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FLORIDA ENTERTAINMENT & SPORTS LAW REVIEW

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FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

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FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

LETTER FROM THE EDITOR

The Florida Entertainment and Sports Law Review is proud to present the second issue of its fifth volume.

This issue centers on the evolving legal challenges created by shifting power structures in sports, entertainment, and digital media. Across each piece, readers will see traditional legal frameworks tested by questions regarding labor rights, economic policy, identity, and artificial intelligence. The articles explore how rapidly developing industries and technologies are forcing courts and institutions to reconsider assumptions about ownership, representation, and the future of creative and commercial rights.

We begin with our Career Spotlights, featuring Emily Hays, Senior Counsel of Intellectual Property at The Walt Disney Company, who discusses navigating intellectual property and emerging technologies within modern media companies, and Nathaniel Otto, UF Law alumni and player agent at MGC Sports, who reflects on his path from Division I athlete and Navy officer to representing professional football players in the evolving NIL and sports law landscape.

Our commentary by Lindsay Meisels examines how artificial intelligence is reshaping music law, exploring emerging challenges surrounding copyright, authorship, deepfakes, streaming fraud, and artists' rights in the age of generative AI.

This issue brings together articles that examine some of the most pressing legal questions across sports, intellectual property, and digital identity. Christan Hanna and Jeffrey Levine examine the NFLPA's handling of the fallout surrounding Deshaun Watson's fully guaranteed contract and analyze whether the union failed to adequately protect players' interests in the face of alleged owner collusion. Alyssa J. Devine explores whether a federal right of publicity statute would better promote social welfare through a unified framework for protecting commercial identity rights. Finally, Mira Moldawer analyzes how AI-generated celebrities and virtual identities challenge traditional concepts of authorship, copyright, and publicity rights, arguing that modern legal systems must adapt to the realities of identity and digital fame.

Serving as Editor-in-Chief has been one of the most rewarding experiences of my time at the University of Florida Levin College of Law. As a double Gator whose undergraduate and law school experiences have both been shaped by sports and entertainment, I hope this journal continues to expand the growing presence of entertainment and sports law at UF and inspires future students to pursue the field with enthusiasm and ambition.

I would like to sincerely thank our authors for their thoughtful and impactful contributions to this issue. I am also incredibly grateful to our Publication Manager, Lisa Caldwell, and Professor Rachel Arnow-Richman for their continued guidance and support throughout the publication process. To our staff members and senior editors, thank you for the time, dedication, and care you poured into this journal. Most importantly, I want to recognize this year's exceptional executive board—Sophia Simeoni, Alex Nazareth, Julie Wittenberg, Lauren Austin, Katie Chronister, Logan Ansted, Keano Jacobs, and Braden Ridlehoover—for helping make this publication possible. It has been incredibly rewarding to watch this journal continue to grow, and I am excited to see all that the incoming executive board will accomplish in the school year ahead.

Kayleigh Thomas

EDITOR-IN-CHIEF

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CAREER SPOTLIGHT: EMILY HAYS, ESQ.

Emily Hays is Senior Counsel, Intellectual Property (IP) at The Walt Disney Company, where she advises creative, business, and legal teams on issues related to copyright, trademark, defamation, right of publicity, and more to help bring the magic of Disney to life. In her role, she works at the intersection of law and storytelling: addressing copyright and trademark clearance, acquisition, protection, and management issues, analyzing complex rights matters, and reviewing and drafting IP-related language for agreements throughout development, production, and distribution. Before joining Disney, Hays served as Counsel, Content Legal at Paramount and was a litigation associate at Katten Muchin Rosenman LLP. She also served as a judicial extern for the Honorable Philip S. Gutierrez of the United States District Court, Central District of California. These experiences collectively shaped her understanding of legal practice within the entertainment industry. Her work requires balancing risk management with artistic collaboration, protecting intellectual property while enabling storytellers to execute their creative visions. Through her transition from private practice to in-house entertainment counsel, she has developed a perspective on career growth, burnout prevention, and the evolving responsibilities of lawyers working inside media companies.

QUESTIONS & ANSWERS

1. What initially drew you to pursue a career in law, specifically in the entertainment and IP sector?

I actually started law school thinking I would go into international relations, but I quickly realized that wasn't a particularly practical path. So, I followed a more traditional trajectory: a 1L externship with a federal judge, On-Campus Interviews (OCI), a 2L summer at Katten, and then several years as a civil litigator. At Katten, I was fortunate to work on entertainment-related matters such as IP disputes, First Amendment issues, and media litigation. I didn't set out to become an entertainment lawyer, but as a former theatre kid with a deep love for the arts, I think there was always an underlying pull toward creative work. Once I started supporting clients in media and entertainment on the IP side, it felt like a natural fit, and I've continued to grow in that space ever since.

2. Many lawyers today reconsider traditional career paths in favor of sustainability and job satisfaction. How did you evaluate your own career priorities when moving from law firm practice to an in-house entertainment role?

My time in private practice was invaluable. It gave me the foundational skills—legal research, writing, effective communication, client management, and juggling competing deadlines—that I rely on every day. But I eventually realized I wanted to be closer to the creative process. I wanted to help shape projects from the beginning rather than only ever untangling problems after the fact. Work-life balance was part of the equation, but the bigger motivation was the opportunity to collaborate with creators, producers, and executives as they develop and distribute content. In-house, I still lead with legal analysis, but I also have to weigh business realities, talent relationships, and publicity considerations to help my internal clients make informed decisions.

3. As Senior Counsel for IP at Disney, you help creative teams realize their vision while mitigating legal risk. What does the content review and clearance process look like behind the scenes?

The process varies depending on the project (scripted series, documentaries, films, digital content, and everything in between), but it's always collaborative. Clearance typically involves attorneys, paralegals, researchers, and subject-matter experts working together to identify and resolve issues. Ideally, we're looped in early so we can help shape strategy before creative decisions are locked. But sometimes questions arise on tight timelines; for example, whether a news segment can rely on fair use to include third-party footage. In those moments, my team and I have to make fast, well-reasoned calls that balance legal risk with editorial needs.

4. Entertainment lawyers must protect IP rights while not stifling creativity. How do you communicate legal limitations to writers, producers, and executives without disrupting the storytelling process?

Building trust with my internal clients is everything. When they see me as a partner in service of the creative—rather than a gatekeeper or a "no person"—we can have honest conversations about risk and work together to find solutions. My goal is never to shut down an idea but to help shape it in a way that preserves the storytelling intent while minimizing exposure. Once that collaborative relationship is established, even difficult conversations become productive.

5. Many projects draw inspiration from real events or people. How do you navigate the intersection of IP law, right of publicity, and First Amendment protections in those situations?

Projects inspired by real people or events almost always sit at the intersection of copyright, right of publicity, and First Amendment protections. My task is not to eliminate risk, but to shape it into something that is reasonable and appropriate for the business. Copyright allows us to use real historical facts and events, but we must be careful not to copy another creator's protected expression of those facts. For right of publicity, we have to think about who the person is, how identifiable the portrayal is, the purpose of our use of their identity, and whether we're suggesting anything that could raise defamation or privacy concerns, among other considerations. And in all cases, we also consider practical factors like talent relationships and potential public relations impacts, which can be just as—if not more—important than the legal questions.

6. Disney manages some of the most valuable and recognizable IP in the world. How does working with such well-known properties affect the legal analysis and level of caution required?

Disney is a beloved global brand and almost everyone has a personal connection to its stories and characters. It's also a fully integrated, end-to-end ecosystem where its content, products, experiences, and technology all feed into one another. That means my legal advice has to account not only for the project in front of me but also how it might affect other branches of the business. The stakes can be higher because the brand is so visible and meaningful to the cultural landscape.

7. Artificial intelligence (AI) and digital recreation technologies are rapidly developing in entertainment. What legal questions are you seeing emerge in this space?

AI raises a host of IP questions, especially around ownership, consent, compensation, and authenticity. The legal frameworks are still evolving, so part of my role is helping internal clients make thoughtful, responsible decisions in an area where the law hasn't fully caught up.

8. For students hoping to work in-house or at a media company, what concrete steps would you recommend they take during school and early practice to position themselves for a career like yours?

1. Stay informed about the industry. Read the trades (*Variety*, *The Hollywood Reporter*, *Deadline*, etc.), follow legal developments from resources like the Media Law Resource Center (MLRC), take advantage of student access to professional organizations like The Copyright Society, conferences, or CLE events sponsored by law firms and schools, and engage with the media you love—television, movies, podcasts, theatre, journalism . . . whatever speaks to you.
2. Conduct informal interviews with attorneys whose careers you admire. Most people are happy to share their experiences, and those conversations can demystify the industry.
3. Get any practical, hands-on legal experience you can such as clinics, internships, externships, or even volunteer work. Even if it's not entertainment or media-specific, developing practical skills will make you a stronger candidate when it comes time to interview.

Hiring managers can tell when someone has genuine enthusiasm for the work, so let your curiosity and passion show!

9. Do you have any advice for junior attorneys to prevent burnout?

Gratitude is key for me. On the most difficult days, I remind myself, "I *get* to do this work," not, "I *have* to." It's a privilege to contribute to the storytelling and creativity that so many people around the world connect with.

CAREER SPOTLIGHT: NATHANIEL OTTO, ESQ.

Nathaniel (Nate) Otto is a corporate and sports attorney and player agent at MGC Sports, advising football players and coaches on contractual matters. Before joining MGC Sports, Nate was an associate attorney in the mergers and acquisitions, corporate, and tax group at Burr & Forman. There, his practice included counseling colleges, universities, collectives, and athletes on matters involving name, image, and likeness (NIL), NCAA rules, and player contract negotiation. In his current role, Nate translates his traditional legal knowledge into expert advice for collegiate and professional football players by combining his legal skills with his prior experience as a Division I athlete.

Nate is a proud alumnus of the University of Florida Levin College of Law (UF Law), where he served as the Executive Articles Editor on the *Florida Entertainment and Sports Law Review* (*FESLR*). He also participated in UF Law's impactful Veterans and Servicemembers Clinic, providing free legal services to local military personnel and veterans by aiding them in recovering owed benefits. Nate earned his Bachelor of Science in Economics at the United States Naval Academy, where he played Division I football. To top off his impressive education, professional background, and commitment to his community, Nate is a Navy veteran, having served over five years as a U.S. Naval Surface Warfare Officer, earning the rank of Lieutenant and serving more than three tours of duty domestically and abroad.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to this current position.

Even when put to paper, it is hard to make my career path look linear. I had the opportunity to play football at the United States Naval Academy from 2011-2015 before commissioning as a junior officer in the U.S. Navy. I served on three separate amphibious ships out of the Virginia Beach and Hampton Roads areas of Virginia, and separated from active duty in May 2020, more on that impeccable timing later. Following service, I was fortunate enough to work as an assistant strength and conditioning coach at Christopher Newport University, where I coached football, men's and women's soccer, men's and women's basketball, men's and women's lacrosse, and field hockey. While coaching, I had time between sessions to polish and submit law school applications in preparation for the next step in my professional career.

I leaned into every opportunity that UF Law provided in the realm of sports and entertainment law. I served as an active member of the Entertainment and Sports Law Society (EASLS), culminating in my being a panelist during the society's annual spring symposium.

Additionally, I was selected by my fellow editors to serve as the Executive Articles Editor of this journal my 3L year. On top of classically offered academic pursuits, I made sure to spend time getting to know members of the UF athletic department and the then new NIL team. I took every sports law related course that was offered and made sure that at the end of the course the professor knew my name and aspirations. One such course led to a legal internship with the PGA TOUR in their Ponte Vedra headquarters, which I still consider the highlight of my law school journey.

Following graduation, I joined the corporate, mergers & acquisitions, and tax law group of Burr & Forman in the firm's Orlando office. Additionally, I was a member of the firm's small sports group that focused on institutional counsel for colleges and universities as the NIL space matured. Naturally, the conversations from clients would turn to individual representation inquiries, as well as taking on a handful of athletes pro bono and counseling them in everything from high school recruiting to collegiate transfer portal processes. Finding early success and joy in the representation work led me to applying, testing for, and earning my contract advisor certification from the NFL Players Association (NFLPA).

Since joining MGC Sports at the beginning of the 2025 college football season I have had an incredible number of positive experiences, be it with players, parents, coaches, athletic directors, general managers, professional scouts, or fellow agents. The agent business is challenging, which is where you find the reward.

2. How did playing football at a Division I school and serving in the military prepare you for law school and, beyond that, practicing law and representing professional athletes? Do you find these skillsets overlap at all?

I was a very average college football player. However, I was surrounded by great teammates and leaders playing a place like the U.S. Naval Academy. The experience of playing at the Division I level gave me perspective and an understanding of the time commitment required for athletes to succeed on and off the field. That same perspective and understanding is helpful now, even a decade removed from my playing career, in connecting and communicating with potential and current clients. Being able to truly empathize with the schedules, distance from home, and finding balance between their athletic and academic endeavors goes a long way.

Similarly, active-duty military service provided me with a separate and fresh perspective. An opportunity to serve alongside people from all over the country, with differing geographic, economic, and cultural

backgrounds from my own. Learning to lead such a diverse group as a young junior officer was challenging and undoubtedly contributed to my eventual successes in law school and beyond. As a newly minted Ensign, I was tasked with everything from consoling a 17-year-old high school dropout who just signed a predatory car loan outside the base gate to counseling a 35-year-old father of three whose second marriage just ended. It felt impossibly difficult; you figure it out.

The practice of law can be a grind, especially as a young associate in a traditional law firm setting. The nose-to-the-grindstone mentality that it takes to show up day in and day out as a college athlete does a great job preparing you for both the law school slog and your early years as a practicing attorney. Sometimes that does look and feel like going through the motions, but the discipline to continue showing up eventually produces results. Whether that is literally clocking in every day at the office to be available to partners or figuratively being accessible to clients or fellow associates for support. Showing up should not be discounted.

I carry experiences from my playing days, active-duty service, and traditional law firm time into my work as an athlete agent daily. The skills that allowed me to succeed in each of those facets are the same ones I can lean on in this phase of my professional career.

3. How do you incorporate your experiences both prior to and during law school into how you deal with clients?

Every client is unique. They prefer to be spoken to, coached, counseled, and managed in a certain way, which, as an agent, you must take note of early in the relationship. Otherwise, the relationship will be short lived. Growing up, I lived in six different states before leaving for college, and numerous neighborhoods and schools before that. My four years in a college dorm at the U.S. Naval Academy, was the longest I had ever lived in one place. Today, I credit being a perpetual new guy for my ability to decode what clients, coaches, general managers, and players' parents expect out of an agent relationship. For some it is more regular communication, others let you know they are looking for a "you-will-speak-when-spoken-to" understanding. Neither is more right than the other, the goal is to ensure that the client is comfortable with the agent relationship and trusting of your counsel.

4. In law school you gave back to your own community by participating in UF Law's Veterans and Servicemembers Clinic. How important to you is it to honor your roots? What did you take away from that experience?

The Veterans and Servicemembers Clinic at UF Law was an incredible experience. I cannot say enough good things about Professor Judy Clausen as a person, professor, and practitioner. The work she facilitates for law students and on behalf of U.S. military veterans and their families is often life changing for all parties. Providing students with the proper amount of direction and freedom to work directly with military veterans regarding VA claims and disability ratings creates lasting impact. During my time with the clinic, I was fortunate enough to work with veterans of several wars, each with their own story and legal puzzles that we helped to solve.

As a military veteran, I personally went through the VA claims process upon separating from active duty and it can be a challenging experience. I was glad for the chance to pour back into the veteran community in law school as somewhat of a thank you for all the opportunities that my time in the Navy gave me.

5. How did practicing corporate law in a traditional law firm prepare you for working as a player agent for the National Football League (NFL) at MGC Sports?

Not all agents are created equal. As a prerequisite to sitting for the NFLPA exam, each applicant must earn a graduate degree or show proof of a certain number of years of relevant negotiating experience. However, there are requirements regarding the area of study for the required graduate degree, which means a Juris Doctorate from UF Law is the same as an 18-month online Master of Arts degree from East West North State College in the eyes of the NFLPA. The degree requirement is simply a threshold metric, increasing the barrier of entry for would-be agents. Neither the J.D. from UF, nor the M.A. from EWNSC, make you a better or more trusted agent by players. However, as an attorney your processes are often tighter, resulting in superior outcomes for clients.

The training you get as a young corporate associate in the traditional law firm setting is second to none. Sitting in on negotiations alongside seasoned partners and sophisticated clients provides practical application of all theory from law school and the nuance introduced by human emotions in business dealings. Like managing a professional athletic career, counseling a client through the sale of their decades-old family business can be an extremely personal and emotional matter. Getting to participate in negotiations with such heightened sensitivities as a young

associate provided me with insights that I carry into conversations with coaches and general managers on behalf of my athletes. Additionally, the less glamorous stuff like rote contract review and diligence on those same deals help with marketing and NIL dealings for both collegiate and professional athletes.

6. What new skills have you had to develop after transitioning from negotiating M&A and other corporate contracts to purely player contracts?

Unexpectedly, it was the sales aspect of the job of an agent that I had to shore up. Conveying to potential clients that I have the right stuff while not coming off as sales-y can be a trickly balance to strike. Sales are a huge part of the job of an agent. First, I am packaging myself and my agency to promote, present, and sell to potential clients, and often their families. Second, you package the player and his talents to promote, showcase, and sell to teams, coaches, and general managers. Finally, you package a player and his image to promote, highlight, and sell to marketers, brands, and corporations for business dealings. Understanding what a significant part of the job sales is, and becoming comfortable with that aspect of agent work was a major part in developing my skill as an agent.

7. As a former editor of *FESLR* and now a sports attorney with nearly two years under your belt, you have been following the development of NIL exploitation in college sports since its early discussions. How do you find the practical application of NIL exploitation in contract negotiation differ from the early theories surrounding the issue?

I despise calling the space the wild wild west and believe that the theoretical what ifs that plagued the first couple years of NIL exploitation made it sound much more ominous than it was and, certainly, is today. Speaking for football specifically, the market has corrected significantly since those early iterations, where seemingly every college athlete was getting a car deal. I think the passing of the House settlement has a lot to do with the NIL market cooling because players no longer need to provide a quid pro quo for payment by collectives or boosters, instead they are being paid directly by the schools to just play ball. Now, you see primarily those athletes that are actively seeking NIL opportunities to obtain larger brand deals. There are still several schools that work closely with third-party and in-house marketing agencies or collectives to allow for their athletic departments to spend in excess of the $20.5 million cap implemented by the House settlement.

The revenue sharing piece of the equation is its own bucket, but the application of the NIL dealings has become much more practical. Each negotiation regarding ownership rights and licenses is player-specific and depends upon the athlete's notoriety, which should often be forecasted to account for future value. Part of that forecast must be a consideration that the athlete is playing in a different uniform the following season, at least until transfer rules are modified. Ultimately, NIL exploitation is not the boogie man despite what headlines read during the first several years of its implementation. The on-field product has never been better and locker rooms are not split because the quarterbacks are making millions of dollars.

8. What advice do you have for students hoping to work in sports law?

First, you cannot discount the training you get at a traditional law firm if that is the route you take immediately following graduation. Your career is long; you have time to learn how to be lawyer before making the switch.

Second, and this may be a hot take, if you wish to be a sports agent, your relationships with players and potential clients are more important than your law degree to agencies. This business is a people-first endeavor, and proving to potential employers that you have the ability to make those connections is paramount.

Finally, in any career path, find a Challenger and a Champion. A Challenger is someone, often a peer, who pushes you to improve yourself along your career path and can celebrate your wins with you. A Champion is often a superior or mentor, who will speak highly of you in rooms you are not in and to people you do not know. Both are worth their weight in gold.

HOW ARTIFICIAL INTELLIGENCE IS REWRITING MUSIC LAW

Lindsay Meisels[*]

1. Copyright law was established to incentivize human authorship, but the rise of generative artificial intelligence (AI) is beginning to challenge the position of human artists, particularly in music. How do you think AI has reshaped the traditional foundations of original creativity and authorship within copyright law?

I am reluctant to say that AI has "reshaped" the traditional foundations of originality and authorship within copyright law. Rather, AI has introduced significant disruption into an industry that, historically, is slow to adapt.

AI has forced the music industry to confront issues it was not fully prepared to address, including how to define "human authorship" (as highlighted in *Thaler v. Perlmutter*) and how to quantify the extent of human input required to qualify for copyright protection. AI has also challenged traditional notions of originality by blurring the boundaries between creation, assistance, and reproduction.[1] At the same time, AI has raised difficult questions about accountability and liability for copyright infringement in the context of musical works, as well as whether the fair use doctrine can serve as a viable affirmative defense in such cases.

While there is a consensus that using AI as a tool differs from relying on it as a substitute for human creativity, the precise point at which that line is crossed remains unclear. This uncertainty has led courts to more carefully distinguish between human-authored "works" and AI-generated "ideas," with the key inquiry focusing on whether a human exercised meaningful creative control over the final expression, rather than merely providing prompts.[2]

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* Lindsay Meisels is an accomplished music and entertainment attorney who currently serves as a Director of Business and Legal Affairs at BMG, the fourth largest music company in the world. She has a strong interest in artists' rights management, the development of AI uses within the music industry, and catalog acquisitions. She regularly shares insights on emerging legal issues in the music business, demonstrating both expertise and ingenuity in her field. Lindsay's engagement with the broader legal and music communities includes participating in industry events and educational opportunities, for example, presenting on topics related to intellectual property ownership and deal-making in the entertainment industry. Lindsay is a trailblazer at the intersection of music and law and can provide valuable insight into the inner workings of the music industry at a pivotal time in its development.

1. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

2. Negar Bondari, *AI, Copyright, and the Law: The Ongoing Battle Over Intellectual Property Rights*, USC IP & TECH. L. SOC'Y (Feb. 4, 2025), https://sites.usc.edu/iptls/2025/02/04/ai-copyright-and-the-law-the-ongoing-battle-over-intellectual-property-rights/#:~:text=In%20August%202023%2C%20a%20district,be%20eligible%20for%20copyright%20protection [https://perma.cc/JX6G-Z9AY].

The Intellectual Property Clause was established to incentivize innovation by allowing authors and inventors to benefit from their efforts and investments. AI has totally disrupted the traditional framework of these protections, but whether this disruption will ultimately expand opportunities for artists to monetize their work or diminish them remains uncertain and unlikely to yield a clear or uniform answer.

2. Cases like *Thaler v. Perlmutter* and the Copyright Office's policy guidance on AI works have highlighted the requirement of human authorship for copyright protection; however, current technology seems to be challenging this. What is the current state of U.S. law regarding copyright protection for AI-generated works?

Copyright protection in the United States requires human authorship.[3] As highlighted in *Thaler v. Perlmutter*, works created solely by AI are not eligible for copyright protection.[4] Furthermore, the Copyright Office has determined that prompts, by themselves, do not constitute enough human control to qualify users of an AI system as the authors of the resulting output,[5] and due to the lack of control one has over the AI output, AI outputs are often considered unprotected ideas rather than protected, human-authored expressions.[6]

In order for a compilation to be copyrightable, it must satisfy the originality requirement.[7] While facts are not copyrightable, and the mere gathering of such facts does not constitute copyright protection, a fact-based work may still pass the originality test.[8] When determining whether a fact-based work passes the originality test, courts have been instructed to focus on the manner in which the collected facts have been selected, coordinated, and arranged.[9]

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3. U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY 7 (2025).

4. Thaler v. Perlmutter, 687 F. Supp. 3d 140, 147 (D.D.C. 2023) ("In order to be eligible for copyright, then, a work must have an author.").

5. U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY 18 (2025).

6. Christopher T. Zirpoli, *Generative Artificial Intelligence and Copyright Law*, LIB. OF CONG. (July 18, 2025), https://www.congress.gov/crs-product/LSB10922 [https://perma.cc/VQ32-96JH]; *see also* Copyright and A.I. Part 2: Copyrightability, U.S. COPYRIGHT OFF., 18 (2025), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-2-Copyright ability-Report.pdf [https://perma.cc/F364-6B5N] ("The Office concludes that, given current generally available technology, prompts alone do not provide sufficient human control to make users of an AI system the authors of the output. Prompts essentially function as instructions that convey unprotectible ideas.").

7. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 357 (1991).

8. U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY 8 (2025).

9. *Feist*, 499 U.S. 340, 345–48 (1991).

Similar to derivative works, when human-authored copyrightable expression is perceptible in AI-generated output, the individual who contributed that material will be considered the author of that portion of the output and retain protection for their creative expression.[10] When submitting an application to the Copyright Office, the Copyright Office requires creators to disclose and disclaim the use of generative AI in their work—AI-generated content that is more than *de minimis* should be explicitly excluded from the application.[11]

3. When considering AI-human-generated songs (i.e., lyrics/composition developed by a human songwriter while AI develops the actual recording), how might courts evaluate when such a work receives copyright protection? How much human involvement must be evident to constitute "enough" for copyright protection? What evidentiary challenges arise with this inquiry?

While *Thaler v. Perlmutter* confirmed that human-authorship is required for copyright protection, the court's decision, unfortunately, failed to address or clarify how much human input is necessary for a work to qualify for copyright protection. As a result, there is still no clear case law defining what level of human contribution is sufficient for AI-generated works to be considered copyrightable.[12]

While no clear definition has been established, prior case law and prior decisions made by the Copyright Office have provided examples of how much human input is necessary for a work to qualify for copyright protection. For example, the Copyright Office court refused registration of AI-generated images in a graphic novel, finding that detailed text prompts are not sufficient for human authorship as the output is not controlled by the artist.[13]

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10. U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY 24 (2025).

11. *Compendium (Third)* sec. 503.5; AI Registration Guidance at 16193; *see also* Registration Guidance for Works Containing AI-Generated Content Tr. (June 28, 2023), https://www.copyright.gov/ai/ai_policy_guidance.pdf [https://perma.cc/3REG-4MJG] (webinar on registration of works incorporating AI-generated material); *see also* U.S. COPYRIGHT OFFICE, COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY 3 (2024).

12. Miriam Lord, *U.S. Copyright Office on AI: Human Creativity Still Matters, Legally*, WIPO MAG. (Apr. 24, 2025), https://www.wipo.int/en/web/wipo-magazine/articles/us-copyright-office-on-ai-human-creativity-still-matters-legally-73696 [https://perma.cc/ZLU9-HT2J]; *see also* Lisa Oratz & Sean West, *Human Authorship Requirement Continues to Pose Difficulties for AI-Generated Works*, PERKINS COIE LLP (Feb. 29, 2024), https://perkinscoie.com/insights/article/human-authorship-requirement-continues-pose-difficulties-ai-generated-works [https://perma.cc/L8TL-LLQD].

13. Letter from Robert J. Kasunic, Assoc. Reg. of Copyrights, U.S. Copyright Office, to Van Lindberg, Att'y, Taylor English Duma LLP (Feb. 21, 2023) https://copyright.gov/docs/zarya-of-the-dawn.pdf [https://perma.cc/2M6L-NUW9].

Without clear case law, determining how much human involvement is sufficient for copyright protection in AI-generated works presents several evidentiary challenges. Many users do not keep detailed records of their prompts, revisions, or editing steps, often making it difficult to determine what portion of the final output or work is attributable to or controlled by the user versus the AI system.

4. Much of the debate in AI and music centers on using copyrighted recordings or compositions as inputs to train generative models' outputs. What are the main arguments for and against permitting that kind of use, and how might recent litigation surrounding fair use, such as *Bartz v. Anthropic* and *Kadrey v. Meta*, shape the future of AI's relationship with the music industry?

The main argument for permitting using copyrighted recordings or compositions as inputs to train generative models' outputs centers around the legal doctrine of fair use. Section 107 of the Copyright Act calls for consideration of the following four factors in evaluating a question of fair use:

1. The purpose and character of the use, including whether the use is for commercial purposes or if it is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect on the use upon the potential market for or value of the copyrighted work.[14]

Currently, AI companies are attempting to use the fair use defense to argue that training large language models (LLMs) on copyrighted data is transformative, creating new functionality and alleging that AI training serves a completely different purpose than the original copyrighted work.

The main argument against permitting use of copyrighted recordings or compositions as inputs to train generative models' outputs is that without proper licensing of the copyrighted works from rightsholders, this use qualifies as copyright infringement, therefore violating copyright holder's economic rights, promoting unfair competition, and qualifying as a market substitution, therefore diluting the worth of the existing copyrighted material.

The court in *Bartz v. Anthropic* found that training LLMs on licensed data to generate new, transformative content is fair use, while piracy is not.[15] The court's decision in *Kadrey v. Meta* established that "fair use is

14. 17 U.S.C. § 107.
15. Bartz v. ANTHROPIC PBC, 787 F. Supp. 3d 1007 (Dist. Ct. N.D. Cali. June 2025)

a fact-specific doctrine that requires case-by-case analysis sensitive to new technologies and their potential consequences."[16] In my view, the two rulings signal that courts are not yet prepared to adopt a definitive position on or set a clear standard for the copyrightability of AI-generated works or on whether AI companies may rely on fair use as a defense to copyright infringement.

5. If an AI-generated song infringes someone's copyright, should the user, the developer, or the platform be held liable, and how should liability be allocated?

Determining who should bear liability for copyright infringement in these situations is challenging, particularly because neither developers nor users can reliably predict or explain why a given output is produced.[17] Some contend that, since the AI system itself generates the expressive content, courts should treat the system as the direct infringer, potentially recognizing it as an artificial legal actor.[18] Even so, this would not necessarily absolve developers or users of responsibility; they may still face secondary liability based on their own conduct if they contribute or facilitate the infringement.[19]

Unfortunately, the future for liability is uncertain. The U.S. Supreme Court recently ruled in *Cox Communications, Inc. et al. v. Sony Music Entertainment, et al.* that an internet service provider (ISP) could not be found liable for contributory copyright infringement (i.e., music piracy committed by its subscribers) under the doctrine of secondary liability simply because the ISP continued to provide known copyright infringers Internet access.[20] On the one hand, this U.S. Supreme Court decision has reshaped contributory liability for willful copyright infringement. On the other hand, and particularly in the context of AI, it should be understood primarily as an indication of the Court's current approach to assessing

16. Kadrey v. Meta Platforms, Inc., 2025 WL 1752484 at *22 (June 25, 2025).

17. Michael P. Goodyear, *Who Is Responsible For AI Copyright Infringement*, ISSUES IN SCI. & TECH. 41, no. 1 (2024), https://doi.org/10.58875/ZERH2384 [https://perma.cc/5YFP-U97F].

18. *Id.*

19. *Id.*

20. Cox Commc'ns, Inc. et al. v. Sony Music Ent., et al., case, No. 24-171, slip op. (U.S. Mar. 25, 2026); *see also* Nathan Smith & Philip Nulud, *Cox v. Sony – A New Landscape in Contributory Copyright Infringement*, BUCHALTER (Mar. 30, 2026), https://www.buchalter.com/insights/cox-v-sony-a-new-landscape-in-contributory-copyright-infringement/ [https://perma.cc/745M-Z5A6]; *see also* Murray Stassen, *U.S. Supreme Court Sides With Cox Communications in Landmark Music Piracy Case Brought by Record Labels*, MUSIC BUS. WORLDWIDE (Mar. 25, 2026), https://www.musicbusinessworldwide.com/us-supreme-court-sides-with-cox-communications-in-landmark-music-piracy-case-brought-by-record-labels/ [https://perma.cc/F22T-CQCJ].

liability, rather than a definitive resolution of how such issues will be handled going forward.

Under current law, if a generative AI output infringes a copyright in an existing work, both the AI user and the AI company could potentially be held liable. However, it may be difficult to analyze the user's liability in some cases, as the user may not have direct access to or be aware of a copyrighted work purportedly infringed by an AI output. The AI company may also face liability under the doctrine of vicarious infringement, which applies to defendants who have the right and ability to supervise the infringing activity and have a direct financial interest in such activities.[21]

6. AI "deepfake" vocals that mimic an artist's voice are being increasingly reported. How does this intersect with the right of publicity, and should artists be able to control their likeness in these instances?

The right of publicity is governed by state laws and protects against the unauthorized commercial use and exploitation of a person's, such as a musician's, name, image, and likeness. Additionally, some states recognize a person's voice and signature as being protected. For example, in California, "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, […] shall be liable for any damages sustained by the person(s) injured as a result hereof. Additionally, the person who violated this section shall be liable to the injured party or parties […] for any lost profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. Punitive damages may also be awarded to the injured party or parties."[22] AI-generated soundalikes and digital replicas produced without the consent of the artist or record label are two examples of conduct that can infringe this right.[23]

It seems self-evident that artists should retain control over the use of their likeness in these situations. AI-generated digital replicas can

21. Christopher T. Zirpoli, *Generative Artificial Intelligence and Copyright Law*, LIB. OF CONG. (July 18, 2025), https://www.congress.gov/crs-product/LSB10922#:~:text=If%20a%20generative%20AI%20output,to%20generate%20an%20infringing%20output [https://perma.cc/VQ32-96JH].

22. CAL. CIV. CODE § 3344 (2026).

23. Ashton Friedman, *AI Deepfakes vs. Right of Publicity*, UNIV. OF DENVER SPORTS & ENT. L.J. (Nov. 17, 2025), https://duselj.wordpress.com/2025/11/17/ai-deepfakes-vs-right-of-publicity/ [https://perma.cc/V6QV-8FAP].

produce commercial endorsements, political propaganda, or damaging content to one's reputation without the individual's consent. The content is not actually their image or voice but rather a computer-generated fiction that mimics their identity and is created without the person's consent, and often without their knowledge. Recently, Sony asked streaming platforms to take down more than 135,000 songs it claims were fraudulently created using generative AI to impersonate some of Sony's largest recording artists.[24] AI "deepfakes" can damage a recording artist's release campaign or even tarnish their reputation, both potentially causing a great deal of direct commercial harm.[25]

While the states may have different rights of publicity laws, and therefore, offer different protections against violations thereof, there is a broad consensus that the usage (including commercial exploitation and monetization) of one's name, image, or likeness without their knowledge or consent, should be prohibited. The TAKE IT DOWN ACT (Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act), signed into law on May 19, 2025, criminalizes the non-consensual distribution of intimate images and AI-generated deepfakes.[26] It mandates that online platforms remove such content within forty-eight hours of a user report or face potential liability.[27] In response to the need to protect one's intellectual property rights in their voice and visual likeness against unauthorized use in digital replicas, a bipartisan group of senators proposed, as U.S. federal legislation, the Nurture Originals, Foster Art, and Keep Entertainment Safe Act (the "NO FAKES Act")."[28]

7. Beyond copyright law, AI is also impacting other areas of the industry, such as streaming, discovery algorithms, and concert ticket purchasing. How might implications such as streaming fraud, AI discovery playlists, and ticketing bots reshape the industry?

Uploading songs under fictitious artists to digital service providers (DSPs) and artificially inflating play counts to generate royalty payments—thereby distorting the royalty pool and the distribution of streaming income—constitutes streaming fraud and manipulation. In order to promote a fair and sustainable music ecosystem, it's critical that

24. Mandy Dalugdug, *Sony Music Has Targeted 135,000+ Deepfakes of its Artists' Music for Removal From Streaming Platforms*, MUSIC BUS. WORLDWIDE (Mar. 19, 2026), https://www.musicbusinessworldwide.com/sony-music-has-targeted-135000-deepfakes-of-its-artists-music-for-removal-from-streaming-platforms/ [https://perma.cc/Q7JK-MX9Q].

25. *Id.*

26. Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act S. 416, 119th Cong. § 12 (2025).

27. *Id.*

28. *Id.*

emphasis be put on transparency by identifying and labelling AI-generated material.[29] Without proper identification, users are generally not aware that they are listening to unauthorized, AI-generated content, which in turn, creates confusion, undermines trust, and impacts their experiences—all of which would deter a loyal music fan from using the platform that facilitated this negative experience.[30]

While one can safely say that streaming fraud and manipulation is inherently wrong, the same cannot be said about AI discovery playlists. Recently, we've seen a large push for digital services to increase engagement through personalization. Earlier this year, Spotify deployed its "Prompted Playlist" feature, currently in beta for Premium subscribers. This feature generates personalized playlists based on user-generated prompts, user listening history, and musical trends. Users can edit prompts to create custom playlists by describing exactly what they want to hear.[31] While some are big supporters of this new feature, others feel it misses the mark.[32]

AI, as it relates to ticketing, has rapidly reshaped the music industry in both positive and negative ways. On the one hand, AI has automated high-speed ticket purchases which helps fans secure tickets but also enables mass scalping causing inflated prices for popular shows. AI is being used to fight AI for "bot mitigation" to stop fraudulent traffic, while it is also being used to streamline venue logistics and enhance fan experiences.

8. Many artists are at odds with Spotify's recent push to embrace AI-generated music more than it did before. How can the law support musicians who are concerned about streaming dilution and loss of revenue to AI? What potential benefits are there to Spotify's position?

The law can support musicians who are concerned about streaming dilution and loss of revenue to AI through a combination of new federal legislation, updated copyright enforcement (i.e., creating the Copyright

29. Mandy Dalugdug, *Sony Music Has Targeted 135,000+ Deepfakes of its Artists' Music for Removal From Streaming Platforms*, MUSIC BUS. WORLDWIDE (Mar. 19, 2026), https://www.musicbusinessworldwide.com/sony-music-has-targeted-135000-deepfakes-of-its-artists-music-for-removal-from-streaming-platforms/ [https://perma.cc/Q7JK-MX9Q].

30. *Id.*

31. *Prompted Playlist in Beta Coming to Premium Listeners in More Markets*, FOR THE RECORD (Jan. 22, 2026), https://newsroom.spotify.com/2026-01-22/prompted-playlists-expansion/ [https://perma.cc/3GX5-2NDX].

32. Dmitry Pastukhov, *Chatting With The Algorithm: What Spotify's AI Playlists Really Change (and What They Don't)*, MUSIC TOMORROW (Dec. 17, 2025), https://www.music-tomorrow.com/blog/chatting-with-the-algorithm-spotify-ai-playlists-music-discovery [https://perma.cc/U9XC-ASQ9] ("AI Playlists don't introduce a new kind of musical intelligence.").

Office AI Guidelines[33]), and holding platforms accountable. Proposed legal solutions focus on protecting the economic value of human-created music, regulating the unauthorized use of voices, and ensuring fair compensation for AI training.[34]

We've seen the Ensuring Likeness, Voice, and Image Security (ELVIS) Act passed in Tennessee, protecting musicians from the unauthorized, AI-generated misuse of their voice, likeness, and image, and safeguarding artists against AI voice cloning and deepfakes. As mentioned above, legislators are pushing to have federal legislation enacted to protect individuals' rights to their voices and visual likeness from unauthorized AI-generated "digital replicas" through the NO FAKES ACT,[35] and proposing a U.S. federal law requiring AI companies to disclose copyrighted works used in training AI models (otherwise known as the Generative AI Copyright Disclosure Act (H.R. 7913)).

Spotify's position will undoubtedly benefit Spotify by reducing royalty costs, increasing user engagement and retention, and giving them a strategic advantage against competitors. The potential advantages of Spotify's position for users include allowing them to engage with their favorite artists' music through innovative AI-generated features. On the artist front, AI-generated derivatives—such as covers or remixes—could also create new revenue opportunities, enabling artists to further monetize their existing catalogs.[36]

While the industry tends to focus on the largest artists (including songwriters), many artists haven't gained much from traditional music licensing, with some earning very little to almost no income from the streaming or licensing of their catalogs. For these artists, the monetization

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33. Christopher T. Zirpoli, *Generative Artificial Intelligence and Copyright Law*, LIB. OF CONG. (July 18, 2025), https://www.congress.gov/crs-product/LSB10922#:~:text=If%20a%20generative%20AI%20output,to%20generate%20an%20infringing%20output [https://perma.cc/VQ32-96JH].

34. *AI Could Endanger the Music Industry. Here's How Congress Can Protect Artists*, BLACKBURN (May 27, 2025), https://www.blackburn.senate.gov/2025/5/technology/ai-could-endanger-the-music-industry-here-s-how-congress-can-protect-artists#:~:text=To%20protect%20our%20creative%20community,should%20support%20this%20vital%20legislation [https://perma.cc/WS4K-HY9A].

35. *Id.*; James Hanley, *Amid Rise of Deepfakes Spotify to Let Artist Vet Releases Before They Appear on Their Profiles*, MUSIC BUS. WORLDWIDE (Mar. 24, 2026), https://www.musicbusinessworldwide.com/amid-rise-of-ai-deepfakes-spotify-to-let-artists-vet-releases-before-they-appear-on-their-profiles/ [https://perma.cc/K7AA-328F].

36. Murray Stassen, *Spotify eyes AI 'derivatives' as new revenue stream for artists – says its tech to let fans make remixes and covers is ready*, MUSIC BUS. WORLDWIDE (Feb. 10, 2026), https://www.musicbusinessworldwide.com/spotify-eyes-ai-derivatives-as-new-revenue-stream-for-artists-and-says-its-tech-to-let-fans-make-remixes-covers-is-ready/#:~:text=News-,Spotify%20eyes%20AI%20'derivatives'%20as%20new%20revenue%20stream%20for%20artists,remixes%20and%20covers%20is%20ready&text=Spotify%20says%20it%20wants%20to,Licensing [https://perma.cc/XU3Y-5M9B].

opportunities offered by AI—particularly around their name, image, and likeness—may be more valuable than the current limited returns from owning their copyrights, even when weighed against the potential impacts of AI-generated music on streaming royalties.

FIDUCIARY FAILURE AND INSTITUTIONAL DRIFT IN THE NFLPA: LEGAL DUTIES, MEMBER HARM, AND THE NEED FOR STRUCTURAL REFORM

Chris Hanna[*] & *Jeffrey Levine*[**]

Abstract

When the Cleveland Browns provided controversial quarterback Deshaun Watson with a fully guaranteed contract, it established a recent precedent that National Football League (NFL or League) teams did not wish to see followed. Soon thereafter, three quarterbacks—Lamar Jackson, Kyler Murray, and Russell Wilson—failed to receive fully guaranteed contracts. The NFL Players Association (NFLPA) filed a grievance arbitrable under the collective bargaining agreement. The union alleged ownership colluded to keep any post-Watson quarterback (and hundreds of NFL veteran players) from receiving a fully guaranteed contract. This manuscript examines the alleged activities of the NFLPA surrounding this case and ancillary activities of the NFLPA that may have done a disservice to NFL players and breached legal duties owed to the NFLPA membership. Through examining the NFLPA's legal obligations pursuant to federal labor law and the significant harm to membership, the authors argue that there is a significant need for structural reform.

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INTRODUCTION

On March 18, 2022, the Cleveland Browns traded for Houston Texans' quarterback Deshaun Watson and promised him a five-year, $230 million guaranteed contract that set a new NFL record for the League's highest guaranteed contract.[1] The move established a precedent against which all future quarterback and player contracts could be compared. This led NFL Commissioner Roger Goodell to raise concerns about the League's largest salaries and the impact contracts like this would have in terms of eroding the collective bargaining agreement and team owners' resistance to guaranteed money unless the clubs (rather than the players) determine a guaranteed contract.[2] NFL general counsel Jeffrey Pash assured Goodell he would raise Goodell's concerns at an upcoming NFL Management Council (NFLMC) meeting to make sure owners were focused and ahead of the issue of fully guaranteed contracts.[3]

When quarterbacks whose contracts were negotiated soon after the Watson contract—including Russell Wilson, Lamar Jackson, and Kyler Murray—tried to follow that precedent, none of them received a fully guaranteed deal. This refusal by NFL franchises to offer fully guaranteed contracts, which appeared to be done in coordination with the NFLMC, led to the filing of a grievance against the League.[4] System arbitrator Christopher F. Droney, who heard the grievance, found "[t]here is little

1. Jake Trotter & Sarah Barshop, D*eshaun Watson Traded to Cleveland Browns; QB Set to Sign Deal Worth $230M Guaranteed, Sources Say*, ESPN (Mar. 18, 2022, at 15:53 PM ET), https://www.espn.com/nfl/story/_/id/33538489/deshaun-watson-willing-waive-no-trade-clause-cleveland-browns-sources-say [https://perma.cc/5W6C-YGWX].

2. NFLPA v. NFL, et al., Arbitration Decision, 37 (Droney, Arb.) (Jan. 14, 2025), https://www.pablo.show/api/v1/file/a3eb7284-d6e8-4d7b-a55a-a2d3f9057d1d.pdf [https://perma.cc/QB4H-LB89].

3. *Id*.

4. *Id.* at 7–8.

question that the NFL Management Council, with the blessing of the Commissioner, encouraged the 32 NFL Clubs to reduce guarantees in veterans' contracts at the March 2022 annual owners' meeting."[5] However, Droney found in favor of the NFL, citing the NFL arbitration standard of a clear preponderance of the evidence and stating the NFL teams still exercised independent free will in their decisions regarding fully guaranteed contracts.[6] Nonetheless, no NFL team has offered a top quarterback a fully guaranteed contract since Watson received his deal.

Removing this adverse decision from the forefront, something seemingly more significant emerged for the NFLPA's rank and file. The NFL players had neither been informed by the union that the arbitration document existed nor had they learned about all information the document contained until recently. This happened despite the fact the NFLPA leadership had access to the document and would ordinarily be expected to inform players about something so consequential. The leadership's decision to remain silent was not incidental; it reflected a deeper choice about what to share with members and when the information would be shared.

Attorney and sport reporter Mike Florio became curious about why he could not learn details about the contract. Once he started trying to find them, he discovered that, despite having tremendous sources throughout the NFL, he could not obtain the arbitration document and determined the document was being withheld by both the NFL and NFLPA to keep the document and its contents secret from everyone.[7] ESPN later reported on July 9, 2025, that the NFL and NFLPA did indeed cooperate to keep the arbitration paperwork secret.[8] At the end of his article, Florio essentially created an open challenge, in which he expressed his frustration with obtaining the seemingly secret arbitration document, to any reporter to race him to obtain the document.[9] Sport reporter Pablo Torre took Florio up on his challenge. Through a source, Torre obtained a copy of the January 14, 2025, secret sixty-one-page arbitration agreement, which he made public on June 24, 2025.[10] And while Droney found for the NFL, Florio stated on behalf of himself and Torre, "[t]he document

5. *Id*. at 126–27.

6. *Id*. at 127.

7. Pablo Torre, *The "Holy Grail" of NFL Secrets*, PABLO TORRE FINDS OUT (June 24, 2025), https://www.pablo.show/p/the-holy-grail-of-nfl-secrets [https://perma.cc/8KCE-YYGY].

8. Don Van Natta Jr. & Kalyn Kahler, *Sources: NFLPA, NFL Agreed to Keep Collusion Findings Secret*, ESPN (July 9, 2025, at 14:47 ET), https://www.espn.com/nfl/story/_/id/45703132/nflpa-nfl-agreed-keep-collusion-findings-secret [https://perma.cc/2VG3-P6NR].

9. Mike Florio, *NFLPA Declines to Release 61-Page Collusion Ruling*, NBC SPORTS: PRO FOOTBALL TALK (June 11, 2025, at 06:20 AM), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/nflpa-declines-to-release-61-page-collusion-ruling [https://perma.cc/44CK-JB6W].

10. Torre, *supra* note 7.

nevertheless includes more than enough evidence, in our view, on which a finding of actual collusion could have been based."[11]

The idea that the NFL may have colluded against its players became significant news. Information concerning the secret arbitration document was part of that news. Despite Florio and Torre raising additional concerns about the documents and other related data they had gathered at the time, the media and public at large initially focused almost exclusively on the collusion angle. Sample headlines demonstrating the focus on collusion include "In stunning ruling, arbitrator finds NFL encouraged collusion,"[12] "NFL 'encouraged' collusion in shocking reveal as league desperately tried to hide docs,"[13] and "Documents reveal NFL encouraged owners to reduce contract guarantees."[14] Missing from the headlines and much of the coverage were Torre and Florio's equally serious allegations that NFLPA senior leadership, including then-President JC Tretter, may have been either incompetent, potentially rising to the level of negligence in their representation of players, or knowingly in breach of their fiduciary duties due to undisclosed conflicts of interest.[15]

It is this latter concern, the possibility that union leaders concealed material information and acted out of self-interest, that provides the true legal lens for understanding the scandal. What began as a collusion dispute in fact illuminates a more fundamental question: whether union leaders fulfilled their duty of fair representation to the members they were bound to serve. The paper therefore frames the NFLPA's choices not as isolated controversies but as interrelated episodes of fiduciary failure that can only be understood through the doctrinal framework of the duty of fair representation.

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11. Mike Florio, *Why Did the NFL and NFLPA Hide the Collusion Ruling?*, NBC SPORTS: PRO FOOTBALL TALK (June 24, 2025, at 09:44 ET), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/why-did-the-nfl-and-nflpa-hide-the-collusion-ruling [https://perma.cc/RJ4F-UT6Z].

12. Chris Bumbaca, *In Stunning Ruling, Arbitrator Finds NFL Encouraged Collusion*, USA TODAY (June 24, 2025, at 18:34 ET), https://www.usatoday.com/story/sports/nfl/2025/06/24/nfl-collusion-roger-goodell-lamar-jackson/84340378007/ [https://perma.cc/6RY5-Q7WF].

13. Matt Ehalt, *NFL 'Encouraged' Collusion in Shocking Reveal as League Desperately Tried to Hide Docs*, N.Y. POST (June 24, 2025, at 13:24 ET), https://nypost.com/2025/06/24/sports/nfl-encouraged-collusion-in-shocking-reveal/ [https://perma.cc/7V5Y-2J84].

14. Ryan Phillips, *Documents Reveal NFL Encouraged Owners to Reduce Contract Guarantees*, SPORTS ILLUSTRATED (June 24, 2025), https://www.si.com/nfl/documents-reveal-nfl-encouraged-owners-reduce-contract-guarantees [https://perma.cc/T9YM-MN2W].

15. Pablo Torre, *Collusion-Gate: The Secret Texts and Testimony of NFL Owners and Superstar QBs, Revealed*, YOUTUBE (June 24, 2025), https://www.youtube.com/watch?v=P42Wq3fmTYg [https://perma.cc/6ESW-9FH8].

I. NFLPA ISSUES EMERGING FROM ARBITRATION

The arbitration dispute gave rise to several alleged issues that extend well beyond the collusion finding itself. Media coverage has highlighted claims that the NFLPA lacked transparency with its members, that union leadership placed protection of executives over their duty of fair representation and good faith,[16] that the NFLPA failed to appeal until the arbitration document became public, and that senior leaders engaged in undisclosed conflicts of interest.[17] Taken in total, these controversies raise fundamental questions not about isolated lapses but about whether the union fulfilled its fiduciary obligations to the 2,400 players it represents. Given that the NFLPA manages assets exceeding $1 billion and pays its executive director $3.4 million annually,[18] its members are entitled to expect conduct that reflects loyalty, candor, and accountability at the highest level. This paper therefore treats each episode not as an isolated failure, but as a cumulative expression of institutional drift away from the core protections the duty of fair representation was designed to secure. The following sections develop this argument by applying the tripartite duty of fair representation standard—arbitrariness, discrimination, and bad faith[19]—across the factual episodes that have defined the NFLPA's recent controversies.

A. *The Duty of Fair Representation*

Before turning to the NFLPA's specific controversies, it is important to establish the legal framework that governs union conduct. The National Labor Relations Act (NLRA) vests unions with exclusive authority to bargain on behalf of all employees in the unit, which necessarily limits the ability of individuals to act for themselves.[20] To safeguard those interests, courts have imposed a duty of fair representation requiring unions to treat all members fairly, equitably, and in good faith.[21] The doctrine functions as a judicially crafted check against unfair or biased conduct in the negotiation, administration, and

16. Florio, *supra* note 11.

17. Rebecca Tauber & Mike Jones, *NFLPA Executive Committee Backs Director Lloyd Howell Following Concerns About Conflict of Interest*, THE ATHLETIC (July 13, 2025), https://nytimes.com/athletic/6491352/2025/07/13/lloyd-howell-nflpa-carlyle-group/ [https://perma.cc/DFB7-Q8ST].

18. Dan Wetzel, *Wetzel: Why the NFLPA Mess Should Matter to Football Fans*, ESPN (July 11, 2025, at 06:45 ET), https://www.espn.com/nfl/story/_/id/45718269/nflpa-mess-matter-football-fans [https://perma.cc/4VSE-NN99].

19. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

20. *Id*. at 182; *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009) (demonstrating how the NLRA vests authority in organizations, such as the Service Employees International Union, as "the exclusive bargaining representative of employees. . . .").

21. Ballard v. Nat'l Football League Players Ass'n, 123 F. Supp. 3d 1161, 1166–67 (E.D. Mo. 2015); Marquez v. Screen Actors Guild, 525 U.S. 33, 36 (1998).

enforcement of collective bargaining agreements.[22] By establishing this duty, the courts ensure that unions fulfill their role as fiduciaries for all employees within the bargaining unit, maintaining confidence in the union's legitimacy while promoting fairness and equity in labor relations.

Courts apply a three-part standard to determine whether this duty has been breached: a union's conduct is unlawful if it is arbitrary, discriminatory, or in bad faith.[23] Only one of the three elements needs to be present for a breach of duty to be present. A union's conduct is "arbitrary" if it is so far beyond the range of what could be considered reasonable that it is irrational, egregious, unfair, or bears no connection to valid union interests[24] Discrimination occurs when members of the bargaining unit are treated differently based on prohibited characteristics such as race, gender, political beliefs, or other impermissible classifications, in a manner that is intentional, severe, and unrelated to legitimate union purpose.[25] Conduct is in bad faith when it involves fraud, dishonest action, or intentionally misleading conduct.[26] This is a demanding standard that requires a union's actions toward bargaining-unit employees to be sufficiently egregious or intentionally misleading enough to arouse resentment, anger, or hostility in others.[27]

Although the doctrine does not require perfection or even sound judgment in every instance, it prohibits conduct that is wholly irrational, perfunctory, or tainted by dishonesty. A breach may also arise when a union withholds material information, fails to communicate decisions that directly affect member rights, or otherwise acts in a manner inconsistent with honesty and transparency.[28] In *NLRB v. Local 282, International Brotherhood of Teamsters* (1984),[29] for example, the court determined that a union failed in its obligation by not notifying employees of an arbitration decision that substantially altered their seniority rights, a silence that was considered arbitrary because it deprived members of the ability to respond to an outcome that directly shaped their employment prospects. This line of authority makes clear that the duty of fair representation is not limited to overt discrimination cases; rather, it encompasses failures of transparency and candor when such failures undermine the ability of members to protect their interests.

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22. Borowiec v. Loc. 1570 of Int'l Bhd. of Boilermakers, 626 F. Supp. 296, 302 (D. Mass. 1986).

23. *Vaca*, 386 U.S. at 190; Peterson v. Kennedy, 771 F.2d 1244, 1253–54 (9th Cir. 1985).

24. Bryan v. Am. Airlines, Inc., 988 F.3d 68, 74 (1st Cir. 2021).

25. Sullers v. Int'l Union Elevator Constructors, 141 F.4th 890, 899 (7th Cir. 2025).

26. Good Samaritan Med. Ctr. v. NLRB, 858 F.3d 617, 630 (1st Cir. 2017); Ruisi v. NLRB, 856 F.3d 1031, 1038 (D.C. Cir. 2017).

27. *Ruisi*, 856 F.3d at 1038.

28. Warehouse Union, Local 860, etc. v. NLRB, 652 F.2d 1022, 1025 (D.C. Cir. 1981) (quoting *NLRB v. Am. Postal Workers Union, etc.*, 618 F.2d 1249, 1255 (8th Cir. 1980)).

29. *See* NLRB v. Local 282, Int'l Bhd. of Teamsters, 740 F.2d 141, 147 (2d Cir. 1984).

B. *Transparency Failures*

NFL players should have a fundamental right to know whether ownership is coordinating strategies that directly affect contract negotiations. Transparency on this point is essential, particularly where the stakes involve fully guaranteed contracts that shape the labor market for elite talent. Instead, as previously noted, ESPN reported that the NFLPA conspired with the NFL to keep the arbitration decision (and with it the owners' internal views on guaranteed contracts) out of sight from both players and the public.[30] Florio wrote, "[f]rankly, an argument could be made that the union's failure to disclose the ruling to its members violates the federal duty of fair representation."[31]

The impact of the concealment had significant implications. The three quarterbacks who are featured in the arbitration ruling who were explicitly named in the arbitration ruling, Jackson, Murray, and Wilson, were denied access to the findings that bore directly on their own negotiations. Likewise, the broader veteran workforce was deprived of information essential to understanding the conditions under which their bargaining rights were being constrained. This omission was particularly damaging in light of the NFL's monopsony structure, where one buyer controls the market for professional football labor. Decades of economic research[32] demonstrate that monopsony power depresses salaries. Against that backdrop, whether legally sufficient to establish a violation or not, evidence of collusion takes on amplified significance. The NFLPA exacerbated the structural disadvantage already facing players by withholding such information.

C. *Applying the Duty of Fair Representation*

A factfinder could conclude that withholding the details of the arbitration decision was arbitrary because it fell outside the wide range of reasonable conduct expected in grievance handling.[33] Arbitrary conduct is typically defined as irrational, egregious, or wholly disconnected from legitimate union interests.[34] Keeping players in the dark about the substance of a decision directly impaired their bargaining leverage. Therefore, the NFLPA acted in a manner so unreasonable that it

30. Van Natta Jr. & Kahler, *supra* note 8.

31. Florio, *supra* note 9.

32. Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203 (2010); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (2d ed. Macmillan 1969); *see* Gerald W. Scully, *Pay and Performance in Major League Baseball*, 64 AM. ECON. REV. 915 (1974); *see* Brad R. Humphreys & Hyunwoong Pyun, *Monopsony Exploitation in Professional Sport: Evidence from Major League Baseball Position Players, 2000–2011*, 38 MANAGERIAL & DECISION ECON. 676 (2017).

33. *See* Thompson v. United Transp. Union, 588 F.3d 568, 572 (8th Cir. 2009).

34. Peterson v. Kennedy, 771 F.2d 1244, 1253–54 (9th Cir. 1985).

undermined the very purpose of collective representation. In past cases, courts have warned that a union cannot shield itself by invoking discretion when its actions bear no rational relationship to member interests; silence or strategic vagueness in the face of material rulings strips members of agency and denies them the opportunity to respond.[35] As Levinson (2007)[36] underscores in discussing *Air Line Pilots Association v. O'Neill* (1991), courts usually afford unions a "wide range of reasonableness," but they draw the line where conduct is perfunctory, wholly irrational, or undertaken with disregard for member rights.[37] By treating disclosure of a consequential arbitration ruling as if transparency were optional, the NFLPA's silence becomes precisely the sort of perfunctory representation that the duty of fair representation was designed to police.

The harm caused by nondisclosure was both individual and systemic. Players like Jackson, Murray, and Wilson were specifically named in the ruling yet were never told what the arbitrator concluded about their contract negotiations. At the same time, every NFL veteran was denied access to information that bore directly on the labor market for their services. In a monopsonistic system, where one buyer exerts overwhelming control, withholding evidence of potential collusion compounds the structural disadvantage already facing players. Courts have long recognized that unions cannot evade their duty by remaining silent in the face of consequential information; the duty of fair representation requires affirmative honesty and transparency when decisions materially affect members.[38] Thus, the secrecy surrounding the arbitration ruling did not simply affect a handful of quarterbacks but distorted the information environment for the entire bargaining unit.

Concealment of the arbitration decision could also constitute bad faith. Courts have consistently recognized that bad faith encompasses dishonest motives, fraudulent conduct, or intentionally misleading actions.[39] Unlike arbitrariness, which focuses on the absence of reason, bad faith turns on intent: whether union leaders acted to protect their own reputations, curry favor with management, or avoid accountability to the membership. If the nondisclosure was part of a quid pro quo with the NFL, although it is unclear what benefit the League received, then the conduct reflects disloyalty rather than mere poor judgment. Employees

35. *See* NLRB v. Local 282, Int'l Bhd. of Teamsters, 740 F.2d at 147.

36. Rachel Levinson, *The Duty of Fair Representation*., AM. ASS'N OF UNIV. PROFESSORS, 1, 2 (2007), https://www.aaup.org/NR/rdonlyres/522E23C3-FF7E-443C-A843-AE1527B3EBF8/0/DFR.pdf [https://perma.cc/986S-8P83].

37. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 78–79 (1991).

38. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976).

39. Good Samaritan Med. Ctr. v. NLRB, 858 F.3d 617, 630 (1st Cir. 2017) (citing Spellacy v. Airline Pilots Ass'n-Int'l, 156 F.3d 120, 126 (2d Cir. 1998)); Ruisi v. NLRB, 856 F.3d at 1038.

already occupy a "precarious and often unprotected"[40] position between powerful unions and management, making concealment driven by self-interest especially corrosive. In that vulnerable posture, secrecy is not a neutral act but a signal that the union has abandoned its adversarial role in favor of institutional self-preservation. Levinson (2007) similarly notes that courts are particularly wary when evidence suggests unions acted out of hostility or self-preservation rather than reasoned balancing of interests.[41] The fiduciary obligation inherent in the duty of fair representation requires candor and loyalty to those represented, and any action that advances personal or institutional interests at the expense of members strikes at the very heart of that obligation.

Finally, a breach could arise if union leaders engaged in fraudulent or misleading conduct by withholding the specifics of the arbitration ruling while leaving members with the impression that nothing adverse had occurred. Intentionally deceptive communication, or omissions that create a materially misleading picture, can violate the duty of fair representation because they distort the information members rely on to protect themselves.[42] Here, the harm stemmed not from an outright falsehood but from the NFLPA's decision to obscure the ruling's content, depriving members of an accurate understanding of its implications for their bargaining leverage.

Misrepresentation, whether by commission or omission, has repeatedly been identified as one of the clearest grounds for duty of fair representation liability[43] because dishonesty severs the trust that legitimizes exclusive representation. Unions serve as adversaries of management during negotiation and cannot later transform into management's ally in administering contracts.[44] However, by aligning with management to keep critical details hidden, the NFLPA magnified the injury: Players were deprived not only of the decision itself but also of the nuanced understanding that could have strengthened their future bargaining power. Taking a holistic view, the concealment of material facts, the systemic distortion of the bargaining environment, and the erosion of candor toward the membership illustrate the very kind of fraudulent or misleading conduct the duty of fair representation is meant to prevent.

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40. Gary S. Figg, *The Union's Duty of Fair Representation: Fact or Fiction*, 60 MARQ. L. REV. 1114, 1132 (1977).

41. Levinson, *supra* note 36, at 4.

42. *See generally Hines*, 424 U.S. at 558.

43. Levinson, *supra* note 36, at 6.

44. *The Duty of Fair Representation in the Administration of Grievance Procedures Under Collective Bargaining Agreements*, 1968 WASH. UNIV. L. Q. 437, 439 (1968), https://openscholarship.wustl.edu/law_lawreview/vol1968/iss3/3 [https://perma.cc/H956-LCVG].

In sum, the NFLPA's handling of the arbitration ruling implicates multiple dimensions of the duty of fair representation. The silence was arbitrary because it fell outside the wide range of reasonableness owed to members, stripping them of agency at a critical moment.[45] The concealment was in bad faith if motivated by self-preservation or a tacit quid pro quo with management, signaling a retreat from the union's adversarial role. And the omissions were misleading because they deprived players of the clarity needed to understand their bargaining leverage.[46] When measured against the tripartite standard, the union's conduct was not a single lapse but a continuing breach that eroded trust, distorted the information environment, and left members worse off than if they had no representation at all. This erosion of candor and accountability provides the backdrop for the next set of concerns: Whether the NFLPA's executive leadership, in the selection of Lloyd Howell and the creation of a lucrative position for JC Tretter, subordinated the interests of players to their own institutional and personal advantage.

II. EXECUTIVE SELF-INTEREST, UNION FIDUCIARY DUTIES, AND DUTY OF FAIR REPRESENTATION

On March 15, 2022, JC Tretter was released by the Cleveland Browns.[47] Tretter, in addition to playing center for the Browns, was also the NFLPA President at the time.[48] Later in March 2022, Tretter said he and the Executive Committee of which he was a part began a process to replace DeMaurice Smith as the new NFLPA executive director.[49] As part of that process, the Executive Committee amended Article 4.04(f) of the NFLPA Constitution to eliminate the thirty-day vetting window, meaning player representatives could be asked to vote on a multi-million-dollar leadership position without meaningful time or information to evaluate the candidates.[50]

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45. *See* Florio, *supra* note 9 ("Whatever the reason(s) for hiding the document, both the league and the union are missing out on a chance to help teams, players, and agents learn from the experience. The teams, if they had full and complete access to the document, could study it for guidance on how to avoid a similar outcome in the future. The agents, if they had full and complete access to the document, could study it for clues on how to prevent and/or expose collusion in the future when trying to get the best possible deals for the players.").

46. *Id.*

47. Jake Trotter, *Cleveland Browns Release Center JC Tretter, Save $8.25 Million Against Salary Cap*, ESPN (Mar. 15, 2022, at 11:59 ET), https://www.espn.com/nfl/story/_/id/33509959/cleveland-browns-release-center-jc-tretter-save-825-million-salary-cap [https://perma.cc/AT4D-TE5G].

48. Florio, *supra* note 9; Torre, *supra* note 15.

49. Pat McAfee, *The Pat McAfee Show: Thursday June 29th, 2023*, YOUTUBE (June 29, 2023), https://www.youtube.com/watch?v=kDbKHeUySFw [https://perma.cc/U6U6-8THW].

50. Torre, *supra* note 15.

Florio said it felt like the executive director selection process was geared towards a specific hand-picked candidate—Lloyd Howell.[51] Torre and Florio found the choice of Howell curious since Howell lacked sport union experience.[52] Maybe more importantly, in his previous job at Booz Allen, a whistleblower named Sarah Feinberg revealed that the company had allegedly overcharged the U.S. Government by hundreds of millions of dollars to subsidize unpaid contracts with foreign governments.[53] Feinberg purportedly quit her job after reporting the issue to her boss, future NFLPA executive director Lloyd Howell, who allegedly said the company would not be looking into the matter.[54] Feinberg was awarded $40 million for serving as an official U.S. government whistle-blower in July 2023 along with a $377 million settlement between the government and Booz Allen that ranked as the third-largest contract fraud settlement of all time.[55] The settlement was reached less than a month after Howell was named the new NFLPA executive director at a press conference.[56]

In addition to Howell's alleged attachment to the third-largest contract fraud settlement of all time, Howell was also allegedly sued for sexual discrimination and retaliation during his time at Booz Allen.[57] One NFL player who represents his team with the NFLPA said he did not learn about the alleged Howell sexual discrimination and retaliation lawsuit until well after the vote naming Howell the NFLPA executive director and reportedly told a confidant, "[t]o find this out after we elected Lloyd is concerning; it feels like it was quashed."[58] Another anonymous player representative said, "[n]ow that all this stuff is coming out, I am like -- wait a second, what happened there?"[59] Van Natta Jr. and Kahler reported that while these player representatives felt they were not informed, two

51. *Id*.

52. *Id.*

53. *Id*.; *United States ex rel. Feinberg v. Booz Allen Hamilton Inc.*, 2023 U.S. Dist. LEXIS 128692 (D.D.C. 2023).

54. Ken Dilanian & Laura Strickler, *'Doing the Right Thing' Was Worth $40 Million to This Marine Veteran and Mother of Three*, NBC NEWS (Aug. 28, 2023, at 18:30 ET), https://www.nbcnews.com/news/investigations/marine-sarah-feinberg-whistleblower-booz-allen-69-million-rcna102098 [https://perma.cc/WL5H-59SQ].

55. *Id*.

56. Jayna Bardahl, *Timeline of Lloyd Howell's Tenure as NFLPA Executive Director from Election to Resignation*, THE ATHLETIC (July 18, 2025), https://www.nytimes.com/athletic/6502042/2025/07/18/nfl-nflpa-lloyd-howell-executive-director-resigns/ [https://perma.cc/9EAB-LLS2].

57. Don Van Natta Jr. & Kevin Kahler, *NFLPA Members Disagree Over Knowledge of Lloyd Howell Lawsuit*, ESPN (July 17, 2025, at 11:35 ET), https://www.espn.com/nfl/story/_/id/45762449/nflpa-members-disagree-knowledge-lloyd-howell-lawsuit [https://perma.cc/G962-RUEP].

58. *Id.*

59. *Id.*

players on the Executive Committee did know.[60] This could be true because only Executive Committee members did the vetting and finalist selection while the thirty-two player reprepresentatives voted.[61] Tretter had amended the NFLPA Constitution so that the player representatives were very limited in the time they had to learn about the candidates.[62] Tretter claimed his search committee had spent 570 hours vetting the candidates.[63] Therefore, at best, the NFLPA was willing to overlook alleged fraud ties[64] and allegations of sexual discrimination and retaliation;[65] at worst, those responsible for making this immensely important decision were intentionally not given this information before voting.

On October 2, 2024, Tretter was hired as the NFLPA's chief strategy officer by Howell—a position that had not previously existed. Such a development was convenient for Tretter because he was no longer an NFL player, which meant he could no longer serve as NFLPA president. This meant the man who seemed most responsible for Howell getting the executive director position, according to Florio,[66] was now lacking a high-paying football-related job, and Howell swooped in to give it to him.[67] At the time, Florio stated, "[a]nd, yes, it's more than fair to point out that the person Tretter hired has now hired Tretter, which could be regarded as the completion of an express or implied *quid pro quo*." He emphasized this was especially true."[68]

Adding to concerns about executive culture, Florio and Torre reported that Tretter had scapegoated Wilson as responsible for "ruining" the guaranteed contract precedent.[69] Tretter called him a "wuss" for not holding out and portrayed Wilson as the player who let guaranteed contracts slip away.[70] Such a statement suggests Tretter's willingness to demean members whose bargaining choices conflicted with leadership's narrative. Torre and Florio said this could have incentivized the NFLPA

60. *Id.*

61. *Id*.

62. Torre, *supra* note 15.

63. McAfee, *supra* note 47; J.C. Tretter, *Trust the Process: How We Elected Lloyd Howell as Our New NFLPA Executive Director*, NFLPA (July 5, 2023), https://nflpa.com/posts/trust-the-process-how-we-elected-lloyd-howell-as-our-new-nflpa-executive-director [https://perma.cc/SN38-HBMF].

64. Torre, *supra* note 15; *United States ex rel. Feinberg v. Booz Allen Hamilton Inc.*, 2023 U.S. Dist. LEXIS 128692 (D.D.C. 2023).

65. Van Natta Jr. & Kahler, *supra* note 57.

66. Torre, *supra* note 15.

67. Mike Florio, *JC Tretter Returns to NFLPA, as "Chief Strategy Officer"*, NBC SPORTS (Oct. 2, 2024, at 15:07 ET), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/jc-tretter-returns-to-nflpa-as-chief-strategy-officer [https://perma.cc/JVF3-LJEV].

68. *Id.*

69. Florio, *supra* note 11; Torre, *supra* note 15, at 52:10.

70. Florio, *supra* note 11.

to agree with the NFL to keep the arbitration document and ancillary pieces secret.[71] Such reported actions by NFLPA leadership raise serious questions about the union's fiduciary duties to membership under federal labor law, as well as potential conflicts of interest.

A. *Union Fiduciary Duties (LMRDA § 501 and executive conflicts)*

Section 501(a) of the Labor-Management Reporting and Disclosure Act (LMRDA) provides that "the officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group."[72] It further requires that officers hold union money and property "solely for the benefit of the organization and its members," manage union affairs in accordance with constitutional and bylaw requirements, "refrain from dealing with such organization as an adverse party," and avoid "any pecuniary or personal interest which conflicts with the interests of such organization."[73] This statutory language codifies a fiduciary framework that parallels, and in some respects exceeds, corporate law's duties to shareholders[74] such as loyalty, care, and candor, while adapting those standards to the distinctive vulnerabilities of labor organizations.

Courts have consistently rejected a narrow reading of Section 501, holding that its fiduciary duties apply broadly to all activities of union officials, not just financial stewardship.[75] For instance, in *Stelling v. International Brotherhood of Electrical Workers* (1978), the Ninth Circuit Court of Appeals noted that most courts take a broad view of Section 501 in that it creates significant fiduciary duties of union officers in all their professional capacities.[76] The Eleventh Circuit has recognized that the LMRDA enforces stringent fiduciary norms for union officers, including in criminal prosecutions for conversion of union assets—reinforcing Congress's intent to police abuses of trust.[77] This broad expansive judicial interpretation aligns with the statute's legislative history, which emphasized Congress's intent to combat corruption and ensure accountability across the full spectrum of union governance so that leadership faithfully completes its responsibilities as fiduciaries.[78]

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71. *Id.*

72. 29 U.S.C. § 501(a).

73. *Id*.

74. Phillips v. Osborne, 403 F.2d 826, 831 (9th Cir. 1968).

75. Johnson v. Nelson, 325 F.2d 646, 650 (8th Cir. 1963); Sabolsky v. Budzanoski, 457 F.2d 1245, 1250 (3d Cir. 1972).

76. Stelling v. Int'l. Bhd. of Elec. Workers, 587 F.2d 1379, 1386 (9th Cir. 1978).

77. *See* United States v. Browne, 505 F.3d 1229, 1266 (11th Cir. 2007).

78. *See* Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC, 638 F.3d 572, 578 (8th Cir. 2011).

Federal courts have repeatedly reinforced the breadth of these obligations. The Third Circuit has made clear that union officials are bound by the highest standards of responsibility and ethical conduct and owe members a duty of complete loyalty.[79] The Eighth Circuit emphasized that officers breach Section 501 when they engage in self-dealing or confer personal benefit at the expense of the membership.[80] Similarly, the Eleventh Circuit has held that union officers breach their fiduciary responsibilities imposed by Congress when they pursue personal gain at the union's expense, particularly if such conduct lacks proper approval or transparency.[81] By contrast, some adopted a narrower interpretation, limiting Section 501 primarily to financial misconduct.[82] However, this view stands as a minority approach, as most circuits have applied the statute more broadly to secrecy, conflicts of interest, and governance abuses. These holdings emphasize that Section 501 reaches far beyond financial embezzlement: It prohibits secrecy, manipulation, and conflicts of interest that compromise union democracy.

Courts have also clarified Congress's intent. As the Seventh Circuit explained, Section 501 was designed as a direct and far-reaching response to the mischief perpetrated by union officials "in its every manifestation,"[83] including secretive governance that disenfranchised members. In keeping with this history, in *Richardson v. National Post Office Mail Handlers* (1977), the court recognized that nondisclosure and manipulation of governance structures can constitute fiduciary breaches because they undermine members' ability to participate meaningfully in union democracy, even absent direct financial injury.[84] Furthermore, in *Yanez v. Virginia International Terminals* (1997), the court recognized that nondisclosure of material information, secrecy in grievance handling, and manipulation of decision-making bodies could constitute fiduciary breaches under Section 501.[85] Like *Richardson v. National Post Office Mail Handlers* (1977), the court recognized that general misconduct by union officials, such as failure to disclose material information and violations of the union constitution, may constitute a breach of fiduciary duty even if such misconduct does not relate solely to financial matters.[86] These cases collectively establish that fiduciary

79. *See* United States v. Lanni, 466 F.2d 1102, 1104 (3rd Cir. 1972).

80. Pignotti v. Sheet Metal Workers' Int'l Ass'n, 477 F.2d 825, 830 (8th Cir. 1973).

81. *See* Erkins v. Bryan, 785 F.2d 1538, 1544 (11th Cir. 1986).

82. *See* Operative Plasterers & Cement Masons Int'l Ass'n v. Benjamin, 843 F. Supp. 1267, 1272-73 (N.D. Ind. 1993); *see also* Gurton v. Arons, 339 F.2d 371, 375 (2nd Cir. 1964).

83. Hood v. Journeymen Barbers, 454 F.2d 1347, 1354 (D.C. Cir. 1972).

84. *See* 442 F. Supp. 193, 194–95 (E.D. Va. 1977).

85. *See* No. 2:97cv153, 1997 U.S. Dist. LEXIS 17145, at *18–19 (E.D. Va. Oct. 16, 1997).

86. *See generally Richardson*, 442 F. Supp. 193 (reviewing court decisions on Section 501 to determine that fiduciary duty extends beyond financial misconduct).

liability under Section 501 is broad, extending to any conduct where leadership subverts transparency, loyalty, or accountability.

Although Section 501 is textually distinct from the duty of fair representation, courts have described both doctrines in fiduciary terms. The duty of fair representation, rooted in the NLRA and *Vaca v. Sipes* (1967) and *Air Line Pilots Association v. O'Neill* (1991), prohibits unions from acting arbitrarily, discriminatorily, or in bad faith in their representation.[87] Section 501 serves as its statutory counterpart: It applies specifically to the internal management and governance of the union itself. When union leaders manipulate constitutional rules, suppress material information, or engage in self-dealing, the same actions that would be arbitrary or in bad faith under the duty of fair representation doctrine also constitute disloyalty and conflict under Section 501. Scholars have underscored this overlap. Ehrlich (2019), for example, explores how undisclosed 'side deals' between the NFLPA and the league in drug-testing disputes deprived players of transparency and meaningful participation, conduct that implicates both the duty of fair representation and Section 501.[88] These doctrines establish a dual fiduciary framework that binds union officials both in their outward role as representatives of members and in their inward role as stewards of democratic governance.

Applied to the NFLPA, this fiduciary framework sharpens concerns about how leadership engineered the transition from DeMaurice Smith to Lloyd Howell. The Executive Committee amended Article 4.04(f) of the NFLPA Constitution to remove the thirty-day vetting requirement, effectively forcing player representatives to vote on an executive director without adequate time or information to evaluate candidates.[89] That change, made by those with the most at stake in controlling the succession, undermined a core democratic safeguard designed to ensure player representatives had sufficient time and information to assess candidates for executive director. It also restricted internal governance oversight in a manner courts have deemed suspect under Section 501, particularly when secrecy or procedural manipulation deprives members of meaningful participation.[90]

The concerns only deepened with Howell's appointment. Howell's prior tenure at Booz Allen was complicated by a $377 million federal

87. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967); *see also* Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 65 (1991).

88. Sam C. Ehrlich, *A More Perfect (NFL Players) Union: Secret "Side Deals," the NFLPA, and the Duty of Fair Representation*, 44 OHIO N. U. L. REV. 33 (2019).

89. Mike Florio, *NFLPA Amended Constitution in 2022 to Keep Executive Director Candidates Secret*, NBC SPORTS (June 28, 2023, at 19:24 ET), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/nflpa-amended-constitution-in-2022-to-keep-executive-director-candidates-secret [https://perma.cc/4USJ-QP5J].

90. *Richardson*, 442 F. Supp. at 193.

fraud settlement[91] and allegations of employment discrimination.[92] Yet players were not informed of this record before the vote, despite the obvious reputational and institutional risks. Precedent establishes that fiduciary duties encompass candor and loyalty in presenting material information to members. By concealing key facts about Howell's record, the Executive Committee denied player representatives the chance to make an informed decision and undermined the core accountability that Section 501(a) is meant to guarantee. The appearance of quid pro quo only compounds the problem. After stepping down as NFLPA President, Tretter was appointed by Howell to a newly created and lucrative "chief strategy officer" role. This sequence, advancing a candidate through a compressed, opaque process followed by creation of a lucrative post for the architect of that process, was described by Florio as the completion of an "express or implied quid pro quo."[93] Such a characterization seems appropriate, as it resembles the self-interested favoritism that courts have condemned under Section 501.

Viewed together, these actions implicate both Section 501 fiduciary obligations and the duty of fair representation. Section 501 frames them as disloyalty, conflicts of interest, and self-dealing inconsistent with the positions of trust Congress imposed on union officers. The duty of fair representation doctrine, by contrast, treats the same secrecy and manipulation of governance structures as arbitrary or bad faith conduct that betrays members in their representational relationship. Courts have further emphasized that even seemingly minor undisclosed procedural changes, if concealed from members, may constitute bad-faith breaches of representational duty.[94] Applying both doctrines underscores the gravity of the NFLPA's conduct: What might appear as procedural maneuvering or internal politics is, in legal terms, a dual breach of the fiduciary obligations imposed by Section 501 and the representational duties enforced through the duty of fair representation. The Howell succession controversy demonstrated how secrecy and self-dealing could

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91. *United States ex rel.* Feinberg v. Booz Allen Hamilton Inc., No. 16-1911, 2023 U.S. Dist. LEXIS 128692, at *1 ((D.D.C. July 21, 2023); Mike Florio, *New NFLPA executive director's former firm pays $377 million settlement to U.S. government*, PRO FOOTBALL TALK (July 22, 2023), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/new-nflpa-executive-directors-former-firm-pays-377-million-settlement-to-u-s-government [https://perma.cc/UM9C-29ZF].

92. Van Natta Jr. & Kahler, *supra* note 59; *Booz Allen Hamilton Sued for Blatant Refusal to Follow Federal Antidiscrimination Laws and for Retaliating Against Employee with Disability*, JGL (Aug. 16, 2022), https://www.jgllaw.com/news/booz-allen-hamilton-sued-blatant-refusal-follow-federal-antidiscrimination-laws-retaliating/ [https://perma.cc/HH42-A6A6].

93. Mike Florio, *JC Tretter Returns to NFLPA as "Chief Strategy Officer*," PRO FOOTBALL TALK (Oct. 2, 2024, 15:07 ET), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/jc-tretter-returns-to-nflpa-as-chief-strategy-officer [https://perma.cc/PRU3-MTRS].

94. Ehrlich, *supra* note 90, at 47.

distort union governance, but those dynamics did not end with his appointment. Instead, they set the stage for an even deeper problem: divided loyalty.

B. *Conflicts of Interest and Divided Loyalty*

At 7 a.m. on July 10, 2025, just hours before the Associated Press reported that the NFLPA would appeal the arbitration decision[95] and one day after ESPN revealed that the union had cooperated with the NFL to keep the arbitration record sealed,[96] news broke that Executive Director Lloyd Howell was simultaneously employed as a paid consultant for The Carlyle Group. Carlyle is an NFL-approved private equity firm with ambitions of acquiring minority stakes in franchises. This made Howell's dual role especially problematic. Were Carlyle to purchase franchise equity, Howell would effectively straddle both sides of the bargaining table: advising owners while ostensibly leading the players' union.

Although union counsel reportedly urged Howell to resign his Carlyle position to mitigate this conflict, Howell refused.[97] His decision was compounded in February 2025, when Howell publicly acknowledged at an NFLPA event that he had held conversations with team owners about private equity's role in franchise ownership. Such discussions contradicted *earlier assurances* that his Carlyle work did not venture into NFL territory, which were intended to assuage any concern over a conflict of interest[98] That reversal not only undermined his credibility but also heightened the perception that Howell's personal interests were intertwined with, and potentially adverse to, the very players he was obligated to represent.

Howell's apparent conflicts of interest and divided loyalty once again implicate the duty of fair representation and his fiduciary obligations to the union as an elected official. As a reminder, Section 501(a) of the LMRDA explicitly bars union officers from holding "any pecuniary or personal interest which conflicts with the interests of [the] organization."[99] Courts have applied this standard broadly, holding

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95. Rob Maaddi, *NFL Players Union Appealing Ruling in Collusion Case*, AP NEWS (July 10, 2025, 12:29 PM ET), https://apnews.com/article/nfl-players-association-owners-collusion-e8bf15c69248b99b01f63c59781fb23b [https://perma.cc/7LU6-BUCR].

96. Don Van Natta Jr. & Kalyn Kahler, *NFLPA Head Also Works for Firm Approved to Invest in NFL*, ESPN (July 10, 2025, at 7:00 AM ET), https://www.espn.com/nfl/story/_/id/45705432/nflpa-head-works-firm-approved-invest-nfl [https://perma.cc/F2SC-N6RG].

97. *Id*.

98. NFL Players Association, *NFL Players Association Live Stream*, YOUTUBE (Feb. 5, 2025), https://www.youtube.com/watch?v=qk6qL6rDQls [https://perma.cc/XDS9-BP4F]; Pablo Torre, *NFL Collusion-Gate II: We Got Another Secret Union Document — and Smoked Out Another Cover-Up*, PABLO TORRE FINDS OUT, YOUTUBE (June 24, 2025), https://www.youtube.com/watch?v=SwVNM266nCM [https://perma.cc/5WQW-X4R8].

99. 29 U.S.C. § 501(a).

officers liable not only for financial misconduct but also for undisclosed conflicts and self-dealing that compromise loyalty.[100] Howell's decision to maintain a consulting relationship with Carlyle, a firm whose financial objectives were directly adverse to the union's mission, implicates Section 501. His refusal to step aside after being warned exacerbates the breach, transforming what might have been a questionable judgment call into a deliberate act of disloyalty.

The risk of divided loyalty was heightened by Howell's inconsistent explanations. Initially, he downplayed the connection between Carlyle and the NFL, suggesting no overlap between his roles. Yet only months later, he admitted to direct conversations with owners about private equity investment in franchises. Courts have found that fiduciary duties include candor and full disclosure of material facts.[101] Howell denied members the transparency necessary to evaluate whether their leader's outside commitments were compatible with his fiduciary role by withholding and then revising his account. Under both legal doctrines, Howell's pecuniary entanglement with Carlyle, an ownership-aligned entity, likely constitutes a conflict of interest prohibited by federal law.

III. DISCUSSION AND SUGGESTED SOLUTIONS: FIDUCIARY FAILURE AS INSTITUTIONAL DRIFT

The NFLPA's secrecy surrounding the collusion arbitration, the engineered executive transition to Lloyd Howell, and the subsequent conflict-of-interest controversies are not independent missteps. Viewed holistically, one discovers a troubling pattern. These incidents are interconnected manifestations of a drift away from the Union executive's fiduciary loyalty and candid representation of its membership toward self-protection and opacity. Framed through the duty of fair representation and the fiduciary obligations imposed by Section 501 of the LMRDA, the same conduct repeatedly appears as (1) arbitrary decision-making outside any reasonable range of representational judgment, (2) bad-faith concealment and misdirection, and (3) structural manipulation that deprives members of meaningful participation.[102]

A. *Secrecy About Arbitration Award as Arbitrary and Bad-Faith Representation*

Players possessed a right to know the details of the alleged League collusion arbitration decision. Among them was the fact that the system

100. Johnson v. Nelson, 325 F.2d 646, 650–51 (8th Cir. 1963).

101. Richardson v. Nat'l Post Off. Mail Handlers, 442 F. Supp 193, 195 (E.D. Va. 1977).

102. 29 U.S.C. § 501(a); *see* Vaca v. Sipes, 386 U.S. 171, 177 (1967) (holding that a union breaches its duty of fair representation only when its conduct is arbitrary, discriminatory, or in bad faith); *see also* Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 78 (1991) (defining arbitrary conduct as actions outside a "wide range of reasonableness").

arbitrator found the NFL Management Council "encouraged" clubs to reduce guarantees, even if the legal standard for collusion was not satisfied. Keeping the sixty-one-page ruling out of the hands of the Executive Committee and team player representatives deprived the membership of the very information needed to evaluate bargaining strategy and potential appellate options. Courts have held that the withholding of critical information, such as an employer's threat of job loss, constitutes a breach of the duty of fair representation.[103] Under *Vaca v. Sipes* (1967), a breach exists where conduct is arbitrary, discriminatory, or in bad faith; only one prong is required.[104] Conduct is "arbitrary" when it is irrational, egregious, or bears no rational relationship to member interests.[105]

In *NLRB v. Local 282, Teamsters* (1984), silence about an arbitration outcome that materially affected members' rights was treated as a violation because it stripped employees of the agency to respond.[106] That logic applies when analyzing the facts. Withholding the sixty-one-page Droney ruling prevented named players (Jackson, Murray, Wilson) from understanding the ruling's implications for their negotiations and denied all veterans critical market information in a monopsonistic setting.[107] Even where courts grant unions a "wide range of reasonableness,"[108] that deference collapses when the conduct is perfunctory, wholly irrational, or undertaken with disregard for member rights.[109] Deference does not extend to suppressing a dispositive arbitration decision that players needed to reevaluate leverage. On this record, the choice to suppress the award was not a permissible strategic judgment; it was a denial of the informational baseline on which representation depends. It was only after the decision became public due to the reporting of Torre and Florio that NFLPA leadership appealed the decision, thereby acknowledging its existence.

Bad faith is also implicated based on the facts. "Bad faith," under the duty of fair representation, encompasses dishonest motives, concealment, and materially misleading omissions.[110] If nondisclosure served to shield leadership from scrutiny or maintain a preferred narrative about executive

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103. *See* Warehouse Union v. NLRB, 652 F.2d 1022, 1025 (D.C. Cir. 1981).

104. 386 U.S. at 190, 191.

105. Peterson v. Kennedy, 771 F.2d 1244, 1253–54 (9th Cir. 1985); Bryan v. Am. Airlines, Inc., 988 F.3d 68, 74 (1st Cir. 2021).

106. NLRB v. Local 282, Teamsters, 740 F.2d 141, 148 (2d Cir. 1984).

107. *See* Ashenfelter, Farber, & Ransom, *supra* note 34, at 203.

108. Air Line Pilots Ass'n. v. O'Neill, 499 U.S. 65, 76 (1991).

109. Levinson, *supra* note 38, at 2.

110. *See* Good Samaritan Med. Ctr. v. NLRB, 858 F.3d 617, 630 (1st Cir. 2017) (citing Spellacy v. Airline Pilots Ass'n. Int'l., 156 F.3d 120, 126 (2d Cir. 1998)); Ruisi v. NLRB, 856 F.3d 1031,1038 (D.C. Cir. 2017) (citing Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. NLRB, 41 F.3d 1532, 1537 (D.C. Cir. 1994)).

decision-making, the motive crosses from poor judgment into bad faith. A union constrained from adopting an adversarial stance because it feared exposure of its own internal secrets effectively surrendered bargaining leverage to management. In contrast, a union transparent in its actions, and unburdened by concern over damaging disclosures, could challenge ownership without the threat of retaliation or informational coercion. Employees stand in a "precarious" position between powerful management and unions.[111] When unions obscure material outcomes, they facilitate precisely the informational coercion the duty of fair representation exists to prevent. Misrepresentation by omission, creating an affirmatively misleading picture of members' rights, can be as corrosive as an outright falsehood.[112] The arbitration secrecy therefore presents a significant problem. This conduct is arbitrary because it bears no rational relation to member interests and is bad faith because it appears animated by institutional self-preservation rather than loyalty to players, thereby subverting the duty of fair representation's central purpose of ensuring fidelity to member interests.

B. *Executive Self-Interest and Constitutional Manipulation Through Section 501*

The succession process that eliminated the thirty-day vetting window (NFLPA Constitution art. 4.04(f)) narrowed player representatives' abilities to evaluate candidates for a multimillion-dollar leadership role, overseeing an organization with over $1 billion in assets and thousands of members. Courts interpreting Section 501 have rejected narrow constructions of union leadership's fiduciary obligations; they attach broadly to matters of integrity, loyalty, and governance transparency.[113] Section 501(a) codifies that officers hold positions of trust and must refrain from "any pecuniary or personal interest which conflicts" with the union's interests.[114] Courts have condemned secrecy and manipulation that deprive members of meaningful participation in governance,[115] consistent with Congress's "far-reaching" response to union abuses "in its every manifestation."[116] Applied here, eliminating the thirty-day vetting period functionally removed the player representatives' abilities

111. Figg, *supra* note 42, at 1117.

112. *See generally* Hines v. Anchor Motor Freight, Inc., 424 U.S. 544, 554 (1976) (providing an overview of the duty of fair representation in the context of grievance and arbitration procedures).

113. *See* Johnson v. Nelson, 325 F.2d 646, 650 (8th Cir. 1963); Sabolsky v. Budzanoski, 457 F.2d 1245, 1250 (3d Cir. 1972); Stelling v. Int'l. Bhd. of Elec. Workers, 587 F.2d 1379, 1386 (9th Circ. 1978).

114. 29 U.S.C. § 501(a).

115. Richardson v. Nat'l. Post Off. Mail Handlers, 442 F. Supp. 193, 195 (E.D. Va. 1977).

116. Hood v. Journeymen Barbers, 454 F.2d 1347, 1354 (D.C. Cir. 1972).

to make informed decisions. This is a form of information control that is as antithetical to Section 501's democratic safeguards, even where no direct monetary loss is shown. In practical terms, the act deprived player representatives of the ability to assess material information about candidates, including Howell's Booz Allen controversies, thereby reducing informed consent to procedural formality. Without such an opportunity, NFLPA membership at large would not receive any of this key material and therefore deprive union representatives of performing their collective responsibilities. Operating blind would force the voting members to rely on the information presented by Union executive leadership, effectively allowing Tretter to manipulate the process based on his personal interests. That is the sort of conduct that Section 501 was designed to deter.

The subsequent appointment of now former NFLPA President JC Tretter to a newly created and likely powerful "chief strategy officer" role after Howell's selection deepens the Section 501 concern. This instance of reciprocal self-dealing and favoritism is a significant fiduciary breach under Section 501.[117] While the facts here are journalist-reported rather than adjudicated, the appearance of a quid pro quo (i.e., one leader's selection to the highest level of union leadership, followed by creation of a new high-level post for the architect of that selection) is well within the prohibited behavior that violates the fiduciary duties owed by union leadership to its members. The arrangement certainly created a significant risk that Tretter's personal interests were put ahead of member interests. This is a risk illustrated by reports that Tretter disparaged Russel Wilson for agreeing to a non-guaranteed contract, inconsistent with leadership's preferred narrative. The same secrecy and process-rigging that Section 501 safeguards against as disloyal can be arbitrary or in bad faith under *Vaca v. Sipes* (1967)[118] because they remove member safeguards and bias representational choices toward leadership preservation.

C. *Conflicts of Interest and Divided Loyalty*

Howell's paid consulting for The Carlyle Group, an NFL-approved private equity firm seeking stakes in clubs, while serving as Executive Director squarely implicates Section 501(a)'s prohibition on "any pecuniary or personal interest" that conflicts with the union's interest.[119] This obligation is broadly applied to undisclosed conflicts and self-dealing,[120] and has enforced strict fiduciary norms to police abuses of

117. *See* Pignotti v. Sheet Metal Workers Int'l Ass'n, 477 F.2d 825, 832 (8th Cir. 1973).

118. *See* Vaca v. Stipes, 386 U.S. 171, 190 (1967).

119. 29 U.S.C. § 501(a).

120. *See* SEIU v. Nat'l Union of Healthcare Workers, 718 F.3d 1036, 1045-46 (9th Cir. 2013).

trust.[121] Here, there is a direct conflict; Carlyle's prospective investments align with ownership, while Howell's fiduciary obligations run to players. Howell's loyalty is divided under these circumstances, and his refusal to step aside after union counsel allegedly urged resignation aggravated the problem. Because he chose not to resolve the conflict when requested, Howell's conflict of interest escalates to an intentional breach of his fiduciary duty to membership.

This conflict is implicated under the Duty of Fair Representation. Representational decisions made by a leader with a contemporaneous financial tie to an ownership-aligned entity risk being "outside the wide range of reasonableness."[122] Such decision-making may also, when paired with concealment, amount to bad faith.[123] Howell's inconsistent public messaging, first assuring there was no NFL overlap in his role as a Carlyle Group consultant and then later acknowledging that he spoke to owners concerning private equity, demonstrates this candor failure. Because a fiduciary duty encompasses disclosure of material facts, any omissions that obscure a leader's conflicts deprive members of the information necessary to evaluate whether representation is undivided and loyal.[124]

IV. CONVERGING DOCTRINES AND INCIDENTS, ONE CONTINUOUS PROBLEM

The two bodies of law, the duty of fair representation and Section 501 of the LMRDA, converge to illustrate a greater danger to the union. Section 501 seeks to prevent individuals from wielding union power through secrecy, conflicts, and self-dealing. The duty of fair representation guards against the resulting representational conduct that such governance predictably yields. Each episode that occurred in this cascading scandal, the arbitration secrecy, succession manipulation, quid-pro-quo-like appointments, and the Carlyle conflict, independently triggers these labor relations legal guardrails. However, when viewed in their totality, they evidence an institutional pattern of *fiduciary drift*: decisions oriented toward leader preservation and private benefit rather than member loyalty, candor, and accountability, all done at the significant expense of union membership.

What might be defended as mere process choices or a confidential strategy in the abstract or separately becomes, in legal terms, conduct that simultaneously breaches the fiduciary obligations of Section 501 and the

121. United States v. Browne, 505 F.3d 1229, 1266 (11th Cir. 2007).

122. Air Line Pilots Ass'n. v. O'Neill, 499 U.S. 65, 67 (1991).

123. Good Samaritan Med. Ctr. v. NLRB, 858 F.3d 617, 630 (1st Cir. 2017); Ruisi v. NLRB, 856 F.3d 1031, 1038 (D.C. Cir. 2017).

124. *See* Hines v. Anchor Motor Frieghts, Inc., 424 U.S. 554, 564, 570–71 (1976); Richardson v. Nat'l Post Off. Mail Handlers, 442 F. Supp. 193, 195 (E.D. Va. 1977).

representational duties of the duty of fair representation. Union membership is significantly injured when its leadership has an incentive to appease management instead of treating it as an adversary and acting in secrecy. While union officials are entitled to due process before any finding of breach or levying of sanctions, they are likely to conclude that the collective fiduciary drift by Howell and Tretter weakened union membership in its various attempts to protect its own interests.

A. *Proposed Structural Reforms*

The recurrent failures outlined suggest an atrophy of the NFLPA's institutional safeguards. Restoring these protections and the union's legitimacy therefore requires structural reform that converts the aspirational standards of the duty of fair representation and LMRDA Section 501 into binding governance mechanisms. The following recommendations reflect such an approach to foster transparency, accountability, and democratic participation as articulated across decades of federal labor law.

B. *Transparency and Disclosure*

Transparency is the foundation upon which both fiduciary and representational duties rest. Courts have consistently treated concealment of material decisions as incompatible with good-faith representation. For instance, *NLRB v. Local 282, International Brotherhood of Teamsters* (1984), silence concerning arbitration outcomes was held to deny members meaningful participation,[125] while in *Richardson v. National Post Office Mail Handlers Union* (1977), the court recognized that union officers' fiduciary obligations encompass broader responsibilities, including the duty to provide information to the membership on matters requiring member decision.[126] Applying these principles, absent a documented, objectively compelling reason, the NFLPA should institutionalize a disclosure system requiring prompt transmission of all arbitration rulings, settlements, and material governance changes to both team representatives and the general membership. A secure online portal accessible to all members would likely satisfy this duty of candor by ensuring that information essential to informed participation cannot be withheld at leadership discretion.[127]

C. *Conflict-of-Interest and Divided Loyalty Prohibitions*

The most direct threat to fiduciary integrity arises when union officials maintain financial or professional entanglements that divide their

125. *See* 740 F.2d 141, 148 (2d Cir. 1984).
126. *See Richardson*, 442 F. Supp. at 193.
127. *See id*. at 194.

allegiance between players and entities aligned with ownership. Union officers breach their fiduciary obligations when personal or pecuniary interests interfere with union governance.[128] *Sabolsky v. Budzanoski* (1972) likewise recognized that union power must be exercised for the benefit of the membership, not leveraged for private or political advantage.[129] Accordingly, the NFLPA should therefore adopt an uncompromising rule prohibiting any outside employment, consulting, or financial interest involving entities that have or seek business with the NFL, its franchises, or their private equity investors. This is a clear boundary so that any violation must carry explicit sanctions up to removal for cause.

D. *Financial Controls and Audits*

Financial accountability is key to fostering the fiduciary duty of care. Section 501(b) explicitly requires union officers to manage assets "solely for the benefit of the organization and its members," a mandate courts have enforced through strict accounting expectations.[130] Such an approach calls for clear financial oversight, where union officers at a minimum must demonstrate "safe, honest, loyal, and conscientious management" in expenditure decisions.[131] Recent developments underscore the urgency of these principles. Federal prosecutors launched an ongoing investigation into the NFLPA's financial practices amid allegations of self-dealing and misuse of union funds by senior executives, including potential criminal conduct related to personal enrichment and improper vendor relationships.[132]

These reports suggest weaknesses in internal financial controls and a continuing lack of transparency in disclosure to the membership. To restore confidence and align with federal law, annual external audits should be institutionalized by truly independent accounting firms, with full results published to all members. Complementary measures, such as real-time disclosure of executive expenses above a defined threshold and independent oversight of vendor contracts, would provide continuous visibility into financial operations. Such an approach might also deter

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128. *See* Erkins v. Bryan, 785 F.2d 1538, 1544 (11th Cir. 1986); Johnson v. Nelson, 325 F.2d 646, 650 (8th Cir. 1963).

129. Sabolsky v. Budzanoski, 457 F.2d 1245,1250 (3d Cir. 1972).

130. 29 U.S.C. § 501(a).

131. Hood v. Journeymen Barbers, 454 F.2d 1347, 1355 (D.C. Cir. 1972).

132. Don Van Natta Jr. & Kalyn Kahler, *Feds Probing NFLPA Actions That "May Be Criminal," Doc Say*s, ESPN (July 25, 2025, 4:05 PM ET), https://www.espn.com/nfl/story/_/id/45822794/feds-probing-nflpa-actions-criminal-doc-says [https://perma.cc/64JH-UE36]; Steven Taranto, *NFLPA Scandal Includes Potential Criminal Actions as Feds Probe Union's Finances, Per Report*, CBS SPORTS (July 25, 2025, 5:25 PM ET), https://www.cbssports.com/nfl/news/nflpa-scandal-includes-potential-criminal-actions-as-feds-probe-unions-finances-per-report/ [https://perma.cc/NNV9-TMHJ].

misconduct before it institutionalizes, while also demonstrating genuine adherence to the fiduciary integrity that federal labor law demands.

E. *Democratic Governance and Leadership Accountability*

A union's legitimacy derives from the informed consent of its members. Courts have long intervened when procedural manipulation undermines that consent. Members possess a protected interest in participating in union governance, one free of procedural manipulation.[133] Accordingly, the NFLPA should restore and extend its leadership vetting process to a minimum of forty-five to sixty days, ensuring that player representatives have meaningful time to evaluate candidates and investigate potential conflicts. Finalist candidates should engage in live question-and-answer sessions and publish written platforms accessible to all members. For major constitutional amendments or executive appointments, the union should consider member-wide referenda requiring a supermajority vote. The NFLPA has begun its search for Howell's replacement and pledged to proceed with greater transparency.[134] However, it is unclear whether such promises will be kept throughout the process.

Furthermore, to protect members and allow them to expose wrongdoing without fear of retaliation, whistleblower protections are necessary.[135] Such protections would reflect the worker rights pursuant to the LMRDA's guarantee of free expression and accountability. Building upon these principles, the NFLPA should expand its whistleblower protections to cover informal and reputational reprisals and delegate investigative authority to an independent ethics officer. Mandatory annual training on the duty of fair representation, Section 501 fiduciary obligations, and ethical leadership should be required of all officers and staff, with completion serving as a condition of office. As *Vaca v. Sipes* (1967) and *Air Line Pilots Ass'n v. O'Neill* (1991) demonstrate, informed and reasoned judgment is the essence of fair representation;[136] training ensures that leaders understand the limits of their discretion and the moral dimensions of their fiduciary roles.

F. *Independent Oversight*

Finally, transparency and accountability require external verification. Federal courts have repeatedly endorsed independent oversight boards as

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133. *See* Richardson v. Nat'l Post Off. Mail Handlers, 442 F. Supp. 193, 195 (E.D. Va. 1977).

134. Mike Jones, *NFLPA Vows Transparency and "Player-Led" Search as It Picks New Executive Director*, THE ATHLETIC (Oct. 17, 2025), https://www.nytimes.com/athletic/6726122/2025/10/17/nflpa-search-firm-executive-director/ [https://perma.cc/FS88-AEXG].

135. Chris Hanna, Jeffrey Levine & Anita M. Moorman, *College Athletics Whistle-Blower Protection*, 27 J. LEGAL ASPECTS SPORT 209, 210–11 (2017).

136. *See* 386 U.S. 171 (1967); s*ee also* 499 U.S. 65, 78–79 (1991).

legitimate and effective responses to systemic governance breakdowns. The court-approved consent decree in *United States v. International Brotherhood of Teamsters*, as subsequently enforced and reaffirmed by the Second Circuit in the early 1990s, established a model of independent review that restored institutional credibility without displacing self-governance.[137] The NFLPA should follow this model by creating an Independent Oversight Board composed of labor-law experts, former player representatives, and public members empowered to monitor compliance with fiduciary duties, adjudicate ethics complaints, and publish annual reports. By embedding oversight within the union's constitutional architecture, the NFLPA would demonstrate a commitment to structural integrity, ensuring that loyalty and candor are enforced as enduring norms rather than temporary corrections.

CONCLUSION: RESIGNATION AS RECKONING

Lloyd Howell's July 2025 resignation does not end the story. His actions illustrate a culture of institutional drift toward executive self-interest that is untethered from the fiduciary and representational principles that justify a union's authority to act on behalf of its members. The legal frameworks examined throughout this paper, the duty of fair representation and Section 501 of the LMRDA, exist precisely to prevent such drift. Once secrecy replaces candor, and personal ambition supplants loyalty, the institutional mission of the union erodes from within. Howell's resignation, then, should not be mistaken for resolution: It is evidence of the very deficiencies that require structural correction.

The reforms proposed in this paper, mandatory disclosure, conflict-of-interest firewalls, independent auditing, democratic restoration, whistleblower protections, and oversight mechanisms, are intended to realign the NFLPA's governance approach with its foundational purpose. They operationalize the union's duties to represent members with fidelity and to govern with integrity. As the NFLPA proceeds through its search for a new executive director, it must repair not only its reputation but also its institutional core. Only by embedding transparency, accountability, and participatory governance into its constitutional design can the union restore credibility and resilience.

Howell's resignation offers, paradoxically, a moment of renewal. It exposes the cost of fiduciary neglect but also clarifies the path forward: a recalibration of structure and culture that ensures the union's power is once again exercised in the collective interest of players. If the reforms outlined here are embraced, the episode that began in secrecy and conflict

137. *See* F.2d 610, 616 (2d Cir. 1990); 931 F.2d 177, 190 (2d Cir. 1991); 998 F.2d 1101, 1111 (2d Cir. 1993).

may ultimately stand as the catalyst for a more transparent, accountable, and democratically grounded NFLPA.

ECONOMIC ANALYSIS OF PUBLICITY RIGHTS IN THE MACHINE LEARNING AGE: THE NEED FOR A FEDERAL STATUTE PROTECTING THE NON-FAMOUS

*Alyssa J. Devine**

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INTRODUCTION

The 1970s were a period of rapid change. Personal computers were conceived, Walt Disney World opened to the public, the first magnetic resonance imaging (MRI) scan was published, Elvis Presley performed the first worldwide concert broadcast live by satellite, and your only child was born. Your son was born with hemophilia, a disease that prevents his blood from clotting. He required regular infusions, one of which gave him acquired immunodeficiency syndrome (AIDS). His peers and his community immediately shunned him. You helped him fight fear-based discrimination in your community and in the world. Together, you made an impactful difference, but he was still taken from you too soon. After his death, you discovered a company using his image to sell products for

its own benefit. As if losing your only child was not enough, despair filled your heart and mind again. Your son was not a celebrity, and he was not born into a wealthy family. Does the law provide a solution to preserve your child's legacy and limit commercial uses of his name, image, and likeness? This Note addresses that question.

Utilizing normative reasoning as a tool, this Note argues for the enactment of a federal publicity statute. Of the few scholarly articles[1] that have conducted an economic analysis of publicity rights,[2] none to the Author's knowledge have advocated for publicity rights belonging to the average individual,[3] presumably due to the belief that only celebrities possess "unequivocal identifying"[4] features of commercial value.[5] While some empirical data may have supported that belief in the past, that is certainly not the case today.[6] Every individual's right of publicity has

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1. *See generally, e.g.*, Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994); Vincent M. de Gradpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 73 (2002); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999) (articles that have conducted an economic analysis of publicity rights).

2. Author uses the terms "the right of publicity" and "publicity rights" interchangeably.

3. *See generally, e.g.*, Noa Dreymann, Note, *John Doe's Right of Publicity*, 32 BERKELEY TECH. L.J. 673 (2017).

4. Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as a Model, the State-Based Right of Publicity is Ready to Move to the Federal Level*, 45 RES GESTAE 31, 38 n.42 (2001) (including "[o]ther unequivocal identifying indicia" within definition of "right of publicity").

5. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 2:3 (2d ed. 2020) ("[T]he right of publicity is not restricted to 'celebrities.'"); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (5th ed. 2019) ("The right of publicity is the inherent right of every human being to control the commercial use of his or her identity.").

6. *See, e.g.*, Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 792 (N.D. Cal. 2011) (explaining how Facebook's primary revenue streams from using unpaid Facebook members as unknowing spokespersons for various goods and services); Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 825 n.11 (9th Cir. 1974) ("The appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless."); *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013); Youth Entrepreneur Council, *Is Influencer Marketing Worth It In 2020?*, FORBES (Jan. 10, 2020, at 06:30 ET), https://www.forbes.com/sites/theyec/2020/01/10/is-influencer-marketing-worth-it-in-2020/#7473adda31c5 [https://perma.cc/6VGM-JD2T] ("Recent market research finds that social media influencers will continue to be an invaluable trust-building mechanism that can be tapped to establish brand identity."); Kevin

commercial value in the "machine learning age,"[7] and some of the first cases addressing the unauthorized commercial use of an individual's likeness recognized greater protection for non-famous individuals than for celebrities.[8] Yet today, publicity rights are misidentified as property belonging exclusively to celebrities.[9] Due to this misconception, this Note emphasizes the protection of non-famous individuals' publicity rights.

This Note provides value to the legal community by being limited in scope. This narrow focus disallows discussion of interesting topics within the intersection of economic analysis of law and publicity rights that do not assist in solving the question this Note poses. For example, wealth

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Roose, *Don't Scoff at Influencers. They're Taking Over the World*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/technology/vidcon-social-media-influencers.html [https://perma.cc/BSF6-SHVP]; Ralph D. Russo, *NCAA Board Supports Name, Image and Likeness Compensation for College Athletes*, CHI. TRIB. (Apr. 29, 2020), https://www.chicagotribune.com/sports/college/ct-ncaa-image-likeness-20200429-nrr6frchmzg2dazv3zilk2mw4a-story.html [https://perma.cc/ANX5-Y5JF]; Fine F. Leung et al., *Does Influencer Marketing Really Pay Off?*, HARV. BUS. REV. (Nov. 24, 2022), https://hbr.org/2022/11/does-influencer-marketing-really-pay-off [https://perma.cc/U4PD-MQ4E]; Boris Dzhingarov, *Why Big-Name Influencers Are Losing Power — and Micro-Influencers Are Taking Over*, ENTREPRENEUR (Mar. 28, 2025), https://www.entrepreneur.com/growing-a-business/why-micro-influencers-are-beating-celebrities-at-their-own/486675 [https://perma.cc/Q7VB-E5ZA].

7. John Brandon, *The Information Age is Over, Welcome to the Machine Learning Age*, VENTUREBEAT (June 25, 2017), https://venturebeat.com/2017/06/25/the-information-age-is-over-welcome-to-the-machine-learning-age/ [https://perma.cc/UPC5-6V3X]; *see* V. Kumar, J. Andrew Petersen & Robert P. Leone, *How Valuable Is Word of Mouth?*, HARV. BUS. REV., Oct. 2007, at 142 (asserting that a customer's referral value (CRV), or the monetary worth of an individual to endorse a product or service to friends and relatives, is quantifiable); Michael Gerlich, *The Power of Personal Connections in Micro-Influencer Marketing: A Study on Consumer Behaviour and the Impact of Micro-Influencers*, 11 TRANSNAT'L MKTG. J. 131 (Mar. 2023). *See generally* ANDREW MCAFEE & ERIK BRYNJOLFSSON, MACHINE, PLATFORM, CROWD: HARNESSING OUR DIGITAL FUTURE (2017); Kimberly A. Whitler, *Why Word of Mouth Marketing Is the Most Important Social Media*, FORBES (Sep. 9, 2019, at 10:32 EDT), https://www.forbes.com/sites/kimberlywhitler/2014/07/17/why-word-of-mouth-marketing-is-the-most-important-social-media/#2745039654a8 [https://perma.cc/L7V3-PMAT] (stating that approximately "[ninety-two percent] of consumers believe recommendations from friends and family over all forms of advertising," but only six percent of marketing executives say they have mastered word-of-mouth advertising).

8. Corliss v. E.W. Walker Co., 57 F. 434 (C.C.D. Mass. 1893), *rev'd*, 64 F. 280 (C.C.D. Mass. 1894) ("[A] private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right . . . . [W]hile the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual.").

9. MCCARTHY, *supra* note 5, § 28:1; Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 229 (2005) ("[C]ourts and commentators accepted too easily that identity appropriation claims by private citizens were a simple extension of the privacy rationale advanced by Warren and Brandeis."); Canessa v. J.I. Kislak, Inc., 235 A.2d 62, 75 (N.J. Super. Ct. Law Div. 1967) (the distinction between celebrities and non-famous individuals "is relevant only to the question of damages").

distribution is intrinsically intertwined with social welfare, but it is excluded from discussion within this Note because wealth distribution is best addressed by taxation principles.[10] Additionally, the intersection of publicity rights and the First Amendment does not directly relate to the purpose of this Note.[11] This Note also does not question whether the right of publicity is a property right—that question has been asked and answered long ago.[12] The aim of this Note is to answer whether a federal publicity statute protecting famous and non-famous individuals' right to control the commercial use of their unequivocal identifying features optimizes social welfare. A positive economic analysis coupled with normative reasoning of tradeoffs in transactions involving publicity rights answers this question in the affirmative. A federal publicity statute optimizes social welfare and serves as the best policy for society.

In Part I, the guiding principles in economic analysis of law are defined. Part II investigates the true origin of publicity rights by inspecting historic legislative proposals and three foundational cases while clarifying the nature of modern publicity rights. Part III details the economic rationales that support the right of publicity as a distinct legal doctrine. Part IV examines tradeoffs relating to transactions under the

10. NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 73, 84–85 (2005) (explaining that wealth distribution is closely related to social welfare, but the subjective nature of redistribution fails "to serve as a foundation for argument" and is best addressed by taxation rules).

11. Despite current disputes regarding the best test to apply in publicity right infringement actions where the First Amendment is used as a defense, publicity rights and the First Amendment have coexisted together for over a century, and those disputes are not the focus of this Note. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 73 (Ga. 1905) ("The right to speak and the right of [publicity] have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other."); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection . . . . [B]ut it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized."); Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) ("Accordingly, First Amendment protection of such [sufficiently transformative] works outweighs whatever interest the state may have in enforcing the right of publicity.").

12. *See* DAVID TAN, THE COMMERCIAL APPROPRIATION OF FAME: A CULTURAL ANALYSIS OF THE RIGHT OF PUBLICITY AND PASSING OFF 46 (2017) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 228–96 (Peter Laslett ed., 1988) (1690)) (stating "every individual has a property right in his or her own person"); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) ("The right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee."); Cabaniss v. Hipsley, 151 S.E.2d 496, 504 (Ga. Ct. App.1966); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825–26 (9th Cir. 1974); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 132 (Wis. 1979); Acme Circus Operating Co., Inc. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983); MCCARTHY, *supra* note 5, § 28:1 (stating publicity rights are "properly categorized as a form of intellectual property").

current state of publicity law and explains how a federal statute protecting the publicity rights of famous and non-famous individuals optimizes social welfare. The conclusion summarizes how social welfare is optimized and offers concluding thoughts on the barriers to enacting a federal publicity statute.[13]

I. ECONOMIC ANALYSIS OF LAW AS A TOOL

Economic analysis of law is often seen as a perplexing concept, partially due to confusion in understanding positive analysis, formal logic, and normative reasoning and under what circumstances should each be applied.[14] Positive analysis describes what something is while normative reasoning explains what something should be.[15] Formal logic uses positive analysis to reach a conclusion, but this method of analysis is incompatible with the economic analysis of law because formal logic cannot generate arguments that reasonably address the ambiguities that arise within the legal system.[16] In contrast, normative reasoning is appropriate in the economic analysis of law as this method strives to optimize social welfare,[17] which can also be described as the maximization of outcomes that satisfy individual preferences.[18]

Positive analysis alone does not produce a rule that optimizes social welfare.[19] Rather, using positive analysis to understand the legal rule and

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13. Many within the legal community support a federal publicity statute. *See* INT'L TRADEMARK ASS'N, BOARD OF RESOLUTIONS U.S. FEDERAL RIGHT OF PUBLICITY (1998), https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/U.S.-Federal-Right-of-Publicity-03.03.1998.pdf [https://perma.cc/8HBM-BZ6F]; ACTION TAKEN ON RESOLUTIONS AT THE 2001 SUMMER IPL CONFERENCE, A.B.A. SEC. INTELL. PROP. L. ANN. REP. [vi] (2001); U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 117–19 (2019), https://www.copyright.gov/policy/moralrights/full-report.pdf [https://perma.cc/Y5XA-DGKL] (explaining benefit of federal publicity law that protects authors' moral rights); Faber & Zirkle, *supra* note 4. *See generally* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, 28 COMM. LAW. 14, 16 (Aug. 2011) (explaining how the current, state-based right of publicity framework invites forum shopping and threatens "First Amendment rights and public domain interests").

14. HAROLD WINTER, ISSUES IN LAW AND ECONOMICS 6 (Univ. Chi. Press ed., 2017) (explaining the differences between positive analysis and normative reasoning); GEORGAKOPOULOS, *supra* note 10, at 12–14 (analogizing positive statements with "syllogisms of formal logic" and explaining why normative reasoning outperforms positive analysis in the economic analysis of law); *see also* Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 287 (1979).

15. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 107–09 (1979); Posner, *supra* note 14, at 285; WINTER, *supra* note 14, at 6.

16. GEORGAKOPOULOS, *supra* note 10, at 12–14.

17. GEORGAKOPOULOS, *supra* note 10, at 21.

18. Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 675 (1993).

19. Posner, *supra* note 14, at 287.

the associated tradeoffs in conjunction with normative reasoning results in a policy that maximizes outcomes that satisfy individual preferences.[20] In other words, before the tradeoffs are examined and subsequent normative analysis is used to propose the policy that optimizes social welfare, the essence of the legal rule needs to be understood.[21]

II. THE RIGHT OF PUBLICITY

Before identifying and examining tradeoffs in right of publicity transactions, positive analysis requires an understanding of what this legal doctrine is and where it comes from.[22] The right of publicity is best defined as a state-based intellectual property doctrine that provides an individual's right to control the commercial use of any feature or indicia that "unequivocally identifies"[23] him or her.[24] In states that have not explicitly spoken on their view of publicity rights through legislation or judicial decisions, the majority position is to recognize a common law right of publicity.[25] Publicity rights are often confused with privacy rights,[26] copyrights, and trademarks, but the right of publicity is a distinct intellectual property doctrine.[27] Publicity rights are also mistakenly and exclusively associated with famous individuals because legal disputes involving this doctrine frequently involve celebrities, including those who are deceased.[28] However, some of the earliest documented cases

20. Posner, *supra* note 15, at 119–21 (discussing difference between welfare maximization and wealth maximization); WINTER, *supra* note 14, at 7.

21. Gathering empirical data measuring tradeoffs, if possible, is also desirable in the economic analysis of law. WINTER, *supra* note 14, at 1–2.

22. Hausman & McPherson, *supra* note 18, at 675.

23. IND. CODE § 32-36-1-7 (2025); Faber & Zirkle, *supra* note 4, at 38 n.42 (including "other unequivocal identifying indicia" within definition of "right of publicity" in proposed federal right of publicity statute); *see also* MCCARTHY & SCHECHTER, *supra* note 5, § 1:3.

24. Faber & Zirkle, *supra* note 4, at 31 (citing IND. CODE § 32-36-1-7 (2001)) (defining "right of publicity" as the name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms of an individual).

25. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (A.L.I. 1995).

26. MCCARTHY, *supra* note 5, § 28:6; WESTON ANSON, RIGHT OF PUBLICITY ANALYSIS, VALUATION, AND THE LAW 18 (2015); *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (stating publicity rights are not privacy rights because the latter protects "reputation, with the same overtones of mental distress as in defamation" while the former protects "the proprietary interest of the individual in his act in part to encourage such entertainment"); Stephanie Rao v. Tropical Bar by Punta Cana, LLC, No. 3:24-CV-121 (CDL), 2025 U.S. Dist. LEXIS 69416, at *6 (M.D. Ga. Apr. 11, 2025) (stating "Georgia courts recognize a 'fundamental distinction' between invasion of privacy [and right of publicity infringement]"); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 406 (1960). *See generally* Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (explaining how individuals have a protectable right to be left alone).

27. MCCARTHY, *supra* note 5, § 28:1; Faber & Zirkle, *supra* note 4, at 31–32. *See generally* Nimmer, *supra* note 12, at 218 (explaining how the right of publicity is a distinct legal doctrine with no equal).

28. *See* Loren Cheri Shokes, *Life After Death: How to Protect Artists' Post-Mortem Rights*,

analyzing the concept of publicity rights in the United States involved non-famous individuals.[29]

A. *The Origin of Publicity Rights*

Judge Jerome Frank is often incorrectly cited as having coined the term "right of publicity" in the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[30] However, this was not the first time publicity rights were referenced in the pursuit of prohibiting others from profiting off an individual's image, name, and likeness without consent.[31]

Not only did earlier cases such as *Pavesich v. New England Ins. Co.*[32] use the exact term "right of publicity" at least forty-eight years before *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, but historical evidence indicates the concept of publicity rights predates what is considered to be the first explanation of privacy rights in the United States.[33]

The conception of publicity rights in the United States can be traced back as early as 1888, when Representative John Robert Thomas introduced a federal bill "[t]o prohibit the use of likenesses, portraits, or

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9 HARV. J. SPORTS & ENT. L. 27 (2018).

29. *See* Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895); Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

30. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953). Interestingly, the term "right of publicity" was used before *Haelan Laboratories, Inc.* by the Georgia Supreme Court in 1905. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905) ("If personal liberty embraces the *right of publicity*, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law") (emphasis added).

31. While scholars correctly point out that *Haelan Laboratories, Inc.* did not directly address an infringement of publicity rights and was not the first case involving the concept of publicity rights, the conclusion that publicity rights are privacy rights falls short. Privacy rights represent an individual's "right to be let alone." *See* Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 278, 288–93 (2019); Warren & Brandeis, *supra* note 26, at 195 (citing THOMAS M. COOLEY, TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)). In contrast, publicity rights represent an individual's right to control the commercial use of his or her property made from unequivocally identifying characteristics; publicity rights are not privacy rights. MCCARTHY, *supra* note 5, § 28:1; *Zacchini*, 433 U.S. at 572–73; Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983) (defining the right of publicity as "an intangible personal property right"); *see also* MCCARTHY & SCHECHTER, *supra* note 5, § 1:7. *See generally* Nimmer, *supra* note 12 (explaining how the right of publicity is a unique intellectual property right distinct from privacy rights, unfair competition, and other legal doctrines).

32. Pavesich v. New England Ins. Co., 50 S.E. 68, 70 (Ga. 1905) ("If personal liberty embraces the *right of publicity*, it no less embraces the correlative right of privacy, and this is no new idea in Georgia law.") (emphasis added).

33. *See supra* notes 30 and 31; *see also* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 605 (1960). *See generally* Warren & Brandeis, *supra* note 26 (providing what is considered by many legal scholars to be the first explanation of privacy rights).

representations of females for advertising purposes without consent in writing."[34] As early as 1888, the United States recognized a need to protect its citizens from the commercial misappropriation of their name, image, and likeness.[35] This federal bill did not pass, but eleven years later in 1899, the first state publicity statute was enacted in California.[36] While it is difficult to ascertain when the first right of publicity case in the United States was decided, it is clear that remedies for the unauthorized commercial use of an individual's name, image, and likeness were pursued in courts across the United States before both Warren and Brandeis' Harvard Law Review article and *Haelan Laboratories, Inc.*[37]

Corliss v. E.W. Walker Co. was one of the earliest documented decisions analyzing the concept of publicity rights.[38] In this case, Emily A. Corliss sued publishers in a federal Massachusetts court to prevent them from creating and selling a biography featuring the image and likeness of her late husband, George H. Corliss.[39] The image and likeness of Mr. Corliss at issue was based on a photograph that the defendants obtained from Mrs. Corliss to be used under specific conditions.[40] The defendants failed to comply with Mrs. Corliss' conditions, and the court granted Mrs. Corliss' injunction under the legal theories of breach of

34. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY, 17–18 (Harv. Univ. Press 2018); A Bill to Protect Ladies, H.R. 8151, 50th Cong. (1888).

35. ROTHMAN, *supra* note 34, at 17–18.

36. In February 1899, California was the first state to enact a right of publicity statute that prohibited the publication and circulation of any living California resident's likeness without written consent. However, it is unclear whether any cases were decided under this statute and California repealed the Act in May 1915 for unknown reasons. In 1971, California would again enact a right of publicity statute. ROTHMAN, *supra* note 34, at 19 (citing Act of Feb. 23, 1899, ch. 29, 1899 Cal. Stat. 28 (codified at Cal. Penal Code § 258); Act of May 22, 1915, ch. 459, 1915 Cal. Stat. 761); Steven Andreacola, *History: California Civil Code § 3344.1*, 12 J. CONTEMP. LEGAL ISSUES 592 (2000); *see* CAL. CIV. CODE § 3344 (2026).

37. Although some of these early claims were often asserted as privacy violations or breaches of contract, courts discussed and articulated the concept of publicity rights in their reasoning by considering property interests. *See* Schuyler v. Curtis, 40 N.Y. St. Rep. 289, 292 (N.Y. Sup. Ct. 1890) (discussing the unreported case Manola v. Stevens & Meyers in which a court issued a permanent injunction to prohibit misappropriation of a photo taken of an actress without permission); Marks v. Jaffa, 26 N.Y.S. 908, 909 (N.Y. Sup. Ct. 1893) ("No newspaper or institution, no matter how worthy, has the right to use the name or picture of any [individual to vote on the individual's popularity] without his consent."); Corliss v. E.W. Walker Co., 57 F. 434 (D. Mass. 1893), *rev'd*, 64 F. 280 (D. Mass. 1894); Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902); *Pavesich*, 50 S.E. 68 (Ga. 1905); Edison v. Edison Polyform Mfg. Co., 67 A. 392, 394 (N.J. Ch. 1907) (granting an injunction against a company for misappropriating Thomas Edison's name and image to sell polyform bottles).

38. *Corliss*, 64 F. at 282.

39. *Id.* at 281.

40. *Id.* The court's opinion does not specify what these conditions entailed.

contract and violation of confidence.[41] The defendants subsequently moved to dismiss the injunction.[42]

In its decision, the *Corliss* court surveyed other opinions that addressed privacy and publicity rights under similar circumstances.[43] Alluding to how copyrights differ from privacy and publicity rights,[44] the *Corliss* Court reasoned that non-famous individuals have both a privacy right and a property right in protecting the misappropriation of their images.[45] However, the court found that George H. Corliss, through his widow, had no such privacy or property right because he relinquished those rights through his conduct during life—he sought fame as one of the first American inventors and never objected to the reproduction or circulation of his image.[46] This naked licensing rationale resulted in the court lifting the injunction and dismissing the remainder of Mrs. Corliss' claims, giving rise to greater protection for the publicity rights of non-famous individuals compared to famous individuals.[47]

Shortly after,[48] New York resident Philip Schuyler alleged a group of women violated the privacy rights of his deceased aunt and step-mother, Mary Morris Hamilton Schuyler,[49] by attempting to create a statue of Mrs. Schuyler to honor her as "a friend and benefactor of their sex."[50] The lower court awarded an injunction to Philip Schuyler that prevented the defendants from creating the sculpture.[51] Philip Schuyler did not believe the defendants' conduct maligned the deceased Mrs. Schuyler, but he asserted she would have objected to the sculpture's creation had

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41. *Id.* Today, these facts would warrant strong claims of right of publicity infringement and breach of contract.

42. *Id.*

43. *Id.* at 282.

44. *Id.* at 281 ("The negative may belong to the photographer, but the right to print additional copies is the right of the customer."). The U.S. Copyright Act of 1976 nullified the *Corliss* Court's assertion of who is able to lawfully make copies of a photo, but the reasoning in this opinion is important to understanding the history of publicity rights.

45. *Id.* at 282 ("[A] private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right. . . .").

46. *Id.* at 282–83. In denying Mrs. Corliss' injunction, Judge Colt reasoned:

> [W]hile the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual… [George H. Corliss] was among the first of American inventors, and he sought public recognition as such… [T]here is no substantial evidence that Mr. Corliss, in his lifetime, ever prohibited the reproduction and circulation of his picture.

47. *Id.* at 283.

48. Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895).

49. *Id.* at 25 ("Mrs. Schuyler was not in any sense a public character during her life, and consequently had not surrendered, to any extent whatever, her own right of privacy.").

50. *Id.* at 24.

51. *Id.* at 22.

she been alive.[52] He argued that this proved the defendants' statue would violate her privacy rights, but he failed to articulate a violation of publicity rights or distinguish publicity and privacy rights—a fatal flaw of his legal arguments.[53] The appellate court agreed these circumstances would theoretically violate a living individual's privacy rights but emphasized that the outcome turned on "the fact that Mrs. Schuyler [was] dead," further highlighting Philip Schuyler's failure to assert right of publicity infringement or distinguish between publicity and privacy rights.[54] In lifting the injunction granted by the lower court, the *Schuyler* Court reasoned that Philip Schuyler did not allege a violation of his rights, but rather, the privacy rights (and not the publicity rights) of his deceased aunt and step-mother, which existed during her life but dissolved upon her death.[55]

The *Schuyler* case is unique from other early cases analyzing the concepts of privacy and publicity rights in that Judge Gray wrote an "emphatic[] dissent" criticizing the majority's decision.[56] Judge Gray argued that the "name and reputation" of an individual was both a privacy right and a property right that allowed individuals to prevent third-party misappropriation:

> [T]he purpose of the defendants was to commit an act which was an unauthorized invasion of the plaintiff's right to the preservation of the name and memory of Mrs. Schuyler… As the representative of all her immediate living relatives, it was competent for [Philip Schuyler] to maintain an action to preserve [the name and memory of Mrs. Schuyler] from becoming public property… I cannot see why the right of privacy is not a form of property… If it is a property right with reference to the publication of a catalogue of private etchings, and entitled to be protected against invasion… why is it not such with reference to name and reputation?[57]

In 1902, seven years after *Schuyler* and three years after the first right of publicity statute was enacted,[58] the New York Court of Appeals examined a case involving a teenager named Abigail Roberson who paid

52. *Id.* at 25. Even today, falsity is not an element required to establish a prima facie claim of right of publicity infringement. MCCARTHY & SCHECHTER, *supra* note 5, § 3:2.

53. *Schuyler*, 42 N.E. at 25.

54. *Id.*

55. *Id.* at 25–26 ("It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her.").

56. *Id.* at 27 (Gray, J., dissenting).

57. *Id.* at 27–28 (Gray, J., dissenting).

58. *See* Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895); ROTHMAN, *supra* note 34, at 19.

a photographer to take her portrait in Rochester, New York.[59] The lithographic print taken of Roberson was subsequently used by the Franklin Mills Company without Roberson's permission, and the Company created over 25,000 copies to advertise its flour products in the United States and other countries.[60]

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There was no question that the likeness used in the Franklin Mills Company lithographic print unequivocally identified Roberson.[62] Because Roberson was humiliated by the "scoffs and jeers" of her neighbors[63] and suffered a nervous breakdown because of the defendants' widespread placement of their "Flour of the Family" advertisement, her

59. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902); STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 143 (2010).

60. Roberson v. Rochester Folding Box Co., 65 N.Y.S. 1109, 1109 (N.Y. Sup. Ct. 1900).

61. Rochester Folding Box Co., *Flour of the Family* (illustration), in *Profitable Advertising* (1902), following p. 186.

62. *Roberson*, 64 N.E. at 442 (Ms. Roberson's likeness on the 25,000 lithographic prints was "one that her friends and acquaintances were able to recognize."). Roberson's lithographic print used in the "Flour of the Family" advertisement was seen as sexually suggestive during this era, which caused her great shame and resulted in Roberson's community ostracizing her.

63. *Id.* at 448.

guardian ad litem initiated a lawsuit on her behalf.[64] The defendants quickly filed a demurrer to dismiss Roberson's claims.[65] The trial court reasoned that the likeness shown in the prints was Roberson's property and overruled the defendants' demurrer.[66] The appellate court affirmed the trial court's decision, concluding the facts showed a violation of Roberson's publicity and privacy rights.[67]

However, the New York Court of Appeals, the highest court in New York, reversed the lower courts' judgments as it reviewed various English and U.S. cases, rejecting its predecessor.[68] In granting the defendants' demurrer, the *Roberson* Court concluded that because there was not a statute prohibiting the defendants' conduct, Roberson's claims could not be recognized under the law.[69] The absence of a statute specifically prohibiting the defendants' conduct crippled the four-judge majority.[70] However, this did not hinder the three dissenting judges from reaching the opposite result.[71] These dissenting judges rationalized that

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64. *Roberson*, 65 N.Y.S. at 1109. Roberson was not a legal adult at this time and needed a guardian ad litem to initiate her lawsuit.

65. *Id.* In this period, a demurrer was a type of pleading akin to today's Federal Rule of Civil Procedure 12(b)(6) motion.

66. *Id.* at 1112 ("It seems to me that a photograph likeness of the plaintiff is her peculiar property, and no man can take it from her, or make use of it, without her consent.").

67. *Roberson*, 64 N.E. at 443 (The appellate court found that Roberson "had a good cause of action against defendants, in that defendants had invaded what is called a 'right of privacy.'").

68. It was undisputed that Abigail Roberson was not a public figure. The *Roberson* court reasoned "[a] private individual should be protected against the publication of any portrait of himself, but where an individual becomes a public character, the case is different." However, this principal was ultimately rejected due to an absence of a statute expressly dictating that right. *Roberson*, 64 N.E. at 447; Jonathan L. Faber, *Recent Right of Publicity Revelations: Perspective from the Trenches*, 3 SAVANNAH L. REV. 1, 42–43 (2016).

69. *Roberson*, 64 N.E. at 443. Two years after writing the *Roberson* majority opinion, Chief Judge Parker publicly complained about being frequently photographed without his permission and argued that this conduct violated his right of privacy. Abagail Roberson was quick to criticize Chief Judge Parker's comments as he denied her rights of publicity and privacy under more extreme circumstances, and she mocked him in a letter published by the New York Times. Roberson wrote, "To the extent, at least, it would seem to me that the *right[s] which you denied me but which you now assert for yourself, [were] stronger in my case than in yours." Parker Taken to Task by an Indignant Woman: If I Can Be Photographed, Why Not You? Asks Miss Roberson*, N.Y. TIMES, July 27, 1904, at 1 (emphasis added).

70. *See* Roberson, 64 N.E. at 443 ("The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such, event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are required to decide cases upon principle, and so are necessarily embarrassed by precedents created by an extreme, and, therefore, unjustifiable application of an old principle."); *cf.* Pavesich v. New England Ins. Co., 50 S.E. 68, 70 (Ga. 1905).

71. *Roberson*, 64 N.E. at 448–51 (Gray, J., dissenting). *Roberson* was decided with a 4-3 vote as Judges Gray, Bartlett, and Haight sharply opposed Chief Judge Parker's majority opinion. Judge Gray also wrote the dissenting opinion in *Schuyler*.

because other courts and legal scholars have recognized publicity and privacy rights at common law and no previous court had denied the existence of such rights, it was logical to conclude that Roberson had a right of publicity and a right of privacy.[72] The dissent also reasoned that Roberson owned a property right in her likeness because it had commercial value, as a company would not use her likeness in 25,000 advertisements to attract customers if her likeness did not possess some inherent commercial value.[73]

The public and the New York legislature were shocked by the *Roberson* decision and refused to tolerate its result.[74] This outrage subsequently led to the enactment of the first right of privacy statute and the second[75] right of publicity statute in the United States.[76]

Only a few years after the New York Court of Appeals dismissed Roberson's claims, the Georgia Supreme Court analyzed a surprisingly similar situation and came to the same conclusion as the three dissenting judges in *Roberson*—individuals have a common law right that prevents others from misappropriating their name, image, and likeness in a commercial context.[77]

In *Pavesich v. New England Ins. Co.*, the Georgia Supreme Court rejected the *Roberson* majority and explained how the "right of publicity" and "right of privacy" were guaranteed by the "right of personal liberty" derived from natural law.[78] The *Pavesich* Court harshly criticized the *Roberson* majority for its conclusion[79] and cited the dissenting opinion in *Roberson* with approval:

> Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's

72. *See id.* at 450 ("[A]s a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purpose or gain… Property is not necessarily the thing itself which is owned; it is the right of the owner in relation to it.").

73. *See id.* at 449–50 (Roberson "has the same property in the right to be protected against the use of her face" for commercial uses as she has for the publication of "her literary compositions… if her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public.").

74. ROTHMAN, *supra* note 34, at 24–25.

75. *Id.* at 25; *see supra* note 36.

76. ROTHMAN, *supra* note 34, at 25.

77. *See generally* Pavesich v. New England Ins. Co., 50 S.E. 68 (Ga. 1905) (finding that the use of the plaintiff's likeness in an advertisement produced a legitimate cause of action).

78. *Id.* at 70–71.

79. *Id.* at 77–78 ("[W]e are utterly at variance with [the *Roberson* majority] in [its] conclusion that the existence of this right can[not] be legitimately inferred from" legal scholars and cases that reference this right. "This conservatism of the judiciary has sometimes unconsciously led judges to the conclusion that because the case was novel the right claimed did not exist.").

> privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law… this plaintiff has the same property in the right to be protected against the use of her face for defendants' commercial purposes as she would have if they were publishing her literary compositions.[80]

The court reasoned that publishing an individual's image without his consent, especially "for the mere purpose of increasing the profits and gains of the advertiser," was an invasion of privacy and violation of publicity rights.[81] After establishing that a right of privacy and right of publicity existed at common law with both personal and property-like elements, the *Pavesich* Court turned to the facts that brought the parties before it.[82] The dispute arose when Paolo Pavesich discovered that the New England Life Insurance Company used his likeness in its advertisements without his permission.[83]


THE CONSTITUTION: ATLANTA, GA., SUNDAY, NOVEMBER 15, 1903

DO IT NOW.
THE MAN WHO DID.

DO IT WHILE YOU CAN.
THE MAN WHO DIDN'T.

THESE TWO PICTURES TELL THEIR OWN STORY.

"In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and today my family is protected and I am drawing an annual dividend on my paid-up policies."

"When I had health, vigor and strength I felt the time would never come when I would need insurance. But I see my mistake. If I could recall my life I would buy one of the New England Mutual's 18-Pay Annual Dividen-Policies."

THOMAS B. LUMPKIN, General Agent,
1008-1009-1010 EMPIRE BUILDING.[84]

80. *Id.* at 78 (quoting Roberson v. Rochester Folding Box Co., 64 N.E. 442, 450 (N.Y. 1902) (Gray, J., dissenting)).

81. *Id.* at 81.

82. *Id.*

83. *Id.*

84. New England Life Ins., *These Two Pictures Tell Their Own Story* (photograph), in *The Constitution: Atlanta, Georgia* (Nov. 15, 1903).

Pavesich's friends and family easily recognized the likeness used in the New England Life Insurance Company advertisement.[85] The advertisement heavily implied that he had bought life insurance from the New England Life Insurance Company and that "his family were protected, and he was receiving an income from an annual dividend on paid-up policies."[86]

However, Pavesich never bought life insurance from the Company, and this was known by everyone who knew him.[87] Because his community knew he never purchased life insurance from the Company, the injury to Pavesich was the possibility of his community perceiving him to be an opportunistic liar.[88] This resulted in the advertisement being classified as libel against Pavesich.[89] The Company's actions amounted to a clear violation of Pavesich's publicity rights in the court's eyes.[90]

Scholars, judges, and practitioners subsequently examined publicity rights under *Pavesich* and other foundational cases.[91] This examination resulted in the right of publicity being established as a distinct intellectual property doctrine by the majority of states as it is seen today.[92]

B. *Subsequent Statutory Enactments and Modern Perspectives on the Right of Publicity*

After the early cases[93] were fought, the term "right of publicity" was rediscovered in *Haelan Laboratories, Inc.*,[94] and several scholars published articles on the subject. As a result, the right of publicity became a fixed legal doctrine.[95] The legal community began to understand this doctrine as society approached the Twenty-First Century. At the same time, more right of publicity infringement cases appeared in courts, and scholars continued verifying the distinction between publicity rights and other legal doctrines.[96] The fixture of publicity rights in modern society

85. *Pavesich*, 50 S.E. at 81.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *See* Nimmer, *supra* note 12, at 216; *see also supra* note 31 and accompanying text. *See generally* Audrey Wessel & Mark Roesler, *Damages and Right of Publicity Infringements*, *in* THE COMPREHENSIVE GUIDE TO ECONOMIC DAMAGES 426 (Nancy J. Fannon & Jonathan M. Dunitz, eds., 2020) (describing some of the early right of publicity cases).
92. Nimmer, *supra* note 12, at 216; *supra* note 31 and accompanying text; Wessel & Roesler, *supra* note 91.
93. *See supra* note 37 and accompanying text.
94. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
95. *Id.*; *see also* MCCARTHY & SCHECHTER, *supra* note 5, § 1:27-1:36. *See* Nimmer, *supra* note 12.
96. *See generally* Nimmer, *supra* note 12 (describing cases that distinguished publicity

was further catalyzed by the enactment of California's second right of publicity statute in 1971.[97] Following California, the majority of states enacted a right of publicity statute, formally recognized publicity rights at common law, or provided both statutory and common law publicity rights to its residents.[98]

Today, the majority of states recognize publicity rights as a type of intellectual property and every individual possesses these rights.[99] Nevertheless, a federal statute is needed to optimize social welfare because the current state of publicity rights lacks the certainty seen in other areas of law.[100] The alarming inconsistency in understanding the foundation of these rights and applying different statutory definitions and exemptions between states in litigation and other disputes is nothing short of disorderly and wasteful.[101] This inconsistency does not optimize social welfare.

Each individual has a right of publicity, but the current legal system struggles to uniformly apply this distinct intellectual property doctrine, especially in situations where modern technology is used to illegally exploit publicity rights of famous and non-famous individuals.[102] This

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rights from privacy rights).

97. *See supra* note 36 and accompanying text. *See generally* Andreacola, *supra* note 36, at 592 (describing California's second right of publicity statute as a "legislative response to court decision."); *see also* CAL. CIV. CODE § 3344 (2026).

98. *See generally* Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, LANDSLIDE MAG. (June 2020), https://www.americanbar.org/groups/intellectual_property_law/resources/landslide/archive/whats-name-likeness-image-case-federal-right-publicity-law/ (last visited May 20, 2026) (explaining how jurisdictions utilize a combination of statutory and common law rights to analyze right of publicity cases); *see also supra* note 36 and accompanying text.

99. MCCARTHY, *supra* note 5, § 28:1; Roesler & Hutchinson, *supra* note 98, at n.7.

100. *See* Stephen R. Barnett, *"The Right to One's Own Image": Publicity and Privacy Rights in the United States and Spain*, 47 AM. J. COMP. L. 555, 556 (1999) (labeling the current state of publicity rights a "quilt of inconsistent statutory and common-law interpretations").

101. *See* Roesler & Hutchinson, *supra* note 98; *see also* ROTHMAN, *supra* note 34, at 96 ("Because of the widespread variations it is difficult to know exactly when a use will, or will not, violate a person's right of publicity.").

102. *See* Ian Sample, *What Are Deepfakes- and How Can You Spot Them?*, THE GUARDIAN (Jan. 13, 2020, at 05:00 EST), https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them [https://perma.cc/V9R7-GSST]; Robert Chesney & Danielle Citron, *Deepfakes: A Looming Crisis for National Security, Democracy and Privacy?*, LAWFARE (Feb. 21, 2018), https://www.lawfaremedia.org/article/deepfakes-looming-crisis-national-security-democracy-and-privacy [https://perma.cc/W7K6-GS3B] (defining deepfakes, a modern technology used to exploit publicity rights, as "digital manipulation of sound, images, or video to impersonate someone or make it appear that a person did something—and to do so in a manner that is increasingly realistic, to the point that the unaided observer cannot detect the fake"); Rachel Metz, *The Number of Deepfake Videos Online Is Spiking. Most Are Porn*, CNN (Oct. 7, 2019, at 11:38 EDT), https://www.cnn.com/2019/10/07/tech/deepfake-videos-increase/index.html [https://perma.cc/4C46-D8SD]; *see, e.g.*, BuzzFeedVideo, *You Won't Believe What Obama Says in This Video!*, YOUTUBE (Apr. 17, 2018), https://www.youtube.com/watch?v=

dichotomy is caused by several factors, including the numerous, and sometimes conflicting, economic justifications seen in court decisions that support publicity law as a distinct legal doctrine further described in Part III. After examination of the primary economic rationales that support publicity rights, Part IV conducts a positive economic analysis of transactions under the current state of publicity law versus transactions under a single federal publicity statute.

III. ECONOMIC RATIONALES SUPPORTING PUBLICITY RIGHTS

The economic analysis of intellectual property rights, let alone publicity rights, is not as simple as describing the tradeoff between "incentive" and "access."[103] Some may condense the economic rationale for intellectual property rights as intellectual property owners fear third-party infringement without sufficient legal protection, and at the same time, excess legal protection incentivizes monopolistic prices, preventing reasonable access by individuals who value access lower than the monopolistic prices.[104] However, economic analysis is more complex than that, especially in regards to a specific type of intellectual property like publicity rights.[105] Before exploring the complexity of tradeoffs related to right of publicity transactions and using normative analysis to optimize social welfare, the varying economic rationales supporting this distinct legal doctrine should be explored.

A. *Control*

Publicity rights are properly classified as a distinct type of intellectual property.[106] Any property right at its core signifies the power to exclude others from using a resource and to transfer ownership of that resource to another.[107] Without this legal doctrine, there is no need to create contracts or engage in negotiations.[108] Just as the principal policy supporting

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cQ54GDm1eL0&feature=emb_logo [https://perma.cc/BR25-Y7EZ]; Megan Spector, *Arizona Lawsuit Filed Against AI Platforms Over Nonconsensual Explicit Deepfakes*, FOX 10 PHOENIX (Jan. 28, 2026, at 20:59 MST), https://www.fox10phoenix.com/news/arizona-lawsuit-filed-against-ai-platforms-over-nonconsensual-explicit-deepfakes [https://perma.cc/H5DQ-ULAB]; Christina Pazzanese, *How AI Deepfakes Have Skirted Revenge Porn Laws*, THE HARVARD GAZETTE (Jan. 28, 2026), https://news.harvard.edu/gazette/story/2026/01/how-ai-deepfakes-have-skirted-revenge-porn-laws/ [https://perma.cc/UK4T-KUNU]; Nurture Originals, Foster Art, and Keep Entertainment Safe Act, S. 1367, 119th Cong. (2025).

103. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11 (2003).

104. *See id.*

105. *See id.*

106. *See supra* notes 26 and 31.

107. LANDES & POSNER, *supra* note 103, at 12.

108. *Id.*

property rights, the core of publicity rights gives an individual the right to control his or her property and exclude others from using it.[109]

Control is the dominant rationale behind publicity rights.[110] This is supported by the early cases as well as the historic need for a statute allowing Indiana residents[111] to control the commercial use of their unequivocal identifying features,[112] prompting the enactment of Indiana's right of publicity statute in 1994.[113] Even today, Indiana offers what is perhaps the most expansive protection of publicity rights for both famous and non-famous individuals.[114] However, the enactment of Indiana's publicity bill codifying the state's common law did not come easily.[115] It required a distraught mother to beg the Indiana General Assembly for a statute that would protect her late son's legacy.[116] It required the not-so-hypothetical hypothetical in the beginning of this Note. It required Jeanne White-Ginder and her son, Ryan White.[117]

Ryan White was born in small-town Kokomo, Indiana, on December 6, 1971.[118] Within days of being born, doctors discovered he had severe hemophilia, a medical condition that prevents blood from clotting.[119] Having hemophilia at this time meant receiving routine blood transfusions.[120] After receiving a contaminated blood transfusion in 1984, White acquired AIDS at age thirteen.[121] He was immediately ostracized by the Kokomo community, and the superintendent of his school district

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109. MCCARTHY & SCHECHTER, *supra* note 5, § 2:1 ("my identity is *mine*—it is my property to control as I see fit") (emphasis in original); Faber, *supra* note 68, at 4 ("The most critical function of the [r]ight of [p]ublicity is *control*") (emphasis in original); Faber & Zirkle, *supra* note 4, at 32 ("Control over one's image allows an individual to prohibit the use of his or her right of publicity for any reason, whether the use is morally objectionable to the individual or whether he or she gives no reason whatsoever for withholding the right.").

110. Control was the dominant rational behind the first publicity cases and statutes. *See* Faber, *supra* note 68, at 4 (explaining the importance of control to the right of publicity); *see also supra* note 31 and accompanying text.

111. All residents of Indiana are known colloquially as "Hoosiers." The term "Hoosiers" is not exclusively used to refer to individuals affiliated with Indiana University.

112. *See* Faber, *supra* note 68, at 11 (detailing the unique circumstances and individuals in Indiana that necessitated passage of a right of publicity statute).

113. *See id.*

114. IND. CODE § 32-36-1-7 (2025).

115. Faber, *supra* note 68, at 11 (detailing the steps Ryan White's mother had to go through to convince the legislature to pass a right of publicity statute).

116. *Id.*

117. *Id.*

118. RYAN WHITE & ANN MARIE CUNNINGHAM, RYAN WHITE: MY OWN STORY 5 (1991).

119. *Id.* at 5–6.

120. Howard Markel, *Remembering Ryan White, the Teen Who Fought Against the Stigma of AIDS*, PBS (Apr. 8, 2016, at 08:32 EST), https://www.pbs.org/newshour/health/remembering-ryan-white-the-teen-who-fought-against-the-stigma-of-aids [https://perma.cc/2JJU-LY85].

121. WHITE & CUNNINGHAM, *supra* note 118, at 49–53.

prohibited him from attending school.[122] With the help of his mother, White fought ignorance by challenging and overcoming his school district's discrimination in court, resulting in a court order allowing White to return to school.[123] Despite his legal victory, White and his family failed to escape bigotry. Church attendees avoided being near him, criminals shot bullets into his windows, his Christmas presents were stolen while he was in the hospital, cashiers tossed money at his mother to avoid touching her, and other children called him a murderer for attending school.[124] This unjust treatment catalyzed Ryan to make great strides in AIDS awareness across the United States before passing away on April 8, 1990, at age eighteen.[125] Months after his death, then-President George H.W. Bush signed the Ryan White CARE Act to provide billions of dollars to states and cities to help AIDS victims, solidifying Ryan White as an AIDS activist and American hero.[126]

Only a few years after Ryan White's death, Eclipse Enterprises released a set of AIDS Awareness trading cards.[127] These cards were sold in packs of twelve with a condom.[128] Ryan White's likeness was printed on one of these cards, reprehensibly suggesting that a condom could have saved his life.[129] These products traumatized Ryan's mother, Jeanne White-Ginder, who wanted Eclipse Enterprises to immediately cease and desist using her son's likeness to sell condoms.[130] Jeanne White-Ginder spoke out against the perversion of her son's legacy as an activist and national hero, calling on the Indiana legislature for a statute that would protect her son's right of publicity.[131] Recognizing the need for both deceased and living Hoosiers to control the commercial use of their unequivocally identifying features, Indiana enacted its right of publicity statute in 1994.[132]

Critics of the control rationale for publicity rights assert that this justification uses circular logic because it bases "legal protection upon

122. WHITE & CUNNINGHAM, *supra* note 118, at 92–97; Markel, *supra* note 120. Due to the little information known about AIDS and the high prevalence of homosexual males diagnosed with AIDS at this time, many believed that having AIDS meant an individual engaged in homosexual sex. This ignorant perception of sexuality and illnesses caused society to shun those with AIDS.

123. WHITE & CUNNINGHAM, *supra* note 118, at 140–41.

124. *Id.* at 112, 131, 134, 136; Markel, *supra* note 120.

125. WHITE & CUNNINGHAM, *supra* note 118, at 190–91; Markel, *supra* note 120.

126. Markel, *supra* note 120.

127. Franklin Robinson, *AIDS Awareness Trading Cards*, THE ATLANTIC (Feb. 14, 2012), https://www.theatlantic.com/health/archive/2012/02/aids-awareness-trading-cards/252829/ [https://perma.cc/KE2E-TW4R].

128. *Id.*

129. *Id.*

130. *See* Faber, *supra* note 68, at 11.

131. *Id.*

132. IND. CODE § 32-36-1-0.2 (1994).

economic value when economic value depends upon legal protection."[133] However, the same could be said for other types of intellectual property, which are readily recognized, and it is not circular logic to support publicity rights with a policy that allows individuals, both famous and non-famous, to choose how and when their persona is associated with products and services, especially given the lengthy historical record of courts' treatment of publicity rights as property.[134] Indiana and other states have enacted publicity statutes because they recognize publicity rights as a type of intellectual property that owners should be able to control.[135]

The control rationale provides that allowing individuals to control their publicity rights optimizes social welfare, addresses transactional costs, and promotes efficiency because it concentrates the collective costs and benefits of the property into the owner's hands and prevents overuse.[136] This concentration maximizes social welfare because, in part, it incentivizes the owner to yield benefits from the property until the costs of doing so exceed the rewards. However, it also does not punish the owner for failing to invest in the property's development.[137] The control

133. MCCARTHY & SCHECHTER, *supra* note 5, § 2:2 (citing Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935)).

134. MCCARTHY & SCHECHTER, *supra* note 5, § 2:2 (citing Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 872 (1995); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 57 (1997); *see also* Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment and the Right of Publicity*, 50 BOS. C. L. REV. 1345, 1352 (2009) ("[I]dentity is a concept completely intrinsic to the individual to whom it is attached and therefore properly subject to that individual's control.").

135. It is important to note that the legal community agrees that rights owners cannot control uses of intellectual property that are protected under the U.S. Constitution or by clearly articulated statutory exemptions. *See supra* note 11 and accompanying text. *See* Nimmer, *supra* note 12; MCCARTHY & SCHECHTER, *supra* note 5, § 2:1; Wessel & Roesler, *supra* note 91; Cabaniss v. Hipsley, 151 S.E.2d 496, 504 (Ga. 1966); Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 826 (9th Cir. 1974); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 132 (Wis. 1979); Acme Circus Operating Co., Inc. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983); Hoffman v. Cap. Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) ("Accordingly, First Amendment protection of such [sufficiently transformative] works outweighs whatever interest the state may have in enforcing the right of publicity.").

136. A survey of right of publicity literature suggests that different purposes for publicity rights exists between celebrities and non-celebrities. For celebrities, publicity rights serve to "prevent the premature exhaustion of the commercial value of the celebrity's name or likeness." *See* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 485 (2003). On the other hand, for less well-known celebrities or non-famous individuals, publicity rights serve as an incentive to invest in one's persona. *See* de Gradpre, *supra* note 1, at 91–92 n.83 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 36–37 (5th ed. 1998); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968)). Due to these conflicting arguments that change based on the fame of the individual in question, this Note advocates that the primary purpose of publicity rights for all individuals is control.

137. *See supra* note 136 and accompanying text.

rationale has been used as a source to derive other rationales, such as the incentive to create.[138] However, the incentive to create is often seen as a stand-alone rationale that describes how recognizing publicity rights incentivizes owners to develop and cultivate their personas, which is only a fraction of what the control rationale represents.[139] The incentive to create rationale was seen as an economic justification for an entertainer's publicity rights in *Zacchini v. Scripps-Howard Broad. Co.*, the one and only U.S. Supreme Court case to address publicity rights.[140]

B. *Incentive to Create*

In *Zacchini v. Scripps-Howard Broad. Co.*,[141] the economic justification for the right of publicity rallied around the incentive to cultivate unique, unequivocal identifying talents for entertainment purposes.[142] *Zacchini* involved a broadcasting company that televised the entire performance of Hugo Zacchini, the "human cannonball," without permission.[143] In concluding that Zacchini's publicity rights superseded the broadcasting company's First Amendment rights, the U.S. Supreme Court balanced the conflicting interests using economic principles.[144]

The broadcast of the entertainer's entire act posed a "substantial threat to the economic value of that performance."[145] The act was the product of the entertainer's own talents after a significant amount of hard work, time, and expense.[146] The economic value of Zacchini's act lay within his exclusive right to control his publicity rights under Ohio law.[147] The broadcast had the same effect as preventing the entertainer from charging an admission fee to see his act.[148] The broadcast did more harm to Zacchini than commercially using his name or likeness because his "human cannonball" act went to the heart of Zacchini's ability to earn a living as a performer.[149] The U.S. Supreme Court reasoned that Ohio's right of publicity statute did more than protect a performer's

138. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–77 (1977).

139. *Id.*; RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW 40 (9th ed. 2014); Hardin, *supra* note 136, at 1244–45.

140. *Zacchini*, 433 U.S. at 576–77.

141. *Id.* The core question in *Zacchini* addressed the tension between publicity rights and the First Amendment. The *Zacchini* court reasoned that both doctrines had limitations and that in Zacchini's case, publicity rights triumphed over the First Amendment. *Id.* at 578.

142. *Id.* at 576.

143. *Id.* at 569, 575–76, 578–79.

144. *Id.* at 576–77; *see also* de Gradpre, *supra* note 1, at 76 ("Economics can go a long way towards making sense of the right of publicity because the rationale for the right of publicity is to offer incentives to celebrities and others to market their identity.").

145. *Zacchini*, 433 U.S. at 575.

146. *Id.*

147. *Id.*

148. *Id.* at 575–76.

149. *Id.* at 576.

compensation—it also incentivized performers to invest in themselves and improve their performances to please the public.[150] By finding that the performer's publicity rights superseded the broadcasting company's First Amendment rights, the U.S. Supreme Court preserved the purpose and validation of publicity rights.[151]

In *Zacchini*, the U.S. Supreme Court suggested that publicity rights should be supported with the incentive to create economic rationale.[152] However, the incentive to create as an economic rationale for publicity rights is a derivative from its true purpose—control.[153] The economic rationale of control responds to the problem of transaction costs and optimizes social welfare because the collective risks and rewards remain with the owner, allowing the property to be utilized in the most efficient way.[154] However, there have been a number of court decisions that have justified publicity rights as a policy for other economic rationales, such as protecting individuals from unjust enrichment.[155]

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150. *Id.* at 576.

151. *Id.* at 575–77, 578–79.

152. *Id.*

153. *See supra* note 109 and accompanying text.

154. de Gradpre, *supra* note 1, at 91–92 n.83 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 36–37 (5th ed. 1998)); Hardin, *supra* note 136, at 1244–45.

155. Right of publicity scholars have concluded that unjust enrichment cannot serve as the principal economic justification for publicity rights after decades of courts citing this rationale as the dominant justification supporting publicity rights. *See* de Gradpre, *supra* note 1, at 76, 109–10 ("The right of publicity is in need of a theoretical model, and assessing right of publicity infringements on criteria of unjust enrichment or fair rewards is unlikely to yield consistent case law."); MCCARTHY & SCHECHTER, *supra* note 5, §§ 2:2, 2.7 ("Most judges and lawyers, and certainly most non-lawyers, are not used to thinking of legal rights in terms of maximizing allocative efficiency."); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 196–205 (1993) (arguing that publicity rights cannot be supported by unjust enrichment); Andrew Beckerman-Rodau, *Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 132, 135 (2013) ("[M]any courts and commentators have misinterpreted the right of publicity by viewing it as a pure property right justified by a labor or unjust enrichment theory."); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 230–31 (2012) (arguing publicity rights' property-like characteristic of alienability does not protect against unjust enrichment); Rochelle Cooper Dreyfuss, *We are Symbols and Inhabit Symbols, so Should We be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM. J. L. & ARTS 123, 127–28 (1996) (stating many right of publicity cases cannot be justified with unjust enrichment); Faber & Zirkle, *supra* note 4, at 32 ("If compensation were the sole objective [of publicity rights], a standardized statutory fee might be advisable (which it is not), similar to the statutory rates for mechanical licenses for the use of copyrighted music."); *see also Zacchini*, 433 U.S. at 576; Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979); Playboy Enters., Inc. v. Baccarat Clothing Co., Inc., 692 F.2d 1272, 1274 (9th Cir. 1982); Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992), and *cert. denied*, 112 S. Ct. 1514 (1992).

C. *Unjust Enrichment*

The economic justification granting an individual the right to control the commercial use of his or her own unique, identifiable features is often supplemented by the rationale of ensuring compensation is provided to the rightful beneficiary.[156] This was discussed by California Supreme Court Chief Justice Rose Bird[157] in *Lugosi v. Universal Pictures*.[158]

The principal question in *Lugosi v. Universal Pictures* asked whether Bela George Lugosi's heirs owned a post-mortem right of publicity in his name, image, and likeness.[159] Bela George Lugosi was famously known for portraying Count Dracula in the 1930 film *Dracula* produced by Universal Pictures.[160] Following Lugosi's death, Universal Pictures began to license Lugosi's publicity rights in association with *Dracula* to sell various commercial products.[161] As a result, his heirs sued, asserting that the profits from these contracts were owed to them because they owned Lugosi's publicity rights as his heirs.[162] The *Lugosi* majority found that a post-mortem right of publicity was not recognized under California law.[163]

However, Chief Justice Bird dissented from the majority opinion and supported a post-mortem right of publicity using the economic rationale of unjust enrichment.[164] She wrote that money, time, and energy are needed to develop one's talents and this investment may result in "considerable commercial value in one's identity."[165] The unauthorized commercial use of a person's identity transfers this potential economic value into another's hands.[166] This loss of value exceeded the mere denial of paying a license fee because unchecked misappropriation disrupted an individual's efforts to control his or her public image and resulted in preclusions from future promotions.[167] Criticizing the majority opinion, Chief Justice Bird asserted that exploitation of one's publicity rights leads

156. *Lugosi*, 603 P.2d at 446.

157. Justice Rose Bird was the first female Chief Justice on the California Supreme Court and she was recalled by voters from her judicial appointment in 1986 for opposing the death penalty. Claire Cooper, *Rose Bird: The Last Interview*, DAILY J. (Feb. 2, 2000),https://www.dailyjournal.com/articles/282902-rose-bird-the-last-interview [https://perma.cc/ GW4F-4HQX].

158. *Lugosi*, 603 P.2d at 427.

159. *Id.* at 427.

160. *Id.* at 426–27.

161. *Id.* at 427.

162. *Id.*

163. *Id.* at 431. Today, California recognizes post-mortem publicity rights. *See* CAL. CIV. CODE § 3344.1 (2026).

164. *Lugosi*, 603 P.2d at 434.

165. *Id.* at 438; Nimmer, *supra* note 12, at 215.

166. *Lugosi*, 603 P.2d at 438.

167. *Id.*

to one's identity being used to endorse a product that competes with another product the individual already endorsed, inciting unfair competition.[168] She concluded that the effects of unjust enrichment and the conflicting presence of the individual's persona in the market significantly diminished the overall value of an individual's publicity rights.[169]

Chief Justice Bird and other judges have supported publicity rights using unjust enrichment.[170] However, most scholars agree this policy is inadequate to serve as the dominant economic rationale supporting publicity rights.[171] Thus, unjust enrichment cannot and should not serve as the dominant economic justification supporting a federal right of publicity statute.[172]

D. *Moral Rights*

In addition to unjust enrichment, another justification for publicity rights is moral rights.[173] This rationale often adds to the misconception that publicity rights are privacy rights.[174] Although there is no doubt publicity rights are related to privacy rights, over a century of case law and legal commentary has established publicity rights as a distinct intellectual property right whose purpose cannot be served by any other legal doctrine due to its unique characteristics.[175]

Moral rights as an economic rationale for intellectual property is not a novel concept.[176] Many scholars have explained the economic rationale

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168. *Id.*

169. *See id.*

170. *See id.* at 434–38; Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977); Playboy Enters., Inc. v. Baccarat Clothing Co., Inc., 692 F.2d 1272, 1274 (9th Cir. 1982); Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

171. *But see supra* note 155 and accompanying text.

172. *But see id. See* Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202 (2004).

173. *See, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 988–89 (1964); *see also* Faber & Zirkle, *supra* note 4, at 32–33 (citing Mark Hyman, *Dead Men Don't Screw Up Ad Campaigns*, BUS. WEEK (Mar. 9, 1997, at 00:00 EST), http://www.bloomberg.com/bw/stories/1997-03-09/dead-men-dont-screw-up-ad-campaigns [https://perma.cc/4JPL-SSFP]).

174. *See supra* note 6 and accompanying text.

175. *See supra* note 12 and accompanying text.

176. *See, e.g.*, Thomas F. Cotter, *Pragmatism, Economics and the Droit Moral*, 76 N.C. L. REV. 1, 68 (1997); Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 519 (1967); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 104–05 (1997); *see also* Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 690–703 (1992) (discussing how moral rights had a strong influence on early intellectual property law in the United States).

underlying moral rights.[177] Moral rights as an economic justification for certain intellectual property rights control reputational externalities, benefiting rights owners, licensees of intellectual property, and the public at large.[178] Reputation has economic value,[179] and moral rights that control reputational value and externalities should be considered in an economic analysis of publicity rights.[180] Just as an artist has interests beyond pure economic gain, individuals' publicity rights are intertwined with the essence of a person and deserve to be protected.[181]

With the understanding of the history and economic justifications behind publicity rights, a positive analysis of the costs and benefits in due diligence and transactions under the current state of publicity law can be conducted.[182] In Part IV, the tradeoffs in right of publicity transactions will be described along with how non-famous individuals' publicity rights are being commercially exploited in the machine-learning age. This analysis coupled with normative reasoning will answer how a federal publicity statute optimizes social welfare and solves modern problems.[183]

IV. ANALYZING SOCIAL WELFARE UNDER A FEDERAL PUBLICITY STATUTE

Right of publicity transactions are all about market influence.[184] Every day, consumers are solicited to purchase more products and services than they could ever want in the name of convenience.[185] With the increasing

177. *See supra* note 176.

178. Hansmann & Santilli, *supra* note 176, at 105–07.

179. Meiring De Villiers, *Quantitative Proof of Reputational Harm*, 15 FORDHAM J. CORP. & FIN. L. 567, 585–91 (2010) (discussing how economists quantify monetary value of reputation and stating that corporations economically suffer up to 7.5 times more from reputational harm than penalties imposed through the legal system).

180. *See* Posner, *supra* note 15, at 133 (discussing morality's place in the economic analysis of law). *See* Hansmann & Santilli, *supra* note 176.

181. Mira T. Sundara Rajan, *Moral Rights in Information Technology: A New Kind of Personal Right?*, 12 INT'L J.L. & INFO. TECH. 32, 33 (2004); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1244 (1996) ("[I]t remains difficult to understand why the identity of artists and authors should be more bound up with their work than the identity of others who enjoy no protection against alteration of their work.").

182. WINTER, *supra* note 14, at 6–7.

183. WINTER, *supra* note 14, at 7; de Gradpre, *supra* note 1, at 91.

184. de Gradpre, *supra* note 1, at 93–95; ANSON, *supra* note 26, at 149–50. *See generally* Anita Elberse & Jeroen Verleun, *The Economic Value of Celebrity Endorsements*, 52 J. ADVERT. RES. 149 (2012) (analyzing evidence of celebrity endorsements impacting business revenue); Young v. NeoCortext, Inc., 690 F. Supp. 3d 1091, 1095 (C.D. Cal. 2023), *affm'd mem.*, 2024 U.S. App. LEXIS 30705, 2024 WL 4987254 (9th Cir. 2024) (reality show participant alleged the defendant infringed his publicity rights by using his likeness to solicit the purchase of paid subscriptions to its Reface application).

185. Jeff Fromm, *Marketing Convenience To The Modern Consumer*, FORBES (Jan. 4, 2019), https://www.forbes.com/sites/jefffromm/2019/01/04/marketing-convenience-to-the-modern-consumer/#731e7c12127f [https://perma.cc/6QG2-AF8W].

level of innovation as well as the increasing number of these solicitations pushed in front of consumers, the concentration of market influence has decreased.[186] Endorsement deals are no longer exclusive benefits for the rich and famous.[187] The rise of the internet, social media, and machine learning has opened the door to market influencers beyond the traditional celebrity.[188] This dispersion of market influence will only grow as more non-famous individuals monetize their publicity rights.[189]

A. *Tradeoffs Under the Current Web of Varying State Laws*

Even though publicity rights have evolved with society,[190] scholars, judges, and attorneys still consider publicity rights "complex and confusing" because there is not a single federal statute on which all parties in right of publicity transactions can rely on.[191] The absence of a federal statute causes uncertainty, resulting in high transactional costs and negative externalities.[192]

In 1979, California Chief Justice Bird wrote: "[T]he sale of one's persona in connection with the promotion of commercial products has

186. *See* Oliver Bajracharya & Drew Wilson, *Protecting Influence*, L.A. LAW. 22, 22 (Feb. 2020), https://lalawyer.advanced-pub.com/?issueID=11&pageID=24 [https://perma.cc/5MVT-78H5]; *see also* Andrew Arnold, *Why YouTube Stars Influence Millennials More Than Traditional Celebrities*, FORBES (June 20, 2017), https://www.forbes.com/sites/under30network/2017/06/20/why-youtube-stars-influence-millennials-more-than-traditional-celebrities/#3b3a296148c6 [https://perma.cc/Y7BM-KN7S]; Ismael El Qudsi, *From Reach To Relevance: Current Trends In Influencer Marketing*, FORBES (Dec. 2, 2025), https://www.forbes.com/councils/forbesagencycouncil/2025/12/02/from-reach-to-relevance-current-trends-in-influencer-marketing/ [https://perma.cc/S5PM-LR7X].

187. Arnold, *supra* note 186.

188. *Id.*

189. The projected dispersion of market influence is supported by the passing of California's statute allowing college athletes to profit from their publicity rights and the NCAA's rule changes allowing college athletes from other states to do the same. *See* Melody Gutierrez & Nathan Fenno, *California will allow college athletes to profit from endorsements under bill signed by Newsom*, L.A. TIMES (Sep. 30, 2019), https://www.latimes.com/california/story/2019-09-30/college-athlete-endorsement-deals-ncaa-california-law [https://perma.cc/H9PM-E8MC]; NCAA BOARD OF GOVERNORS, FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS (2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [https://perma.cc/5V6H-NAB8]; Bajracharya & Wilson, *supra* note 186; Talor Bearman, Note, *Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85 (2012); Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2010 DUKE L. & TECH. REV. 2 (2010); Karen Dooley, *Beyond the Field: New Research Highlights How NIL is Reshaping College Athlete Identity*, UNIV. OF FLA. (July 29, 2025), https://news.ufl.edu/2025/07/college-athletes-roles-and-identities/ [https://perma.cc/VH2T-LE6G].

190. de Gradpre, *supra* note 1, at 93 (citing ESTHER DYSON, RELEASE 2.1: A DESIGN FOR LIVING IN THE DIGITAL AGE 172–201 (1998).

191. *See* Barnett, *supra* note 100, at 556 (labeling the current state of publicity rights a "quilt of inconsistent statutory and common-law interpretations").

192. *Id.*; Roesler & Hutchinson, *supra* note 98.

unquestionably become big business."[193] However, this "big business" is not new and has caused problems for rights owners since 1888.[194] Additionally, varying state statutes further add to the quilt of inconsistent interpretations and outcomes in right of publicity cases.[195] States have enacted different statutes defining the right of publicity, defining which acts constitute an infringement of those rights, stating how long those rights last, and listing acceptable exemptions,[196] but opportunists have taken advantage of this uncertainty.[197] They have counterfeited individuals' publicity rights by slightly modifying the names, or voices of individuals with valuable publicity rights they want to profit from.[198] The issue for rights owners, businesses, and other parties is that varying state publicity statutes produce different results under similar circumstances.[199] Under the current state of publicity law in the United States, attorneys managing right of publicity transactions must conduct rigorous due diligence to assess and negotiate risks on behalf of their clients.[200] This system generates significant costs and does not optimize social welfare.[201]

For potential right of publicity licensees, the first step in analyzing the scope of publicity rights often involves identifying the personality's[202] domicile.[203] Identifying the domicile of the individual whose publicity rights are being sought for commercial use is one of the greatest hurdles

193. Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979) (Bird, C.J., dissenting); *see* Nimmer, *supra* note 12, at 215–16.

194. *See* Nimmer, *supra* note 12, at 215–16; ROTHMAN, *supra* note 34, at 17–18 (citing A Bill to Protect Ladies, H.R. 8151, 50th Cong. (1888)).

195. Barnett, *supra* note 100, at 556.

196. Roesler & Hutchinson, *supra* note 98.

197. Gordon, *supra* note 33, at 593 ("The mere change of names in connection with an appropriation or fictionalization for commercial exploitation will not defeat recovery if the plaintiff is readily identifiable."). *See* Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992), and *cert. denied*, 112 S. Ct. 1514 (1992); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014); Wendt & Ratzenberger v. Host Int'l Inc., 197 F.3d 1284 (9th Cir. 1999).

198. *See, e.g.*, *Waits*, 978 F.2d at 1097–98 (where Frito-Lay, through Tracy-Locke, knew of Tom Waits' policy against commercials, but nonetheless hired someone who could imitate his voice for a radio advertisement).

199. Roesler & Hutchinson, *supra* note 98.

200. MCCARTHY & SCHECHTER, *supra* note 5, §§ 10:58-10:81.

201. Roesler & Hutchinson, *supra* note 98.

202. The term "personality" is frequently used to describe the individual whose publicity rights are being sought for commercial use. Roesler & Hutchinson, *supra* note 98; MCCARTHY & SCHECHTER, *supra* note 5, § 11:15.

203. Domicile is generally defined as the jurisdiction where an individual has a physical presence and intends to make his or her home. Martin H. Redish, *Determination of Domicile*, *in* JAMES WM. MOORE, 15A MOORE'S FEDERAL PRACTICE, CIVIL § 102.34 (3d ed. 2020); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (A.L.I. 1988).

that adds uncertainty in right of publicity transactions.[204] Because right of publicity law is state-based, determining domicile is expensive and proves to be more complex than merely determining where someone owns a house.[205]

Most state right of publicity statutes recognize an individual's publicity rights for individuals domiciled in their jurisdiction.[206] However, there are a handful of states that recognize every individual's right of publicity and control any unauthorized commercial uses of publicity rights that occur within their borders.[207] These statutes have been held to be constitutional under challenge,[208] but the variation in these statutes and how they are applied still create obstacles for rights owners, potential licensees, and third parties.[209] To establish any sense of certainty, parties who dispute a personality's domicile must engage in litigation, which is notoriously expensive.[210] In litigation, when domicile is disputed, courts typically look to rules before analyzing a variety of factors to resolve the conflict.[211] However, accurate information to analyze the question of domicile is difficult to obtain, and without a prior court case determining the personality's domicile or a client's willingness to pursue litigation, attorneys are unable to appropriately advise their clients about risks involving the commercial use of publicity rights.[212]

Once domicile is identified, attorneys must also determine the scope of the personality's right of publicity.[213] Some states recognize every individual's right of publicity, but others limit who has enforceable rights and the extent to which such rights are recognized.[214] For example,

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204. Roesler & Hutchinson, *supra* note 98.

205. Determining domicile is a mixed question of fact of law. Roesler & Hutchinson, *supra* note 98; Palazzo v. Corio, 232 F.3d 38, 42 (2d Cir. 2000); Francis v. Goodman, 81 F.3d 5, 7 (1st Cir. 1996); Lew v. Moss, 797 F.2d 747, 750 (9th Cir. 1986); Redish, *supra* note 203, § 15.

206. Roesler & Hutchinson, *supra* note 98.

207. *See, e.g.*, WASH. REV. CODE ANN. § 63.60.010 (2026); HAW. REV. STAT. § 482P-1 (2026); IND. CODE § 32-36-1-1 (2026) ("This chapter applies to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship.").

208. *See, e.g.*, Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 762 F.3d 829, 836–37 (9th Cir. 2014).

209. Roesler & Hutchinson, *supra* note 98.

210. Roesler & Hutchinson, *supra* note 98; *see, e.g.*, Lord Cairns v. Franklin Mint Co., 292 F.3d 1139, 1156–59 (9th Cir. 2002).

211. Redish, *supra* note 203, § 102.34; Roesler & Hutchinson, *supra* note 98 (citing CHRISTOPHER H. HALL, ESTABLISHMENT OF A PERSON'S DOMICILE, 39 AM. JUR. PROOF FACT 587 § 9 (2d ed. 2020)); *see also* Melinda R. Eades, *Choice of Law and the Right of Publicity: Domicile as an Essential First Step*, 66 BROOK. L. REV. 1301, 1321–25 (2001) (citing Factors v. Pro Arts, 579 F.2d 215 (2d Cir. 1978)).

212. *See* Roesler & Hutchinson, *supra* note 98 ("If the business is unable to determine where the celebrity was domiciled, they will be unable to determine the scope of that celebrity's Right of Publicity, the duration of that Right, or even whether the Right exists at all.").

213. Roesler & Hutchinson, *supra* note 98.

214. *Id.*

Kentucky limits protection to public figures, and Arizona only recognizes the publicity rights of military personnel.[215] Additionally, most jurisdictions offer a specific term length for publicity rights, but the terms vary from state to state.[216] For example, in California, the term length for publicity rights is seventy-five years after the personality's death while in Florida, post-mortem publicity rights terminate after forty years.[217]

After determining domicile and the scope of enforceability, attorneys must locate the owner of the personality's publicity rights.[218] For living individuals, this is a straightforward task because publicity rights are generally not assignable or transferable until after the personality's death.[219] However, in the case of deceased personalities, ownership of publicity rights may be fractionalized through the probate process and may become exponentially more difficult to assess through multiple generations of inheritance. Essentially, the greater amount of time since death, the harder it is to establish a clear chain of title for publicity rights.[220] This exposes attorneys' clients to the difficult choice of either researching the personality's potential heirs as well as various state probate and intestacy laws where domicile might have been or risk infringing the personality's publicity rights and paying hefty damages later.[221]

On top of the costs to determine domicile, scope of enforceability, term length, and rights owners, transactions involving publicity rights pose another burden to attorneys' clients.[222] Several federal courts have found that a state that has not officially recognized or rejected post-mortem publicity rights would in fact have recognized a personality's right of publicity.[223] But the negative effect of this issue is not limited to potential licensees.[224] It also hurts rights owners who are forced to either

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215. *Id.* (citing KY. REV. STAT. ANN. § 391.170 (West 2025) (extending right of publicity protection to public figures only)); ARIZ. REV. STAT. ANN. § 12-761 (2026) (extending right of publicity protection to members of the armed services only).

216. Roesler & Hutchinson, *supra* note 98.

217. Roesler & Hutchinson, *supra* note 98 (citing CAL. CIV. CODE § 3344 (West 2026); FLA. STAT. ANN. § 540.08 (West 2025)).

218. *See* Roesler & Hutchinson, *supra* note 98.

219. Goldman v. Simpson, No. SC036340, 2006 WL 6845603 at 13 (Cal. Super. Ct. W. L.A. Cnty. Oct. 31, 2006) (denying motion requesting assignment of *inter vivos* publicity rights); *cf.* RSR Art, LLC v. Bob Ross, Inc., 380 F. Supp. 3d 510, 516 (E.D. Va. 2019) (finding personality assigned his publicity rights into a holding company during life through analysis of vague contract language).

220. *See* Roesler & Hutchinson, *supra* note 98.

221. *Id.*

222. *Id*

223. *Id.* (citing Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989)); *see also* Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc., 270 F.3d 298, 326 (6th Cir. 2001); Jim Henson Prods., Inc. v. John T. Brady & Assocs., 867 F. Supp. 175 189–90 (S.D.N.Y. 1994).

224. Roesler & Hutchinson, *supra* note 98.

pay expenses for "precedent-setting litigation" or watch the value of their rights deteriorate.[225]

Overall, the current, state-based system of publicity rights produces many problems. The uncertainty and expense associated with conducting due diligence and completing right of publicity transactions hinders the cultivation and utilization of these rights.[226] In addition to discouraging investment in publicity rights and lowering their value, this unbalanced system incentivizes third parties to counterfeit others' publicity rights and gamble with the immeasurable chance of liability courts have granted in this area of law.[227]

Adding to the growing costs and negative externalities produced in the current, state-based right of publicity doctrine is the urgent need for non-famous individuals to protect their publicity rights. The technological evolution in the machine learning age produces incredible societal benefits, but it also creates fast-growing methods to exploit individuals' publicity rights.[228]

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225. *Id.*

226. *Id.* (implying that it is counterintuitive for a personality in Idaho to not be incentivized to create a commercially valuable persona while personalities in Indiana and California are).

227. Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992), and *cert. denied*, 112 S. Ct. 1514 (1992); Waits v. Frito-Lay, 978 F.2d 1093, 1098 (9th Cir. 1992); Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 514 (7th Cir. 2014); Wendt v. Host Int'l Inc., 197 F.3d 1284, 1285 (9th Cir. 1999).

228. Ethics and ownership are significant topics of conversation among those whose income derives from monetizing their publicity rights. When asked about how AI has impacted her career, actor Jennifer English responded, "Because so much has been recorded and data farmed from *Baldur's Gate 3*, there are hundreds of hours of my voice online that has then been trained to use AI without my consent… It's frightening and it feels violating… You can get my voice to say the worst things imaginable… I can't tell you how intrusive and gross that is." The Video Game Podcast, *Jennifer English and Aliona Baranova on AI, Pay and the Game of the Year*, YOUTUBE, at 24:11-24:46 (Aug. 28, 2025), https://www.youtube.com/watch?v=RuDrlk6pnnk [https://perma.cc/257T-D27Y]. When commenting on SAG-AFTRA's negotiations regarding ethical AI use, voice actor Jennifer Hale stated that actors want to keep "ownership over our own voices." *See* Ed Nightingale, *Negotiations Over AI Are Still Holding Up Video Game Development - Mass Effect's Jennifer Hale Explains Why*, EUROGAMER (Jan. 9, 2025), https://www.eurogamer.net/negotiations-over-ai-are-still-holding-up-video-game-development-mass-effects-jennifer-hale-explains-why [https://perma.cc/2QPE-BTAG]. *See also* Metz, *supra* note 102; Jesse Koehler, Note, *Fraley v. Facebook: The Right of Publicity in Online Social Networks*, 28 BERKELEY TECH. L.J. 963 (2013); Adam Satariano, *Elon Musk's X Faces European Inquiry Over Sexualized A.I. Images*, N.Y. TIMES (Jan. 26, 2026), https://www.nytimes.com/2026/01/26/business/european-union-x-grok-ai-images-musk.html [https://perma.cc/M534-SZT8]; Edelman, *2025 Edelman Trust Barometer Special Report: Trust and Health* (June 18, 2025), at 25, https://www.edelman.com/trust/2025/trust-barometer/special-report-health [https://perma.cc/EF26-EXPH] (demonstrating the quantifiable economic value of employee's publicity rights through measurements of consumer trust).

B. *How Publicity Rights are Used in the Machine Learning Age*

Even though the "big business" of celebrity endorsements has not changed much over the last forty years, endorsements are not the only way to monetize publicity rights, and celebrities are not the only ones benefiting.[229] The publicity rights of the average Jane and John Doe are also being sought after.[230] In the machine learning age, publicity rights of both celebrities and non-celebrities are being used in new, and often, disturbing ways.[231] While the publicity rights of non-celebrities have been historically exploited or "neglected in practice,"[232] that recently changed when Facebook was accused of infringing non-celebrities' publicity rights.[233]

Facebook is not a stranger to lawsuits.[234] Like other international companies, its size and complexity attract legal problems.[235] Facebook CEO Mark Zuckerberg built the company by generating revenue through advertising to its users and argues that "[a] trusted referral is the Holy Grail of advertising."[236] However, in 2011, Facebook's "Sponsored Stories," the Holy Grail of its advertising practices, went a step too far, resulting in a right of publicity class action lawsuit.[237]

Facebook's "Sponsored Stories" displayed a Facebook user's "name, profile picture, and an assertion that the person 'likes' the advertiser, coupled with the advertiser's logo" on another Facebook user's page.[238] Once a Facebook user "liked" a specific product or service, that action was shared with an average of 130 other Facebook users in the form of "Sponsored Stories," which appeared alongside Facebook's paid

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229. Lugosi v. Universal Pictures, 603 P.2d 425, 438 (Cal. 1979) (Bird, C.J., dissenting); *see* Nimmer, *supra* note 12, at 215–16.

230. *See, e.g.*, Dreymann, *supra* note 3; Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 790 (N.D. Cal. 2011).

231. *See, e.g.*, Metz, *supra* note 102. *See* Hayley Duquette, Note, *Digital Fame: Amending the Right of Publicity to Combat Advances in Face-Swapping Technology*, 20 J. HIGH TECH. L. 82, 103–11 (2020); Anthony L. Pessino, Note, *Mistaken Identity: A Call to Strengthen Publicity Rights for Digital Personas*, 4 VA. SPORTS & ENT. L.J. 86, 89–94 (2004); Sample, *supra* note 102.

232. *See* Claire E. Gorman, *Publicity and Privacy Rights: Evening Out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media*, 53 DEPAUL L. REV. 1247, 1248 (2004); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 389 n.21 (1999) (discussing how technology enables the hijacking of publicity rights to create images and videos of individuals in fictitious, lewd, or violent acts).

233. *See, e.g.*, *Fraley*, 830 F. Supp. 2d at 790.

234. *See, e.g.*, Jeff John Roberts, *Facebook Has Been Hit by Dozens of Data Lawsuits. And This Could Be Just the Beginning*, FORTUNE (Apr. 30, 2018, at 14:33 ET), https://fortune.com/2018/04/30/facebook-data-lawsuits/ [https://perma.cc/U5VU-K5TW].

235. *See id.*

236. *Fraley*, 830 F. Supp. 2d at 799.

237. *See id.*

238. *Id.* at 791.

advertisements.[239] This practice gave users the impression that their Facebook friends endorsed a product or service.[240] Once this practice was discovered, a number of Facebook users filed suit alleging that Facebook unlawfully misappropriated their names, images, and likenesses in paid advertisements without obtaining their consent.[241]

The social media giant responded to this allegation by filing a motion to dismiss the class action.[242] Facebook argued that no relief could be granted for the claims within the plaintiffs' complaint because they failed to allege a cognizable legal injury.[243] Facebook also asserted the plaintiffs consented to the commercial use of their publicity rights by citing Facebook's Statement of Responsibility and Rights and various Facebook webpages instructing how users can edit their privacy settings for sponsored content.[244] Because courts are limited to examining the pleadings and documents referenced within them when considering motions to dismiss, only Facebook's Statement of Responsibility and Rights was admissible.[245]

Facebook supported its motion to dismiss by citing a similar case, *Cohen v. Facebook*,[246] which involved "Friend Finder," another of Facebook's advertising practices. *Cohen* was also a class action alleging Facebook violated the plaintiffs' publicity rights, but the case was dismissed upon Facebook's motion.[247] However, the *Fraley* Court easily distinguished *Fraley* from *Cohen* because the *Fraley* plaintiffs alleged, with supporting citations, their publicity rights had economic value and that Facebook unlawfully benefited from that value.[248]

In denying Facebook's motion to dismiss the class action's right of publicity infringement claims, the *Fraley* Court emphasized that the class action's complaint described "specific examples of how their personal endorsement is valued by advertisers," unlike in *Cohen*.[249] The *Fraley* complaint demonstrated the plaintiffs' tangible property interest in their publicity rights by citing Facebook's Sheryl Sandberg who stated the value of a "Sponsored Story" advertisement was "at least twice and up to three times the value of a standard Facebook.com advertisement without

239. *See id.* at 792.
240. *Id.*
241. *Id*.
242. *Id.* at 795.
243. *Id.*
244. *Id.* at 805.
245. *Id.* at 794–95.
246. Cohen v. Facebook, Inc., No. C 10—5282 RS, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011).
247. *Id.* at *1, *3; *Fraley*, 830 F. Supp. 2d at 800.
248. *Fraley*, 830 F. Supp. 2d at 800.
249. *Id.* at 799.

a friend endorsement" and as well as data gathered by the Nielsen Company, a well-respected marketing research firm.[250]

Fraley v. Facebook represents a modern-day *Pavesich* and is one of the first cases that acknowledges how social media enables both famous and non-famous individuals to profit from their publicity rights.[251] However, social media influencers are not the only type of non-celebrities whose publicity rights have economic value. In addition to the unauthorized, commercial use of non-celebrities' publicity rights in social media and similar cases involving modern technology,[252] college athletes' publicity rights will likely be infringed in the near future.[253] Coupled with the National Collegiate Athletic Association's (NCAA) rule change allowing college athletes to profit from their right of publicity is the opportunity and incentive to exploit.[254] Few college athletes have the legal power or business sophistication wielded by celebrities, and college athletes are more likely to be taken advantage of in business transactions than their professional counterparts.[255]

The NCAA cannot make law, recognize college athletes' publicity rights, or provide a uniform legal system—that is the responsibility of state and federal legislatures.[256] Even so, how will the monetization of college athletes' publicity rights work when not every state recognizes publicity rights of non-famous individuals?[257] How can standard business practices monetizing college athletes' publicity rights be developed when

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250. The *Fraley* court also rejected Facebook's other right of publicity infringement defenses, including those under the Communications Decency Act and the newsworthiness exemption in California's right of publicity statute. *Id.* at 810 ("[T]he Court finds [the plaintiffs'] allegations of provable commercial value sufficient to survive a motion to dismiss and accordingly denies [Facebook's] 12(b)(6) motion with respect to the [Cal. Civ. Code] § 3344 claim.").

251. *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011); *Pavesich v. New England Ins. Co.*, 50 S.E. 68 (Ga. 1905). *See also* Lara O'Reilly, *How Unilever's Huge Bet on Influencers Led to a Creator Economy Gold Rush*, BUS. INSIDER (Dec. 23, 2025), https://www.businessinsider.com/unilever-20x-influencer-mandate-sparks-creator-marketing-gold-rush-2025-12 [https://perma.cc/88TU-EAM4]; Kevin Westcott et al., *2022 Digital Media Trends, 16th edition: Toward the metaverse*, DELOITTE (Mar. 28, 2022), https://www.deloitte.com/us/en/insights/industry/technology/digital-media-trends-consumption-habits-survey/summary.html [https://perma.cc/Q8VD-XMKU].

252. *See* Damon Beres & Marcus Gilmer, *A Guide to 'Deepfakes,' the Internet's Latest Moral Crisis*, MASHABLE (Feb. 2, 2018), https://mashable.com/2018/02/02/what-are-deepfakes/ [https://perma.cc/AFY5-W6WV] (casting doubt on the likelihood of "Deepfake" pornography victims prevailing in lawsuits). *See generally*, *e.g.*, Bosley v. Wildwett.com, 310 F. Supp. 2d 914 (N.D. Ohio 2004).

253. *See* Gutierrez & Fenno, *supra* note 189. *See also* Bajracharya & Wilson, *supra* note 186; NCAA BOARD OF GOVERNORS, *supra* note 189.

254. Taylor A. McGlashan, *The NCAA Turns the Page: The NIL Marketplace and the Potential for Exploitation of Student-Athletes*, 1 OHIO ST. BUS. L.J. 1, 6 (2022).

255. *Id.* at 6–7.

256. NCAA BOARD OF GOVERNORS, *supra* note 189, at 27–30.

257. *Id.*

the scope of publicity rights and acts that constitute infringement vary from state to state? How will attorneys, rights owners, and other stakeholders manage risks of college athletes accidently assigning their publicity rights when one court has found publicity rights are assignable during life and others have prohibited assignability until after death?[258] These types of unanswered questions present impossible choices for the NCAA, colleges, college athletes, and other parties in right of publicity transactions. College sports generate millions of dollars, and there is no doubt that college athletes could benefit from right of publicity transactions.[259] However, there is no uniformity to right of publicity law, and this industry-wide change will produce more uncertainty, more costs, and more negative externalities in the absence of a federal statute.[260]

With more non-famous individuals' publicity rights being unfairly exploited, the need for a federal publicity statute is clear. More importantly, the excessive transactional costs and negative externalities currently seen in right of publicity law would be significantly reduced by a federal publicity statute. In addition to increasing certainty and positive externalities in right of publicity transactions involving college athletes and other non-famous individuals, a federal publicity statute would optimize social welfare.

C. *How a Federal Statute Protecting the Non-Famous Solves Modern Problems*

Enacting a federal publicity statute to replace the current state-based doctrine of publicity law would reduce uncertainty, costs, and negative externalities.[261] With the introduction of deepfakes and other technology,[262] the urgency for a federal publicity statute is apparent.[263]

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258. *See, e.g.*, Goldman v. Simpson, No. SC036340, 2006 WL 6845603 at 13 (Cal. Super. Ct. W. L.A. Cnty. Oct. 31, 2006) (denying motion requesting assignment of *inter vivos* publicity rights); *cf.* RSR Art, LLC v. Bob Ross, Inc., 380 F. Supp. 3d 510, 516 (E.D. Va. 2019) (finding personality assigned his publicity rights into a holding company during life through analysis of vague contract language).

259. *See* NCAA BOARD OF GOVERNORS, *supra* note 189.

260. *See supra* Part IV.A.

261. *See supra* Part IV.A.

262. Chesney & Citron, *supra* note 102; Heejae Lee et al., *Virtual Influencers vs. Human Influencers in the Context of Influencer Marketing: The Moderating Role of Machine Heuristic on Perceived Authenticity of Influencers*, 41 INT'L J. HUM.-COMPUT. INTERACTION 6029, 6030 (2025).

263. *See* Roesler & Hutchinson, *supra* note 98 ("The ability to produce false, humiliating, or even pornographic content, indistinguishable from real content, of ordinary people and distribute it online represents what could be a mounting risk in coming years."); Sample, *supra* note 102; Metz, *supra* note 102; Todd Spangler, *Miquela, the Uncanny CGI Virtual Influencer, Signs With CAA (EXCLUSIVE)*, VARIETY (May 6, 2020), https://variety.com/2020/digital/news/miquela-virtual-influencer-signs-caa-1234599368/ [https://perma.cc/CE8K-CPS6].

But what is needed in this federal statute to reduce the costs and uncertainty seen within the current, state-based system?

Domicile is perhaps the greatest contributor of costs and uncertainty in right of publicity transactions.[264] By enacting a federal publicity statute that applies to any act within the United States, the expense of identifying a personality's domicile in due diligence and deal making becomes unnecessary.[265] A federal statute would also eliminate the need for attorneys to inspect numerous state statutes to determine the scope of a personality's publicity rights because a federal statute would recognize every individual's right of publicity.[266] The costs of evaluating the term length of a personality's right of publicity would also be removed with a federal statute that provides a clear duration of publicity rights after death.[267] This statute could also assist attorneys' current difficulty of locating the rights owners of deceased personalities.[268] With a federal registry for verified rights owners of deceased personalities, similar to the U.S. Patent and Trademark Office's (USPTO) Principle Register for trademarks, rights owners could be easily identified and contacted by businesses seeking to use certain personalities' publicity rights.[269] These solutions would reduce the need for precedent-setting litigation and reduce incentives for companies such as Facebook to unfairly profit from non-celebrities' publicity rights and produce negative externalities.[270]

Another important component of a federal publicity statute that would optimize social welfare is defenses to right of publicity infringement. Critics assert that publicity rights undermine free speech.[271] However, with a clearly articulated statutory exemption for First Amendment uses of publicity rights, judges and practicing attorneys would be rewarded with consistent reasoning and outcomes in future right of publicity cases. This consistent precedent would result in less costs and negative externalities[272] in right of publicity transactions because predictability under the same set of facts would be established. A federal statute with

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264. Roesler & Hutchinson, *supra* note 98.

265. *See, e.g.*, IND. CODE § 32-36-1-1 (2025) ("This chapter applies to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship."); Faber & Zirkle, *supra* note 4, at 36–37 (Indiana's statute dispenses the issue of domicile and "makes an infringement that enters Indiana actionable upon simple and easily understood criteria").

266. Roesler & Hutchinson, *supra* note 98; MCCARTHY, *supra* note 5, § 28:1.

267. Roesler & Hutchinson, *supra* note 98.

268. *Id.*

269. *Id.*

270. *Id.*; Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 809 (N.D. Cal. 2011).

271. *See, e.g.*, Jonathan Peters, *Media Opposes Right-of-Publicity Bill: "An Attack on the First Amendment*," COLUM. JOURNALISM REV. (June 26, 2017), https://www.cjr.org/united_states_project/right-of-publicity-new-york.php [https://perma.cc/A4AG-NF7D].

272. *See* Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *1 (Tex. Ct. App. May 16, 2018).

these characteristics would solve modern problems and maximize outcomes that satisfy individual preferences.[273] This solution would optimize social welfare.

CONCLUSION

The history and purpose of publicity rights establishes control as the dominant economic justification.[274] This rationale optimizes social welfare because it grants individuals control over the commercial use of their features or indicia that unequivocally identify them and prevents overuse.[275] It incentivizes rights owners to yield benefits from their publicity rights until the costs of doing so exceed the rewards without punishment for failing to develop their value.[276] However, the inconsistency between state statutes and court decisions has resulted in unfair forum shopping in right of publicity litigation,[277] added unnecessary transactional costs in right of publicity transactions, and other negative externalities.[278]

The bulk of the costs and uncertainty relate to identifying domicile and determining the scope of publicity rights,[279] and the current state of right of publicly law does not elicit the maximization of outcomes that satisfy individual preferences.[280] However, a federal right of publicity statute does.[281] By reducing costs, eliminating inconsistencies with the current, state-based system, and solving modern problems, a federal right of publicity statute optimizes social welfare.[282] With a growing number of individuals, who are not traditional celebrities, monetizing their publicity rights, a federal statute is needed now more than ever.[283] A federal publicity statute significantly reduces the unnecessary time, money, and energy attorneys currently expend to conduct due diligence and complete right of publicity transactions.[284]

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273. POSNER, *supra* note 154, at 119–21 (discussing difference between welfare maximization and wealth maximization); WINTER, *supra* note 14, at 7.

274. *See supra* Parts II–III.

275. Landes & Posner, *supra* note 136, at 485; MCCARTHY & SCHECHTER, *supra* note 5, § 1:3; Faber & Zirkle, *supra* note 4, at 38 n.42.

276. Landes & Posner, *supra* note 136, at 485; MCCARTHY & SCHECHTER, *supra* note 5, § 1:3; Faber & Zirkle, *supra* note 4, at 38 n.42.

277. Roesler & Hutchinson, *supra* note 98.

278. *See supra* Part IV.

279. *See supra* Parts I–V.

280. Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 675 (1993).

281. *See supra* Part IV.

282. *See supra* Part IV.

283. *See supra* Part IV. *See* Lehrman v. Lovo, Inc., 790 F. Supp. 3d 348 (S.D.N.Y. 2025); McPherson v. Kith Retail, LLC, No. 503083/2024, 2024 N.Y. Misc. LEXIS 74048 (Sup. Ct. July 26, 2024); Complaint, Bodett v. G6 Hospitality LLC, No. 25-04854 (S.D.N.Y. June 9, 2025).

284. *See supra* Part IV.

However, there are barriers to the enactment of a federal statute. Many argue publicity rights undermine free speech.[285] These critics forget that publicity rights have coexisted with the First Amendment for over a century.[286] Although individuals and corporate entities dramatize publicly rights as an unreasonable attack on the First Amendment,[287] the majority of the legal community sees publicity rights as they are—a force of fairness, a preserver of individual economic interests, an optimizer of social welfare.[288] A federal publicity statute would ensure individuals have control over the commercial use of features that unequivocally identify them.[289] It would preserve the economic value of individuals' livelihoods as activists, entertainers, and government officials but also the economic value of individuals' reputations against those who seek to harm or unfairly profit.[290]

These concerns are not met by current United States law, and because no other legal doctrine requires the same elements as right of publicity infringement or serves the same purpose, there are no statutes or legal doctrines that preempt publicity rights. These concerns are not met by the Lanham Act[291] because falsity is not required to show right of publicity infringement, and it is costly to obtain a federal trademark registration that ensures nationwide protection.[292] Additionally, a federal right of publicity statute does not belong within the Lanham Act because it serves a different purpose than publicity rights[293]—trademarks serve to reduce consumers' search costs and provide uniform quality for goods and services.[294] As with trademarks, copyrights serve a different purpose and have unique requirements for eligibility, such as fixation, expression of

285. *See, e.g.*, Peters, *supra* note 271.

286. *See supra* note 11 and accompanying text.

287. Publicity rights and the First Amendment are not at odds with one another anymore than other types of intellectual property. However, the varying methods courts use to determine whether a right of publicity infringement is protected under the First Amendment is cause for concern. A federal publicity statute, providing a uniform test for a First Amendment defense, provides a solution to this problem. Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA ENT. L. REV. 301, 309–22 (2004) (summarizing the different tests courts use to evaluate First Amendment defenses in right of publicity cases); Peters, *supra* note 271; *cf. supra* note 11 and accompanying text.

288. *See supra* Part IV.

289. Faber & Zirkle, *supra* note 4, at 38 n.42.

290. *See supra* Part V.

291. 15 U.S.C. § 1051 *et seq.*

292. MCCARTHY & SCHECHTER, *supra* note 5, § 3:2.

293. MCCARTHY & SCHECHTER, *supra* note 5, § 5:6; Solomon, *supra* note 172, at 1211–12 ("While some commentators and those who oppose a federal right of publicity have suggested that the availability of a false endorsement claim obviates the need for an express federal right of publicity, as discussed below it is a poor substitute at best."); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, comment b (A.L.I. 1995).

294. POSNER, *supra* note 139, at 419.

creativity, sweat equity, and registration—requirements that publicity rights do not have.[295] Publicity rights certainly do not belong with other types of intellectual property, like patents[296] or trade secrets.[297] Finally, and most importantly, a federal right of publicity statute does not belong within privacy statutes because privacy rights serve a different purpose than publicity rights.[298] The right of publicity is a standalone intellectual property doctrine matched by no other.[299]

The need for a federal publicity statute was recognized in 1888,[300] and the legal community has spent over a century defining publicity rights and distinguishing them from other legal doctrines.[301] Law has traditionally been slow to catch up with technology, but an economic analysis of publicity rights in the machine learning age brings two major revelations. First, a federal publicity statute optimizes social welfare. Second, evolving technology that exploits publicity rights in new ways adds to the urgent need for a federal publicity statute. Change is long overdue. After nearly 140 years of waiting, it is time for a federal publicity statute that protects both famous and non-famous individuals.

295. 17 U.S.C. § 101 *et seq.*; MCCARTHY & SCHECHTER, *supra* note 5, §§ 5:40–5:46.

296. *See* 35 U.S.C. § 101 (2026) (defining patentable subject-matter).

297. *See* UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1986) (defining trade secrets).

298. *See supra* note 31 and accompanying text; *see also* ANSON, *supra* note 26, at 18.

299. MCCARTHY, *supra* note 5, § 28:1; Faber & Zirkle, *supra* note 4, at 31. *See generally* Nimmer, *supra* note 12 (explaining how publicity rights protect different interests than privacy rights).

300. ROTHMAN, *supra* note 34, at 17–18; *A Bill to Protect Ladies*, H.R. 8151, 50th Cong. (1888).

301. *See generally* Pavesich v. New England Ins. Co., 50 S.E. 68, 70 (Ga. 1905) (describing publicity as something "embraced within the right of personal liberty" and "guaranteed" alongside privacy); Nimmer, *supra* note 12 (categorizing the right of publicity as a property right); Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (proposing the exposure of prominent persons as the "right of publicity"); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (referring to the right of publicity as both a "right arising under Ohio law" and "constitutional privilege"); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001) (recognizing the right of publicity as a common law and statutory right); MCCARTHY & SCHECHTER, *supra* note 5, § 1:3.

"WHAT'S IN A NAME?": AUTHORSHIP WITHOUT A SUBJECT, OWNERSHIP WITHOUT A SELF IN THE AGE OF ALGORITHMIC FAME

Mira Moldawer[*]

"What's in a name? That which we call a rose
By any other name would smell as sweet."[1]

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1. WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2, ll.l. 43–44, PLAYSHAKESPEARE.COM, https://www.playshakespeare.com/romeo-and-juliet/scenes/301-act-ii-scene-2 [https://perma.cc/L2YZ-3V3X].

INTRODUCTION

In the context of authorship, the question "What's in a name?" has never been more urgent. As generative artificial intelligence (AI) blurs the boundaries between human and synthetic creativity, the function of an author's name is increasingly symbolic, performative, and legally unstable in the digital age.[2] It follows that the question "What's in a name?" may become the key to redefining authorship itself. Lil Miquela, also known as Miquela Sousa, is a computer-generated influencer with millions of followers that embodies the shift from human authorship to algorithmic persona and might serve as a suitable test case.[3]

She's the popular Brazilian-American lifestyle influencer and singer from LA, with around eight million followers across platforms, prior brand collaborations with Chanel, Calvin Klein, and Prada, posts showcasing her intimate encounters with the American supermodel Bella Hadid, and recognition by Time magazine as one of the most influential people on the internet in 2018. She sounds perfect. Except for one thing perhaps, she is not real, at least not in the concrete, tangible, and physical sense of the word. She is a "virtual influencer" (VI).[4]

Lil Miquela is not alone. Among the top AI influencers to look out for, we can find an ever-enlarging list of profiles. Lu do Magalu (@magazineluiza), developed by Brazilian retail conglomerate Magazine Luiza, disseminates lifestyle and promotional content across social media platforms, effectively merging advertising and digital identity.[5] Aitana Lopez (@fit_aitana), an AI influencer designed to target fashion-conscious youth demographics, is frequently engaged in brand collaborations within the beauty and apparel sectors.[6]

Shudu (@shudu.gram), heralded as the world's first digital supermodel, was created by British photographer Cameron-James

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2. *See generally AI Influencers: How Virtual Personalities Are Shaping the Future of Marketing*, INFLUENCITY (Jan. 10, 2025), https://influencity.com/blog/en/ai-influence [https://perma.cc/DY92-LYGM]; CRYSTAL ABIDIN, INTERNET CELEBRITY: UNDERSTANDING FAME ONLINE (2018) (introducing the typology of influencers, including emerging non-human forms).

3. Alice E. Marwick, *Epilogue: The Algorithmic Celebrity: The Future of Internet Fame and Microcelebrity Studies* in MICROCELEBRITY AROUND THE GLOBE: APPROACHES TO CULTURES OF INTERNET FAME 161, 161 (2018 Crystal Abidin & Megan Lindsay Brown eds. 8) (claiming that Lil Miquela is the most successful VI).

4. Bernadett Koles et al., *The Authentic Virtual Influencer: Authenticity Manifestations in the Metaverse*, 170 J. BUS. RSCH. 1 (2024), https://doi.org/10.1016/j.jbusres.2023.114325 [https://perma.cc/V6MX-7M3M] (discussing the three types of authenticity—true-to-ideal [TTI], true-to-fact [TTF], and true-to-self [TTS], and their implications).

5. Mudit Kaushik, *Unreal Humans but Real Laws – A Saga of Virtual Influencers*, FASHION L.J. (Dec. 28, 2022), https://fashionlawjournal.com/unreal-humans-but-real-laws-a-saga-of-virtual-influencers/ [https://perma.cc/29C7-HQCM].

6. INFLUENCITY, *supra* note 2.

Wilson.[7] Her hyper realistic appearance and collaborations with luxury brands, such as Fenty Beauty by Rihanna, position her at the intersection of visual art, commercial speech, and the evolving definition of identity in the fashion industry.[8] Bee Influencer (@bee_nfluencer) employs a stylized bee avatar to promote environmental awareness and sustainable consumption.[9]

Further, Imma (@imma.gram) is a Japanese virtual model developed by Aww Inc. who is known for her distinct visual branding, particularly her pink bob and high-fashion aesthetics; she has appeared in campaigns for global firms, including IKEA and Gucci.[10] Kyra (@kyraonig), India's first virtual influencer, is portrayed as a twenty-two-year-old model based in Mumbai. She produces aspirational content focused on fashion, travel, and wellness, and she has entered into partnerships with Amazon Prime Video and other commercial entities.[11] Milla Sofia (@millasofia_fin), a Finnish AI persona, curates luxury fashion and lifestyle content.[12]

Regarding the key features of all these influencers, they are entirely synthetic entities, constructed through artificial intelligence, machine learning, and digital design to replicate human expression and engagement.[13] Despite lacking personhood or physical form, they autonomously generate personalized content and maintain consistently branded identities. While their activities mirror those of human influencers in promoting goods and shaping consumer behavior, their algorithmic adaptability, data-driven customization, and global scalability raise novel interdisciplinary questions concerning authorship, identity, fame, and cultural control.[14]

As leading scholars caution that "Miquela will not be the last of her kind; let us be prepared," the pressing question arises: Can our current Intellectual Property (IP) framework, particularly copyright law and the right of publicity, adequately respond to the emergence of the virtual celebrity?[15] Namely, are we entering a post-subject era of celebrity where the "face" is less important than the interface? *Time*'s inclusion of

7. *Id.*

8. *Id.*; *see* Miranda Katz, *CGI 'Influencers' Like Lil Miquela Are About to Flood Your Feeds*, WIRED (May 1, 2018), https://www.wired.com/story/lil-miquela-digital-humans/?utm_source [https://perma.cc/WPL6-W8QU].

9. INFLUENCITY, *supra* note 2.

10. *Id.*

11. *Id.*

12. *Id*.

13. *Id.* ("AI influencers are completely digital creations, designed using advanced algorithms, machine learning, and AI technologies.").

14. *See* Daisy Jones, *Why We Follow Lil Miquela, The Model With 900K Followers & No Soul*, REFINERY29 (Apr. 10, 2018, at 16:00 EST), https://www.refinery29.com/en-us/miquela-sousa-fake-instagram [https://perma.cc/U33K-F9H4].

15. Marwick, *supra* note 3, at 166.

Miquela among the twenty-five most influential people on the internet in June 2018 underscores that the virtual influencer is more than a technological or artistic novelty.[16] We are facing a new legal subjectivity that destabilizes longstanding boundaries between subject and object, author and avatar.

The tension between authorship, identity, and power is as old as copyright law itself, although it has historically appeared under different guises. Already in the foundational cases of British jurisprudence that shaped the core principles, justification, and duration of copyright law, the legal system has oscillated between treating authorship as a personal expression of identity and as a commodifiable property interest, a duality that continues to inform current legal and philosophical debates.[17]

The hybrid nature of legal authorship was first articulated in *Pope v. Curl* (1741).[18] The poet Alexander Pope sued a bookseller for publishing his private correspondence without consent. The court distinguished between the physical letter, which the recipient owned, and its intangible content, which the author owned.[19] While privacy interests were implicated, the ruling emphasized the writer's composition as a property interest, laying the groundwork for the modern concept of authorship.[20]

This foundation was expanded in *Millar v. Taylor*.[21] In *Millar*, the plaintiff, bookseller Andrew Millar, had acquired the publishing rights to James Thomson's *The Seasons*. When the statutory term under the Statute of Anne expired, the defendant, Robert Taylor, began reprinting the work.[22] The case became a landmark in copyright history, affirming the view that common law granted authors perpetual rights independent of statutory limits.

While the majority treated authorship as a transferable property right, Lord Yates dissented, viewing publication control as a personal, non-

16. Melissa Chan, *The 25 Most Influential People on the Internet*, TIME (June 28, 2018, at 10:33 ET), https://time.com/5324130/most-influential-internet/ [https://perma.cc/Q239-GJVT].

17. *See generally* Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29 (2012) (discussing publishers' focus on property rights regarding the Statute of Anne and the seminal precedents that have categorized copyrightability as a property right ever since).

18. Ronan Deazley, *Commentary on Pope v. Curl (1741)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008).

19. Stern, *supra* note 17, at 63. ("[T]he receiver only acquires a qualified interest in [the letter]. The paper on which it is written may belong to him, but the composition does not become vested in him as property, and he cannot publish against the consent of the writer.").

20. *Id.* at 68 ("Pope's legal strategy anticipates the emphasis on property rights that later courts would solidify. Pope is best known as the judgment that began to articulate a distinction between the physical embodiment of the work and the words that constitute it, but the dispute is also important as an early example of an exclusively property-driven approach to copyright."); *see also* Lior Zemer, *The Conceptual Game in Copyright*, 28 HASTINGS COMM. & ENT. L.J. 409, 423 (2006).

21. *Millar v. Taylor* (1769) 4 Burr. 2303, 98 Eng. Rep. 201 (KB).

22. Statute of Anne 1710, 8 Ann. c. 19 (Eng.); *see* Zemer, *supra* note 20, at 420.

transferable right rooted in dignity and more akin to early publicity or privacy rights.[23] Lord Mansfield, writing for the majority, advanced a more complex justification. His opinion blended labor theory, unjust enrichment, and authorial will, anticipating personhood theory.[24] Lord Mansfield held that authors should control how, when, whether, and by whom their works are published, reflecting the moral rights of attribution and integrity.[25]

Even in *Donaldson v. Becket*, where the British House of Lords overturned *Millar* and rejected the notion of perpetual common-law copyright because copyright in published works was limited by the Statute of Anne, the underlying debate centered on the transformation of copyright from a transferable right to a heritable form of property.[26] The plaintiff, a Scottish bookseller named Alexander Donaldson, was sued to prevent him from printing *The Seasons*, the same work at issue in *Millar*.

While the Court of Chancery, adhering to *Millar*, treated copyright in published works as a perpetual common-law right, Donaldson contended that once the term established by the Statute of Anne expired, the work entered the public domain, as the statute had displaced any pre-existing common-law basis for protection. As Simon Stern notes, the word "property" itself did not appear in the formal questions posed to the judges.[27] Nonetheless, while the publishers ultimately lost the case for perpetual copyright, they succeeded in advancing a more consequential legal premise: that copyright should be understood as a form of property, an idea that would prove foundational to its future legal treatment.[28]

This legacy continues to shape the division within copyright law justifications, with legal systems aligning along two distinct approaches: the instrumental model predominant in Anglo-American jurisdictions, which presumes authorial motivation through economic incentives and copyright protections, and the Continental tradition, which emphasizes moral frameworks such as authors' rights to attribution and integrity.[29]

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23. Millar, 4 Burr. at 245 (Yates, J., dissenting) (describing the action as "amerely vindictive: it is in personam; not in rem").

24. *Id.* at 252–53.

25. *Id*. at 252 ("The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend; or cancel a faulty edition . . . He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.").

26. (1774) 4 Burr. 2408, 98 Eng. Rep. 257 (HL). The case is also reported as Donaldson v. Beckett (1774) 2 Bro. PC (2d ed.) 129, 1 Eng. Rep. 837.

27. Stern, *supra* note 17, at 82.

28. *Id.* at 35 ("One of the ironies of the decision in Donaldson v. Becket (1774) is that, although the publishers lost the dispute over perpetual protection, they won the argument over the premise for such protection—the premise that copyright was a form of property.").

29. Wendy J. Gordon & Robert G. Bone, *Copyright*, *in* ENCYCLOPEDIA OF LAW & ECONOMICS 189, 190–91 (2000) (categorizing the different approaches to intellectual property

Publicity rights, commonly defined as the right to control the commercial use of one's name, image, likeness (NIL), or other personal attributes, extend and complicate the longstanding conflict between privacy/identity, property/ownership, and authorship/control.[30] Publicity rights form a fragmented and contested legal field, often referred to as a "patchwork" of state-based misappropriation doctrines, despite their seemingly straightforward definition.[31] The right of publicity emerged from a fundamental reconfiguration of the legal understanding of identity, shifting from a personal, inalienable attribute protected under privacy doctrines to a commodifiable asset subject to ownership, transfer, and control.[32]

This shift did not occur in isolation but reflects a deeper jurisprudential turn toward the objectification of identity, where the self is reimagined through the language of property and economic utility. Initially tethered to the tort of privacy, publicity rights found early expression in the appropriation doctrine, which protected individuals from the unauthorized commercial use of their names or likenesses.[33] Rooted in the dignitary concerns articulated by Samuel Warren and Louis Brandeis, privacy law was conceived as a response to the intensifying

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law as moral and instrumental); KIM TREIGER-BAR-AM, POSITIVE FREEDOM AND THE LAW 167–68 (2019) (arguing that "[t]he Anglo-American incentive model is instrumental: authors are presumed to rely upon the incentive of copyright protection and profits for their efforts of creation. The Continental deontological models for authors' rights [droit d'auteur] are rights in property [in France] and personality [in Germany]. Copyright is often considered to exist on two norms and, indeed, as caught between them. Yet both instrumental and deontological aspects of the doctrine function side by side.").

30. CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB11052, ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY 1 (2024).

31. *See* Mira Moldawer, *From Now to Eternity: What Went Wrong with Publicity Rights*, 65:3 IDEA: L.REV. FRANKLIN PIERCE CTR. FOR INTELL. PROP. 106, 108 (2025) [hereinafter Moldawer, *From Now to Eternity*] (citing Patrick Kabat, Senior Lecturer at the Case Western Reserve University School of Law, The Right of Publicity: Through the Thicket? The Report of the Right of Publicity Workshop at Yale Law School 1 (Oct. 16–17, 2015), https://law.yale.edu/sites/default/files/area/center/isp/documents/yls_right_of_publicity_workshop_report_final.pdf [https://perma.cc/ME8K-6ARC]) (highlighting the lack of uniformity of state publicity laws).

32. *See generally* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 172 (1993) (discussing the history of the persona/celebrity and publicity rights); Tonia Hap Murphy, *The Right of Publicity: Worth a Closer Look in the Classroom*, 36 J. LEGAL STUD. EDUC. 237, 258 (2019) (discussing the rise of the right of publicity and corresponding tort rights).

33. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 152–53 (1992) (arguing the tort of "misappropriation" was ground to the phenomenon she calls "sisterly rights," or even "metastasis in the law," that begot publicity rights on the one hand, and dilution of trademark law, on the other hand, which are all embedded in the restitution paradigm).

threats of modern publicity, famously defined as "the right to be let alone."[34]

Dean William Prosser advanced the doctrine by identifying four distinct torts encompassed within the right to privacy, the fourth of which involves the unauthorized use of the plaintiff's name or likeness for the defendant's advantage.[35] However, this framework proved insufficient in cases where the harm was not emotional distress but unauthorized commercial exploitation. The inadequacy of the privacy paradigm to address these new forms of harm catalyzed the transformation of identity from a personal interest to a proprietary right.[36]

While many scholars draw a clear distinction between the right of privacy, which is aimed at protecting emotional and dignitary interests, and the right of publicity, which centers on commercial control over one's identity, leading scholarship has shown this dichotomy to be overly simplistic.[37] The two rights are deeply intertwined, as the original formulation of the right of publicity was rooted in shielding individuals from "unwarranted publicity" concerning their personas.[38] This blurriness was further exacerbated by two key milestones that framed the evolution of publicity rights.

The first is Judge Jerome Frank's pivotal decision in *Haelan Laboratories v. Topps Inc.*, which marked the transformation of publicity rights from a privacy-based tort into a form of property.[39] In that case, the plaintiff had secured an exclusive contract with a baseball player to use his photograph for promotional purposes. Despite knowing this, the defendant obtained a similar agreement with the same player. Traditionally, such disputes would fall under privacy law, where unauthorized use could trigger liability under Sections 50 and 51 of the New York Civil Rights Law.

Justice Frank broke from this model, recognizing a transferable "right of publicity" distinct from the right of privacy, one that could be licensed and enforced against third parties.[40] This doctrinal shift acknowledged

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34. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

35. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

36. Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1345–46 (2009) [hereinafter Rosenthal Kwall, *A Perspective*]; Murphy, *supra* note 32, at 238–39; Madow, *supra* note 32, at 167.

37. Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 COLUM. J.L. & ARTS 277, 279 (2019).

38. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 4–5, 11–44 (2018); Rothman, *The Right of Publicity's Intellectual Property Turn*, *supra* note 37, at 279.

39. 202 F.2d 866, 868 (2d Cir. 1953).

40. *Id*. at 868 ("We think that, in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive

identity's commercial value and laid the foundation for treating it as property. In addition, Melville Nimmer's influential article, which argued that the right of publicity should be recognized as a standalone legal right protecting the commercial exploitation of a persona, cemented the property turn in publicity rights.[41]

The boundary between publicity rights as a privacy-based tort and as a full-fledged property right remained ambiguous even in *Haelan Laboratories*, as Justice Frank downplayed the significance of labeling it a "property right," suggesting that the term merely indicated judicial recognition of a claim with economic value.[42] However, following Dean Prosser's influential reclassification of privacy into four distinct torts, there remains reason to question whether such labels are inconsequential.[43] Dean Prosser underscored the proprietary dimension of appropriation but continued to frame it within the broader privacy doctrine.[44]

In contrast, Justice Frank viewed the property designation as a legal convenience rather than a conceptual shift. Dean Prosser's approach, however, introduced a persistent tension. His formulation of appropriation law combines personal and commercial harms under the umbrella of privacy, resulting in a duality that continues to blur the lines between dignitary protection and economic control. As a result, the term "privacy" itself conveys two divergent meanings, one rooted in personal autonomy and the other in market value.

The second major turning point was *Zacchini v. Scripps-Howard Broadcasting Co.*, the only right of publicity case to reach the U.S. Supreme Court.[45] In a 5–4 decision, the Court held that broadcasting Hugo Zacchini's entire "human cannonball" act without his consent violated his right of publicity. The Court emphasized the economic value of the performance, analogizing the unauthorized broadcast to copyright infringement.[46] Here, the Court decisively framed the right of publicity

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privilege of publishing his picture . . . For it is common knowledge that many prominent persons . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements.").

41. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203–04 (1954) ("[T]he [privacy] doctrine, first developed to protect the sensibilities of nineteenth century Brahmin Boston, is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the advertising, motion picture, television, and radio industries. Well known personalities connected with these industries do not seek the 'solitude and privacy' which Brandeis and Warren sought to protect.").

42. *Haelan Laboratories*, 202 F.2d at 868.

43. Prosser, *supra* note 35, at 389.

44. *Id.* at 406.

45. 433 U.S. 562 (1977).

46. Mark A. Lemley appropriates this continuous error to the *Zacchini* case, *supra* note 45, in which the whole plaintiff's show was copied by the defendant, rendering the case to look "more like a common law copyright claim than a traditional right of publicity claim." *See* Mark A.

not as a dignitary harm but as a form of economic misappropriation, blurring the boundaries between copyright and publicity and embedding identity within copyright's logic of exclusive control and economic incentive. Hence, the conjoined copyright law and publicity rights authorship was initiated.

In doing so, the Court affirmed that identity, like authorship, could be controlled through legal exclusivity. Yet unlike copyright, which is constrained by doctrines of originality, term limits, and public domain access, publicity rights are potentially perpetual and increasingly expansive.[47] The commodification of identity, under the guise of publicity rights, threatens to displace traditional notions of authorship, public interest, and the constitutional balance between expression and ownership.[48] Thus, it challenges not only the conventional limits of copyright but also those of trademark law, exposing the persistent complexity and entanglement within this evolving legal framework.[49]

As digital media increasingly blurs the lines between news, entertainment, and commerce, the unchecked expansion of publicity rights threatens to destabilize the fragile equilibrium between creative freedom, public interest, and proprietary control.[50] Regarding this framework, viral social media avatars problematize traditional legal frameworks of authorship, originality, and persona even more than their living counterparts**.** Meanwhile, copyright and publicity rights remain rooted in eighteenth- and nineteenth-century models of Romantic

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Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153, 1170 n.76 (2019) [hereinafter Lemley, *Privacy*].

47. For the current legal status of the right of publicity in each state, *see Right of Publicity, Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes [https://perma.cc/3LZU-TQF5]; *Right of Publicity State-by-State*, ROTHMAN'S ROADMAP TO RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com [https://perma.cc/8XT5-6RBT].

48. *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, JJ., dissenting) (arguing against the exaggerated legal power of publicity right due to its bypassing copyright law's constraints).

49. Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV 1271, 1273 (2022) ("Both trademark and unfair competition laws and state right of publicity laws protect against unauthorized uses of a person's identity. These distinct rights are thought to work in harmony to protect a person's commercial and personal interests. Increasingly, however, these rights are working at odds with one another and can point in different directions with regard to who controls a person's name, likeness, and broader indicia of identity. This creates an identity thicket of overlapping and conflicting rights over a person's identity.").

50. Matthew Savare, *Image is Everything*, INTELL. PROP. MAG. 52, 53 (Mar. 2013), https://www.lowenstein.com/media/4712/publicity-rights.pdf [https://perma.cc/KNC8-CBFA] (claiming the issue of the "hybrid speech" to be the most complicated and disputed in copyright claims).

authorship, heavily influenced by three Enlightenment-era philosophers, Immanuel Kant, G. W. F. Hegel, and J. G. Fichte.[51]

While often grouped, Kant, Fichte, and Hegel differ significantly in their justifications for authorship and copyright. Kant adopts a rights-based approach, focusing on the author's communicative act.[52] In *What Is a Book?*, he views the book not as a commodity but as a form of speech in which the author "speaks to his reader."[53] For Kant, unauthorized publication creates an "agency without authority," as only the author, or someone properly authorized, may address the public in her name.[54] This perspective grounds the modern idea of expressive autonomy.[55] Fichte builds on Kant's approach by emphasizing the originality of the author's expressive form, asserting that each writer must uniquely shape his thoughts.[56]

Hegel advances the argument by linking the creative act to the author's will, treating the work as an extension of the self.[57] His theory,

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51. *See generally* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 430 (1984); MARTHA WOODMANSEE & PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 10 (1994); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1019 (1990); Olufunmilayo B. Arewa, *The Freedom to Copy*: *Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 54 (1996).

52. *See* Maurizio Borghi, *Copyright and the Commodification of Authorship in 18th and 19th Century Europe*, OXFORD RSCH. ENCYC. OF LITERATURE 341 (2018).

53. IMMANUEL KANT, *What is a Book? The Unauthorized Publishing of Books Is Contrary to the Principles of Right, and Is Rightly Prohibited*, *in* IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 31(II), 89 (W. Hastie, trans., Edinburgh: Clark, 1887) (THE ONLINE LIBRARY OF LIBERTY: A PROJECT OF LIBERTY FUND, INC.), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/359/Kant_0139_EBk_v6.0.pdf [https://perma.cc/G334-57ES].

54. Friedemann Kawohl, *Commentary on Kant's Essay on the Injustice of Reprinting Books (1785)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_d_1785 [https://perma.cc/NRH6-AVP5].

55. TREIGER-BAR-AM, *supra* note 29, at 170.

56. JOHANN G. FICHTE, PROOF OF THE ILLEGALITY OF REPRINTING: A RATIONALE AND A PARABLE (M. Woodmansee trans., 1793) ("Hence, each writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property.").

57. 1 G.W.F. HEGEL, AESTHETICS: LECTURES ON FINE ART 296 (T.M. Knox trans., Oxford University Press 1975) [hereinafter HEGEL, AESTHETICS] ("The true work of art must be freed from this perverse originality, for it evinces its genuine originality only by appearing as the one personal creation of one spirit which gathers and compiles nothing from without, but produces the whole topic from its own resources by a single cast, in one tone, with strict interconnection of its parts, just as the thing itself has united them in itself."). *See generally* Paul Redding, *Georg Wilhelm Friedrich Hegel*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 13, 1997),

grounded in the Kantian notion of autonomous will, provides a philosophical basis for property rights in intellectual labor.[58] Unlike Kant's focus on speech, Fichte and Hegel draw a sharper distinction between writing and speaking to support writing as a professional and proprietary activity.[59] Still, for Hegel's and Fichte's contemporaries, Kant's notion of authorial control over thought alone was insufficient to ground a comprehensive copyright regime.[60]

Yet, all these perspectives legitimize legal control by asserting that creative works are extensions of the self. Thus, they simultaneously reinforce authorship as a moral entitlement and economic claim. Therefore, the conceptions of identity, authorship, originality, and property that underpin both copyright law and the framework of publicity rights are increasingly unsustainable in the context of contemporary digital modes of creativity and self-representation. Part I draws on Schopenhauer's aesthetic metaphysics in *The World as Will and Representation* to critique the prevailing legal models of authorship and identity.[61]

By positing that the self is merely a representation, a phenomenal illusion serving the *Will*, Schopenhauer anticipates a legal reality in

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https://plato.stanford.edu/entries/hegel [https://perma.cc/5KT2-RPL6] (claiming private property as a necessary vehicle for cultivating the individual, as it materializes her inner will. Hence, the creator has a given right to control her creation and exploit it solely); Stephen Houlgate, *Hegel's Aesthetics*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 20, 2009), https://plato.stanford.edu/archives/win2021/entries/hegel-aesthetics [https://perma.cc/DC4B-G23E] (supporting the importance of Hegel's Aesthetics).

58. *See generally* Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Jan. 21, 2022), https://plato.stanford.edu/archives/spr2022/entries/kant-moral [https://perma.cc/A992-G33F] (holding that Kant's theory of autonomy encompasses the property of wills); G.W.F. HEGEL, PHILOSOPHY OF RIGHT, 7, 59 (S.W. Dyde trans., Batoche Books 2001) ("In property my will is personal. But the person, it must be observed, is this particular individual, and, thus, property is the embodiment of this particular will. Since property gives visible existence to my will, it must be regarded as 'this' and hence as 'mine.' This is the important doctrine of the necessity of private property.").

59. HEGEL, *supra* note 58, at 61 ("In order to fix property as the outward symbol of my personality, it is not enough that I represent it as name and internally will it to be mine; I must also take it over into my possession. The embodiment of my will can then be recognized by others as mine.").

60. Kawohl, *supra* note 54 (referring to Kant) ("He resorts to a completely different juridical concept: it is not the author's property that is violated by a reprint, but the author's right to decide whom he will delegate to transfer his speech to the public. Unauthorized reprinting is, therefore, not a property offence but, rather, an 'agency without authority.'").

61. E. F. J. Payne, *Translator's Introduction* to ARTHUR SCHOPENHAUER, THE WORLD AS WILL AND REPRESENTATION, v, vii (E. F. J. Payne trans., 1969), https://philocyclevl.files.wordpress.com/2016/10/schopenhauer-world-as-will-and-representation-1of2.pdf [https://perma.cc/D65K-F4BX] [hereinafter SCHOPENHAUER, WWR].

which authorship and personhood no longer cohere.[62] Schopenhauer's conception of the genius as one who suppresses the *Will* to intuit universal ideas, morphing into "pure subject of knowing," undermines copyright's emphasis on both expression as personal authorship and the idea/expression dichotomy.[63] Hence, Schopenhauer provides the philosophical groundwork for a post-authorial legal theory.

Schopenhauerian applications are particularly apt in an era in which content is increasingly generated by machines, avatars, and networks rather than by autonomous human agents. In offering originality without self and serving as a conceptual bridge to postmodern critiques of celebrity culture and the disproportionate legal authority granted to authorship, it proposes a shift from ownership to stewardship, from identity to relation, and from originality to perception, aligning law with the ontological conditions of cultural production in the digital age.[64]

Moving from author to interface, Part II focuses on Foucault's framework, aligning with Schopenhauer's metaphysics, which similarly dismantles the notion of the autonomous individual. In his seminal lecture, *What Is an Author?*, Michel Foucault deconstructs the traditional view of the author as a sovereign originator, proposing instead that authorship functions as a classificatory and institutional device.[65] The "author-function," according to Foucault, is part of his understanding of power as being primarily based on law, prohibition, and repression, thereby creating a juridico-discursive construct that arises from the needs of legal and institutional regulation.[66]

Virtual celebrities are produced through processes of surveillance, optimization, and audience analytics, precisely the mechanisms of Foucauldian power/knowledge.[67] The synthetic body, ever-pliable and governed by performance metrics, becomes the ideal of disciplinary

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62. *See generally* Robert Wicks, *Arthur Schopenhauer*, STANFORD ENCYCLOPEDIA OF PHIL. (May 13, 2003), https://plato.stanford.edu/archives/spr2024/entries/schopenhauer/ [https://perma.cc/R47K-T6AK] [hereinafter Wicks, *Schopenhauer*].

63. SCHOPENHAUER, WWR, *supra* note 61, at 194; *see also* BOYLE, *supra* note 51, at 57–58 (discussing the idea/expression dichotomy in copyright law functioning as the moral linchpin of copyright law, enabling a conceptual division between public and private domains); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 395 (1989) (discussing the idea/expression dichotomy as a foundational principle of copyright law since its origins are in the common law tradition and what renders copyright law constitutionally sound).

64. SCHOPENHAUER, WWR, *supra* note 61, at 185–86; *see infra* Part II (discussing postmodern approaches to the originality myth).

65. Michel Foucault, *What is an Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 113 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977) [hereinafter Foucault, *What is an Author?*].

66. *Id.* at 130–31.

67. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 204 (Alan Sheridan trans., Pantheon Books 1977) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH].

authority: a subject that does not resist but performs endlessly. Corporations, as creators and curators of virtual celebrities, govern identity itself, acting as epistemological sovereigns who determine what is seen, who is heard, and how subjectivity is constructed. In Foucauldian terms, this is not authorship; it is governance.[68]

Part III deconstructs the virtual author-function, suggesting a post-authorial legal paradigm and blueprint policy in terms of contribution and control, drawing lessons from Schopenhauer and Foucault. If ownership of a VI is an ontological governance over an interface rather than a persona, the question becomes what sort of legal subjectivity we are prepared to recognize. Consequently, the gist of the matter is not the identity of the VI, but ours.

I. THE VIRTUAL CELEBRITY AS SCHOPENHAUERIAN SPECTACLE

The celebrity figure, especially her metamorphosis into VI, epitomizes what Jean Baudrillard termed the *simulacrum*, a self-replicating image unmoored from any original referent, existing purely within the domain of mediated appearance and cultural projection.[69] This condition of image without essence and of appearance without origin finds a striking philosophical precursor in Schopenhauer's metaphysical and aesthetic thought.[70] While German Idealists such as Fichte, Schelling, and Hegel grounded reality in the principle of self-consciousness, conceived as a rational, self-generative force mirroring divine creation,[71] Schopenhauer offered a radical departure.[72]

Rejecting the dialectical logic and teleological optimism of his predecessors, Schopenhauer posited that the foundation of reality is not Reason, but *Will*: a blind, aimless, and non-rational force underlying all existence. According to Schopenhauer, the world presents itself in two aspects: as *Will*, the metaphysical reality in itself, and as *representation*, the world as it appears to human consciousness.[73] Within this framework, individuation and multiplicity arise only through human cognition, which fractures the unified *Will* into discrete appearances. This epistemological

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68. *See id.* at 170.

69. *See generally* JEAN BAUDRILLARD, SIMULACRA AND SIMULATION(Sheila Faria Glaser trans., Univ. of Mich. Press 1994).

70. *See* Sandra Shapshay, *Schopenhauer's Aesthetics*, STANFORD ENCYC. PHIL ARCHIVE (May 9, 2012), https://plato.stanford.edu/entries/schopenhauer-aesthetics/ [https://perma.cc/S4TE-Z6QD].

71. *See* Colin McQuillan, *German Idealism*, INTERNET ENCYCLOPEDIA OF PHIL., https://iep.utm.edu/germidea [https://perma.cc/2UYV-HQE5].

72. *See* SCHOPENHAUER, WWR, *supra* note 61, at vii.

73. Wicks, *Schopenhauer*, *supra* note 62. *See generally* SCHOPENHAUER ON SELF, WORLD AND MORALITY, VEDANTIC AND NON-VEDANTIC PERSPECTIVES (Arati Barua, ed., 2017) (for the interface with Indian philosophy, which greatly influenced Schopenhauer's thinking).

act is the root of suffering; by dividing the undivided, we generate a world of striving, conflict, and dissatisfaction.[74]

In this way, his vision prefigures the postmodern condition of the celebrity-simulacrum, a world in which appearances proliferate independently of substance, and mediated identity replaces essential being, while constantly purchasing eternally unfulfilled desires. Schopenhauer's depiction of the world aligns with a society increasingly dependent on virtual influencers as embodiments of the simulacrum. In an often-cited paragraph, Schopenhauer argues:

> All *willing* springs from lack, from deficiency, and thus from suffering. Fulfilment brings this to an end; yet for one wish that is fulfilled there remain at least ten that are denied. Further, desiring lasts a long time, demands and requests go on to infinity; fulfilment is short and meted out sparingly. But even the final satisfaction itself is only apparent; the wish fulfilled at once makes way for a new one; the former is a known delusion, the latter a delusion not as yet known. No attained object of willing can give a satisfaction that lasts and no longer declines; but it is always like the alms thrown to a beggar, which reprieves him today so that his misery may be prolonged till tomorrow. Therefore, so long as our consciousness is filled by our will, so long as we are given up to the throng of desires with its constant hopes and fears, so long as we are the subject of willing, we never obtain lasting happiness or peace.[75]

Unlike Hegel, who saw tragedy as delivering poetic justice to the hero,[76] Schopenhauer maintains that "The true sense of the tragedy is the deeper insight that what the hero atones for is not his own particular sins, but original sin, in other words, the guilt of existence itself."[77] Schopenhauer presents a counter-semiotic framework to the Romantic ideals of genius, originality, identity, and authorship. This framework is especially pertinent to the case of the VI, which occupies the intersection of publicity rights and copyright law.

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74. Wicks, *Schopenhauer*, *supra* note 62, at ch. 4.

75. SCHOPENHAUER, WWR, *supra* note 61, at 196; *id*. ("Essentially, it is all the same whether we pursue or flee, fear harm or aspire to enjoyment; care for the constantly demanding will, no matter in what form, continually fills and moves consciousness; but without peace and calm, true well-being is absolutely impossible. Thus, the subject of willing is constantly lying on the revolving wheel of Ixion, is always drawing water in the sieve of the Danaids, and is the eternally thirsting Tantalus.").

76. *See* Leonard W. Conversi, *Hegel*, BRITANNICA (Mar. 9. 2026), https://www.britannica.com/art/tragedy-literature/Hegel [https://perma.cc/ZFL6-3Z33].

77. SCHOPENHAUER, WWR, *supra* note 61, at 254; *see also id*. (referring to Hegel) ("But only a dull, insipid, optimistic, Protestant rationalistic, or really Jewish view of the world will make the demand for poetic justice, and find its own satisfaction in that of the demand.").

While the VI embodies a form of conjoined authorship rooted in *Zacchini*'s legacy, publicity rights remain a legal hybrid, justified both as rights *sui generis* and through the structural paradigms of copyright. Before turning to Schopenhauer's reversal of the shared semiotics underpinning both regimes, it is important to acknowledge the doctrinal distinctions between them, which are explored in the following section.

A. *Publicity Rights: Between Identity and Authorship*

Publicity rights, though often marginalized in broader intellectual property discourse, expose a fundamental instability at the core of modern authorship doctrines. Despite Justice Deanell Tacha's description of the right of publicity as "a red herring" and scholarly arguments that it might be better located within trademark law, the right of publicity has, particularly since *Zacchini*, evolved into a legal hybrid.[78] This hybrid form of authorship draws from the language and structure of copyright law while resisting its definitional boundaries.[79] In so doing, it unsettles the modern legal alignment of originality, authorship, and identity.[80]

Attempts to establish publicity rights as autonomous intellectual property rights have proven conceptually unstable. Their legal foundations remain fractured, producing divergent judicial outcomes and unresolved doctrinal tensions. As Wendy Gordon has illustrated, the modern right of publicity emerged from the tort of misappropriation first articulated in *International News Service v. Associated Press*.[81] *International News Service* relied on a restitution-based logic, namely the idea that individuals should not "reap where they have not sown."[82]

This logic gave rise not only to the right of publicity but also to the development of "sisterly" doctrines such as dilution in trademark law, all

78. *See* Cardtoons, L.C. v. MLBPA, 95 F.3d 959, 973 (10th Cir. 1996) ("[T]he Supreme Court's sole case involving a right of publicity claim, is a red herring."); *see generally* Lemley, *Privacy*, *supra* note 46 (arguing that the right of publicity evolved over the last few decades from a fundamentally economic right to covering more aspects within name and likeness).

79. ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW IN THE UNITED STATES 34 (2010) [hereinafter ROSENTHAL KWALL, THE SOUL OF CREATIVITY] ("On a theoretical level, both the right of publicity and moral rights contradict the view that members of the public have the unconditional right to interpret texts according to their own cultural needs. As the right of publicity safeguards individuals' abilities to control the public presentations of their personas in commercial contexts, moral rights allow authors of artistic works a comparable measure of control regarding the substantive presentations of their works.").

80. S*ee* Mira Moldawer, *Publicity Rights and Copyright Law: Conjoined Authorship as a Red Herring*, 45 LOY. L.A. ENT. L. REV. 27, 44–48 (2024) [hereinafter Moldawer, *Red Herring*].

81. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 152–53 (1992); Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918).

82. *Int'l News Serv.*, 248 U.S. at 239.

rooted in an ethos of unjust enrichment.[83] Yet the moral force behind these doctrines often obscures their legal incoherence. The public may not distinguish between infringement of a celebrity's identity via trademark, copyright, or publicity rights, but the doctrinal label selected by the court determines dramatically different legal consequences.[84] These rights, in effect, are semiotically aligned, concerned with symbolic meaning and control, yet structurally divergent.

Complicating matters further, is the origin of publicity rights in privacy law. Scholars have grounded the right in values of dignity and autonomy, aligning it with moral rights in civil law jurisdictions.[85] However, American jurisprudence has oscillated between this framing and a property-oriented framework.[86] As courts have extended publicity rights into commercial domains, especially in cases involving false endorsement and image commodification, the boundaries between privacy, property, and expression have blurred.[87]

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83. David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 467–68 (2003) (regarding publicity rights and dilution as a kind of metastasis in the law) (relating to his previous article, David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981) ("I turned then to what I had begun to see as a kind of metastasis in the law, particularly in the developing law of publicity, but no less so in the laws of trademark dilution and unfair competition (of the misappropriation variety), both of which latter doctrines had troubled me before.").

84. *See* Brown v. Electronic Arts Inc., 724 F.3d 1235, 1244 (9th Cir. 2013); Keller v. Electronic Arts Inc., 724 F.3d 1268, 1280 (9th Cir. 2013) for the contradictory results of two cases involving digital avatars modeled on real athletes. (In *Brown*, the plaintiff brought a false endorsement claim under Section 43(a) of the Lanham Act. Applying the *Rogers test*, the court determined that the use of Brown's likeness bore artistic relevance to the video game and did not explicitly mislead consumers. Thus, the First Amendment prevailed. In contrast, *Keller*, adjudicated under California's right of publicity statute, rejected application of the *Rogers* test. Instead, the court applied the transformative use test derived from *Campbell v. Acuff-Rose Music, Inc.*, holding that the use of Keller's likeness was insufficiently transformative. The court emphasized that the right of publicity protects personal identity, rather than consumer perception.).

85. 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, 166 [hereinafter Rosenthal Kwall, *Preserving Personality*]; Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 420–21, 427–28 (1999); Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1272 (2022) [hereinafter Rothman, *Navigating the Identity Thicket*].

86. *See* Moldawer, *Red Herring*, *supra* note 80, at 34–42 (describing publicity rights as a legal hybrid).

87. Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539, 1545 (2017). *Compare with* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 111 (2020) ("The aspect of the right of commercial value that is based on confusion is analogous to trademark infringement and false endorsement laws that protect against confusion as to the source or sponsorship of products and services.").

Robert Post and Jennifer Rothman have attempted to bring clarity by dividing publicity rights into four conceptual strands: the right of dignity, the right of performance (exemplified by *Zacchini*), the right of commercial value (akin to trademark claims), and the right of control (aligned with autonomy and unfair competition).[88] Although descriptively useful, this taxonomy has not yet yielded a stable doctrinal consensus. As Roberta Rosenthal Kwall observes, the right of publicity now purports to serve a broad array of objectives: incentivizing creativity, protecting labor, preventing deception, and avoiding unjust enrichment.[89]

But this multiplicity of justifications undermines any coherent account of what the right protects or how it should be limited. The legal figure of the "author" at the center of publicity rights remains undefined, at times a laborer, a brand, or merely a self. The *Zacchini* decision initiated a legal fusion between the right of publicity and copyright law. In doing so, it introduced the notion of persona-as-performance and thus, persona-as-authorship. But this fusion is neither complete nor seamless. It reveals critical divergences across three legal dimensions: fixation and preemption, intermediary liability, and ownership structure.

First, copyright law requires fixation in a tangible medium as a condition for protection; yet in cases of persona authorship, the "work" in question is not a fixed creation but the very personality itself.[90] Because the persona is not treated as "work" or "writing" within the scope of the Copyright Clause, and because personality traits lack the tangible form required for fixation, it falls outside the threshold of copyright protection.[91] This analysis addresses only the first prong of copyright preemption: the subject matter requirement.[92] Even if that hurdle were

88. Post & Rothman, *supra* note 87, at 92–125.

89. Rosenthal Kwall, *The Right of Publicity v. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 54 (1994) ("The right of publicity promotes the societal interests of 'fostering creativity, safeguarding the individual's enjoyment of the fruits of her labors, preventing consumer deception, and preventing unjust enrichment.'").

90. Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUM. J.L. & ARTS 441, 446 (2016) [hereinafter Rothman, *The Other Side of Garcia*] ("Are we talking about the author of the underlying film or the underlying work, or instead, are we perhaps talking about a different type of authorship—meaning authorship over oneself, one's name, or one's likeness? This latter notion of being the author of oneself is the purview of the right of publicity.").

91. 1 NIMMER ON COPYRIGHT, § 1.17 (2023) [hereinafter NIMMER ON COPYRIGHT] ("To specify, the 'work' that is the subject of the right of publicity is the *persona*, i.e., the name and likeness of a celebrity or other individual. A *persona* can hardly be said to constitute a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution. A *fortiori*, it is not a 'work of authorship' under the Act.").

92. Mark Baghdassarian & Shannon Hedvat, *How 2nd Circ. Clarified a Key Right of Publicity Claim Issue*, LAW360 EXPERT ANALYSIS – CORPORATE (Oct. 17, 2023).

overcome, the second prong, commonly known as the general scope requirement, must also be satisfied.[93]

This second prong reflects the broader rationale of preemption: to maintain a uniform, nationwide federal copyright system by displacing conflicting state laws.[94] Courts have interpreted the general scope prong narrowly, holding that only state-law rights that are functionally equivalent to copyright's exclusive rights, such as reproduction, distribution, performance, or display, fall within the scope of federal preemption.[95] However, the right of publicity typically encompasses additional elements beyond these enumerated rights, such as misappropriation of identity or commercial exploitation of likeness. As a result, publicity claims often escape preemption.[96]

Second, regarding intermediary liability, the distinction between copyright and publicity rights is also apparent. The Digital Millennium Copyright Act (DMCA) provides online platforms with clear safe harbors for user-generated copyright violations, contingent upon compliance with the notice-and-takedown regime.[97] No such mechanism exists for publicity rights because, due to their lack of fixation, they are not copyrightable. Instead, Section 230 of the Communications Decency Act (CDA) becomes the operative legal shield.[98] Yet courts reached contradictory decisions regarding different classifications of publicity rights, whether as IP rights unprotected by Section 230 or as a privacy-based tort granting platform immunity under Section 230.[99]

Third, these inconsistencies reveal deeper tensions surrounding the meaning of ownership and authorship in the digital age. Copyright law traditionally treats authorship as an expression of originality, with

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93. *Id*.

94. *In re* Jackson, 972 F.3d 25, 42 (2d Cir. 2020).

95. Williams v. D'Youville Coll., JBCN Educ., Inc., No. 21-1001, 2022 U.S. Dist. LEXIS 178950, at *36–*37 (W.D.N.Y. Sep. 29, 2022) (Nevertheless, "if an 'extra element' is 'required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action,' then the right does not lie 'within the general scope of copyright,' and there is no preemption.").

96. *See* David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 676 (1981).

97. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at scattered sections of the U.S. Copyright Act of 1976) (DMCA).

98. 47 U.S.C. § 230 (e)(2) ("[N]othing in [Section 230] shall be construed to limit or expand any law pertaining to intellectual property.").

99. *See Contrast* Hepp v. Facebook, 14 F.4th 204, 214 (3d Cir. 2021) (where the Third Circuit concludes Section 230 does not immunize platforms from state-based publicity rights claims, interpreting the phrase "any law pertaining to intellectual property" to include state IP doctrines and explicitly draws on *Zacchini* to analogize publicity rights to copyright and patent law, thereby affirming their quasi-IP status), *with* Ratermann v. Pierre Fabre U.S. Inc., 22-CV-325, 670 (JMF) (S.D.N.Y. Jan. 17, 2023) (where the court classified New York's right of publicity as a privacy-based tort and granted platform immunity under Section 230).

ownership as its legal corollary. Publicity rights, however, assert ownership over the self, not based on creative expression but rather on identity and market value. This divergence becomes critical in assessing the broader implications of authorship. Copyright law ties originality to the fixation of form; publicity rights tie it to the projection of persona.

This doctrinal ambiguity not only fragments the law but also exposes its metaphysical presuppositions: that identity is something one "owns," that persona can be fixed, and that authorship is an act of sovereign will. This is where Schopenhauer enters the conversation. Both copyright and publicity rights rest on a shared semiotic premise: that identity can be transmuted into property through the sign of authorship. Schopenhauer, however, disrupts this premise. For him, the individual is not the originator of expression but a vessel through which impersonal forces, the *Will*, are momentarily made intelligible.

Authorship, in his metaphysics, is not the projection of the ego but the suspension of it. This philosophical inversion has direct implications for law. If authorship is not an act of mastery over form or self but rather an impersonal, intuitive detachment from the *Will*, then the legal conflation of identity and property collapses. Publicity rights, in claiming authorship over one's persona, reinforce the illusion of self as origin and property as entitlement. Schopenhauer's framework calls for a conceptual decoupling of identity from proprietary control, an undoing of the legal subject as author-owner.

Accordingly, before law can move toward a post-authorial paradigm, capable of addressing the complexities of generative AI and virtual influencers, it must confront the metaphysical foundations of authorship itself. The crisis of publicity rights is not merely doctrinal; it is ontological. As a result, the following section examines how Schopenhauer's philosophy reconfigures the notion of originality, replacing expression with intuition and thereby opening space for a fundamentally different understanding of authorship.

B. *Originality Revisited*

Hegel, drawing on Kant's concept of the autonomous will, links authorship to intellectual labor and individuality, grounding property rights in the creative will; however, Schopenhauer rejects this framework.[100] Accordingly, the genuine art does not arise from personal expression but from the contemplation of universal forms that transcend the individual will.[101] Thus, the genius becomes a pure subject of

100. *See* SCHOPENHAUER, WWR, *supra* note 61, at 37, 237, 237–55.
101. *Id.*

knowing.[102] Schopenhauer asserts how the same crucial words, such as originality, genius, will, and authorship, convey contradictory meanings:

> [t]he *gift of genius* is nothing but the most complete *objectivity,* i.e., the objective tendency of the mind, as opposed to the subjective directed to our own person, i.e., to the will. Accordingly, genius is the capacity to remain in a state of pure perception, to lose oneself in perception, to remove from the service of the will the knowledge which originally existed only for this service.[103]

This stands in contrast to the Hegelian view of the true work of art, where originality is centered on a single genius as its exclusive bearer and "evinces its genuine originality only by appearing as the one personal creation of one spirit which gathers and compiles nothing from without, but produces the whole topic from its own resources by a single cast, in one tone, with strict interconnection of its parts, just as the thing itself has united them in itself."[104]

To round out the picture, Schopenhauer, in *On Authorship and Style*, criticizes the commodification of literature by drawing a sharp distinction between those who write out of genuine insight and those who write merely to sell.[105] His denunciation of writing "for money" and a mass audience anticipates modern critiques of expansive copyright regimes that prioritize output and marketability, thus ultimately hollowing out the utilitarian or incentive-based rationale originally intended to serve the public interest.[106]

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102. *Id*. at 194 ("Now according to our explanation, genius consists in the ability to know, independently of the principle of sufficient reason, not individual things which have their existence only in the relation, but the Ideas of such things, and in the ability to be, in face of these, the correlative of the Idea, and hence no longer individual, but pure subject of knowing.").

103. *Id.* at 185–86 ("In other words, genius is the ability to leave entirely out of sight our own interest, our willing, and our aims, and consequently to discard entirely our own personality for a time, in order to remain *pure knowing subject,* the clear eye of the world.").

104. HEGEL, AESTHETICS, *supra* note 57, at 296, 291 ("For, as subject, he has entirely identified himself with his topic, and fashioned its embodiment in art out of the inner life of his heart and his imagination. This identity of the artist subjectively with the true objectivity of his production is the third chief point which we still have to consider briefly, because in this identity we see united what hitherto we have separated as genius and objectivity. We can describe this unity as the essence of genuine originality.").

105. ARTHUR SCHOPENHAUER, *On Authorship and Style*, *in* ESSAYS OF SCHOPENHAUER (Rudolf Dircks, trans.), https://www.gutenberg.org/files/11945/11945-h/11945-h.htm#link2H_4_0004 [https://perma.cc/AV96-SUAV].

106. *See generally* Christopher Buccafusco & Jonathan S. Masur, *Intellectual Property Law and the Promotion of Welfare*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 98 (Ben Depoorter, Peter Menell & David Schwartz eds., 2019); Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 346 (2017) (criticizes the accumulative approach, arguing "Thus, while a strong accumulationist model of progress is typically applied to scientific-technological progress,

Connecting Schopenhauer's philosophy with the concept of the virtual celebrity, especially in light of generative media and social platforms, allows us to critique the aesthetics, authorship, and commodification of identity in ways that challenge both traditional and digital constructions of fame. To answer Schopenhauer's criticism of authorship and originality in the context of copyright law, with which publicity rights share the same theoretical infrastructure since *Zacchini*, we must confront the tension between metaphysical authorship (as he conceives it) and the legal-institutional concept of authorship as a basis for exclusive rights.

Schopenhauer's philosophy provides a critical conceptual framework that reveals the inherent contradictions, cultural biases, and limitations of contemporary legal systems. Though not formulated with legal theory in mind, his thought fundamentally challenges the premises underpinning the legal notion of authorial identity, especially as codified in modern copyright law, which is grounded in ideals of individual creativity, proprietary authorship, and personal rights over intellectual expression. In this context, Schopenhauer's aesthetic metaphysics offers a compelling alternative to the prevailing myth of the author as a sovereign owner.

While his system was never meant as a guide for policy, Schopenhauer's ideas serve as a philosophical counterbalance to the dominant economic and egocentric logic of copyright regimes. His polemic against Kant and Hegel transcends mere metaphysical dispute; it represents a broader rejection of rationalist and systematizing worldviews that inform contemporary legal understandings of authorship. Applied to copyright discourse, Schopenhauer's critique undermines the Enlightenment and post-Enlightenment foundations, especially the Kantian emphasis on autonomous subjectivity and the Hegelian linkage of property to personality, upon which modern notions of the author largely rest.

The principal relevance of Schopenhauer's philosophy to copyright law lies in its challenge to the concept of originality, which functions as the "sine qua non" of copyright protection.[107] Therefore, the justification of the artist as a sole custodian of originality and property rights is summed up by James Boyle: "Precisely because the originality of his spirit was converted into an originality of form, the author retains the

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in which the goal is to accumulate ever-better scientific and technological achievements, a weak accumulationist model is typically applied to aesthetic progress. In the latter, the focus is not on better works but simply on more works. The weak accumulationist account of aesthetic progress retreats to the quantitative in an effort to disengage from the qualitative.").

107. Gideon Parchomovsky and Alex Stein, *Originality*, 95 VA. L. REV. 1497, 1505 (2009) (Originality is the sine qua non of copyrightability; *What is Copyright?*, U.S. COPYRIGHT OFF., https://www.copyright.gov/what-is-copyright/ [https://perma.cc/T3EH-B3M4] ("Copyright is originality and fixation.")); 17 U.S.C. § 102.

right to the form in which those ideas were expressed."[108] Although the Authorship Project has shown that even the most renowned artists relied on collaboration and existing materials, the myth of solitary originality continues to shape copyrightability.[109]

The concept of originality is not uniform across jurisdictions; rather, it reflects the distinct legal philosophies embedded within each system.[110] In the English common law tradition, originality is primarily assessed through the elements of origination and labor, drawing heavily on Lockean theories of labor and entitlement.[111] By contrast, in the American judicial system, the originality approach is based on the components of origination and creativity, concentrating primarily on "creation" rather than authorship, as derived from the American Constitution, which adopts the utilitarian/incentive approach.[112]

Shaped by Enlightenment thought, the concept of originality in copyright law evolved along two interconnected paths. The first path involves a direct originality narrative, evolving alongside the legal treatment of derivative works.[113] As John Tehranian has argued, the rise of derivative works jurisprudence destabilized the notion of originality by displacing the myth of the autonomous author with a legal fiction

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108. James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1466 (1992).

109. For the false myth of originality, *see* Litman, *supra* note 51, at 969, 991–1001; Arewa, *supra* note 51; for originality as a chronicle of a failure foretold, *see* Moldawer, *Red Herring*, *supra* note 80, at 58–63. For the authorship projects, *see generally* WOODMANSEE & JASZI, *supra* note 51.

110. *See generally* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 998, 1006 (1989) (contrasting the author centric philosophy used in France with the utilitarian philosophy used in the United States).

111. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS BY PETER LASLETT, ch. V, §§ 26–28, 44 (1963); Michelle M. Wu, *Defeating the Economic Theory of Copyright: How the Natural Right to Seek Knowledge is the Only Theory Able to Explain the Entirety of Copyright's Balance*, GEO. L. FAC. PUBL'N & OTHER WORKS 9 (Apr. 14, 2023), https://scholarship.law.georgetown.edu/facpub/2495 [https://perma.cc/T8MA-6UAL].

112. *See generally* Ginsburg, *supra* note 110, at 991 (describing the U.S. model as "utilitarian" in nature); AVIV H. GAON, THE FUTURE OF COPYRIGHT IN THE AGE OF ARTIFICIAL INTELLIGENCE 73 (2021) (for differentiating between the Lockean approach and the personhood approach as the source of authorship entitlement, claiming: "The principal difference between the theories of Locke and Hegel is that for Locke the source of entitlement is labor, whereas for Hegel it is will.").

113. *See* Stowe v. Thomas, 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853) (deciding case according to the Copyright Act of Feb. 3, 1831, ch. 16, 4 Stat. 436, in which an unauthorized translation of *Uncle Tom's Cabin* was considered an independent copyrightable work, whereas today, an unauthorized translation would be considered derivative and infringing. The Court stated, "By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. . . . Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished. All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it.").

negotiated between the competing interests of authorial control and the public domain.[114] The Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.* formally recognized transformative use as a separate category from derivative works, aimed at restoring copyright's balance between incentivizing creativity and preserving public access.[115]

In *Campbell v. Acuff-Rose Music, Inc.*, the petitioners were sued for copyright infringement by the respondents, who held the rights to Roy Orbison's rock ballad "Oh, Pretty Woman." The dispute arose over the petitioners' commercial parody, "Pretty Woman," which reinterpreted the original song.[116] The U.S. Supreme Court, in assessing the first statutory factor of the fair use doctrine, the purpose and character of the use, emphasized its predominance in evaluating transformative uses.[117] While creating the parody/satire distinction, the leitmotif was originality.

A parody, the Court held, necessarily draws upon elements of the original work to comment on it: "the heart of any parodist's claim to quote from existing material," lies in the need "to use some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[118] In contrast, a satire, defined as commentary directed at society at large rather than the original work, "can stand on its own two feet," and thus must independently justify its appropriation of copyrighted material.[119]

Yet in practice, the concept of transformation has become doctrinally diffuse, spawning a range of inconsistent and often conflicting judicial tests, each attempting, with limited success, to articulate the underlying essence of originality.[120] The indirect originality narrative fares no better, operating within doctrinal frameworks such as moral rights and the idea/expression dichotomy. The romantic ideal of the author as a unique originator informs moral rights**,** particularly the right of attribution and right of integrity.[121]

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114. *See* John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1233, 1245, 1249–50 (2012) (discussing how the mechanism of derivative-works protection created a new cultural distinction and highbrow/lowbrow norms).

115. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 580–81.

120. *Compare* Rosenthal Kwall, *A Perspective*, *supra* note 36, at 1345–46 (offering the Transformative Use Test (*id.* at 1357–58), the Predominant Use Test (*id.* at 1357–59), the Actual Malice Test (*id.* at 1359–60), the Relatedness/Restatement Approach (*id.* at 1361), and the Ad Hoc Balancing (*id.* at 1362) *with* Matthew Savare & John Wintermute, *A Haystack in a Hurricane: Right of Publicity Doctrine Continues to Clash with New Media*, 32(8) COMPUT. & INTERNET LAW. 1, 2 (2015) (omitting the Ad Hoc Balancing and instead including the Rogers Test, from Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989)).

121. *See generally* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 363–64 (2006) (explaining how the right of attribution protects an author's ability to claim

Absent originality, these rights lose coherence: attribution becomes unfounded, and integrity may shield mere imitation. Moreover, moral rights and the right of publicity are theoretically aligned in that both oppose the unrestricted public reinterpretation of texts or identities without the author's control.[122] However, both doctrines implicitly rely on the originality of the underlying work or persona. Without it, they risk functioning less as safeguards for creativity than as instruments for unjust enrichment. Schopenhauer's philosophy is even more radical regarding the idea/expression dichotomy, as discussed in the following section.

C. *The Idea/Expression Dichotomy Revisited*

Similarly, the idea/expression dichotomy, foundational in Anglo-American copyright jurisprudence, predicates protection on originality: only original expressions are copyrightable, while ideas remain in the public domain to facilitate further creative progress.[123] While aesthetic nondiscrimination is one of copyright law's central myths, according to Justice Oliver Wendell Holmes' legacy, that any personal reaction to nature can be copyrighted, in practice, originality, whether direct or indirect, and aesthetic judgment are inseparable.[124] Tools like the idea/expression dichotomy and fair use all rely on implicit aesthetic evaluations.[125] Thus, originality is a shifting cultural construct.

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authorship over their work); NIMMER ON COPYRIGHT, *supra* note 91, § 8D.01[A] (listing moral rights to include:

> The right to be known as the author of his work; The right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written; The right to prevent others from being named as the author of his work; The right to publish a work anonymously or pseudonymously, as well as the right to change his mind at a later date and claim authorship under his own name; The right to prevent others from using the work or the author's name in such a way as to reflect adversely on his professional standing. In addition, there are several distinct categories that comprise the classic droit moral: The right to prevent others from making deforming changes in his work (*droit au respect de l'oeuvre*); The right to publish a work, or to withhold it from dissemination (*droit de divulgation*); and The right to withdraw a published work from distribution if it no longer represents the views of the author (*droit de retrait; also, droit de repentir*.).

122. ROSENTHAL KWALL, THE SOUL OF CREATIVITY, *supra* note 79.

123. Litman, *supra* note 51, at 983–90.

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

125. NIMMER ON COPYRIGHT, *supra* note 91, § 2.01[B][1] ("Notwithstanding the endless repetition of Justice Holmes' pious observation quoted above, to the effect that judges should not evaluate artistic worth, one may doubt whether hermetic separation is possible. Numerous are the domains in which judges' aesthetic evaluations percolate into copyright case law."); *see generally*

Originality, long burdened by internal contradictions within the modern copyright framework, finds a radical reorientation through Schopenhauerian philosophy, one that ultimately reshapes the very conception of authorship. Schopenhauer contends that the individual self is not a substantive reality but a mere representation, a phenomenal expression of the deeper, blind metaphysical *Will*.[126] Within this framework, artistic creation is not the product of rational volition but a moment of metaphysical suspension, in which the self temporarily dissolves and the artist, through aesthetic contemplation, intuits the Platonic Idea.[127]

Hence, ownership of transcendent insight is contradictory. In addition, Schopenhauer's philosophical originality lies not merely in his critique of the Kantian and Hegelian conception of the autonomous self, as the sovereign originator of unprecedented creation and, in Hegelian terms, the natural bearer of intellectual property, but also in his innovative reinterpretation and evolution of the Platonic Idea within his aesthetic metaphysics. Thus, prompting a fundamental rethinking of copyright law's core principles, particularly the idea/expression dichotomy.

Humanity's persistent quest for rational, absolute truth as a defense against existential uncertainty is most clearly expressed in Plato's philosophy, where the primacy of the Idea, representing absolute truth, necessitates the exclusion of artists from his Republic, as they are mere imitators "thrice removed from the truth."[128] The artist's identity or subjectivity held no significance in Plato's view.[129] Plato denied the artist any claim to authorship, seeing her merely as a vessel for divine inspiration or madness.[130] This conception evolved into the "stewardship" theory, wherein the poet is seen not as the originator but as a caretaker of gifts that do not belong to her.[131]

Mira Moldawer, *Myths and Clichés: The Doctrinal Myopia of Publicity Right*, 22 UIC REV. INTELL. PROP. L. 50, 54–61 (2022).

126. Wicks, *supra* note 62, at ch. 4.

127. SCHOPENHAUER, WWR, *supra* note 61, at Vol. 1, § 36–38; SCHOPENHAUER, *On Authorship and Style*, *supra* note 105; ARTHUR SCHOPENHAUER, *On Reading and Books*, *in* ESSAYS OF SCHOPENHAUER, https://www.gutenberg.org/files/11945/11945-h/11945-h.htm#link2H_4_0007 [https://perma.cc/MLU3-HLKQ].

128. PLATO, THE REPUBLIC, bk. X (Benjamin Jowett trans., The Project Gutenberg 1998), https://www.gutenberg.org/files/1497/1497-h/1497-h.htm [https://perma.cc/7VWG-APLX].

129. THE DIALOGUES OF PLATO 470 (Benjamin Jowett trans., Oxford Univ. Press, 3d rev. ed. 1892), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/111/Plato_0131-01_EBk_v6.0.pdf [https://perma.cc/B7LK-L9J7] ("For the poet is a light and winged and holy thing, and there is no invention in him until he has been inspired and is out of his senses, and the mind is no longer in him.").

130. *Id*. ("[F]or not by art does the poet sing, but by power divine."); *id.* at 438 (relating to the poet's "divine madness").

131. ROSENTHAL KWALL, THE SOUL OF CREATIVITY, *supra* note 79, at 19.

Hegel attempted to reconcile this opposition between truth and representation by introducing a dialectical synthesis. Though rooted in Enlightenment ideals of absolute reason and truth, Hegel overcame Plato's suspicion of art's emotive power by reimagining art as a vehicle for divine truth. Art, in this sense, has the "capacity and vocation to mitigate the ferocity of desires," not by indulging passion, but by channeling it toward higher, rational ends.[132] For Hegel, originality is the defining mark of the unique creator, the product of her inner life and imagination, arising from the depths of the self.[133]

In his framework, the artist becomes indistinguishable from her work, and the artwork itself embodies true objectivity. This synthesis, of subjective inspiration and objective form, lies at the heart of Hegelian originality.[134] From its inception, Hegelian originality is bound to the figure of the Romantic image of the tortured genius, creating ex nihilo, replacing the mimetic artist.[135] The artist is tasked with an impossible mission: to produce rational truth through subjective means.[136] As Plato feared, these opposing forces, reason and passion, truth and illusion, are inherently at odds.

Schopenhauer is free from the internal contradiction that troubles Plato and Hegel. While he aligns with Plato's concept of the Idea and views art as the sole escape from the world as *Will* and representation, his notion of the intuiting genius diverges sharply from Hegel's.[137] For Schopenhauer, the true artist is the antithesis of subjectivity; it is precisely

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132. HEGEL, AESTHETICS, *supra* note 57, at 47.

133. *Id.* at 291 ("For, as subject, he has entirely identified himself with his topic, and fashioned its embodiment in art out of the inner life of his heart and his imagination. This identity of the artist subjectively with the true objectivity of his production is the third chief point which we still have to consider briefly, because in this identity we see united what hitherto we have separated as genius and objectivity. We can describe this unity as the essence of genuine originality.").

134. *Id.* at 294 (referencing how Hegel relates to the artistic product as "its external form both in the essence and conception of a definite species of art and also appropriately to the general nature of the Ideal").

135. *Id.* at 296.

136. *Id.* at 55 ("Against this we must maintain that art's vocation is to unveil the truth in the form of sensuous artistic configuration, to set forth the reconciled opposition just mentioned, and so to have its end and aim in itself, in this very setting forth and unveiling.").

137. SCHOPENHAUER, WWR, *supra* note 61, at 185 ("Only through the pure contemplation described above, which becomes absorbed entirely in the object, are the Ideas comprehended; and the nature of *genius* consists precisely in the preeminent ability for such contemplation. Now as this demands a complete forgetting of our own person and of its relations and connexions, the *gift of genius* is nothing but the most complete *objectivity*, i.e., the objective tendency of the mind, as opposed to the subjective directed to our own person, i.e., to the will. Accordingly, genius is the capacity to remain in a state of pure perception, to lose oneself in perception, to remove from the service of the will the knowledge which originally existed only for this service.").

her complete absence of ego and personal will that allows her to perceive the Idea concealed behind the veil of illusion.[138]

Therefore, incorporating Schopenhauer's philosophy into the framework of copyright law could offer a remedy to the myth of originality and reverse ownership to stewardship. Yet, as Schopenhauer focused on the Idea as the manifestation of art, it would also invert the long-standing idea/expression dichotomy that has underpinned the system since its inception. The idea/expression dichotomy has been a foundational principle of copyright law since its origins in the common law tradition.[139] As Boyle observes, the idea/expression dichotomy has long functioned as the moral linchpin of copyright law, enabling a conceptual division between public and private domains.[140]

By allocating ideas and facts to the public realm and reserving original expression for the author, this distinction attempts to reconcile the inherent tension between collective benefit and individual entitlement, between public good and private greed.[141] Therefore, while the artist is rewarded for original expressions that serve the public interest, ideas lacking originality remain in the public domain to nourish future creativity. As Justice Brandeis famously asserted, knowledge and ideas should be "free as the air to common use."[142]

Metaphors often used to illustrate this principle include the image of "dwarfs standing on the shoulders of giants" and that of "building," both emphasizing how unprotected ideas form the essential groundwork upon which new, original expressions are constructed.[143] From the perspective of the incentive-based approach, designed to stimulate new creative production while keeping transaction costs relatively low, copyright law

138. *Id*. at 185–86 ("In other words, genius is the ability to leave entirely out of sight our own interest, our willing, and our aims, and consequently to discard entirely our own personality for a time, in order to remain *pure knowing subject,* the clear eye of the world.").

139. Yen, *supra* note 63, at 395; BOYLE, *supra* note 51, at 114.

140. BOYLE, *supra* note 51, at 57–58.

141. *See id. at* 56–57 (arguing that the idea/expression dichotomy provides the moral justification of copyright law).

142. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("[T]he general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."); Sid & Marty Krofft TV Prods. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977) ("Ideas which may be of public interest are not subject to copyright; the specific form of expression of these ideas are. Thus, the political views of Dr. Martin Luther King may be widely disseminated. But the precise expression of these views in a speech may be protected."); Yen, *supra* note 63, at 421 ("The idea/expression dichotomy theoretically limits copyright so that it prohibits only copying that is constitutionally valueless.").

143. Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFFALO IP L.J. 3, 41 (2001).

incorporates several key limitations to balance public and private interests.[144]

Doctrines such as limited duration, fair use, and the idea/expression dichotomy collectively function to minimize deadweight loss and other inefficiencies within a broader framework aimed at fostering innovation.[145] This incentive-driven rationale remains the most prevalent justification for IP law generally and for copyright law in particular.[146] The result is a complex entanglement, almost a Gordian knot, between idea, expression, originality, and freedom of speech.[147] Prominent scholars contend that this distinction is precisely what renders copyright law constitutionally sound.[148] Alfred Yen argues that the idea/expression dichotomy is:

> [P]erhaps the most important limit on the unwarranted expansion of copyright. It operates by denying protection to the ideas which underlie copyrightable works. Consequently, only the original "expressions" contained in these works can actually receive copyright protection. This makes certain portions (the "ideas") of every work freely available for others to copy. Such permitted borrowing from copyrighted works ostensibly keeps copyright from unduly restricting speech and running afoul of the First Amendment.[149]

John Perry Barlow's well-known metaphor of fixation as the "obsolete bottles" of the pre-Internet IP regime draws directly from the idea/expression dichotomy.[150] The line between unprotectable ideas and

144. Gordon & Bone, *supra* note 29, at 189.

145. *Id.*

146. Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (claiming that the main purpose of copyright is to "secure a fair return for an 'author's' creative labor" by creating this incentive "to stimulate artistic creativity for the general public good").

147. Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003); Golan v. Holder, 565 U.S. 302, 328–29 (2012) ("[The] idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.") (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985)).

148. *See* Mark A. Lemley, *How Generative AI Turns Copyright Upside Down*, 25 COLUM. SCI. & TECH. L. REV. 190, 195–96 n.19 (2024) (arguing that, recently, the Supreme Court diminished the scope of the fair use doctrine, thus leaving the idea/expression dichotomy as the last pillar of copyright law constitutionality).

149. Yen, *supra* note 63, at 395.

150. John Perry Barlow, *Selling Wine without Bottles: The Economy of Mind on the Global Net*, 18 DUKE L. & TECH. REV. 8, 11 (2019) [hereinafter Barlow, *Selling Wine Without Bottles*]. For the legacy of Barlow, *Selling Wine Without Bottles*, *see generally* Joseph A. Tomain, "*The Virus of Liberty": John Perry Barlow, Internet Law, and Grateful Dead Studies*, 5 GRATEFUL DEAD STUD. 14, 16–17 (2022/2021) (relating to the interface of both Barlow, *Selling Wine Without*

protectable expression traditionally hinges on the transformation of a mental concept into a tangible form through fixation. Yet, Barlow argued that in a digital age, where technology enables the transmission of intellectual content without any material embodiment, these "obsolete bottles" are no longer necessary.

If fixation is no longer required to convert an idea into expression, then what remains is the unbottled "wine" of pure creativity, an idea, and therefore uncopyrightable. In this view, the abandonment of fixation not only challenges the foundation of the idea/expression divide but calls into question the continued relevance of copyright law itself.[151] While the idea/expression dichotomy already carries the unresolved tensions of the originality myth, its limitations become even more apparent in the context of the persona, by and large, and the virtual persona, in particular.[152]

Because publicity rights do not satisfy either prong of the preemption analysis, they not only lie beyond the scope of copyright protection but also largely escape copyright's preemptive force, particularly in their post-mortem application.[153] Long before the right of publicity evolved into its contemporary digital incarnation as the right to control one's name, image, and likeness (NIL), its foundational logic had already been established in *White v. Samsung Electronics America, Inc.*[154] In that case, Samsung launched a satirical ad campaign suggesting its products would remain relevant twenty years into the future.[155]

One particular advertisement featured a robot garbed in attire reminiscent of Vanna White, the iconic host of *Wheel of Fortune*, posed beside a game board closely resembling the show's set.[156] The caption read: "Longest-running game show. 2012 A.D."[157] White sued under California's right of publicity statute, alleging that the ad unlawfully

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Bottles and John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/4GLP-QQ46].

151. For the evolution of Barlow's vision into the contradictory Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of the U.S. Copyright Act of 1976) ("DMCA"), *see generally* Mira Moldawer, *Cassandra's Curse or Cassandra's Triumph: Three Tales of Intellectual Property Revised*, 43 LOY. L.A. ENT. L. REV. 111, 118–23 (2023).

152. For the failure of implementing the preemption doctrine as a potential restraint of publicity rights, *see generally* Rothman, *The Other Side of Garcia*, *supra* note 90, at 446; Shipley, *supra* note 96, at 702–03; ROSENTHAL KWALL, THE SOUL OF CREATIVITY, *supra* note 79, at 113.

153. For the conjoined yet different authorship of publicity rights and copyright law, reflected by the preemption failure, *see* Moldawer, *Red Herring*, *supra* note 80, at 44–48; Moldawer, *From Now to Eternity*, *supra* note 31, at 112.

154. 971 F.2d 1395, 1398–99 (9th Cir. 1992).

155. *Id.* at 1396.

156. *Id.*

157. *Id.*

appropriated her identity.[158] The court ruled in White's favor, holding that the right of publicity extends beyond name and likeness to encompass elements that merely evoke a person's identity.[159]

The decision emphasized that clever advertising tactics that invoke a celebrity's persona, without explicitly using their name or image, should not be allowed to circumvent publicity protections. The court warned that without such breadth, the right of publicity risked being "eviscerated" by strategic workarounds.[160] *White* thus marked a pivotal expansion of publicity rights, but also exposed their fraught relationship with First Amendment principles. In this context, Justice Kozinski criticized the *White* decision for expanding the scope of publicity rights to encompass anything that evokes the celebrity, thereby protecting the abstract idea of the plaintiff rather than her specific, identifiable traits.[161]

Drawing on the deeply rooted principle of the idea/expression dichotomy in American law, Justice Kozinski emphasized that this distinction is "the means by which intellectual property law advances the progress of science and art."[162] Yet, the *White* court opted to disregard this foundational doctrine.[163] Thus, *White* granted authorship to a digital simulation of personality with no underlying human referent, echoing Schopenhauer's distinction between appearance and essence. The emergence of the virtual celebrity as a Schopenhauerian spectacle carries significant implications for both copyright law and publicity rights, which share the same legal framework.

First, Schopenhauer challenges copyright's emphasis on original expression attributed to an individual author, proposing instead that the true value of art lies in its capacity to reveal universal truths, regardless of who created it or how uniquely. Second, this perspective resonates with critiques of Romantic authorship and supports more collective or derivative models of creativity, such as remix culture and collaborative production.[164] In doing so, it destabilizes the notion of intellectual

158. *Id.*; *see* CAL. CIV. CODE § 3344(a).

159. *White*, 971 F.2d at 1398–99.

160. *Id.* at 1399.

161. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1514 (9th Cir. 1993).

162. *Id.* at 1517 (referring to Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding creativity as the standard for copyrightability, and not the creator's effort)).

163. Mira Moldawer, *Publicity Rights Metamorphosis: From the Right to Evoke to the Ultimate Evoked Rights*, 24 CHI.-KENT J. INTELL. PROP. 1, 12–14 (2025).

164. Jonathan Gingerich, *Remixing Rawls: Constitutional Cultural Liberties in Liberal Democracies*, 11 NE. U. L. REV. 401, 465–66 (2019) (advocating for democratic control of culture to enable everyone to have an equal opportunity to accessibility and creativity, following Rawls' legacy: "Building a legitimate constitution requires that we all come to see one another as 'coworker[s] in the kingdom of culture' and that our laws and institutions embody this respect."); Arewa, *supra* note 51, at 527–28. *But cf.* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (characterizing sampling and hip-hop as acts of theft, as exemplified by District Judge Duffy's statement that "[t]hou shalt not steal" has been an

property as a private, exclusive asset and advances a vision of creative works as emanations from a shared metaphysical source, one more aligned with public domain, open access, or commons-based frameworks.

Though such implications may appear idealistic, Schopenhauer's core claim, that the self is not the origin, proves especially relevant in the age of virtual influencers, whose "authorship" defies traditional copyright categories. They offer a form of authorship without a subject and a form of ownership without a self, emblematic of a culture shaped by algorithmic visibility rather than by individual creation. By treating aesthetic experience as a public good rather than a market commodity, Schopenhauer compels a reconsideration of the very purpose of authorship.

Schopenhauer's philosophy urges a reorientation of copyright's foundational values: from ownership to stewardship, from incentivization to cultivation, from individual control to shared access. In sum, Schopenhauer challenges every pillar of the modern author as a legal construct. From a postmodern standpoint, reframing Schopenhauer's challenge to the significance of "the name" within our IP system shifts the focus from identifying the true author to asking: under what conditions can a discourse be attributed to a name at all? This question, as Michel Foucault explores and as the following section elaborates, lies at the heart of authorship's legal and philosophical construction.

II. THE VIRTUAL CELEBRITY AS AUTHOR-FUNCTION 2.0

A. *From Author to Interface: The Author-Function Decoded*

Michel Foucault's essay, *What is an Author?* challenges the traditional concept of the author as an individual, suggesting that the "author-function" is a construct shaped by legal and institutional demands.[165] Foucault contends that this function arises from power structures and classifications, aligning with Schopenhauer's assertion that personality is an illusion that masks deeper metaphysical realities. Consequently, what was once deemed an absolute truth is contingent upon historical context, with the Enlightenment being no exception.[166]

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admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business, and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the Copyright Laws of this country.").

165. Foucault, *What is an Author?*, *supra* note 65, at 130.

166. Michel Foucault, *What is Enlightenment?*, *in* THE FOUCAULT READER 32, 37 (Paul Rabinow ed., 1984) [hereinafter Foucault, *What is Enlightenment?*] (where Kant explains what

In response to his renowned question, What is an author?, Foucault references Samuel Beckett: "What matter who's speaking, someone said, what matter who's speaking?"[167] This view characterizes the author as an "author-function" designed to navigate legal and institutional frameworks.[168] This conceptualization implies that an author's name acts as a classification mechanism. The notion of authorship emerges as a historical invention that governs the act of writing. Foucault posits that authorship represents a legal construct rather than a source of creativity.

Foucault's primary inquiry explored the complex relationship between authorship and authority, examining how power dynamics create and sustain what is accepted as truth.[169] In his view, power and knowledge become instruments of social regulation.[170] Foucault elaborates:

> The "author-function" is tied to the legal and institutional systems that circumscribe, determine, and articulate the realm of discourses; it does not operate in a uniform manner in all discourses, at all times, and in any given culture; it is not defined by the spontaneous attribution of a text to its creator, but through a series of precise and complex procedures; it does not refer, purely and simply, to an actual individual insofar as it simultaneously gives rise to a variety of egos and to a series of subjective positions that individuals of any class may come to occupy.[171]

Foucault critiqued the Enlightenment Romantic ideal of the "genius" as a product of metaphysical fantasy; he argues that originality, the foundational idea enabling authorship, emerged due to a discursive shift

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enlightenment is as a proposal to Frederick II, namely, "a sort of contract—what might be called the contract of rational despotism with free reason").

167. Foucault, *What is an Author?*, *supra* note 65, at 115.

168. *Id*. at 130; *see* Jakob Stougaard-Nielsen, *The Author in Literary Theory and Theories of Literature*, *in* THE CAMBRIDGE HANDBOOK OF LITERARY AUTHORSHIP 270, 284 (Ingo Berensmeyer, Gert Buelens & Marysa Demoor eds., 2019); *see also* Roland Barthes, *The Death of the Author*, *in* IMAGE MUSIC TEXT 142, 142 (Stephen Heath trans., 1977) (explaining writing is a neutral space where the subject slips away and all identity is lost).

169. *See generally* MICHEL FOUCAULT, ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE (A.M. Sheridan Smith trans., 1972) [hereinafter FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE]; MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Pantheon Books, 1970) [hereinafter FOUCAULT, THE ORDER OF THINGS]; MICHEL FOUCAULT, *in* MADNESS AND CIVILIZATION; A HISTORY OF INSANITY IN THE AGE OF REASON 109–10 (Richard Howard trans., 1964) [hereinafter FOUCAULT, MADNESS AND CIVILIZATION].

170. PHILIP STOKES, PHILOSOPHY: 100 ESSENTIAL THINKERS 187, 187 (Paul Whittle ed., 2006) (for the power relations between power and knowledge as the main theme in Foucault's work and for the idea that "The theme that underlies all Foucault's work is the relationship between power and knowledge, and how the former is used to control and define the latter. What authorities claim as 'scientific knowledge' are just means of social control").

171. Foucault, *What is an Author?*, *supra* note 65, at 130–31.

that allowed for individual nomination and attribution.[172] While Schopenhauer suggests the individual precedes the structure of authorship, Foucault contends the structure itself precedes the individual.[173] Thus, authorship stems from institutional privileges rather than metaphysical impulses, leading Foucault to question the basis for linking discourse to a name and designating it as original.

Foucault's archaeological method reveals not an essence but rather a contingency, ultimately illustrating the transition from origin to function in authorship.[174] VIs epitomize what can be termed the "author-function 2.0." They are not merely symbols of originality or attribution; they serve as focal points of emotional engagement, algorithmic valuation, and branding.[175] In Foucault's terms, a virtual celebrity is a subject formed by visibility, normalcy, and self-governance.[176] Fame becomes a regime of discipline, requiring constant examination and optimization under the watchful eyes of algorithms and audiences.[177]

This system of governance emerges not through coercion but through optimization, resulting in a compliant subject, the ideal of disciplinary authority.[178] The synthetic body does not resist; it conforms. It is the dream of disciplinary power: a body without rebellion, designed to please, and engineered to perform endlessly. When considering AI-generated celebrities, this observation reveals a profound critique: corporations do not just wield the tools for persona creation; they control the discursive frameworks that construct and manage identity.[179]

Those who dominate discourse also determine what constitutes reality. In the context of AI, companies act not merely as economic

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172. *See* FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE, *supra* note 169, at 135, 139 (explaining his principles of archaeology "The authority of the creative subject, as the raison d'être of an œuvre and the principle of its unity, is quite alien to it"); *see id.* at 141, 147 ("Archaeology—and this is one of its principal themes—may thus constitute the tree of derivation of a discourse.").

173. *See* SCHOPENHAUER, WWR, *supra* note 61, at 184–200 (discussing the subject's role in perceiving the essential "Idea" over the perceived structure); *id*. at 237–55; *cf.* FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE, *supra* note 169, at 138–39.

174. Foucault, *What Is Enlightenment?*, *supra* note 166, at 46.

175. *See* CRYSTAL ABIDIN, INTERNET CELEBRITY: UNDERSTANDING FAME ONLINE 1–33 (2018).

176. *Cf.* FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 67 ("Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.").

177. *Id.* at 204 ("The Panopticon functions as a kind of laboratory of power. Thanks to its mechanisms of observation, it gains in efficiency and in the ability to penetrate into men's behavioral knowledge follows the advances of power, discovering new objects of knowledge over all the surfaces on which power is exercised.").

178. *Id.* at 249.

179. *Id.* at 194 ("The individual is no doubt the fictitious atom of an 'ideological' representation of society; but he is also a reality fabricated by this specific technology of power that I have called 'discipline.'").

entities but as epistemological sovereigns, defining how identity manifests, articulates, and appeals to audiences. Consequently, identity becomes a commodified interface, curated not by the self but rather by marketing strategies and algorithmic analytics. Ownership of AI-generated identity is more than merely a legal matter; it signifies governance over significant aspects of existence, effectively executable.[180]

This generates a closed epistemic loop. Corporations forge ideal identities, and audiences consume and internalize these identities; the resulting data informs the creation of subsequent iterations. Identity transforms into a feedback mechanism, managed and owned by market forces. From a Foucauldian viewpoint, VIs do not liberate identity from biological or human constraints but instead instantiate a novel power paradigm that governs identity production through algorithms and commercial principles.

Here, ownership transcends legal considerations, becoming fundamentally ontological. Corporations do not merely possess characters; they control the conditions of identity realization, performance, and recognition. Thus, we perceive a metamorphosis of subjectivity into interface, of personhood into product, and of identity into extractive capital, ultimately transforming corporations into epistemological arbiters. By historicizing the notion of the author, we open avenues for innovative forms of collective and pluralistic creativity.[181] By displacing the author, we empower readers and society to take a more active role in the construction of meaning.[182]

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180. *Id.* ("We must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it 'abstracts,' it 'masks,' it 'conceals.' In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.").

181. DAVID J. GUNKEL, PERSON, THING, ROBOT: A MORAL AND LEGAL ONTOLOGY FOR THE 21ST CENTURY AND BEYOND 171 (MIT Press 2023) (drawing from Levinas and stating that "[h]ow something is treated precedes and contributes to the determination of what it is").

182. *Id*. at 172 ("This change in perspective—an ethics of Things that does not acquiesce to the gravitational pull of either reification or personification—provides a way of responding to and taking responsibility for Things that is oriented and arranged otherwise. It precedes not from the essential ontological condition of individuals but the social situations and relationships out of which these individuated beings first emerge and become what they will have been"); *id*. at 181 ("This means that the question concerning robot rights or the moral and legal status of AI systems is not really—or not exclusively—about the artifacts. It is about us and the limits of who is included in and what comes to be excluded from that first- person- plural pronoun we. It is about how we decide—together and across differences—to respond to and take responsibility for our shared social reality with others and other kinds of otherness. It is, then, in responding to the opportunities and challenges posed by seemingly intelligent and social artifacts that we are called to take responsibility for ourselves, for our world, and for the other Things—whether naturally occurring or artificially made—that are encountered here").

Foucault's perspective enables us to view authorship as a discursive function rather than a matter of personal origin. Here, VIs are developed through a distributed collective and sustained by algorithmic curation, a "function" rather than a singular "who." Accordingly, Schopenhauer and Foucault claim that the author is simultaneously hollow, devoid of metaphysical substance (Schopenhauer) and juridically constructed (Foucault). Therefore, if the celebrity is produced by code, the question is: Should the same legal protections apply as its human authorship counterpart, namely, exclusive rights, moral standing, and publicity control?

B. *Toward a Post-Authorial Legal Paradigm*

From the Enlightenment to the VIs, the author's name has transformed from a guarantor of reason and originality into an algorithmic floating signifier.[183] Foucault would likely argue that virtual identity is the current site of power; the regime of knowledge, power, and control in our time. Hence, while in Enlightenment and Romantic thought, the name denoted mastery and genius, in postmodern thought, it is recognized as a fiction disguising an institutional strategy for discipline, branding, and control; in Generative AI, the name may become optional, interchangeable, or even deceptive, intensifying the stakes associated with defining authorship, agency, and legal identity.

Foucault's lecture "Power/Knowledge," later published as "The Subject and Power," asserts:

> It is therefore, I think, a mistake to think of the individual as a sort of elementary nucleus, a primitive atom or some multiple, inert matter to which power is applied, or which is struck by a power that subordinates or destroys individuals. In actual fact, one of the first effects of power is that it allows bodies, gestures, discourses, and desires to be identified and constituted as something individual. The individual is not, in other words, power's opposite number; the individual is one of power's first effects. The individual is in fact a power-effect, and at the same time, and to the extent that he is a power-effect, the individual is a relay: power passes through the individuals it has constituted.[184]

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183. *Cf.* Peter Conrad, *Blend It Like Beckham*, OBSERVER (May 25, 2003), https://www.theguardian.com/theobserver/2003/may/25/features.review7 [https://perma.cc/K4DX-7MS4] (characterizing the human celebrity as a "floating signifier" who serves as a "medium . . . [to] transmit whatever message you wish").

184. *See* MICHEL FOUCAULT, *Jan. 14, 1976*, *in* SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975–76, at 23 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003); HUBERT L. DREYFUS & PAUL RAINBOW, *The Subject and Power*, *in* MICHEL FOUCAULT : BEYOND STRUCTURALISM AND HERMENEUTICS 208, 212 (1983).

Prior to the rise of the digital—let alone the virtual—celebrity, Foucault had already anticipated the legal consequences of the Enlightenment paradigm, underscoring a legal system that imposes strict binaries and enforces fixed distinctions.[185] By historicizing the author, we free ourselves from her and perhaps make room for new forms of creativity, collective and plural. As the digital celebrity embodied in the VIs phenomenon is not self-authored but algorithmically constructed, the celebrity transcends the role of author, functioning as an interface. The law must respond accordingly.

The virtual celebrity embodies a Schopenhauerian paradox; it marks the victory of the *Will* over contemplation, of simulation over essence, and of appearance over originality. Yet paradoxically, while authorship is currently withheld from generative AI, its impersonal nature may render it more compatible with Schopenhauerian authorship.[186] By separating intellectual merit from legal identity, Schopenhauer offers a powerful critique of human-centric authorship. His philosophy, though idealist and metaphysical, ironically strengthens the case for recognizing generative AI as a participant in cultural creation.

First, a Schopenhauerian perspective suggests we value what is created, not simply by the author's classification or identity. Second, this unexpected alignment arises not only from AI's lack of subjectivity but also from its role in generating prompts that point toward universal Ideas, echoing Schopenhauer's conception of art as engaging with Ideas themselves rather than their individualized expressions.[187] In terms of

185. FOUCAULT, MADNESS AND CIVILIZATION, *supra* note 166, at 109–10 ("[It is a] law which excludes all dialectic and all reconciliation; which establishes, consequently, both the flawless unity of knowledge and the uncompromising division of tragic existence; it rules over a world without twilight, which knows no effusion, nor the attenuated cares of lyricism; everything must be either waking or dream, truth or darkness, the light of being or the nothingness of shadow. Such a law prescribes an inevitable order, a serene division which makes truth possible and confirms it forever.").

186. Thaler v. Perlmutter, No. 1:22-cv-01564 (D.D.C. June 2, 2022); Thaler v. Perlmutter, No. 1:22-cv-01564, slip op. at 8 (D.D.C. Aug. 18, 2023) ("Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding 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."); U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICES PRACTICES § 306 (3d ed. 2021) (insisting on human authorship as sine qua non). *See generally* Mira Moldawer, *The Shadow of the Law Versus a Law With No Shadow: Pride and Prejudice in Exchange for Generative AI Authorship*, 14 SEATTLE J. TECH., ENV'T & INNOVATION L. 5 (2024), https://digitalcommons.law.seattleu.edu/sjteil/vol14/iss2/5 [https://perma.cc/BW8R-WFX5].

187. Lemley, *supra* note 148, at 26 ("This long-standing principle is designed to ensure that copyright owners don't end up controlling an entire concept or genre, but only the particular way they have chosen to communicate that idea. The idea itself is free for the world to use. Ensuring that copyright doesn't protect ideas is not just embedded in the caselaw and the Copyright Act. It is a fundamental part of what makes copyright law constitutional. Along with the fair use defense,

both copyright law and publicity rights, sharing the same legal infrastructure, Schopenhauerian offers a post-authorial legal paradigm.

Drawing on Foucault's critiques, the author's name functions less as a mark of origin than as a mutable node of institutional control and branding. As the new VI idols represent a new kind of celebrity co-authored by AI and fans**,** legal constructs often neglect the role of the public, which continually reshapes and reinterprets public figures to suit its own cultural and emotional needs.[188] As Richard Dyer famously asks, are stars a product of production—shaped by the film industry's creators—or of consumption, emerging in response to audience desires?[189]

In a society where, as Barton Beebe and Jeanne Fromer observe, "about three-fourths of the time we are using a word that someone has claimed as a trademark" when we speak, this becomes a fundamental question.[190] Foucault is not alone in criticizing the Enlightenment's flawed legacy regarding the construction of the author versus her audience. While Kantian and Hegelian paradigms are rooted in Enlightenment ideals, framing authorship as part of a rational progression toward human emancipation, postmodern thought dismantles these grand narratives.[191]

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the Supreme Court tells us, the idea expression dichotomy prevents copyright from treading on the First Amendment.").

188. Stuart Hall, *The Spectacle of the "Other"*, *in* REPRESENTATION: CULTURAL REPRESENTATION AND SIGNIFYING PRACTICES 223, 270 (Stuart Hall ed., 1997); Stuart Hall, *Encoding/Decoding*, *in* CULTURE, MEDIA, LANGUAGE 117, 127 (Stuart Hall, Dorothy Hobson, Andrew Lowe & Paul Willis eds., 1980) (for the contested terrain in which individuals make and establish their cultural meanings, bypassing mainstream culture); JOHN FISKE, UNDERSTANDING POPULAR CULTURE 126–27 (1989) ("Popular pleasures must be those of the oppressed, they must contain elements of the oppositional, the evasive, the scandalous, the offensive, the vulgar, the resistant. The pleasures offered by ideological conformity are muted and are hegemonic; they are not popular pleasures and work in opposition to them."); Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 380 (1992); *see* Henry Jenkins & John Tulloch, "*At Other Times, Like Females": Gender and Star Trek Fan Fiction*, *in* SCIENCE FICTION AUDIENCES: WATCHING DOCTOR WHO AND STAR TREK 196 (John Tulloch & Henry Jenkins eds., 1995) (where scholars traced organized media fandom and Fan fiction to the second season of Star Trek in 1967); Rosemary J. Coombe, *The Celebrity Image and Cultural Identity: Publicity Rights and the Subaltern Politics of Gender*, 14(3) DISCOURSE 59 (1992); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461 (2006); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

189. RICHARD DYER, STARS 9 (new ed. 1998) ("Are stars a phenomenon of production [arising from what the makers of films provide] or of consumption [arising from what the audience for films demands]?").

190. Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 953, 982 (2018).

191. JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE XI, XVIII, XXIV-V 79–82 (Geoff Bennington & Brian Massumi trans., 1984).

In the wake of historical disillusionment following Fascism and Totalitarianism, postmodernism characterizes contemporary society as driven by spectacle, narcissism, and compulsive consumption, which manipulates us into purchasing illusory images in our eternal quest for artificial satisfaction of our desires.[192] Postmodern thought, which challenged the Enlightenment's commitment to absolute truth and its rigid separation between reality and representation, offered a radically different decoupling of signifier and signified, where cultural constructs, such as the persona, no longer pointed to a fixed or original meaning.[193]

Consequently, we face what theorists have termed the "floating" or "empty" signifier: a symbol that has a meaning determined entirely by the interpretive practices of its audience.[194] In this framework, the persona becomes a vessel filled with content projected onto it by the public, negating any claim to pure or inherent originality.[195] While in Enlightenment and Romantic thought, the name signified *ownership* and *genius*, in postmodern thought, it became an institutional mechanism for discipline, branding, and control. Nowadays, the VI is our algorithmic floating signifier/celebrity.

The name becomes *optional, interchangeable,* or even *misleading*, raising the stakes for how we define authorship and legal identity. Virtual celebrity exemplifies a collapse of essence into appearance, requiring a reconsideration of both copyright and right of publicity frameworks. Fusing Schopenhauer and Foucault, we can frame the virtual celebrity as a post-subjective legal actor. Namely, a bundle of representations, metrics, and platform incentives, but legally treated as a singular rights-holder.

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192. GUY DEBORD, THE SOCIETY OF THE SPECTACLE 60 (Fredy Perlman et al. trans., Black & Red rev. ed. 1977). *See generally* CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHED EXPECTATIONS (1979); JEAN-FRANÇOIS LYOTARD, LIBIDINAL ECONOMY (Iain Hamilton Grant trans., Indiana Univ. Press 1993) (LYOTARD was greatly influenced by Gilles Deleuze & Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* [Robert Hurley, Mark Seem & Helen R. Lane trans., Univ. of Minnesota Press 1977] who regarded society as a mechanism of desiring machines manufactured by Consumer Capitalism.).

193. *See generally* Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 85 (Ben Brewster trans., 1971); ROLAND BARTHES, MYTHOLOGIES (Annette Lavers trans., 1972); FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE, *supra* note 169; FOUCAULT, THE ORDER OF THINGS, *supra* note 169; Foucault, *What is Enlightenment?*, *supra* note 166; Jeffrey Mehlman, *The "Floating Signifier": From Lévi-Strauss to Lacan*, *in* 48 YALE FRENCH STUD. 10 (1972).

194. Mehlman, *supra* note 194, at 23.

195. ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 89 (1998) ("Celebrity names and images, however, are not simply marks of identity or simple commodities; they are also cultural texts—floating signifiers that are continually invested with libidinal energies, social longings, and, I will argue, political aspirations.").

This raises profound questions. First, can we assign copyright or publicity rights to a subject that has no metaphysical interiority (Schopenhauer) and no coherent discursive unity (Foucault)? Second, are courts protecting authorship, or simply regulating symbols of power and visibility? Rethinking copyright law and publicity rights authorship through the lens of Schopenhauer and Foucault suggests policy blueprints beyond the current infrastructure of IP law, starting with the originality myth, as detailed in the following Part.

III. BEYOND ORIGINALITY: A SCHOPENHAUER AND FOUCAULT-INSPIRED POLICY FRAMEWORK

A. *From Will and Representation to Author-Function: Philosophical Groundwork for Copyright Reform*

The legal institution of copyright rests on a metaphysical assumption: that a discrete, autonomous subject originates expressive works ex nihilo. This modern conception of authorship, inherited from Enlightenment philosophy, underpins the idea of the author as the rightful owner of intellectual property. Yet both Michel Foucault and Arthur Schopenhauer dismantle this figure from radically different angles. Foucault achieves this through discourse theory and institutional critique while Schopenhauer achieves it through metaphysics, art theory, and a pessimistic rejection of the individuated will.

Foucault's notion of the author-function exposes the author not as a source of creativity but as a regulated effect of discursive systems. Schopenhauer, conversely, displaces originality from the author's will and locates it in the metaphysical intuition of the Idea, achieved through contemplative escape from the ego. Foucault and Schopenhauer offer a dual philosophical arsenal for deconstructing the authorial illusion of copyright law and publicity rights conjoined authorship, and reconfiguring it as relational, functional, and metaphysically decentered, in the age of generative AI, algorithmic creation, and posthuman production. Accordingly, five crucial legal pillars are concerned.

First, applying the shift from originality to intuition, the individual originality in copyright eligibility is de-emphasized. This is the outcome of both the Schopenhauerian and Foucauldian rationales. While, according to Schopenhauer, originality is not the product of ego or ownership but of rare, contemplative intuition detached from the individual will, the Foucauldian rationale regards originality as a modern invention, historically deployed to legitimize certain discourses and exclude others. Therefore, copyright eligibility should be reframed in terms of *transformative contribution* or *discursive function* rather than originality or personality.

Second, if authorship is a function, not an identity, the author can be replaced with a distributed attribution model. While, according to the Foucauldian rationale, the author is a regulatory figure who enables and limits discourse, not a sovereign originator, Schopenhauerian philosophy complements this rationale by arguing that the true creator momentarily loses their individuality, suggesting authorship is less personal than traditionally assumed. Thus, applying a multi-tiered attribution system, copyright law should enable legal recognition of collaborative, anonymous, and synthetic contributions.

Third, following Foucauldian rationale, according to which copyright operates as a disciplinary mechanism that privatizes knowledge and enforces exclusion, backed by Schopenhauerian insight**,** arguing that art should liberate us from the will-to-own, not intensify it through commodification, legal entitlements should be recast. Consequently, copyright law shifts from a property regime to a discourse governance framework; from monopolies over expression to prioritizing access over exclusion.

Fourth, going beyond the *Will*, according to Schopenhauer, means addressing synthetic and posthuman creativity by recognition of non-human and collective modes of creation, as intentionality is not a prerequisite for creation. Following Foucault, limiting authorship to individuals reinforces legal subjectivity and excludes algorithmic or communal modes of expression. Therefore, copyright law should introduce categories for non-volitional creativity, granting limited and conditional rights to outputs by AI systems or collectives. Thus, creating legal pathways for recognizing hybrid works without collapsing them into outdated binaries of human/non-human authorship.

Fifth, according to Foucauldian rationale, power is exercised through regimes of visibility, and who is seen as an author determines who can speak. Backed by the Schopenhauerian contribution of the artistic genius as rare, not market-driven, and often marginalized by dominant systems of value, copyright law should implement equity-oriented attribution protocols to ensure attribution reflects cultural contribution, not just legal formalities or market clout. A tiered copyright system**,** with shorter terms for utilitarian works and potentially longer protection for profound aesthetic contributions, balanced by strong public access obligations, will answer this challenge.

Hence, in place of the autonomous, proprietary author, these blueprints reframe authorship as a *discursive, functional, and relational role* within broader cultural systems, proposing a model of *functional attribution, discursive participation,* and *post-volitional creativity* in the digital age. The goal is not to abolish copyright but to reorient it away from identity and ownership and toward function and access. In this

reimagined legal paradigm, creativity is not the property of a self but the expression of a system.

B. *Reimagining Copyright Through Schopenhauer and Foucault*

By supplanting the "identity-as-property" paradigm with an "identity-as-relation" approach, the law can better accommodate the collaborative, mediated, and fluid nature of authorship in the twenty-first century. This does not eliminate rights; it redistributes them based on systemic participation, in contrast to metaphysical possession, as offered in this blueprint. The policy objective is to replace the outdated, Enlightenment-based model of authorship and copyright, centered on ownership, originality, and identity, with a functional, pluralistic, and access-oriented legal framework that reflects contemporary modes of cultural production.

This blueprint offers a post-authorial legal paradigm: one that rejects the myth of the sovereign, original author and instead embraces a system of creative governance built on function, access, and collective contribution. By referring to the post-authorial legal paradigm, this offer addresses both copyright law and publicity rights, as they share the same theoretical infrastructure due to *Zacchini*'s legacy. Drawing from Schopenhauer's critique of the ego-bound *Will* and Foucault's analysis of authorship as a discursive function, the proposed reforms reposition copyright law to meet the cultural realities of the digital and algorithmic age. The policy pillars are:

1. Redefine Authorship as Attribution Function

As the goal is to displace the author as a legal subject of property and redefine creative roles in functional terms, copyright law should:

a. replace the legal category of "author" with "attribution roles," including initiator, curator, assembler, prompt designer, or editor;

b. base rights allocation on demonstrable function and contribution within a creative process; and

c. encourage multi-party attribution frameworks in collaborative and AI-mediated works.

2. Deprioritize Originality as a Legal Criterion

As the goal is to shift focus from metaphysical originality to contextual significance and transformative function, copyright law should:

a. remove "originality" as a threshold requirement for protection and substitute it with "discursive contribution" or "contextual impact";

b. recognize aesthetic value in works emerging from recombination, curation, or reinterpretation; and

c. develop legal tests for transformative participation rather than novelty.

3. Establish a Layered Access-Based Copyright Model

As the goal is to replace binary ownership/exclusion rights with a contextual, differentiated model of use, copyright law should:

a. legislate categories of permitted use: transformative, non-commercial, and algorithmic;

b. introduce scalable licensing protocols based on use context and degree of modification; and

c. incentivize creators and rights holders to opt into commons-based or tiered-access licensing schemes.

4. Recognize Synthetic, Collective, and Anonymous Creators

As the goal is to provide legal recognition for posthuman and communal creativity, copyright law should:

a. create legal categories for non-volitional or posthuman creators, including algorithmic systems and collectives;

b. grant limited, use-specific rights (e.g., time-bound or non-commercial) to works generated without individual human intention; and

c. protect derivative and folk expressions that originate in shared cultural environments from misattribution or enclosure.

5. Implement Context-Sensitive and Equity-Based Attribution Protocols

As the goal is to ensure cultural, ethical, and historical context informs legal attribution and rights allocation, copyright law should:

a. require cultural impact assessments for works;

b. introduce context-sensitive attribution standards reflecting contribution, power dynamics, and cultural significance; and

c. prohibit extraction and commodification of culturally embedded works without appropriate contextual safeguards and benefit-sharing.

CONCLUSION

In each era, answering "What's in a name?" reflects and reproduces dominant ideologies of authorship. This Note traces the evolution of the author's name, from the rational individual of the Enlightenment to the decentered authorial subject of postmodernism, and finally to the algorithmic outputs of the VI phenomenon. The emergence of virtual celebrities, whether influencer avatars, AI-generated personas, or hyper-curated human brands, challenges traditional copyright and publicity doctrines premised on the individuality and originality of authorship. In the age of generative AI, the name no longer guarantees originality, creativity, or even human intervention.

However, it remains indispensable for copyright enforcement, cultural legitimacy, and commercial exploitation. The VIs phenomenon marks the culmination and crisis of the legal figure of the author. Traditional authorship paradigms collapse in the face of the emergent virtual celebrity, an entity that resists attribution, authorship, and identity, as classically understood. Rooted in Enlightenment ideals, current legal frameworks, particularly copyright law and publicity rights sharing the same theoretical infrastructure, remain tethered to the Romantic conception of the autonomous, originating subject.

Schopenhauer's philosophical critiques of Kant and Hegel dismantle the conceptual foundations of modern copyright law, particularly its constructions of authorship, originality, and ownership. Schopenhauer's philosophy, especially his theory of the impersonal genius, critique of commodified writing, and anti-Romantic aesthetics, provides a philosophical lens for questioning dominant copyright paradigms and challenges the myth of absolute originality or property-based notions of literary value, thus reevaluating the commodification of identity, the illusion of authorship, and the contradictions inherent in modern legal protections of fame.

Applying Schopenhauer to copyright law paradigms is not simply an exercise in philosophical juxtaposition; it provides a radical critique of the metaphysical, ethical, and aesthetic foundations upon which modern copyright regimes rest. Schopenhauer's thought offers an alternative conceptual lens that exposes the limitations, contradictions, and cultural biases embedded in our current legal IP system. In an age of AI-generated content and collaborative creativity, Schopenhauer's aesthetic metaphysics offers a timely alternative to the mythology of the author as individual owner.

Through Foucault's theories of the author-function, disciplinary power, and technologies of the self, this Note argues that corporate ownership of synthetic identities constitutes a new mode of power over subjectivity. Identity has become an engineered, regulated, and commodified entity. These virtual figures, although post-human in form, are governed by very human hierarchies of discourse, profit, and control. The author's name functions less as a mark of origin than as a mutable node of institutional control.

From a Foucaultian perspective, AI-generated celebrities represent a new regime of power, one that governs the production of identity itself through algorithms, metrics, and commercial logic. Therefore, ownership is ontological. Corporations do not merely own characters; they own the conditions under which identity appears, performs, and becomes legible. What we witness, then, is the transformation of subjectivity into interface, of personhood into product, and of identity into extractive capital.

Both Schopenhauer and Foucault reject the notion that identity is something one owns. Yet, as Schopenhauer critically foresaw, originality is not a metaphysical property but a contingent act, deeply vulnerable to commodification and institutional distortion. Likewise, Foucault's theory of the "author function" exposes how legal subjectivity is governed by discursive protocols of classification, exclusion, and control. The virtual celebrity, curated, algorithmically enhanced, and performatively fractured, escapes both frameworks.

No longer an originator of expression, it emerges as a platform-mediated interface**,** challenging the assumptions of ownership, autonomy, and identity that underlie traditional copyright and publicity regimes. To regulate such entities through the lens of authorship is not merely obsolete; it is legally incoherent. Instead, this Note proposes a jurisprudential shift from metaphysical to functional authorship, urging reforms that emphasize control, contribution, and regulation of the interfaces of fame, the platforms, design systems, and algorithmic economies that produce digital visibility and identity.

Therefore, the law must reject identity as property in favor of a relational model. In doing so, it calls for a post-authorial legal paradigm, one that reflects the systemic production of fame in digital capitalism and the legal inadequacy of subject-centered rights in the age of synthetic visibility. Consequently, this Note offers a post-authorial legal paradigm blueprint to embrace a system of creative governance built on function, access, and collective contribution instead of originality and identity, as entitled to property rights.

Drawing from Schopenhauer's critique of the ego-bound *Will* and Foucault's analysis of authorship as a discursive function, the proposed reforms reposition copyright law to meet the challenges of the VI phenomenon. What is at stake is the very capacity of law to respond meaningfully to the post-authoritarian age. To do so, it must finally heed the warnings of Schopenhauer and Foucault, not by defending the author but by releasing it. As courts and lawmakers confront the ontological ambiguity of AI-generated works, the question "What's in a name?" may become the key to redefining authorship itself.

VOLUME V

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