influencers are incentivized to invest the time and effort to create a virtual/AI influencer with a sufficiently compelling story or identity to breakthrough to consumers in a crowded social media space. Just like with other forms of incentive theory, the logic goes if others are permitted to copy or use the name, image, or likeness of the virtual/AI influencer without permission or licensing, then there will be little incentive for the original creator(s) to spend time and effort in the creation. This logic decreases if society were to get to the far end of the spectrum with entirely autonomous AI influencers as it is not clear that AI requires financial compensation to incentivize creation.

#### IV. CONCLUSION

Overall, looking more closely at the potential theoretical justifications underlying the right of publicity there are strong arguments available for extending right of publicity to virtual and AI influencers. The Labor-Reward/Lockean Theory justification for right of publicity is arguably even stronger for virtual and AI influencers that require a good deal of human labor than for protecting the right of publicity of ordinary humans. The consumer confusion and unjust enrichment rationales, which have as their primary focus harms to or unfair benefits to others, apply equally to virtual and AI influencers as to their human counterparts. The exhaustion or allocative efficiency theory also seems to apply equally as well to virtual and AI influencers as to humans. The privacy, moral/natural rights, and autonomy/control justifications for the right of publicity all appear focused on furthering human-specific goals. Nonetheless, they all are still a good fit for right of publicity protection for the subset of virtual/AI influencers who act as an opportunity for a human to explore identity without the limitations of the real world. Furthermore, there are prophylactic reasons under these theories to protect all virtual and AI influencers since it is impossible and perhaps undesirable for would-be infringers to be able to tell the exact human role behind virtual or AI influencers, or even, as Lil Miquela demonstrated, whether the influencer is even human. Finally, the incentive theory rationale is weakest for pure AI influencers but still has traction for the rest of the influencer spectrum.

Before turning to the implications of extending the right of publicity to virtual or AI influencers, it is important to briefly explore why the right of publicity even matters

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335. *Zacchini*, 433 U.S. at 576.

336. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Cal. 2001).

in this space rather than other forms of intellectual property. Turning first to copyright law, names are not copyrightable.<sup>337</sup> Therefore, copyright law would not protect against the unauthorized use of the virtual or AI influencer's name in promoting a product or service. Copyright also likely would not protect virtual or AI influencers who are digital clones of an actual human.<sup>338</sup> Copyright might protect some aspects of the virtual or AI influencer to the extent that such influencers may constitute fictional, copyrightable characters. Although there is no Supreme Court definitive test for the copyrightability of characters, the Ninth Circuit's test requires that the characters must generally have "physical as well as conceptual qualities," be "sufficiently delineated" to be recognizable as the same character whenever it appears" and also must be "especially distinctive" and "contain some unique elements of expression."<sup>339</sup> Other than the first prong, it is not clear whether most virtual and AI influencers would meet that standard, which in practice usually appears to be applied to famous characters. Finally, the Copyright Office has taken the position that fully AI-created works cannot register for a copyright and that works with human involvement can only register for a copyright for the human contribution and must disavow those aspects that are contributed by the AI.<sup>340</sup> Potentially, that can create challenges for protection for AI influencers that involve both human and AI contributions.

Similarly, trademark law does not sufficiently cover this space. After all, if it did there would be no need for the right of publicity for humans either. Traditional trademark law cases require a showing of likelihood of consumer confusion.<sup>341</sup> While one of the normative theories for protecting right of publicity involves consumer confusion, there are other reasons to protect right of publicity, as suggested by the numerous other theories, that do not rely on consumer confusion.

Policymakers considering enacting a federal right of publicity or revising a state right of publicity may wish to address its applicability to virtual or AI influencers. Similarly, courts applying existing statutory or common law regimes, may face a situation where they have to decide whether the right of publicity applies to virtual or AI influencers. In either circumstance, there are some secondary implications that need to be considered. One of the biggest questions to grapple with will be who will have standing to assert the right of publicity on behalf of the virtual/AI influencer. Many states already allow the right of publicity to be transferred to individuals besides the human whose right of publicity is being asserted.<sup>342</sup> Policymakers or courts will have

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337. U.S. COPYRIGHT OFF., CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT (2021), <https://www.copyright.gov/circs/circ33.pdf>.

[<https://web.archive.org/web/20251009095215/https://www.copyright.gov/circs/circ33.pdf>].

338. See Jennifer E. Rothman, *Copyrighting People*, 72 J. COPYRIGHT SOC'Y 1, 8–9, 15, 26–28 (discussing digital replicas and voice clones in the copyright space).

339. DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).

340. See U.S. COPYRIGHT OFF., Letter Re: *Zarya of the Dawn* (Registration #VAu001480196) (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf> [<https://web.archive.org/web/20251008015545/https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>].

341. See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (5th ed. 2025) (noting trademark law is meant to protect against consumer confusion).

342. See, e.g., CAL. CIV. CODE § 3344.1 (West 2024) (noting right of publicity is transferable).

to consider who should have standing to assert the right of publicity for virtual or AI influencers.

States may also have to reconsider the length of the right of publicity. As opposed to the right of publicity lasting a set number of years, many states borrowed the method for calculating the length of the right of publicity from copyright law, which links the length of copyright to the length of human life. In the case of copyright the applicable term is lifetime plus seventy years for human-creations, and many states have adopted terms linked to the lifetime of the rightsholder with lifetime plus fifty years,<sup>343</sup> and lifetime plus seventy years being two common examples.<sup>344</sup> Since virtual or AI influencers do not necessarily age—note that Lil Miquela remained the same age for years—and certainly do not necessarily die, then linking the length of the right to lifetime does not seem appropriate. Those states that wish to continue to borrow from copyright law may instead need to turn to the copyright term for works created under a pseudonym or by a corporation, which is ninety-five years from the year of first publication (or 120 years from the year of creation, but that is harder to determine) for the length of the right of publicity for a virtual or AI influencer. Alternatively, states can borrow from trademark law where trademarks can last forever as long as the trademark continues to be used by the owner. If so, then the right of publicity would last only as long as the virtual or AI influencer continues to post on social media, which could end up being a shorter term than the copyright version linked to human lifetime.

Finally, since the choice of law analysis between different state right of publicity regimes often depends on where the human rightsholder lives, that method of analysis may need to be reconsidered for virtual or AI influencers who do not actually live anywhere besides the internet. Where they choose to live in their fictional identities does not seem important to the choice of law analysis. Otherwise, one would expect to see a trend with all virtual and AI influencers fictionally living in the most protective state.

Additionally, it is important to emphasize that if legislatures and courts decide that virtual or AI influencers may have a right of publicity, that does not answer the question of whether they will have a successful cause of action under the right of publicity in any particular case. Rather, just like their human counterparts, their right of publicity would be limited by the various doctrines that have developed to limit the doctrine, and especially those doctrines, such as transformativeness, that work to ensure that the right of publicity does not impermissibly interfere with free speech

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343. See, e.g., 765 ILL. COMP. STAT. 1075/30 (2024); KY. REV. STAT. ANN. § 391.170 (West 2024); NEV. REV. STAT. § 597.790(1) (2024); ARK. CODE ANN. § 4-75-1107 (2024); TEX. PROP. CODE ANN. § 26.012 (West 2024) (“A person may use a deceased individual’s name, voice, signature, photograph, or likeness in any manner after the 50th anniversary of the date of the individual’s death.”).

344. See, CAL. CIV. CODE § 3344.1 (West 2024) (noting right of publicity protection of the deceased individual lasts only seventy years past death); HAW. REV. STAT. § 482P-4 (2024); S.D. CODIFIED LAWS § 21-64-2 (2024).



rights.<sup>345</sup> For example, California has developed a transformativeness test in order to balance first amendment interests with right of publicity interests.<sup>346</sup>

All of these nuances are questions for another day as they do not become relevant unless policymakers, legislators, and judges decide to extend the right of publicity to virtual and AI influencers. To do so it is first necessary to add analytical coherency to the right of publicity doctrine in order to decide why protecting it is important. Doing so will help answer whether it makes sense to extend it to virtual or AI influencers.

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345. See Kwall, *The Right of Publicity vs. The First Amendment*, *supra* note 256; Post & Rothman, *The First Amendment and the Right(s) of Publicity*, *supra* note 258.

346. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808–810 (Cal. 2001); *see also* Rebecca Schoff Curtin, *Transformative Celebrity* (draft on file with author) (discussing the relationship between the transformative test in right of publicity and copyright doctrines).



# **Burden-Shifting: Amending United States Trade Regulations to Protect International Cultural Heritage Property During Armed Conflict**

*Nina Chandra*\*

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\* J.D. Candidate, Columbia Law School, Class of 2026; B.A., Harvard College, Class of 2023. Thank you to my Note advisor, Jane Levine, for her guidance and feedback. Thank you also to the *Columbia Journal of Law & the Arts* staffers for their support throughout the publication process.

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INTRODUCTION.....	412
I.INTERNATIONAL AND DOMESTIC LEGISLATION DO NOT PREVENT THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY DURING ARMED CONFLICT .....	414
A. The Hague Convention: American Hesitance and Failure to Prevent Exportation of Cultural Property During Armed Conflict.....	414
B. The 1970 Convention: Implementation in the United States Adds Additional Burdens to Protecting Cultural Property. ....	416
C. The CPIA: A Compromise Between the Private Art Market and Cultural Heritage Protection Advocates.....	417
D. The CPIA Should Be Leveraged to Prevent Illicit Trafficking During Armed Conflict .....	419
II.REMOVING STATUTORY OBSTACLES IN THE CPIA'S EMERGENCY PROVISION WILL SHIFT THE BURDEN FROM A REQUESTING NATION AND MORE EFFICIENTLY PROTECT CULTURAL PROPERTY .....	420
A. Ukrainian Cultural Property Is at Risk of Looting Following Russia's Invasion. ....	421
B. Implementation of Import Restrictions for Ukrainian Cultural Heritage Property Was Delayed by the Statutory Requirements of the CPIA Emergency Provision.....	423
C. The CPIA Emergency Provision Should Be Amended to Ease the Burden on a Requesting Nation, Which Will Facilitate Quicker Responses to Crises.....	426
III.THE CPIA'S RENEWAL PROVISION SHOULD BE ADJUSTED TO ADDRESS THE ISSUES FACED BY NATIONS UNDER THE CONTROL OF HOSTILE FORCES.....	427
A. Afghan Cultural Heritage Property Is at Risk Following the Taliban Takeover.....	428
B. The CPIA's Renewal Provision Is Incompatible with the Interests of a Nation Under Hostile Leadership. ....	429

C. The CPIA's Renewal Provision Should Be Amended to Lessen the Burden on the Requesting Nation, Which Will Better Address the Predicament of Nations Under the Control of Hostile Forces.... 431

IV.CONCLUSION .....433

## INTRODUCTION

“I have seen many destroyed buildings in my city. But the worst pain I felt after seeing all the destruction was when I stood on the ruins of our ancient monuments. I felt as if a piece of my body had been destroyed, a piece of my soul had been damaged.”

—Testimony from a Syrian citizen interviewed by the International Committee of the Red Cross.<sup>1</sup>

The Syrian Civil War has taken a piece of the nation’s soul. The conflict has killed over half a million Syrians and displaced over eleven million more.<sup>2</sup> Another casualty of the conflict is Syria’s rich cultural history. All six of Syria’s UNESCO World Heritage Sites have been destroyed or damaged.<sup>3</sup> Important religious sites such as the Temple of Bel-Shamin were intentionally destroyed by ISIS.<sup>4</sup> Countless archaeological sites in Syria were quickly ravaged by looters.<sup>5</sup> Despite the scale of destruction of cultural property, the international community’s response was weak at best.

Cultural property protection is not often the first priority during armed conflict. A nation embroiled in violent warfare will undoubtedly focus its attention on protecting the lives of its citizens, as well as fending off aggressive forces. Bomb shelters take precedence over museum galleries. Military planning is more important than finding escape routes for precious artifacts. The lives of humans are more important than the historic and cultural art that they have created. While this hierarchy is certainly understandable, the result is that cultural property remains unprotected until it is often too late to be recovered.

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 Convention”) defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.”<sup>6</sup> While this definition paints cultural

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1. *Attacks on Our Cultural Property Are Attacks on Our Humanity*, INT’L COMM. OF THE RED CROSS (Oct. 30, 2017), <https://www.icrc.org/en/document/attacks-our-cultural-property-are-attacks-our-humanity> [https://web.archive.org/web/20251012223736/https://www.icrc.org/en/document/attacks-our-cultural-property-are-attacks-our-humanity].

2. Francesco Bandarin, *The Destruction of Aleppo: The Impact of the Syrian War on a World Heritage City*, GETTY (July 13, 2022), <https://www.getty.edu/publications/cultural-heritage-mass-atrocities/part-2/10-bandarin/> [https://web.archive.org/web/20251110191707/https://www.getty.edu/publications/cultural-heritage-mass-atrocities/part-2/10-bandarin/].

3. *History Lost Amid the Destruction of These Syrian UNESCO World Heritage Sites*, ABC NEWS (Mar. 15, 2016), <https://abcnews.go.com/International/history-lost-destruction-syrian-unesco-world-heritage-sites/story?id=37654762> [https://web.archive.org/web/20251110191816/https://abcnews.go.com/International/history-lost-destruction-syrian-unesco-world-heritage-sites/story?id=37654762].

4. Bandarin, *supra* note 2.

5. *Id.*

6. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property Nov. 14, 1970 [hereinafter the “1970 Convention”], art. 1, 823 U.N.T.S. 231.

property as holding significance within the confines of academic fields, its real significance is much broader. Cultural property is crucial to the identity of a nation and its citizens.<sup>7</sup> Archaeological sites uncover the collective memories of a nation's past. Landscape paintings speak to the way of life preserved by a nation's citizens. Physical monuments capture religious traditions that go to the heart of a nation, far beyond academic pursuits.

Perpetrators of armed conflict have long recognized the importance of cultural property to nations under attack. Cultural property is attacked on two fronts. First, aggressors target culturally significant sites and works as a secondary means of warfare.<sup>8</sup> Second, looting forces cultural property into illicit streams of global trade. Looters are individuals or criminal networks that destroy archaeological sites and steal from "religions and cultural institutions" to profit off tragedy.<sup>9</sup> Armed conflict provides the perfect cover for looters to excavate previously protected sites and invade museums.<sup>10</sup>

The international community has an important role to play, both in punishing the perpetrators of armed conflict for their targeting of cultural property and deterring the unofficial pillage and sale of these artifacts in the global market. Each of these threats to cultural property dilutes the identity of a nation and its citizens. However, the existing international law framework focuses on only the first threat. The 1954 Hague Convention ("Hague Convention") is the major international law treaty governing the protection of cultural property during armed conflict. The Hague Convention focuses on punishing those who target the cultural property of another nation during war and instructs nations to take measures during peacetime to safeguard their property.<sup>11</sup> While this addresses the first problem of how to punish perpetrators, the second major threat to cultural property—the unofficial looting of important objects—is overlooked.

7. Several scholars have argued that cultural property is so significant to a nation that the intentional destruction of said property should be framed as a violation of human rights. See Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights on Her Visit to Botswana, U.N. Doc. A/HRC/31/59, at 3 (Jan. 12, 2016).

8. For instance, the Nazi-backed destruction of German synagogues on Kristallnacht in 1938 was intended to dehumanize Jewish citizens. See ROBERT BEVAN, *THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR* 7 (2006). In addition, Serbian nationalists intentionally bombed Bosnia's National and University Library, an institution dedicated to preserving a written record of Bosnia's past. See András Riedlmayer, *Erasing the Past: The Destruction of Libraries and Archives in Bosnia-Herzegovina*, 29 MIDDLE EAST STUD. ASS'N BULL. 7 (1995).

9. U.S. IMMIGR. & CUSTOMS ENFT, *Cultural Property, Art, and Antiquities Smuggling*, <https://www.ice.gov/about-ice/hsi/investigate/cpaa-smuggling> [https://web.archive.org/web/20251110192742/https://www.ice.gov/about-ice/hsi/investigate/cpaa-smuggling] (last visited Nov. 10, 2025).

10. For instance, social media revealed videos of masked looters hoisting priceless paintings from the Kuindzhi Art Museum in Ukraine into trucks following the Russian invasion in 2022. This important cultural property was then sold to art collectors around the world, including the United States. See Anna Neplii, *Stolen Culture: Arkhip Kuindzhi, the Mariupol Artist Who Painted Ukraine*, KYIV POST (Jan. 7, 2023), <https://www.kyivpost.com/post/6471> [https://web.archive.org/web/20251012224451/https://www.kyivpost.com/post/6471]. .

11. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention [hereinafter the "Hague Convention"], art. 3, May 14, 1954, 249 U.N.T.S. 215.

This Note argues that the illicit trade of cultural property during armed conflict can be mitigated through amending domestic trade laws. In particular, this Note suggests amendments to the United States Cultural Property Implementation Act (“CPIA”) to deter the illicit trade of cultural property. The CPIA is a United States Customs regulation which permits the United States to enter into bilateral agreements to restrict the imports of another nation’s cultural property in danger of pillage, subject to a set of criteria.<sup>12</sup> The CPIA has allowed for the United States to enter into several bilateral agreements, but the current framework is not calibrated for the needs of nations dealing with armed conflict. Specifically, the CPIA places too heavy a burden on the nation seeking import restrictions, which is typically (and rightfully) more concerned with protecting the lives of its citizens and fending off attacks than preventing the illegal trade of its cultural artifacts.

Part I of this Note will provide an overview of current United States and international efforts to protect cultural property during periods of armed conflict. Part I will also demonstrate that the United States is a particularly key player in preventing the illegal sale of cultural property. Part II of this Note will propose amendments to the CPIA’s emergency provision, which will reduce delays for nations requesting import restrictions. Part III of this Note will argue that the CPIA’s renewal provision should be amended to remove the high burden on nations under the control of hostile forces.

## **I. INTERNATIONAL AND DOMESTIC LEGISLATION DO NOT PREVENT THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY DURING ARMED CONFLICT**

### **A. THE HAGUE CONVENTION: AMERICAN HESITANCE AND FAILURE TO PREVENT EXPORTATION OF CULTURAL PROPERTY DURING ARMED CONFLICT.**

The United States has long harbored an interest in protecting cultural heritage property during armed conflict, dating back to the Civil War. In 1863, President Abraham Lincoln requested the development of what eventually became the Lieber Code, a set of general orders issued to the Government of the Armies of the United States.<sup>13</sup> Article 35 of the Lieber Code provided that “classic works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes . . . must be secured against all avoidable injury.”<sup>14</sup> The United States recognized early on that the law of armed conflict must include special provisions for preserving cultural property.

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12. See 19 U.S.C. §§ 2601–2613.

13. Jenny Gesley, The “Lieber Code”—the First Modern Codification of the Laws of War, lib. of congress blog (Apr. 24, 2018), <https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/> [<https://web.archive.org/web/20260105152025/https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/>].

14. U.S. War Dep’t, Instructions for the Government of Armies of the United States in the Field (Gen. Orders No. 100, Apr. 24, 1863) [the “Lieber Code”], § II, art. 35.



The first concerted international effort to protect cultural heritage property during armed conflict did not arise until nearly a century later. The 1954 Hague Convention was the first international treaty focused solely on the protection of cultural heritage.<sup>15</sup> The Hague Convention was a response to the widespread destruction and looting of cultural property brought about by World War I and World War II.<sup>16</sup> The treaty encouraged nations to take preventative measures to protect cultural heritage at risk of destruction, such as creating national registers of important works and planning emergency procedures.<sup>17</sup> The United States was heavily involved in the negotiation and drafting of the Hague Convention. Indeed, the guiding principles of the Hague Convention aligned with President Dwight Eisenhower's commands to Allied troops during World War II that they mitigate damage to cultural artifacts.<sup>18</sup> However, the United States did not ratify the Convention (thus codifying the goals of the international agreement into its own domestic legal obligations) until 2009.<sup>19</sup> This 2009 ratification notably did not include Section I of the accompanying First Protocol to the Hague Convention, which aimed to prevent the exportation of cultural property from a territory occupied by armed conflict.<sup>20</sup> The United States did not ratify the First Protocol because of "concerns about the acceptability" of the mandate to prevent exportation of cultural property.<sup>21</sup> In particular, the United States worried that the term "export" was ambiguous and that being forced to abide by Section I of the First Protocol would be too burdensome on the U.S. legal system.<sup>22</sup>

The delay in ratifying the Hague Convention, and the refusal to ratify Section I of the First Protocol, demonstrates the reluctance of the United States to clamp down on exports of cultural property during armed conflict. Although the United States had expressed a longstanding commitment to protecting cultural property during wartime, the government was unwilling to use domestic trade restrictions to address the root of

15. *Cultural Heritage and Armed Conflicts*, UNESCO, <https://www.unesco.org/en/heritage-armed-conflicts/convention-and-protocols/1954-convention> [<https://web.archive.org/web/20251114125945/https://www.unesco.org/en/heritage-armed-conflicts/1954-convention>] (last visited Nov. 14, 2025).

16. See S. EXEC. DOC. NO. 110-26, at 3 (2008).

17. See Patty Gerstenblith, *Beyond the 1954 Hague Convention*, in *CULTURAL AWARENESS IN THE MILITARY: DEVELOPMENTS AND IMPLICATIONS FOR FUTURE HUMANITARIAN COOPERATION* 89-90 (Robert Albro & Bill Ivey eds., 2014).

18. See Letter from General Eisenhower, Commander-in-Chief of the U.S. Army, to All Commanders (Dec. 29, 1943) (on file with the Records of the War Department General and Special Staffs, National Archives); S. EXEC. DOC. NO. 110-26, at 3 (2008).

19. Corine Wegener, *The 1954 Hague Convention and Preserving Cultural Heritage*, *ARCHAEOLOGICAL INST. OF AM.* (Oct. 19, 2010), <https://www.archaeological.org/the-1954-hague-convention-and-preserving-cultural-heritage/> [<https://web.archive.org/web/20251114131835/https://www.archaeological.org/the-1954-hague-convention-and-preserving-cultural-heritage/>].

20. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 20 U.N.T.S. 215, art. 2.

21. S. Treaty Doc. No. 106-1, at 4 (1999). These suspicions about the First Protocol were expressly addressed in a 1999 Senate report and remained in place when the treaty was finally implemented in 2009. The First Protocol was absent in the finalized text of the statute. See 19 U.S.C. §§ 2601-2613.

22. S. Treaty Doc. No. 106-1, at 9 (1999).

the issue. New international efforts would be needed to halt the illicit trafficking of cultural property in the wake of war.

### B. THE 1970 CONVENTION: IMPLEMENTATION IN THE UNITED STATES ADDS ADDITIONAL BURDENS TO PROTECTING CULTURAL PROPERTY.

Nearly two decades after the Hague Convention, the international community addressed the illegal trade of cultural property. While the Hague Convention focused on encouraging countries to proactively protect their cultural property during armed conflict, the 1970 Convention focused on stemming the illicit trafficking of cultural property, both during peacetime and wartime.<sup>23</sup> The 1970 Convention has been ratified by 149 nations, many of which have also ratified the Hague Convention.<sup>24</sup>

However, the 1970 Convention was not easily implemented in the U.S. domestic framework. After over a decade of intense debate, the United States passed the CPIA, which is comparatively limited in scope.<sup>25</sup> The CPIA adopts only Articles 7(b)(2) and Article 9 of the 1970 Convention.<sup>26</sup> Article 7(b)(2) prohibits importing cultural property taken from museums or other significant areas.<sup>27</sup> Article 9 creates a mechanism for nations to request assistance from other powers to control the exports and imports of its cultural property in jeopardy.<sup>28</sup> The other articles of the 1970 Convention were not adopted by the United States.

The CPIA created a procedure by which a nation can ask the United States to block the exportation of its cultural heritage property under Article 9 of the 1970 Convention.<sup>29</sup> The CPIA requires the President of the United States to make four determinations before taking any action to restrict trade.<sup>30</sup> First, the President must find the cultural property of the requesting nation is in danger of pillage.<sup>31</sup> Second, the President must find that the nation has “taken measures consistent with the [1970] Convention to protect its cultural patrimony.”<sup>32</sup> Third, the President must determine that import restrictions would actually deter pillage of cultural materials from the requesting nation, and that less “drastic” remedies would be ineffective.<sup>33</sup> Fourth, the President must find that the rest of the international community has taken similar steps

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23. 1970 Convention, *supra* note 6.

24. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: States Parties*, UNESCO, <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural> [<https://web.archive.org/web/2025114133744/https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural>] (last visited Nov. 14, 2025).

25. 19 U.S.C. §§ 2601–2613.

26. 19 U.S.C. § 2606; 19 U.S.C. § 2602.

27. 1970 Convention, 823 U.N.T.S. 231 at art. 7(b)(2).

28. *Id.* at art. 9.

29. 19 U.S.C. § 2602.

30. *Id.*

31. 19 U.S.C. § 2602(a)(1)(a).

32. 19 U.S.C. § 2602(a)(1)(b).

33. 19 U.S.C. § 2602(a)(1)(c).

to protect against the illicit trafficking of the requesting nation's cultural heritage property.<sup>34</sup> If all four criteria are met, the President may form a bilateral agreement with the requesting nation and apply the requisite import restrictions.<sup>35</sup>

The CPIA does provide for a limited emergency implementation of import restrictions. The cultural property seeking protection must meet a specific set of requirements in order to receive emergency protection: The cultural property must be a "newly discovered type of material," originate from a significant site in jeopardy of pillage or a from a particular culture at risk of dispersal, and import restrictions would be effective at protecting the cultural property.<sup>36</sup> In addition, the nation seeking emergency assistance must make a request to the United States and supply the information needed to determine that an emergency condition exists in the first place. Finally, the President must also consider the advice of the Cultural Property Advisory Committee ("advisory committee"), which makes recommendations on every bilateral agreement.<sup>37</sup>

### C. THE CPIA: A COMPROMISE BETWEEN THE PRIVATE ART MARKET AND CULTURAL HERITAGE PROTECTION ADVOCATES

The United States took over ten years to (partially) implement the 1970 Convention through the passage of the CPIA. This delay was due to disagreements between the private art market, whose advocates favored fewer trade restrictions to increase the circulation of artwork, and cultural heritage property protection groups, who favored stronger import restrictions.<sup>38</sup> The resulting CPIA is a weak framework for restricting the illicit trafficking of cultural heritage items in the United States.

Legislative history demonstrates intense debate between the private art market and cultural heritage protectionists in the build-up to the passage of the CPIA. In a 1977 hearing, the Subcommittee on Trade of the Committee on Ways and Means considered testimony from Douglas Ewing, the president of the American Association of Dealers in Ancient, Oriental, and Primitive Art. Mr. Ewing argued that adopting the proposed CPIA would be a "cultural disaster" to the United States.<sup>39</sup> Mr. Ewing further posited that the President would use the CPIA to impose an "embargo" on art trade into the United States, thereby depriving the American public of access to important pieces of

34. 19 U.S.C. § 2602(a)(1)(d).

35. 19 U.S.C. § 2602(f)(3).

36. 19 U.S.C. § 2603(a).

37. The special committee is comprised of eleven members appointed by the President with a diverse set of interests. Two members must represent the interests of museums, three must be experts in archaeology, anthropology, or ethnology, another three must be experts in the sale of cultural property, and the last three represent the public interest. See 19 U.S.C. § 2605(b).

38. See Lawrence J. Persick, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 PENN STATE INT'L L. REV. 89, 92-95 (1985).

39. *Legislative Proposals on Miscellaneous Tariff and Trade Matters: Hearing on H.R. 5643 Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 95th Cong. 31 (1977) [hereinafter the "1977 Hearing"] (statement of Douglas Ewing, President, Am. Ass'n of Dealers in Ancient, Oriental, & Primitive Art).

artwork.<sup>40</sup> Other dealers in artwork testified to the danger of returning cultural and historical artifacts back to nations who were neglectful or lacked the resources to properly care for these artifacts.<sup>41</sup>

On the other side of the aisle, Clemency Coggins, a legal scholar at the Archaeological Institute of America, testified in a 1979 hearing that the livelihood and aesthetic pleasures of art dealers do not outweigh the destruction and plundering of important archaeological sites.<sup>42</sup> Ms. Coggins argued further that cultural property relies entirely on protection, as there is no alternative for “repopulating” important historical and cultural artifacts.<sup>43</sup> Several other archaeological scholars echoed these sentiments in other statements heard by the Subcommittee. In a 1978 hearing, Congress acknowledged the impact of these voices over the past four years of debates between art dealers and archaeological preservationists.<sup>44</sup> It took another three years for Congress to finally pass a much-modified version of the CPIA.

Even after the debates concluded and the legislation was passed, criticism continued to plague the CPIA. Archaeological scholars argued that the law created more problems than solutions because other major art-import hubs were not imposing similar restrictions.<sup>45</sup> Museums supported the bill but expressed concern about the ability of requesting nations to properly care for the items returned to them.<sup>46</sup> American dealers worried that other countries would have free-range to export cultural property, and American art dealers would lose out on profits.<sup>47</sup>

The result of the constant back-and-forth was a greatly weakened mechanism for controlling the illicit trade of cultural property items. Those favoring stronger import restrictions made many concessions to push the CPIA through Congress. For instance, art dealers successfully modified earlier drafts of the CPIA that would have permitted unilateral Presidential action without a showing of concerted international effort.<sup>48</sup> The final version of the CPIA, which requires a determination of concerted international efforts to restrict importations of a requesting nation’s cultural heritage,

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40. *Id.*

41. See H.R. Rep. No. 95-615, at 4 (1977).

42. *To Implement the UNESCO Convention on Cultural Property: Hearing on H.R. 3403 Before the Subcomm. On Trade of the H. Comm. on Ways & Means*, 96th Cong. 30 (1979) [hereinafter the “1979 Hearing”] (statement of Clemency Coggins, Chairperson, Subcomm. on the Preservation of Archaeological Res., Archaeological Inst. of Am.).

43. *Id.*

44. *Convention on Cultural Property Implementation Act: Hearing on H.R. 5643 and S. 2261 Before the Subcomm. of Int. Trade of the S. Comm. on Finance*, 95th Cong. 218 (1978) [hereinafter the “1978 Hearing”] (statement of Mark. B. Feldman, Deputy Legal Adviser, Dep’t of State).

45. Linda Charlton, *Senate Weighs Bill to Control Imports of Major Cultural Property*, N.Y. TIMES (Mar. 12, 1978), <https://www.nytimes.com/1978/03/12/archives/senate-weighs-bill-to-control-imports-of-major-cultural-property-a.html>.  
[<https://web.archive.org/web/20251124183451/https://www.nytimes.com/1978/03/12/archives/senate-weighs-bill-to-control-imports-of-major-cultural-property-a.html>].

46. *Id.*

47. *Id.*

48. 1977 Hearing, *supra* note 39, at 33.

is one of many concessions made by archaeological preservationists to pass the legislation over the dissent of the private art market.

Another concession concerned the formation of an advisory committee of experts representing the perspectives of museums, art dealers, and academia.<sup>49</sup> Cultural property protectionists opposed this change because instead of permitting broader discretion to act, the law requires the President to consider the points of views of those opposed to the goals of the CPIA before creating a bilateral agreement with the requesting nation. The private art market influence won out, and the CPIA requires the President to consider the recommendations of the advisory committee.

The result of a decades-long debate over the implementation of the 1970 Convention resulted in a piecemeal framework for preventing the illicit trafficking of cultural property.

#### D. THE CPIA SHOULD BE LEVERAGED TO PREVENT ILLICIT TRAFFICKING DURING ARMED CONFLICT

Importantly, the CPIA is a trade agreement passed under the supervision of the Subcommittee on Trade of the House Committee on Ways and Means. U.S. Customs acts as the enforcement agency of import restrictions at the U.S. borders.<sup>50</sup> While the CPIA is not explicitly grounded in international human rights or wartime law, it still plays an important role in protecting the cultural property of nations during armed conflict.

Import restrictions on cultural heritage items are most necessary during armed conflict, when looting and trafficking of said items reach all-time highs. Armed conflict has long facilitated the looting and destruction of important cultural heritage items. For example, after the fall of Saddam Hussein's regime in Iraq, 170,000 antiquities were stolen from the National Museum in Baghdad amid renewed violence in the nation.<sup>51</sup> During the Syrian civil war, over 40,000 artifacts were smuggled from Syrian archaeological sites.<sup>52</sup> After the Taliban took power in Afghanistan in 2021, reports showed widespread bulldozing of archaeological regions to facilitate easier looting.<sup>53</sup>

49. H.R. Rep. No. 95-615, at 2 (1977).

50. 19 U.S.C. § 2609(a).

51. Karin E. Borke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL J. ART & ENT. L. 381, 385 (2003).

52. *Report Documents Severe Damage to Syrian Heritage and Museums*, AL JAZEERA (June 8, 2020), <https://www.aljazeera.com/features/2020/6/8/report-documents-severe-damage-to-syrian-heritage-and-museums> [https://web.archive.org/web/20251108040729/https://www.aljazeera.com/features/2020/6/8/report-documents-severe-damage-to-syrian-heritage-and-museums].

53. Kawoon Khamoosh, *Afghanistan: Archaeological Sites "Bulldozed for Looting"*, BBC (Feb. 21, 2024), <https://www.bbc.com/news/world-asia-68311913> [https://web.archive.org/web/20251108041320/https://www.bbc.com/news/world-asia-68311913].

While existing laws, namely the Hague Convention, can deter this behavior, the CPIA can be used as a tool to stem the illicit trafficking of cultural property after it has already begun. The United States is a major player in the trafficking of cultural items. The demand for cultural items is high in the United States, where there is a concentration of private art dealers who have the resources and desire to purchase looted items.<sup>54</sup> Thus, the United States' implementation of trade restrictions can protect cultural property during times of armed conflict at home and abroad.

Additionally, the Hague Convention is alone not sufficient to protect cultural property during war. While the Hague Convention is largely seen as the governing legislation for cultural property during armed conflict, it does not provide a concrete framework for dealing with the inevitable aftermath of armed conflict. There must also be decisive action reactive to wartime. The CPIA (ideally) allows for a nation to place immediate import restrictions on cultural property at risk. Meanwhile, the Hague Convention's recommendations might take years to implement. Marking cultural property items and creating emergency plans requires coordination across a nation and lots of planning. The CPIA can react quicker to armed conflict.

Finally, legislative history suggests Congress intended for the CPIA to apply during armed conflict. Specifically, the CPIA was needed to address the destruction of important cultural sites because of armed conflict. Testimony from a 1979 hearing suggests that import restrictions are necessary to disincentivize the "destruction of archaeological sites . . . by the most violent means" due to the "degradation of war and neglect."<sup>55</sup> A 1977 Congressional report emphasized the role of import restrictions in deterring pillage, a common consequence of armed conflict.<sup>56</sup> Congressional intent did not distinguish between peacetime and wartime. Instead, the CPIA was designed to apply to times of armed conflict.

Even though the CPIA is a trade regulation, it is a significant means to protect cultural heritage property during armed conflict. Its focus on halting and deterring illicit trafficking after armed conflict has broken out, rather than before conflict has begun, and its mechanism for forming bilateral agreements with nations at risk of pillage closes large gaps in the existing international framework. Instead of trying to amend the Hague Convention, the CPIA should be amended to effectively react to armed conflict and protect cultural heritage property when the chaos has already ensued.

## II. REMOVING STATUTORY OBSTACLES IN THE CPIA'S EMERGENCY PROVISION WILL SHIFT THE BURDEN FROM A REQUESTING NATION

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54. Predita C. Rostomian, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 272 (2002).

55. 1979 Hearing, *supra* note 42, at 92 (statement of Paul N. Perrot, Vice President of the Int'l Council of Museums).

56. H.R. Rep. No. 95-615, at 9-10 (1977).

## AND MORE EFFICIENTLY PROTECT CULTURAL PROPERTY

The CPIA allows for the emergency implementation of import restrictions. Under 19 U.S.C. § 2603, an emergency condition is triggered when: (1) the material seeking trade protection is coming from a site in jeopardy of pillage, dispersal, dismantling, or fragmentation and (2) applying import restrictions would reduce the incentive for continued behavior.<sup>57</sup> This emergency provision has been utilized in several instances to support nations in crisis, including Yemen, Peru, Cambodia, and Libya.<sup>58</sup>

However, the CPIA's emergency provision is cabined by limitations set forth in 19 U.S.C. § 2603(c). Specifically, the President cannot use the emergency provision to implement trade restrictions until the nation seeking protection has made a formal request to the United States and supplied the necessary information to determine that an emergency condition is in effect.<sup>59</sup> In addition, the President must still consider the opinions of the advisory committee, which may take months to meet and present findings to the President.<sup>60</sup> As a result, the CPIA emergency provision is often bogged down by statutory delays, leaving the nation in need of assistance without recourse.

This Section will utilize Ukraine as a case study to illustrate that nations at war do not have the ability to jump through all the hoops set up by the CPIA to form a bilateral agreement with the United States. Lessening the logistical requirements of the CPIA's emergency provision would have permitted nations like Ukraine to receive import restrictions before the damage became irreversible.

### A. UKRAINIAN CULTURAL PROPERTY IS AT RISK OF LOOTING FOLLOWING RUSSIA'S INVASION.

Ukraine's cultural property has been at increased risk since Russia's invasion in 2022. Ukrainian cultural property has been targeted by the Russian government as a part of a larger campaign to erase Ukrainian cultural history.<sup>61</sup> This campaign fits with President Vladimir Putin's image of Russia and Ukraine as a "single whole"; by targeting Ukrainian art and history, Russia can erase Ukraine's individual culture and claim that Russia and Ukraine were one nation to begin with.<sup>62</sup> Ukraine's Ministry of Culture and

57. 19 U.S.C. § 2603(a).

58. *Current Agreements and Import Restrictions*, U.S. DEP'T OF STATE, <https://www.state.gov/current-agreements-and-import-restrictions> [https://web.archive.org/web/20251114151339/https://www.state.gov/current-agreements-and-import-restrictions] (last visited Nov. 14, 2025).

59. 19 U.S.C. § 2603(c)(1).

60. 19 U.S.C. § 2603(c)(2).

61. See Richard Kurin, *How Ukrainians Are Defending Their Cultural Heritage from Russian Destruction*, SMITHSONIAN MAG. (Feb. 22, 2023), <https://www.smithsonianmag.com/smithsonian-institution/ukrainians-defend-their-cultural-heritage-russian-destruction-180981661/> [https://web.archive.org/web/20251108042929/https://www.smithsonianmag.com/smithsonian-institution/ukrainians-defend-their-cultural-heritage-russian-destruction-180981661/].

62. Vladimir Putin, *On the Historical Unity of Russians and Ukrainians*, KREMLIN (July 12, 2021), <http://en.kremlin.ru/events/president/news/66181> [https://web.archive.org/web/20251108043147/http://en.kremlin.ru/events/president/news/66181].

Information Policy reported 353 Russian crimes against Ukrainian cultural heritage in May of 2022, just a few months after Russia's invasion began.<sup>63</sup> As of January 2024, the Ukrainian Ministry of Culture and Strategic Communications documented the destruction or damage of over 2,000 pieces of cultural infrastructure, including Ukrainian libraries, museums, galleries, and theaters housing important cultural heritage property.<sup>64</sup>

The large-scale targeting of Ukrainian cultural heritage has been accompanied by unprecedented levels of looting and pillaging.<sup>65</sup> Tourists, Russian soldiers, police officers, and border guards have all been participants in Ukrainian site lootings.<sup>66</sup> A study examining the link between looting in Eastern Europe and Western markets found that several significant cultural items had been taken out of Ukraine and entered the international market, including coins, adornments, instruments, and ceramic vessels.<sup>67</sup> Several of the looters examined in the study were based in the United States.<sup>68</sup> The pillaging of Ukrainian sites was so commonplace that looters complained openly online that there were not enough sites left un-looted.<sup>69</sup>

The illicit trafficking of Ukrainian cultural items quickly reached American shores. In 2022, looters attempted to smuggle twenty shipments of Ukrainian archaeological items, which included weaponry dating back to the Neolithic Period, into the United States.<sup>70</sup> The aforementioned study found that one United States dealer alone had

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63. *MCIP Recorded More Than 350 Russian War Crimes Against Ukraine's Cultural Heritage*, MINISTRY OF CULTURE & STRATEGIC COMM'NS OF UKRAINE (May 20, 2022), <https://mcs.gov.ua/en/news/mcip-recorded-more-than-350-russian-war-crimes-against-ukraines-cultural-heritage/> [<https://web.archive.org/web/20251108043115/https://mcs.gov.ua/en/news/mcip-recorded-more-than-350-russian-war-crimes-against-ukraines-cultural-heritage/>].

64. *2,156 Cultural Infrastructure Objects Damaged or Destroyed Due to Russian Aggression*, MINISTRY OF CULTURE & STRATEGIC COMM'NS OF UKRAINE (Jan. 7, 2024), <https://mcs.gov.ua/en/news/2156-cultural-infrastructure-objects-damaged-or-destroyed-due-to-russian-aggression/> [<https://web.archive.org/web/20251108043150/https://mcs.gov.ua/en/news/2156-cultural-infrastructure-objects-damaged-or-destroyed-due-to-russian-aggression/>].

65. Bill Whitaker, *Ukraine Accuses Russia of Looting Museums, Destroying Churches as Part of Heritage War*, CBS NEWS (June 30, 2024), <https://www.cbsnews.com/news/ukraine-accuses-russia-museum-looting-church-destruction-60-minutes-transcript/> [<https://web.archive.org/web/20251108043423/https://www.cbsnews.com/news/ukraine-accuses-russia-museum-looting-church-destruction-60-minutes-transcript/>].

66. See Letter from Patty Gerstenblith, President, U.S. Comm. of the Blue Shield, to Dr. Alexandra Jones, Chair, Cultural Property Advisory Comm. (May 28, 2024), <https://uscbs.org/wp-content/uploads/2024/05/USCBS-Comments-on-Ukraine-Request.pdf> [<https://web.archive.org/web/20250322180727/https://uscbs.org/wp-content/uploads/2024/05/USCBS-Comments-on-Ukraine-Request.pdf>].

67. Sam Hardy & Serhii Telizhenko, *Russia Was "Doomed to Expand [Its] Aggression" Against Ukraine: Cultural Property Criminals' Responses to the Invasion and Occupation of the Donbas Since 20th February 2014*, 14 HISTORIC ENV'T: POL'Y & PRAC. 286, 295 (2023).

68. *Id.* at 286–287.

69. See Letter from Gerstenblith, *supra* note 66.

70. *Fourteen Historical Artifacts, Stolen by Russians, Have Been Returned to Ukraine*, MINISTRY OF CULTURE & STRATEGIC COMM'NS OF UKRAINE (Oct. 20, 2023), <https://mcs.gov.ua/en/news/14-historical-artifacts-stolen-by-russians-have-been-returned-to-ukraine/> [<https://web.archive.org/web/20251108043447/https://mcs.gov.ua/en/news/14-historical-artifacts-stolen-by-russians-have-been-returned-to-ukraine/>]. Note that this shipment was caught before it entered



managed to traffic hundreds of Ukrainian (and Russian) antiquities over fifteen years, both preceding and during the invasion.<sup>71</sup>

In April 2022, UNESCO called for action against the illicit trafficking of Ukrainian cultural property.<sup>72</sup> It became clear that the United States had to act to prevent the further illegal sale of archaeological objects and protect Ukrainian culture and history against Russian forces. United States officials were made aware of this need early on into the invasion. However, the CPIA proved to be a difficult tool to rely on.

### **B. IMPLEMENTATION OF IMPORT RESTRICTIONS FOR UKRAINIAN CULTURAL HERITAGE PROPERTY WAS DELAYED BY THE STATUTORY REQUIREMENTS OF THE CPIA EMERGENCY PROVISION.**

Although reports of illegal shipment of Ukrainian cultural property into the United States had been widespread since the invasion began, the United States did not finalize a bilateral agreement under the CPIA emergency provision with Ukraine until September 2024, nearly two years later.<sup>73</sup> This delay was caused by Ukraine's inability to submit an official request for a bilateral agreement, a requirement to receive emergency import restrictions.<sup>74</sup>

The CPIA emergency provision creates several obstacles for nations like Ukraine seeking import restrictions, including the lengthy process of formulating a request and the need to wait for the advisory committee to meet. These statutory requirements put too much burden on the nation requesting assistance, while that nation is simultaneously focused on protecting the lives of its citizens and avoiding continued aggression from an invading nation. As a result, cultural heritage property import restrictions are not implemented until it is far too late, which counteracts the purpose of the CPIA emergency provision.

The Ukrainian government was unable to submit an official request for a bilateral agreement because it understandably prioritized protecting the lives of its citizens and

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the United States. A bilateral agreement under the CPIA would allow for countries to catch shipments at the border.

71. Hardy & Telizhenko, *supra* note 67, at 297.

72. *Call by UNESCO and Partners Concerning the Risk of Illicit Trafficking of Ukrainian Cultural Property*, UNESCO (Apr. 1, 2022), <https://www.unesco.org/en/articles/call-unesco-and-partners-concerning-risk-illicit-trafficking-ukrainian-cultural-property> [<https://web.archive.org/web/20251114155343/https://www.unesco.org/en/articles/call-unesco-and-partners-concerning-risk-illicit-trafficking-ukrainian-cultural-property>].

73. *Emergency Import Restrictions Imposed on Categories of Archaeological and Ethnological Material of Ukraine*, 89 Fed. Reg. 73280 (Sep. 10, 2024).

74. *Notice of Receipt of Request From the Government of Ukraine Under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 89 Fed. Reg. 31247 (Apr. 24, 2024).

outsourced cultural property protection to other nations. Ukrainian President Volodymyr Zelenskyy emphasized in a 2022 speech to the United Nations General Assembly the death toll brought on by the Russian invasion, stating “we must protect life. . . . [T]his is a war for life.”<sup>75</sup> In a more recent speech, President Zelenskyy again stated the “full pain” of the invasion is felt by the Ukrainian people and cited instances of family separation due to occupation, threats to home energy systems, and the potential for nuclear disaster.<sup>76</sup> When faced with such threats, it is certainly logical that cultural property protection would not be the first priority for the Ukrainian government.

Because the Ukrainian government was occupied during the onset of the invasion, the work of protecting Ukrainian cultural heritage fell to museums and the broader international community. Local museum directors hid Ukrainian archival material, created shelter spaces in the basement of galleries, and continued to raise funds and awareness after fleeing their homes.<sup>77</sup> Ukraine also turned to other European countries for assistance. The Ukrainian Minister of Culture and Information Policy, Oleksandr Tkachenko, requested that European Union countries allocate 1% of their culture budget to support Ukrainian culture and media.<sup>78</sup>

While these efforts are admirable, only the Ukrainian government itself was eligible to file a request for a bilateral agreement with the United States, even on an emergency basis.<sup>79</sup> With the Ukrainian government focused on ending Russian aggression and protecting the lives of its citizens, cultural property protection was offloaded onto other parties who plainly could not file the necessary paperwork to receive import restrictions. The fact that Ukraine, a country which deeply values its cultural property and has had relatively functional campaigns to protect its cultural history, was unable to put together the dossier for a bilateral agreement demonstrates the impossibly high burden of the CPIA.

In addition to the procedural hassle, it would also be extremely costly for the Ukrainian government to funnel its own money into programs that would protect cultural heritage. President Zelenskyy and other officials have stated that it will take

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75. Volodymyr Zelenskyy, President of Ukraine, Address at the General Debate of the 77th Session of the U.N. General Assembly (Sep. 21, 2022).

76. Volodymyr Zelenskyy, President of Ukraine, Address at the General Debate of the 79th Session of the U.N. General Assembly (Sep. 25, 2024).

77. See, e.g., Masha Gessen, *The Museum Director Who Stayed Behind to Defend Ukrainian Literature*, NEW YORKER (Mar. 16, 2023), <https://www.newyorker.com/news/dispatch/the-museum-director-who-stayed-behind-to-defend-ukrainian-literature> [<https://web.archive.org/web/20251108043648/https://www.newyorker.com/news/dispatch/the-museum-director-who-stayed-behind-to-defend-ukrainian-literature>]; Malcolm Gay, *After Fleeing to Salem, a Ukrainian Museum Director Leads a Global Effort to Preserve Her Country's Heritage*, BOSTON GLOBE (May 7, 2022), <https://www.bostonglobe.com/2022/05/07/arts/fleeing-russian-aggression-ukrainian-museum-director-lands-salem/> [<https://web.archive.org/web/20251108043722/https://www.bostonglobe.com/2022/05/07/arts/fleeing-russian-aggression-ukrainian-museum-director-lands-salem/>].

78. Oleksandr Tkachenko, Minister of Culture & Info. Pol'y of Ukraine, Speech at the Council of Ministers of Education, Youth, Culture & Sports of the Eur. Union (Nov. 29, 2022).

79. 19 U.S.C. § 2603(c)(1).

\$6.9 billion of investment in the cultural sector of Ukraine over the next ten years to rebuild the damage from the war.<sup>80</sup> Instead, the Ukrainian government must continue to focus its on budgetary plans on defense and internal security.<sup>81</sup>

The Ukrainian government finally had the bandwidth to begin filing a request for a bilateral agreement in early 2024, but there were still more statutory obstacles in its path. First, compiling a request is a time and labor-intensive process. The CPIA mandates that the request be accompanied by a written statement of facts which relate to the four criteria under 19 U.S.C. § 2602, including showing that the cultural patrimony is in jeopardy of pillage, that Ukraine has taken measures to protect its cultural patrimony, that applying import restrictions would aid the problem and less drastic measures aren't available, and that the international community has taken concerted action to address the issue as well.<sup>82</sup>

Under the CPIA emergency provision, the Ukrainian government needed to supply information that an emergency condition exists under 19 U.S.C. § 2603.<sup>83</sup> The Ukrainian government also needed to request protection for highly-specified categories of material, which undoubtedly required more research to narrow down which materials were most at risk of looting and should be protected under the CPIA.<sup>84</sup> Whilst balancing competing priorities, the Ukrainian government had to spend a significant amount of time drafting a request for a bilateral agreement.

Further exacerbating the delay, the advisory committee did not meet until June 2024 regarding Ukraine's emergency request.<sup>85</sup> As mentioned previously, the President is required under the CPIA to consider the opinions of the advisory committee so long as the committee's report is submitted within ninety days of the President submitting information to the committee about the request.<sup>86</sup> The United States could not properly consider the Ukrainian request for several months while it waited for the advisory committee to discuss and make recommendations to the President. A bilateral agreement under the emergency provision was finally entered into in September 2024, two years after the invasion first began.<sup>87</sup>

80. *Ukraine: A. Azoulay and V. Zelensky Together to Rebuild the Cultural Sector*, UNESCO (Apr. 25, 2023), <https://www.unesco.org/en/articles/ukraine-azoulay-and-v-zelensky-together-rebuild-cultural-sector> [<https://web.archive.org/web/20251009220449/https://www.unesco.org/en/articles/ukraine-azoulay-and-v-zelensky-together-rebuild-cultural-sector>].

81. Vladyslava Kovalenko, *Ukraine's Cabinet of Ministers Submits 2025 State Budget Draft to Verkhovna Rada*, RBC-UKRAINE (Sep. 14, 2024), <https://newsukraine.rbc.ua/news/ukraine-s-cabinet-of-ministers-submits-2025-1726314318.html> [<https://perma.cc/MND8-2AWC>].

82. 19 U.S.C. § 2602(a)(1).

83. 19 U.S.C. § 2603(c)(1).

84. *See* Emergency Import Restrictions Imposed on Categories of Archaeological and Ethnological Material of Ukraine, 89 Fed. Reg. 73280 (Sep. 10, 2024) (to be codified at 19 C.F.R. pt. 12).

85. *Id.*

86. 19 U.S.C. § 2603(c)(2).

87. U.S. EMBASSY & CONSULATES IN ITALY, *United States Announces New Support for Protection of Ukrainian Cultural Heritage*, (Sep. 26, 2024), <https://it.usembassy.gov/united-states-announces-new-support-for-protection-of-ukrainian-cultural-heritage/> [<https://web.archive.org/web/20251009222659/https://it.usembassy.gov/united-states-announces-new-support-for-protection-of-ukrainian-cultural-heritage/>].

During this two-year delay, countless Ukrainian cultural artifacts and artworks were pillaged and entered the illicit global market. In just one year after the invasion began, Russian forces looted artifacts from almost forty different Ukrainian museums.<sup>88</sup>

The situation in Ukraine demonstrates that the framework of the CPIA emergency provision is ill-suited for decisive and efficient action. The hoops that nations must jump through create unreasonable time lags, especially for nations embroiled in intense conflict and have other, pressing priorities. The CPIA emergency provision does not act fast enough to prevent cultural heritage property entering the illegal global market.

**C. THE CPIA EMERGENCY PROVISION SHOULD BE AMENDED TO EASE THE BURDEN ON A REQUESTING NATION, WHICH WILL FACILITATE QUICKER RESPONSES TO CRISES.**

Several amendments should be made to the CPIA emergency provision to prevent delays and allow for the United States to implement import restrictions immediately after armed conflict has broken out in a nation needing assistance. Unilateral action by the President would reduce delays caused by waiting for a request from the nation seeking assistance or a report from the advisory committee.

The emergency provision should be amended to permit unilateral action without a formal request from the nation at war. The section of the CPIA emergency provision which denotes the requirement for a nation seeking assistance to compile an official request, 19 U.S.C. §2603(c)(1), should be removed in its entirety. This would allow the President to instate a bilateral agreement absent a specific request. A less dramatic, and perhaps more palatable, alternative would be to amend the language of 19 U.S.C. §2603(c)(1) to lessen the burden on the nation seeking import restrictions. Existing language requires nations seeking import restrictions to make a request according to the parameters set by the non-emergency provision of the CPIA under 19 U.S.C. §2602(a), with an additional set of information supporting a determination that an emergency condition exists.<sup>89</sup> To reduce delays caused by compiling a laborious request, a nation would submit a modified request in an emergency situation, requiring only a shorter statement of facts rather than a lengthy statement detailing all the criteria of the CPIA.

Unilateral action would also be facilitated by amending 19 U.S.C. §2603(c)(2), which requires the President to consider the recommendations of the advisory committee so long as the report is submitted within ninety days.<sup>90</sup> This prong of the CPIA should be

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88. Andriy Kostin, Prosecutor General of Ukraine, *The Russian Assault on Ukraine's Heritage*, INT'L BAR ASS'N (Feb. 28, 2024), <https://www.ibanet.org/The-Russian-assault-on-Ukraines-heritage> [<https://web.archive.org/web/20251009223144/https://www.ibanet.org/The-Russian-assault-on-Ukraines-heritage>].

89. 19 U.S.C. § 2603(c)(1).

90. 19 U.S.C. § 2603(c)(2).

eliminated, thereby permitting the President to act without having to wait for a report from the advisory committee. Alternatively, the language should be amended to shorten the ninety-day period to urge the advisory committee to submit recommendations earlier and make the process of establishing a bilateral agreement more efficient.

It is true that critics of the CPIA, including early dissenting voices from the private art market, are wary of the President possessing unilateral power to restrict trade. Indeed, the creation of the advisory committee was intended to address the concerns of art dealers that bilateral agreements would only be formed to strengthen political relationships.<sup>91</sup> However, the unprecedented scale of destruction and looting in Ukraine mandates a stronger approach to import restrictions. Further, the United States will have likely already formed a strong relationship with the nation seeking assistance if that nation is in the midst of armed conflict, as is the case with the Ukraine. As of the first quarter of 2025, the United States had already disbursed more than \$80 billion to support Ukraine during the invasion.<sup>92</sup> Clearly, a strong relationship between the United States and Ukraine has already been established. Implementing import restrictions for Ukrainian cultural heritage items would not add much to the already-fortified relationship between American and Ukrainian officials. Unilateral action to implement restrictions for nations enduring armed conflict does not necessarily bring about the same concerns of Presidential ingratiation that early critics of the CPIA raised.

If unilateral action to impose import restrictions had been permitted, rather than waiting for a nation at war to gather the sufficient materials for a bilateral agreement request, Ukraine's cultural property could have been protected earlier and without significant expense.

### III. THE CPIA'S RENEWAL PROVISION SHOULD BE ADJUSTED TO ADDRESS THE ISSUES FACED BY NATIONS UNDER THE CONTROL OF HOSTILE FORCES

The CPIA places a time limit on the duration of bilateral agreements with other nations. Under 19 U.S.C. §2602(b), the President is not permitted to enter into any agreements with an "effective period" of longer than five years from the time at which the initial agreement was entered into force.<sup>93</sup> However, the CPIA does lay out a framework for extending or renewing agreements. Under 19 U.S.C. §2602(e), the President can extend an agreement for additional periods of time if it can be shown that

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91. See H.R. Rep. No. 95-615, at 12 (1977).

92. U.S. AGENCY FOR INT'L DEV. SPECIAL INSPECTOR GENERAL, OPERATION ATLANTIC RESOLVE (Oct. 1, 2024-Dec. 31, 2024), [https://oig.usaid.gov/sites/default/files/2025-02/Special\\_IG\\_OAR\\_Q1\\_FY25\\_Final.pdf](https://oig.usaid.gov/sites/default/files/2025-02/Special_IG_OAR_Q1_FY25_Final.pdf) [[https://web.archive.org/web/20250306103212/https://oig.usaid.gov/sites/default/files/2025-02/Special\\_IG\\_OAR\\_Q1\\_FY25\\_Final.pdf](https://web.archive.org/web/20250306103212/https://oig.usaid.gov/sites/default/files/2025-02/Special_IG_OAR_Q1_FY25_Final.pdf)].

93. 19 U.S.C. § 2602(b).

the four criteria under §2602(a) are met.<sup>94</sup> One of the four criteria that must be examined for renewal of a bilateral agreement is that “the [requesting nation] has taken measures consistent with the [1970] Convention to protect its cultural patrimony.”<sup>95</sup>

However, the path to renewing a bilateral agreement is entirely unclear when the nation seeking renewal is occupied by hostile forces. Hostile forces include new governments who ousted previous powers, foreign invaders, or any other form of leadership that will not prioritize the cultural history of the nation they occupy. If a nation cannot demonstrate that they are trying to protect their cultural patrimony per the statutory requirement, an existing bilateral agreement cannot be renewed.

This disconnect between nations led by hostile forces and the text of the CPIA may prove to be disastrous in Afghanistan, a nation currently led by a group unwilling to protect Afghan culture.<sup>96</sup> By once again shifting the burden onto the shoulders of nations to meet specific criteria, the CPIA is ineffective at protecting cultural heritage property when a nation is under the force of a hostile government. This Section will demonstrate that the Taliban will be unable to meet the requirements under the CPIA to extend current import restriction agreements or create new agreements with the United States. Before the current agreement expires, the CPIA should be amended to provide for the automatic renewal of bilateral agreements and take into account a country’s hostile government when deciding if a new agreement should be instated.

#### A. AFGHAN CULTURAL HERITAGE PROPERTY IS AT RISK FOLLOWING THE TALIBAN TAKEOVER.

Afghan cultural heritage items have been at increased risk since the Taliban takeover in 2021. Reports from cultural heritage experts on the ground confirm that the Taliban’s occupation of Afghanistan puts a significant number of objects and sites at risk.<sup>97</sup> A report from early 2024 indicates that several well-known archaeological sites in Afghanistan have been bulldozed over, which allows for easier and systematic looting.<sup>98</sup> Relatedly, dozens of the 29,000 archaeological sites in Afghanistan have been bulldozed over, then spotted with “pits dug by looters.”<sup>99</sup> Professional international smugglers are suspected to have engaged in large-scale excavations at the Bamiyan Valley, an important archaeological site, after the Taliban takeover ended protective regulations.<sup>100</sup> Cultural heritage experts in Afghanistan also found that rural-based

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94. 19 U.S.C. § 2602(e).

95. 19 U.S.C. § 2602(a)(1)(B).

96. Khamoosh, *supra* note 53.

97. *Id.*

98. *Id.*

99. *Id.*

100. The previous Afghan government had been in the process of buying property around the Bamiyan Valley and instating flood prevention measures. However, these efforts had to be abandoned when the Taliban took over. As a result, the land around the Bamiyan Valley is now in the hands of private citizens who began using their property to build coal stores and residential properties. Not only have these commercial endeavors damaged the Bamiyan Valley site, but the lack of government oversight has created the opportunity for looting. See Sarvy Geranpayeh, *Afghanistan’s Bamiyan Valley Will Collapse in the Next Ten*

groups began looting artifacts and outsourcing them to international art markets as soon as the Taliban takeover began.<sup>101</sup>

In February 2022, the United States imposed trade restrictions on material from Afghanistan following a seizure of thirty-three Afghan artifacts from a New York art dealer.<sup>102</sup> The import restrictions were intended to disincentivize the pillaging of Afghan cultural items.<sup>103</sup> Importantly, the bilateral agreement was enacted with an expiration date in April 2026, despite the unlikelihood that turmoil in Afghanistan will abate by this date such that import restrictions are no longer necessary. American and North Atlantic Treaty Organization (NATO) forces withdrew in 2023, and the Taliban face no other immediate challenges to their regime.<sup>104</sup> Taliban authorities have further entrenched themselves into their positions of power through suspending the previous government's constitution and issuing legally vague edicts to affirm their religious extremist views.<sup>105</sup> The cultural heritage property of Afghanistan will undoubtedly still be at risk beyond the timeline of the current bilateral agreement.

## B. THE CPIA'S RENEWAL PROVISION IS INCOMPATIBLE WITH THE INTERESTS OF A NATION UNDER HOSTILE LEADERSHIP.

As the active period of the bilateral agreement between Afghanistan and the United States shrinks, the path to renewing import restrictions on Afghan cultural property is statutorily unclear. To extend the current agreement or create a new agreement under the CPIA's plain text, the Taliban government would have to take measures to protect the cultural patrimony of Afghanistan, which is an unlikely possibility. As an

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*Years if Looting and Neglect Continue, Former UNESCO Representative Warns*, ART NEWSPAPER (Feb. 10, 2022), <https://www.theartnewspaper.com/2022/02/10/afghanistans-bamiyan-valley-will-collapse-in-the-next-ten-years>

[<https://web.archive.org/web/20251009232159/https://www.theartnewspaper.com/2022/02/10/afghanistans-bamiyan-valley-will-collapse-in-the-next-ten-years?ref=hir.harvard.edu>].

101. Brianne Seaberg, Note, *Statutes Saving Statutes: A Proposal to Reform U.S. Customs Laws to Better Protect Cultural Property*, 57 VAND. J. TRANSNAT'L L. 955, 965 (May 2024).

102. Emergency Import Restrictions Imposed on Archaeological and Ethnological Material of Afghanistan, 87 Fed. Reg. 9439 (Feb. 22, 2022); Ben Fox, *Relics Seized from Smugglers Are Returning to Afghanistan*, ASSOCIATED PRESS (Apr. 22, 2021), <https://apnews.com/article/joe-biden-arts-and-entertainment-afghanistan-fl1225cd218f1997827469840b33ab95>

[<https://web.archive.org/web/20251114191936/https://apnews.com/article/joe-biden-arts-and-entertainment-afghanistan-fl1225cd218f1997827469840b33ab95>]. This art dealer is allegedly one of the most prolific smugglers of international antiquities, according to authorities. Note that these artifacts were seized after they entered into the United States. A CPIA agreement would have prevented the artifacts from passing through the U.S. border.

103. Emergency Import Restrictions, 87 Fed. Reg. at 9439.

104. Riazat Butt, *The Taliban Are Entrenched in Afghanistan After Two Years of Rule*, ASSOCIATED PRESS (Aug. 14, 2023), <https://apnews.com/article/afghanistan-taliban-takeover-anniversary-explainer-10711b53a73638f46f2eb534b15b1a63>

[<https://web.archive.org/web/20251010174356/https://apnews.com/article/afghanistan-taliban-takeover-anniversary-explainer-10711b53a73638f46f2eb534b15b1a63>].

105. Richard Bennett, Special Rapporteur on Afghanistan, *Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan*, U.N. Doc. A/79/330, at ¶ 60 (Aug. 30, 2024).

alternative, the U.S. President would either be forced to hope the Taliban government shows effort to protect their patrimony by the time the agreement expires, or bend the language of the CPIA beyond recognition to continue restrictions. Both of these options are unsuited in the case of Afghanistan.

The Taliban government will not be able to demonstrate attempts to protect cultural patrimony by the time the current agreement expires. It is true that Taliban leadership has made public attempts to assure the public that they are committed to preserving Afghan cultural property. The Taliban released a statement requiring political and military officials to “take into consideration . . . ancient artifacts found around the country.”<sup>106</sup> However, these assurances are difficult to believe. The Taliban has a long history of mistreating cultural objects in Afghanistan. Most notably, Taliban forces infamously destroyed the thousand-year-old “Bamiyan Buddhas,” an impressive structure carved into a cliff.<sup>107</sup> Additionally, it has taken the National Museum in Kabul years to piece together the wooden and stone sculptures that Taliban forces intentionally broke in early 2001.<sup>108</sup>

International reactions to the Taliban’s new interest in cultural property protection confirm the validity of this skepticism. In January 2022, the Taliban-controlled Afghan government submitted an application to UNESCO to designate the Bagh-e Babur Gardens a World Heritage Site.<sup>109</sup> However, UNESCO never responded to this application.<sup>110</sup> Other international groups dedicated to protecting Afghan cultural heritage ceased funding efforts for fear of going against domestic policies that restrict aid to Afghanistan. For instance, the French Archaeological Delegation in Afghanistan (“DAFA”), one of the more prominent international organizations working on the ground in Afghanistan, ceased all operations.<sup>111</sup> DAFA stopped its work to remain compliant with French policy, limiting all aid to Afghanistan except for emergency humanitarian support.<sup>112</sup>

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106. ISLAMIC EMIRATE OF AFGHANISTAN, Statement Regarding Protection and Preservation of Ancient Artifacts (Feb. 20, 2021), <https://www.alemarahenglish.af/statement-of-islamic-emirate-regarding-protection-and-preservation-of-ancient-artifacts/> [<https://web.archive.org/web/20221126185945/https://www.alemarahenglish.af/statement-of-islamic-emirate-regarding-protection-and-preservation-of-ancient-artifacts/>].

107. Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES (Mar. 19, 2001), <https://www.nytimes.com/2001/03/19/world/taliban-explains-buddha-demolition.html> [<https://web.archive.org/web/20251010180335/https://www.nytimes.com/2001/03/19/world/taliban-explains-buddha-demolition.html>].

108. Andrew Lawler, *As the Taliban Rises, Uncertainty Looms for Afghanistan’s Historic Treasures*, NAT’L GEOGRAPHIC (May 20, 2021), <https://www.nationalgeographic.com/history/article/as-taliban-rises-uncertainty-looms-afghanistan-historic-treasures> [<https://web.archive.org/web/20251010182127/https://www.nationalgeographic.com/history/article/as-taliban-rises-uncertainty-looms-afghanistan-historic-treasures>].

109. Melissa Gronlund, *New Threats to Heritage in the Taliban’s Afghanistan*, NEW LINES MAG. (Dec. 6, 2022), <https://newlinesmag.com/reportage/new-threats-to-heritage-in-the-talibans-afghanistan> [<https://web.archive.org/web/20251010182331/https://newlinesmag.com/reportage/new-threats-to-heritage-in-the-talibans-afghanistan/?ref=hir.harvard.edu>].

110. *Id.*

111. *Id.*

112. *Id.*



The international community has not taken the Taliban's assurances at face value. Instead, the international community has withdrawn support or ignored requests. If international actors have not yet been able to believe that the Taliban can protect their own heritage sites, then it is difficult to imagine a U.S. President finding the contrary (i.e., that the Taliban government has "taken measures" to protect their cultural patrimony under the CPIA).

The second hypothetical option—skirting the language in the CPIA to re-impose import restrictions—poses its own issues. The requirement that a requesting nation highlight its own efforts to preserve cultural patrimony was intended to be strict. The current language of the CPIA requires the President to determine the nation has "taken measures consistent with the Convention to protect its cultural patrimony."<sup>113</sup> This stands in contrast to the 1970 Convention, which requires only that nations "undertake to oppose [the impoverishment of cultural heritage] with the means at their disposal."<sup>114</sup> While international guidelines create more leniency by contextualizing cultural preservation efforts in the "means" available to each nation, the CPIA does not do so.

In addition, early drafts of the CPIA used softer language when discussing the responsibilities of nations requesting import restrictions. An earlier draft simply stated that the "President should endeavor to obtain the commitment of the [nation] concerned."<sup>115</sup> Advocates for the current language of the CPIA argued that this earlier language "water[ed] down drastically the insistence that the Executive branch, in return for helping other countries by adopting import embargoes, bargain for reciprocal concessions."<sup>116</sup> The final version of the CPIA leans more restrictive, expecting partner nations to take on their own responsibilities instead of relying on the United States to do all the work for them. The explicit modification of less demanding language from both international texts and earlier drafts of the CPIA demonstrates congressional intent that lack of effort from the nation is a substantive barrier for import restrictions. It would be difficult to overlook the Taliban government's inability to show effort to protect their own cultural heritage.

**C. THE CPIA'S RENEWAL PROVISION SHOULD BE AMENDED TO LESSEN THE BURDEN ON THE REQUESTING NATION, WHICH WILL BETTER ADDRESS THE PREDICAMENT OF NATIONS UNDER THE CONTROL OF HOSTILE FORCES.**

The CPIA should be modified to better accommodate the interests of countries under the rule of hostile forces, like Afghanistan. Several amendments should be made to the text of the statute to continue upholding import restrictions on illicitly trafficked cultural property beyond the limited time frame of the bilateral agreements.

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113. 19 U.S.C. §2602(a)(1)(b).

114. 1970 Convention, *supra* note 6, at art. 2.

115. 1979 Hearing, *supra* note 42, at 22 (Statement of Prof. Paul M. Bator).

116. *Id.*

First, the CPIA should provide for the automatic renewal of bilateral agreements. The provision of the CPIA requiring that the President examine the efforts of a nation to preserve its own cultural patrimony (19 U.S.C. §2602(e)(1)) should be removed. Removing this provision would allow for the President to renew bilateral agreements without conducting another analysis of the four criteria under the CPIA, which might have altered determinations if a hostile government has taken over.

Alternatively, the CPIA should borrow from existing language in international law. As stated previously, Article 10 of the 1970 Convention implicitly reviews the efforts shown by a nation to protect its property in relation to the “means” available to that nation.<sup>117</sup> The CPIA should include this qualifier in 19 U.S.C. §2602(a)(1)(b). The President would then engage in a more holistic review of a nation’s attempts to protect its culture when deciding whether to form or extend a bilateral agreement with that nation. In this way, countries under the rule of hostile forces would not be penalized for the failures of antagonistic leadership to demonstrate commitment to protecting their patrimony. Either of these amendments will reduce the burden on the nation to prove they have earned extended import restrictions.

It is true that the United States chose not to adopt Article 10 of the 1970 Convention when the CPIA was passed in 1983. Incorporating language from Article 10 of the 1970 Convention into the CPIA would appear to go against this legislative intent. However, attitudes towards the 1970 Convention have changed since 1983. Action from Congress over the past several years indicates that the United States has prioritized cultural property more so than in the past. For instance, the United States passed the Protect and Preserve International Cultural Property Act in 2016, which instructed the President to apply import restrictions to all ethnological and archaeological material from Syria regardless of whether an emergency condition under the CPIA applies.<sup>118</sup> The passage of this Act demonstrates that Congress is now willing to weaken what were originally strong stances on the CPIA, including the requirements under the emergency provision, to meet the demands of nations in need. Further, Congress passed the Emergency Protection for Iraqi Cultural Antiquities Act in 2004, which similarly bypassed the strict requirements of the CPIA to instate import restrictions on Iraqi cultural property, even though Iraq wasn’t a state party.<sup>119</sup>

The CPIA had to be overlooked to pass both of these Acts. However, both Acts would be allowed under the 1970 Convention. These slight shifts away from the strict requirements of the CPIA towards the broader goals of the 1970 Convention demonstrates that Congress is now more open to incorporating language from the 1970 Convention in its domestic policies.

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117. 1970 Convention, *supra* note 6, at art. 10.

118. Pub. L. No. 114-151, 130 Stat. 369 (2016).

119. Pub. L. No. 108-429, 118 Stat. 2434 (2004).

#### IV. CONCLUSION

Protecting cultural property is akin to protecting the heart of a nation. Armed conflict around the world provides the perfect opportunity for attacking nations to target cultural property, and for unofficial looters to profit off tragedy. While both threats pose significant risks to the strength of a nation's historical and artistic memory, only the first receives adequate attention in existing international law.

Leveraging domestic policy steps in where international law falls short. The United States' CPIA can be an effective tool to protect the cultural property looted from nations embroiled in warfare. As one of the largest buyers of illicitly trafficked cultural material, the United States can deter pillaging and return cultural items to where they belong. However, the CPIA is mismatched to the needs of the current state of the world. Specifically, the CPIA puts too much of the burden on the nation requesting import restrictions. Nations fighting for the lives of their citizens do not have the time or capabilities to fulfill the necessary requirements under the CPIA to receive, or extend, import restrictions.

If steps had been taken to remove logistical barriers in the CPIA's emergency provision for Ukraine, more of Ukraine's rich cultural heritage could have been protected from looting. Meanwhile, the current situation in Afghanistan highlights the pressing need to reform the CPIA's renewal policies to extend import restrictions, even if the occupying leadership is hostile to the goals of the 1970 Convention.

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