THE LANGUAGE GAMES OF DENIED AUTHORSHIP TO GENERATIVE AI

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TABLE OF CONTENTS

INTRODUCTION

"[T]he sovereignty of reason and justice is no more tyrannical than that of desire." —Blaise Pascal.[1]

Generative Artificial Intelligence ("AI") fascinates both federal and state-level legislators regarding what constitutes authorship in two important

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[1] BLAISE PASCAL, PASCAL'S PENSÉES § 325 (2006) (ebook), https://www.gutenberg.org/cache/epub/18269/pg18269-images.html [https://perma.cc/AX46-TT7G].

Intellectual Property ("IP") law branches: copyright law and publicity rights.[2] Generative AI computer programs—such as Open AI's *DALL-E* and *ChatGPT* programs, Stability AI's *Stable Diffusion* program, and *Midjourney*—challenge the current IP system, as they are capable of independently generating new images, texts, music, and many other conceivable artistic uses, such as outputs in response to a user's prompts or inputs without the user's control.[3] Thus, the question arises: who is their author in copyright law?

From the publicity rights' prism, the reference is to generative AI's capacity to create realistic "images, videos, replicas, or voice simulations of real people," thus trespassing on the real people's publicity rights—defined as "the right to prevent unauthorized commercial uses of one's name, image, or likeness ("NIL") or other aspects of one's identity."[4] However, despite publicity rights being initiated as a privacy tort, copyright law and publicity rights share conjoined yet different authorship, as the only publicity right case that has reached the Supreme Court of the United States was anchored in copyright law infrastructure.[5]

This anomaly is due to *Zacchini v. Scripps-Howard Broadcasting Co.*, in which the defendant copied the plaintiff's entire fifteen-second act in its evening news broadcast, despite the plaintiff's objection. While the Ohio Supreme Court found the defendant was constitutionally privileged under the First Amendment to include in its newscasts matters of public interest that the state-law right of publicity would otherwise protect, the U.S. Supreme Court held that the First and Fourteenth Amendments do not immunize the news media when they broadcast a performer's entire act without his consent; thus, finding the defendant violated the plaintiff's right of publicity.

The fact that Zacchini's entire act was broadcasted made the Supreme Court's reasoning to forbid copying—which is the focus of copyright infringement lawsuits—seem natural.[6] Consequently, the second question is: who authorizes publicity rights regarding generative AI? The border between copyright law and publicity rights infringements is not always clear. Although artistic or literary generative works created by AI "in the style of" a particular artist or author may not infringe upon copyright laws—which

[2] See CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW (2023) [hereinafter ZIRPOLI, AI AND COPYRIGHT LAW], for a discussion of generative artificial intelligence and copyright law. See CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB11052, ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY (2024) [hereinafter ZIRPOLI, AI AND FEDERAL RIGHT OF PUBLICITY], for a discussion of generative artificial intelligence regarding publicity rights.

[3] ZIRPOLI, AI AND COPYRIGHT LAW, *supra* note 2, at 1.

[4] ZIRPOLI, AI AND FEDERAL RIGHT OF PUBLICITY, *supra* note 2, at 1.

[5] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); ZIRPOLI, AI AND FEDERAL RIGHT OF PUBLICITY, *supra* note 2, at 3. See Tonia Hap Murphy, *The Right of Publicity: Worth a Closer Look in the Classroom*, 36 J. LEGAL STUD. EDUC. 237 (2019) for the history of publicity rights.

[6] Mark A. Lemley, *Privacy, Property, and Publicity,* 117 MICH. L. REV. 1153, 1170 n.76 (2019) [hereinafter Lemley, *Privacy*] appropriates this continuous error to the *Zacchini* case, *supra* note 5, in which the copying of the plaintiff's whole show rendered the case to look "more like a common law copyright claim than a traditional right of publicity claim." Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 98 nn.48–49 (2020) (arguing that the *Zacchini* court sought to close the gap in copyright law's coverage by recognizing Zacchini's claim under the state's right of publicity).

require copying of a specific work—they may still violate publicity rights.[7] Hence, we are left with the question of what constitutes authorship in generative AI regarding both IP right schemes, and why the recent legislation frenzy is important. These questions will be discussed on two different axes: the axis of generative AI versus copyright law and the axis of generative AI versus publicity rights.

Following the current frenzy concerning generative AI regulation and adjudication, the axis of copyright law versus generative AI leads to the conclusion that the question of what constitutes authorship in generative AI is wrongly phrased. The axiom quoted in recent adjudication and the Compendium of the United States Copyright Office Practices, that human creativity is "the sine qua non at the core of copyrightability," means that the correct question should be reversed.[8] Namely, what does not constitute authorship in generative AI? In all the relevant generative AI regulation and adjudication human control is the Siamese twin of human creativity, without which authorship is legally denied.

However, the legal rationale of authorship denial to generative AI seems to be an axiom more than a proven conclusion, as human authorship is neither mentioned in the Constitution nor the Copyright Act. Likewise, analyzing the relevant Register's decisions refusing authorship to generative AI fares no better. While this axiom is anchored "on centuries of settled understanding," this assumption could not be more erroneous concerning more than two thousand years of Western culture.[9] Until the Enlightenment era, the axiom was the opposite: creativity or inspiration was the sine qua non of the divine, not of the human.

As preached by Plato, not only was authorship denied to humans, but poets would be both expelled from Plato's Republic and given the title of the enemies of eternal truth and reason by creating only its third-rate imitation and encouraging feelings and imagination instead.[10] Plato was willing to reconcile the madness of love with the quest for the eternal truth, but not the madness of creativity, due to his fear of the uncontrollable art that cannot be tamed by reason.[11] Hence, what cannot be controlled is negated, reflecting the instinctive reaction to AI's capacity for deep learning as a threat to human control altogether.

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[7] ZIRPOLI, AI AND FEDERAL RIGHT OF PUBLICITY, *supra* note 2, at 3 (referring to the AI-generated song "Heart on My Sleeve," imitating Drake's voice).

[8] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.D.C. 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 OFFICE PRACTICES § 306 (3d ed. 2021) ("The U.S. Copyright will register an original work of authorship, provided that the work was created by a human being."). *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. (2024) [hereinafter Moldawer, *The Shadow of the Law*] (discussing the fight against granting generative AI legal authorship).

[9] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 147 (D.D.C. 2023), *appeal docketed*, No. 23-5233 (D.C. Cir. Oct. 18, 2023).

[10] *See generally* PLATO, *Book X*, *in* THE REPUBLIC (Benjamin Jowett trans., 1998) (360 B.C.E.) (ebook) ("[A]ll poetical imitations are ruinous to the understanding of the hearers, and that the knowledge of their true nature is the only antidote to them.").

[11] PLATO, SYMPOSIUM (Benjamin Jowett trans., 2013) (c. 385-370 B.C.E.) (ebook).

The relatively new shift from authorship as irreconcilable with humanity to exclusive human authorship evolving into a property right demonstrates "authorship" as a form of Ludwig Wittgenstein's "language game."[12] Accordingly, language is not a metaphysical entity but a vehicle that organizes our world depending on rules of accepted behavior in their relevant cultural context. Therefore, meaning is given to our vocabulary through its usage in different forms of life in the relevant culture and society.[13]

The key concept of a "language game" is meant to "address the countless multiplicity of uses, their un-fixedness, and their being part of an activity."[14] Due to a variety of language games in different social situations, one can play different language games on the constantly changing forms of life, such as scientific, aesthetic, and so on. The relevant question that links meaning to utilizing any specific language game is: "[i]n what sort of context does it occur?"[15] Consequently, our forms of life—ever-contingent on culture, context, and history—enable our language to function in forming meaning and judgments. As Wittgenstein argues, "[s]o you are saying that human agreement decides what is true and what is false? What is true or false is what human beings say; and it is in their language that human beings agree. This is agreement not in opinions, but rather in form of life."[16]

The turning point in evolving the author from a mere vessel of divine madness whose dangerous poetry belongs to divine inspiration into an author who deserves a property right instead of an exile, starts and ends with new language games of attribution, created by the three pillars of the Enlightenment era: Immanuel Kant, G. W. F. Hegel, and J. G. Fichte.[17] Even then, the language games in use differed considerably. Whereas Kant argued the primary relationship between the author and the public through the author's speech addressed to the public was an action of an authorized agency, his contemporaries focused on authorship as equal to property rights.[18] The Kantian attribution of the book as an author's speech morphed

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[12] *See generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., Basil Blackwell Ltd 2d ed. 1958) [hereinafter WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS I]; LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe et al. trans., Wiley-Blackwell 4th ed. 2009) [hereinafter WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS II]; Anat Biletzki & Anat Matar, *Ludwig Wittgenstein,* STAN. ENCYC. PHIL. (Fall 2023), https://plato.stanford.edu/archives/fall2023/entries/wittgenstein [https://perma.cc/9ZX2-4SW2].

[13] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS I, *supra* note 12, § 43, at 20 ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language.").

[14] Biletzki & Matar, *supra* note 12.

[15] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS I, *supra* note 12, at 188.

[16] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS II, *supra* note 12, § 241, at 94; *id.* § 242, at 88 ("If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments.").

[17] *See generally* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee et al. eds., 1994) [hereinafter THE CONSTRUCTION OF AUTHORSHIP].

[18] IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 89 (William Hastie trans., 1887) (ebook) [hereinafter KANT, WHAT IS A BOOK?] https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/359/Kant_0139_EBk_v6.0.pdf [https://perma.cc/SED6-TKAL]. *See* Friedemann Kawohl, *Commentary on: Kant: On the Unlawfulness of Reprinting*, *in* PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently et al. eds., 2008), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_d_1785 [https://perma.cc/7CGS-BRAD] (arguing the inadequacy of authorship of Kant's perception of authorship as regarded by his contemporaries who wanted to live on their pens).

into the language game of their unprecedented originality deserving of property rights. Fichte and Hegel enlarged the language game of attribution to embrace exclusive appropriation regarding property rights.[19]

While both Plato and Hegel cherished reason and ultimate truth, their perceptions of art and artists used contradictory language games regarding the essence of truth, supporting Wittgenstein's assertion that language games are inseparable from judgment.[20] The Hegelian dialectics bridged the previously irreconcilable art and truth by harnessing art to the sublime truth, as the latter's mere aspect of the divine was considered a facet of absolute reason.[21] The language game of attribution begot one more prominent with a higher price than predicted: the language game of appropriation.

The appropriation language game is ideologically demonstrated by the debate regarding Vincent van Gogh's painting *A Pair of Shoes*, in which prominent philosophers and researchers fell into the attribution trap by zealously claiming only one exclusive possibility for attribution, creating an incorrect concept of appropriation.[22] Whereas Heidegger attributed the pair of shoes to the quintessence of the Dutch peasant woman, Meir Shapiro argued the shoes to be Van Gogh's, who lived in Paris at the time. Jacques Derrida realized the mutual failure of both Heidegger and Schapiro as derived from the false axiom "[t]hat the desire for attribution is a desire for appropriation," as art was never meant to be the straight reproduction of reality.[23]

In practice, attribution and appropriation language games are demonstrated by the Supreme Court's interpretation of what counts as fair use in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, in which attribution morphs into appropriation.[24] In 1984, the respondent agreed to license one of her Prince photographs for use as an "artist reference" for "one time" only to Andy Warhol, with the resulting artwork to be published in *Vanity Fair*. While Warhol made a silkscreen using the respondent's photo—for which she was paid and credited—and *Vanity Fair* published both the respondent's photo and Warhol's silkscreen alongside an article about Prince, Warhol also created fifteen additional works from the

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[19] JOHANN GOTTLIEB FICHTE, PROOF OF THE ILLEGALITY OF REPRINTING: A RATIONALE AND A PARABLE (Martha Woodmansee trans., 1793). *See generally* Paul Redding, *Georg Wilhelm Friedrich Hegel*, STAN. ENCYC. PHIL. (2020), https://plato.stanford.edu/entries/hegel [https://perma.cc/R29K-QRGL] (for claiming private property as a necessary vehicle for cultivating the individual, as it materializes her inner will).

[20] *See generally* 1 G. W. F. HEGEL, HEGEL'S AESTHETICS: LECTURES ON FINE ART (Thomas Malcom Knox, ed., 1975).

[21] *Id.* at 46 (referring to the aim of art).

[22] *See generally* MARTIN HEIDEGGER, POETRY, LANGUAGE THOUGHT 15 (Albert Hofstadter trans., 2013) (1971). Iain Thomson, *Heidegger's Aesthetics*, STAN. ENCYC. PHIL. (Edward N. Zalta ed., 2019), https://plato.stanford.edu/archives/fall2019/entries/heidegger-aesthetics [https://perma.cc/SW2C-J5CP]; Meyer Schapiro, *The Still Life as a Personal Object - A Note on Heidegger and Van Gogh, in* THE BLOOMSBURY ANTHOLOGY OF AESTHETICS 403 (Joseph Tanke et al. eds., 2012); JACQUES DERRIDA, THE TRUTH IN PAINTING 255–382 (Geoff Bennington et al. trans., 1987).

[23] DERRIDA, *supra* note 22, at 260; *id*., at 272 (regarding the prima facie contradictory empiric premise of Heidegger and Schapiro):

> And when both of them say, basically, "I owe you the truth" for they both claim to be telling the truth, or even the truth of the truth-in painting and in shoes), they also say: I owe the shoes, I must return them to their rightful owner, to their proper belonging: to the peasant man or woman on the one side, to the city-dwelling painter and signatory of the painting on the other. But to whom in truth?

[24] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

same photo. The appellant licensed one of those works to Condé Nast to illustrate a magazine story about Prince. While the appellant was paid ten thousand dollars, the respondent was neither paid nor credited.

The question presented to the Supreme Court of the United States was whether the first fair use factor favored the appellant's commercial licensing to Condé Nast.[25] The majority opinion of the Supreme Court delivered by Justice Sotomayor not only insisted that the "purpose and character" of the first fair use factor is a matter of degree but also that the assessment of the degree required commercial use, thus reversing the language game of attribution through originality to appropriation through commerciality.[26]

Whereas the denial of authorship to generative AI might draw its fears from both Plato's and the Enlightenment era's legacies (which are embedded in copyright law) which feared the loss of control to irrationality or mere desire, publicity rights legislation's frenzy reflects the same fears of losing control from a contradictory approach. The concept of the persona, or celebrity, has undergone a drastic transformation since its formation as a reward for achievement, becoming a reward for being famous.[27] Celebrity culture is defined as "wedding of consumer culture with democratic aspirations" to fulfill the American Dream.[28] Therefore, the democratization of fame—according to which "anybody can be anything"—might either be seen as "the core of democracy" or lamented as a culture in which image overrides essence, regardless of ethical values.[29]

Be it as it may, celebrity culture manifested by publicity rights embraces the opposite values of Plato or Hegel, as "fame is used to persuade, inspire, and inform Americans in nearly every aspect of their lives and [American] fascination with fame has reached epic proportions."[30] In a broader sense, the reference is to a culture of celebrities and brands based on spectacle, narcissism, and compulsive consumption that manipulates us to purchase illusionary images in our eternal quest for the artificial satisfaction of our desires.[31]

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[25] *Id.* at 515–16; 17 U.S.C. § 107(1) ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes").

[26] *Goldsmith*, 598 U.S. at 532:

In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.

[27] *See* DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1992) (coining the celebrity as "famous for being famous" due to her manufacturing by the media-dominated world); Mira Moldawer, *Myths and Clichés: The Doctrinal Myopia of Publicity Right*, 22 UIC REV. INTELL. PROP. L. 50, 50–51, 55 (2022) (heralding celebrities as our cultural text in a culture based on passion) [hereinafter Moldawer, *Myths and Clichés*].

[28] GRAEME TURNER, UNDERSTANDING CELEBRITY 14 (2d ed. 2013); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 22 (1997) (advocating the persona/celebrity phenomenon as the manifestation of the American Dream). The full title that Rosenthal Kwall uses is "The American Dream—Anybody Can Be Anything/The 'I Can Do It Too' Mentality," analyzing how celebrities personify the very core of the American Dream by democratizing fame.

[29] *See* Rosenthal Kwall, *supra* note 28, at 4, 22. *But see* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 228 (1993) (strongly advocating for the contrary and demonstrating the harm that celebrity culture inflicts on our society).

[30] ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 111 (2009).

[31] GUY DEBORD, THE SOCIETY OF THE SPECTACLE 60 (Fredy Perlman et al. trans., Black & Red 2000) (1977). *See generally* CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE

Yet, the axis of publicity rights legislation concerning both federal and state levels interfacing with generative AI is enhancing the outcome of the copyright law axis. The Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023 ("NO FAKES Act") and the No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024 ("No AI FRAUD Act") use the same language games in their titles, stressing the negative impact of generative AI.[32] Incurring liability on unauthorized AI-generated replicas of an individual not only retains publicity rights as posthumous property rights but also focuses on sanctions versus First Amendment exemption from liability, leaving out the question of who the author of their generative AI is. In addition, the Federal Trade Commission ("FTC") issued a supplemental notice of proposed rulemaking ("SNPRM") on February 15, 2024 to expand a new trade regulation rule prohibiting the impersonation of government and businesses (16 C.F.R. §§ 461.1–461.3) ("Impersonation Rule").[33]

The state level of publicity rights legislation—as reflected by Tennessee's ELVIS Act and the laws of Kentucky, Illinois, California, and Louisiana—embrace the legal path paved by the No AI FRAUD Act and the Senate's NO FAKES Act relating to music, entertainment, and politics.[34] Focusing on California A.B. 1836 suggests that free expression is the exception, not the rule. While exaggerated cultural control is granted to publicity rights holders, especially posthumously, traditional defenses of protected forms of speech by the First Amendment are omitted.[35] Consequently, contradictory cultures, whether advocating for reason or passion, use an arsenal of language games to control what seems uncontrollable—namely, different types of authorship—to negate their existence.

Publicity rights authorship is already an unsolved mess. First, this outcome is partially due to the ever-changing classification of publicity rights as either a tort of privacy or a property right.[36] Second, publicity rights are usually exempt from the preemption doctrine, as the persona or celebrity is not considered "writing" of an "author" within the meaning of the Constitution's Copyright Clause, given its subject matter.[37] Thus, the preemption doctrine, which could restrain publicity rights posthumously, is

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OF DIMINISHING EXPECTATIONS (1979); JEAN-FRANÇOIS LYOTARD, LIBIDINAL ECONOMY (Iain Hamilton Grant trans., 1993) (1974). Lyotard was greatly influenced by GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA (Robert Hurley et al. trans., Univ. of Minn. Press 1983) (1972) (regarding society as a mechanism of desiring machines manufactured by consumer capitalism).

[32] NO FAKES Act of 2024, S.4875, 118th Cong. § 1 (2024); No AI FRAUD Act, H.R. 6943, 118th Cong. (2024).

[33] Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15072 (proposed Mar. 1, 2024), https://www.federalregister.gov/documents/2024/03/01/2024-03793/trade-regulation-rule-on-impersonation-of-government-and-businesses [https://perma.cc/6Q82-X5BG].

[34] S.B. 317, 2024 Leg., Reg. Sess. (Ky. 2024); H.B. 4875, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024) (passing unanimously on May 24, 2024); S.B. 217, 2024 Leg., Reg. Sess. (La. 2024).

[35] *See generally* Mike Montgomery, *What's Past Is Prologue: How California's AB 1836 Threatens Creative Freedom,* ORANGE CNTY. REG. (Apr. 10, 2024, 7:00 AM), https://www.ocregister.com/2024/04/10/whats-past-is-prologue-how-californias-ab-1836-threatens-creative-freedom [https://perma.cc/29RV-XDW5].

[36] See Moldawer, *Myths and Clichés, supra* note 27, at 66–74, for the blurry theoretical infrastructure of publicity rights.

[37] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.17 (Matthew Bender, rev. ed. 2024).

not applicable. However, while publicity rights are denied copyrightability due to an anachronistic language game of fixation, publicity rights' appropriation language game is stronger than its counterpart in copyright law. This conclusion is strengthened by contradictory adjudications regarding the interfacing of publicity rights as an IP right or a privacy tort within Section 230 of the Communications Decency Act ("CDA").[38] Thus, even within this scope, publicity right language games concerning authorship change in different states.

Part I of this article discusses the language games behind the concepts of attribution and appropriation through major stages of Western culture that shaped the current legal perception of authorship while attempting to also analyze the axis of copyright law versus generative AI. Starting from the total negation of the current legal system to attribute authorship to generative AI, Part I demonstrates how the sine qua non for copyrightability drastically changed from attributing authorship solely to divine inspiration during the pre-Enlightenment era to later attributing the same coveted authorship to the agonizing artist as the sole custodian of their unprecedented originality, culminating in exclusive appropriation. Part I demonstrates how attribution morphs into appropriation in the Supreme Court's current interpretation of fair use in *Goldsmith*, letting commerciality gain supremacy over creativity.

Part II attempts to analyze the axis of publicity rights legislation and adjudication versus generative AI at both federal and state levels, culminating in ancient fears of lack of control morphing into modern refusal of generative AI authorship while sanctioning its outcome. The already-missing publicity rights authorship is discussed by analyzing its fragile and inconsistent theoretical infrastructure against its exaggerated legal power in terms of property rights, demonstrating how the dominant language game is one of appropriation and that what merits attribution to start with is omitted.

In addition, the massive AI legislation reflects the unsolved paradox of the conjoined authorship of publicity rights with copyright law regarding the language games of the incentive approach. The incentive or utilitarian approach, classified also as an instrumental approach, while considered the dominant legal justification for all IP rights in American law, is heavily criticized theoretically, empirically, and normatively.[39] Yet, while suitable for

[38] 47 U.S.C.S. § 230(e)(2) (LexisNexis 2024): "[N]othing in [§ 230] shall be construed to limit or expand any law pertaining to intellectual property." *Compare* Hepp v. Facebook, 14 F.4th 204 (3d Cir. 2021) (holding publicity rights are IP rights and are thus exempted from § 230 of the CDA's havens once infringing), *with* Ratermann v. Pierre Fabre U.S., Inc., No. 22-CV-325, 2023 U.S. Dist. LEXIS 203445 (S.D.N.Y. Jan. 17, 2023) (reaching the opposite result due to regarding publicity rights as a privacy tort).

[39] Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1256 (2014) ("The major forms of IP—trademark, patent, copyright, and design patent—look different, but they do have at least one objective in common: they are generally concerned with the instrumental goal of providing individuals with an incentive to create something intangible that might otherwise be easily appropriated."). *See* GLYNN LUNNEY, COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY 3–4 (2018) (proving that, from 1962 to 2015, more money for creators not only did not lead to more or better music but quite the contrary); Rebecca Tushnet, *Intellectual Property as a Public Interest Mechanism*, *in* THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 95, 102 (Rochelle Dreyfuss et al. eds., 2018):

> Incentive theory, indeed, is a notable contributor to the metastasis of the right of publicity in American law, despite the empirical dubiousness of the claims that celebrities need economic incentives in the form of control over all commercial uses of their identities. In IP, "if value, then right," is unfortunately not only a realist criticism, but also a never-ending threat.

concurring with generative AI authorship for the good of the public, the incentive approach is a major vehicle for denying it altogether.[40] Likewise, while the main question regarding publicity rights—whether our law should incentivize fame for fame's sake—is still unanswered, the new AI legislation creates a powerful language game of the incentive approach to enhance dubious rights.[41]

Lastly, I conclude by arguing that ancient fears of losing control in different stages of Western culture create different language games attempting to disguise the mystical foundation of authority. Denying authorship to generative AI is only one of its facets.

I. THE AXIS OF COPYRIGHT LAW VERSUS GENERATIVE AI

A. WHAT CONSTITUTES GENERATIVE AI AUTHORSHIP?

According to the Copyright Registration Guidance of the Register of Copyrights issued on March 16, 2023, the answer is clear cut.[42] As stated by the Register of Copyrights, Shira Perlmutter, in her update to Congress on February 23, 2024, "The Registration Guidance reiterated the core legal principle that copyright protection in the United States requires human authorship."[43] The leitmotif in both the Copyright Registration Guidance and the Register of Copyrights' decision declining copyrightability to generative AI works is the issue of human control, as stated in the Copyright Registration Guidance:

> If a work's traditional elements of authorship were produced by a machine, the work lacks human authorship and the Office will not register it. For example, when an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the ''traditional elements of authorship'' are determined and executed by the technology—not the human user. Based on the Office's understanding of the generative AI technologies currently available, users do not exercise ultimate creative control over how such systems interpret prompts and generate material.[44]

Works absent human control—works in which AI "determines the expressive elements of its output"—will not be considered the product of human authorship and will thus be denied authorship altogether. In cases of mixed authorship, such as Kris Kashtanova's graphic novel illustrated with images generated by *Midjourney* in response to text inputs, copyrightability

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[40] *See generally* Ryan Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence,* 75 FLA. L. REV. 1141 (2023) (demonstrating pro and contra arguments concerning generative AI authorship by applying the incentive approach).

[41] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 101 (2018) ("If the right of publicity incentivizes anything, it is not clear that it is incentivizing anything we might wish to encourage.").

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

[43] Letter from Shira Perlmutter, Reg. of Copyrights and Dir., U.S. Copyright Off., to Sen. Chris Coons, Chair, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary (Feb. 23, 2024), https://www.copyright.gov/laws/hearings/USCO-Letter-on-AI-and-Copyright-Initiative-Update.pdf [https://perma.cc/U4LH-AB9X].

[44] Copyright Registration Guidance, *supra* note 42, at 16192 (notes omitted).

may also be denied to the images, as *Midjourney* was considered to be the author rather than Kashtanova.[45] However, analyzing the Copyright Registration Guidance, human creativity as "the sine qua non at the core of copyrightability" seems an axiom more than a proven conclusion.

First, while the Constitution and Copyright Act do not explicitly define who (or what) may be an "author," the Copyright Registration Guidance claims the opposite.[46] Second, the key case that the Register used to decline Kashtanova's application is *Burrow-Giles Lithographic Co. v. Sarony*, a lawsuit for an infringement of copyright of Oscar Wilde's photograph in which the defense challenged the constitutional right of Congress to confer rights of authorship on the maker of a photograph.[47] The Register focused on the human identity of the photographer instead of dwelling on the originality requirement, as was done by the Supreme Court. While it is plausible to compare the human control behind the camera to Kashtanova's inputs to *Midjourney*, the Register refused to do so.[48] Last but not least, the Register quoted the U.S. District Court for the District of Columbia in *Thaler v. Perlmutter*, holding that "[h]uman authorship is a bedrock requirement of copyright," and this "principle follows from the plain text of the Copyright Act" and "rests on centuries of settled understanding."[49] Alas, if time is a criterion for the plausibility of copyright paradigms, then this reasoning is arguably erroneous because more than two thousand years of Western culture demonstrate the contrary.

B. WHAT CONSTITUTED PRE-ENLIGHTENMENT-ERA AUTHORSHIP?

When looking at the technological threat embodied by AI today, copyrightability and human creativity are Siamese twins. However, the concept was the opposite before the Enlightenment era: creativity or inspiration was divine, not human. Consequently, no human copyrightability existed. The main concept linking art and inspiration as its source in Platonic philosophy was divine madness. *Phaedrus* admits four kinds of divine madness (prophetic, initiatory, poetic, and erotic), whereas poetic madness is governed by the Muses.[50] For a philosopher who regards rational thinking toward an absolute truth as the goal of philosophy, admitting a positive state of madness in which the very faculty of thinking is lost is a doctrinal leap.[51]

Therefore, in *Symposium* the only way to reconcile erotic madness with the quest for eternal truth is to regard love as another aspect of philosophy

[45] Letter from Robert J. Kasunic, Assoc. Reg. of Copyrights and Dir. of the Off. of Registration Pol'y & Prac., U.S. Copyright Off., to Van Lindberg, Taylor English Duma, LLP (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [https://perma.cc/3BC7-J958].

[46] Copyright Registration Guidance, *supra* note 42, at 16191 ("In the Office's view, it is well-established that copyright can protect only material that is the product of human creativity. Most fundamentally, the term 'author,' which is used in both the Constitution and the Copyright Act, excludes non-humans.").

[47] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1883).

[48] Copyright Registration Guidance, *supra* note 42, at 16191.

[49] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146–47 (D.D.C. 2023).

[50] PLATO, PHAEDRUS (Benjamin Jowett trans., 2008) (360 B.C.E.) (ebook) ("The divine madness was subdivided into four kinds, prophetic, initiatory, poetic, erotic, having four gods presiding over them; the first was the inspiration of Apollo, the second that of Dionysus, the third that of the Muses, the fourth that of Aphrodite and Eros.").

[51] PLATO, SOPHIST (Benjamin Jowett trans., 1999) (c. 360 B.C.E.) (ebook), https://www.gutenberg.org/cache/epub/1735/pg1735-images.html [https://perma.cc/KU2V-85GU].

by creating a "spiritual ladder," thus taming the mind to develop from erotic love for a certain body into the loving of many, culminating by the perception of beauty in its quintessence "not with the bodily eye, but with the eye of the mind."[52] As the passion of reason is the theme of the *Symposium,* "Plato would have us absorb all other loves and desires in the love of knowledge."[53] Prima facie, if the Gordian knot is untied between love and madness, it should naturally follow that a similar method can apply to art and madness, being part of the same quartet as stated in *Phaedrus*.

Nevertheless, the outcome is contradictory. Plato refused to grant poets the possibility of climbing the ladder from beauty to truth, thus ending the old quarrel between philosophy and poetry by finally expelling poets from his state in *The Republic,* as he regarded artists to be mere imitators "[i]n the third degree removed from the truth."[54] Poetry leads to the triumph of imagination and feeling over truth or reason, hence, the artist is the latter's enemy.[55] Plato was willing to reconcile the madness of love with the quest for the eternal truth but not the madness of creativity.[56]

In addition, Plato regarded poets as the ministers of God who "[u]tter these priceless words in a state of unconsciousness, but he also held that God himself is the speaker and that through them—poets—he is conversing with us."[57] Although he crowned the poet as "[a] winged and holy thing," Plato negated any of the poet's control over creativity as the poet lacks invention or mind, being a mere vessel of divine inspiration.[58] Hence, poets deliver art without knowing its rules or themes.[59] The question is, why is the lover forgiven while the poet is banished from Plato's Republic? So far, the distance from eternal truth or idea by divine madness defines the superior source versus an inferior representation, as the latter is perceived as a menace to the former.

The same phenomenon recurs in *A Midsummer Night's Dream,* in which the poet is most loathed by the speaker (Theseus) who represents law and order, in comparison with lovers and madmen.[60]

> Lovers and madmen have such seething brains,
>
> Such shaping fantasies, apprehend
>
> More than cool reason ever comprehends.
>
> The lunatic, the lover and the poet
>
> Are of imagination all compact.

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[52] PLATO, SYMPOSIUM, *supra* note 11.

[53] *Id.*

[54] *See generally* PLATO, *Book X, supra* note 10 ("[A]ll poetical imitations are ruinous to the understanding of the hearers, and that the knowledge of their true nature is the only antidote to them.").

[55] *Id.* ("[T]he imitative poet implants an evil constitution, for he indulges the irrational nature which has no discernment of greater and less, but thinks the same thing at one time great and at another small—he is a manufacturer of images and is very far removed from the truth.).

[56] See Moldawer, *The Shadow of the Law, supra* note 8, at 27 for the pre-Enlightenment era's theories of creativity.

[57] PLATO, ION (Benjamin Jowett trans., 2008) (ebook).

[58] *Id.* ("[F]or not by art does the poet sing, but by power divine.").

[59] *Id.*

[60] WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM act 5, sc. 1, l. 7–8.

One sees more devils than vast hell can hold:
That is, the madman. The lover, all as frantic,
Sees Helen's beauty in a brow of Egypt.
The poet's eye, in fine frenzy rolling,
Doth glance from heaven to earth, from earth to heaven,
And as imagination bodies forth
The forms of things unknown, the poet's pen
Turns them to shapes and gives to airy nothing
A local habitation and a name.
Such tricks hath strong imagination,
That if it would but apprehend some joy,
It comprehends some bringer of that joy;
Or in the night, imagining some fear,
How easy is a bush supposed a bear![61]

While the madman is barely given two lines embedded in pity for seeing more devils than hell itself can accommodate and the lover is half mocked for seeing an imaginary beauty in his wretched beloved, the tone changes drastically once the poet is concerned—although allegedly all the triad members suffer from the same malady. The poet's sin is against the reasonable mind, as they give "[a] local habitation and a name to airy nothing." Such a sin deserves more than the quick line-and-a-half toss-offs that were sufficient for the lover and the lunatic.

Like Plato, Theseus perceives the poet as capable of creativity only under the spell of lunacy, devoid of reason and prey to pure feelings. Hence, creativity begotten under such circumstances ends up giving shape to a fantasy: "[n]ot only does the poet give these fantasies a name, but also a HOME, a place in the real world."[62] However, turning the unknown to shape is what led William Blackstone to differentiate between ideas and their "clothing," leading to the most important dichotomy of copyright law between an uncopyrightable idea to a copyrightable expression since.[63] The current motive is the fear of the uncontrollable art that cannot be tamed by reason. Both Plato and Theseus perceived inspiration and human creativity as a menace to human political control. Hence, what cannot be controlled is negated, characterizing the instinctive reaction to AI's capacity for deep learning, thus threatening human control in its entirety. How then, does the human inspiration—as the most feared element by ancient philosophers and

[61] *Id*. at act 5, sc. 1, l. 4–22.

[62] *The Lunatic, the Lover, and the Poet*, THE BILL SHAKESPEARE PROJECT (Apr. 21, 2010), https://thebillshakespeareproject.com/2010/04/the-lunatic-the-lover-and-the-poet [https://web.archive.org/web/20240228070509/https://thebillshakespeareproject.com/2010/04/the-lunatic-the-lover-and-the-poet].

[63] Tonson v. Collins [1760] 96 Eng. Rep. 169 [KB], *reargued and dismissed*, Tonson v. Collins [1761] 96 Eng. Rep. 180 [KB]. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 56–58 (1996) for the ideology that still serves as the theoretical infrastructure of the idea/expression dichotomy.

rulers—get transformed from a legal pariah into the new ultimate and sole sovereign of creativity?

Thanks to Martha Woodmansee, it is known that human authorship was constituted in the Enlightenment era.[64] The new cultural and historical context of the Enlightenment era enables us to better understand the new forms of life preached by Wittgenstein, begetting different language games that introduced unprecedented concepts such as attribution and originality, culminating in human authorship. Until the Enlightenment era, the language game of authorship was non-existent, as authors were considered craftsmen.[65] Even when copyright laws replaced a market that was initially regulated by a system of printing privileges, they were meant to defend the interests of publishers and booksellers—as best demonstrated by the Statute of Anne (widely regarded as the first modern copyright law), which was silent about the paramount distinction of authorship between the uncopyrightable idea and the copyrightable expression fixed in a tangible form.[66] Thus, applying Wittgenstein's vocabulary, new forms of life enable new language games.

C. WHAT CONSTITUTED ENLIGHTENMENT-ERA AUTHORSHIP?

The turning point constituting the current legal concept of authorship starts and ends with new language games of attribution and originality.[67] As Martha Woodmansee demonstrated, only when inspiration is attributed to the author and not to external sources is the road to authorship open.[68] The three pillars of the Enlightenment era—Kant, Hegel, and Fichte—created new language games that finally contributed to the current legal perception of copyright law. However, while it is tempting to mention these giants in one breath, they differ considerably.

Kant expresses the right-based (instead of value-based) approach, according to which there is a primary relationship between the author and the public through the speech the author addresses to the public.[69] In his essay *What Is A Book?*, regarding the wrongfulness of unauthorized publication of books, Kant describes the book as a writing in which "He who speaks to the Public in his own name, is the Author."[70] Thus, the perception of "book as speech" renders an unlicensed book unlawful because it becomes an "agency without authority."[71] The focus of Kant is on books as actions of speech, not

[64] *See generally* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 17.

[65] Maurizio Borghi, *Copyright and the Commodification of Authorship in 18th- and 19th- Century Europe, in* OXFORD RESEARCH ENCYCLOPEDIA OF LITERATURE 341 (2018).

[66] *See generally* Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29, 63 (2012) (explaining the publishers focusing on property rights regarding the Statute of Anne and the seminal precedents that designed copyrightability as property rights ever since). *See also* Orit Fischman-Afori, *The Evolution of Copyright Law and Inductive Speculations as to Its Future*, 19 J. INTELL. PROP. L. 231, 245 (2012) (referring to secularization in European history as a main cause for introducing the author as a relevant stakeholder in the concept of authorship); The Statute of Anne 1710, 8 Anne c. 19–21, § 2 (Eng.); Pope v. Curl [1741] 26 Eng. Rep. 608 [KB] (creating the idea/expression dichotomy omitted by the Statute of Anne).

[67] *See generally* Woodmansee, *supra* note 17; THE CONSTRUCTION OF AUTHORSHIP, *supra* note 17.

[68] Woodmansee, *supra* note 17, at 427.

[69] KANT, WHAT IS A BOOK?, *supra* note 18.

[70] *Id*. at 89.

[71] Kawohl, *supra* note 18.

as commodities.[72] Therefore, scholars attribute "[t]he modern concept of the autonomy of expression" to Kant's legacy.[73] However, Fichte and Hegel created different language games regarding attribution linking the unique expressive act of the author with property rights.[74] Fichte writes:

> 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.[75]

Hegel enhanced Kant's and Fichte's innovative thinking by connecting the author's extension of their inner will, intellectual process, and individuality with the property right—for instance, the author's right to control their creation.[76] While the Kantian act of speech may not create a distinction between writing and speaking in its gist as an authorial address to an audience, Fichte and Hegel need this dichotomy to establish property rights for writing as an emerging profession. It follows, that for his contemporary colleagues, the Kantian "authorial ownership of one's thoughts" was not sufficient to justify property rights in terms of a coherent copyright system.[77]

However, something else was needed to pacify the fear of the uncontrollable art that threatened the ultimate truth. For Hegel, divine inspiration was a mere aspect of the divine as a facet of absolute reason, a far cry from Plato's vision.[78] Hegel solved Plato's fear of art as a great provocateur of feelings and desires by creating a new dialectic regarding the prima facie irreconcilable conflict between art and truth. Accordingly, art can mitigate the power of passion and unveil the truth by harnessing sensuous artistic configurations to a sublime truth, so the latter cleans the former and thus leads humanity to moral improvement.[79] In short, the uncontrollable art is reigned to the same Platonic goal of ultimate truth. Once tamed, the road to attribution is free. What Plato allowed only love to do in the *Symposium*,

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[72] *Id.* (demonstrating the failure of the Kantian concept of reprinting as "agency without authority" in copyright discourse: "[I]t 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").

[73] KIM TREIGER-BAR-AM, POSITIVE FREEDOM AND THE LAW 170 (2019).

[74] Kawohl, *supra* note 18 ("[Kant] 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.").

[75] FICHTE, *supra* note 19.

[76] *See generally* Redding, *supra* note 19 (claiming the private property as a necessary vehicle for cultivating the individual); Stephen Houlgate, *Hegel's Aesthetics*, in STAN. ENCYC. PHIL. (Jan. 20, 2009), https://plato.stanford.edu/archives/win2021/entries/hegel-aesthetics (demonstrating the importance of Hegel's Aesthetics).

[77] Kawohl, *supra* note 18.

[78] HEGEL, *supra* note 20, at 46 (referring to the aim of art).

[79] *Id*. at 49 ("For man's preoccupation with artistic objects remains purely contemplative, and thereby it educates, even if at first only an attention to artistic portrayals in general, later on an attention to their meaning and to a comparison with other subjects, and it opens the mind to a general consideration of them and the points of view therein involved. (*β*) Now on this there follows quite logically the second characteristic that has been attributed to art as its essential aim, namely the *purification* of the passions, instruction, and *moral* improvement.").

Hegel allowed art to do as well by advocating the same language game that allowed erotic madness in the *Symposium*.[80]

Hegelian dialectics begot the most important language game in copyright law: the concept of unprecedented originality. Despite the false narrative constituted by Fichte and Hegel of the unprecedented originality of the agonizing genius, this language game gained supremacy due to the new economic nexus of intellectuals who wanted to live by their pens.[81] The fact that pure originality never existed, as artists always collaborated with themselves while heavily using contemporary and predecessors alike as influence, was not harmonious with the new use of language games required for new ways of life.[82]

Yet, the Hegelian dialectics still constitute copyright laws concept of authorship, surviving not only Plato's argumentations and historical facts but also postmodern criticism that offered new concepts of authorship due to the catastrophes of fascism and totalitarianism—which were followed by the "postmodern condition" in which the great stories of the Enlightenment, such as the ultimate reason that will lead humanity to progress, have died.[83] What stands at the bottom of this success? Why does the illusion of controlling passion and dangerous desire still prevail? Ideologically, we may understand Hegel's victory over Plato because the two share the same premise; even if proven flawed, reason and truth are the ultimate values of humanity as they can control the chaos of the human condition. A false and unique attribution is a bearable price compared to the illusion of control. Once control is lost, attribution cannot survive—as is the case against generative AI. However, the language game of attribution begets a more prominent one with a higher price than predicted: the language games of appropriation.

D. THE LANGUAGE GAMES OF ATTRIBUTION

The outcome of the different language games regarding attribution is demonstrated by the debate concerning Vincent van Gogh's painting *A Pair of Shoes*, demonstrating how the meaning in the language one uses reflects the cultural context of the beholder. The mystery regarding the origin of this work of art evoked three different and contradictory answers.[84] In *The Origin of the Work of Art*, Martin Heidegger sought to build a

[80] *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.")

[81] Woodmansee, *supra* note 17, at 426.

[82] *See generally* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 17.

[83] *See generally* JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington et al. trans., 1984) (1979) ("Simplifying to the extreme, I define postmodern as incredulity toward metanarratives."); Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 106 (2009) (characterizing the major traits of postmodernism).

[84] *See generally* HEIDEGGER, *supra* note 22; Thomson, *supra* note 22; Schapiro, *supra* note 22; DERRIDA, *supra* note 22.

phenomenological bridge from a particular work of art to the ontological truth of art in general.[85]

Heidegger's task was ambitious: reconciling beauty (which so far belonged to the aesthetics) with truth, which is the protégé of philosophy.[86] In a broader sense, Heidegger's terminology offered a defense to Plato's indictment but, like Hegel, clung to a concept of philosophy and truth as superior synonyms to art. The hidden pivot is the rivalry for supremacy, which might be gained only if art is reconciled with reason and eternal truth as unshaken principles. Hence, the thinking is binary: art should adapt to reason for its legitimacy, from which the concept of attribution might beget authorship.

To let aesthetics transcend from within, Heidegger created the classification of a thing, equipment, and a work of art, and the dichotomy between "earth" and "world".[87] As "the dominance of the conjunction of matter and form, are all grounded in such usefulness", the work of art as the superior level in this classification reveals the very essence of "equipmentality" (the medium level) that transforms the thing (the basic level).[88] The dialectics between the concealing "earth" and the "world" that attempt to reveal the Open which the former refuses to discover is the battlefield of art—namely, the human struggle for intelligibility.[89] Hence, through art, truth is established.[90]

Van Gogh's painting revealed to Heidegger the essential tension in that the phenomenologically abundant "earth" simultaneously makes possible and also resists, being finally mastered or fully expressed within the "world."[91] In Heidegger's words:

> From the dark opening of the worn insides of the shoes the toilsome tread of the worker stares forth. In the stiffly rugged heaviness of the shoes there is the accumulated tenacity of her slow trudge through the far-spreading and ever-uniform furrows of the field swept by a raw wind. On the leather lie the dampness and richness of the soil. Under the soles slides the loneliness of the field-path as evening falls. In the shoes vibrates the silent call of the earth, its quiet gift of the ripening grain and its unexplained self-refusal in the fallow desolation of the wintry field. This equipment is pervaded by uncomplaining anxiety as to the certainty of bread, the wordless joy of having once more

[85] Thomson, *supra* note 22, §§ 1–3 (supporting that although Van Gogh painted such shoes several times, Heidegger's interpretation dwells on a certain work in particular, the source of which, ironically, aroused Schapiro's criticism).

[86] HEIDEGGER, *supra* note 22, at 35 ("Truth, in contrast, belongs to logic. Beauty, however, is reserved for aesthetics.").

[87] *Id*. at 28.

[88] *Id*. at 28, 35 ("Rather, the equipmentality of equipment first genuinely arrives at its appearance through the work and only in the work.") (defining work in this terminology as a work of art).

[89] *Id*. at 61:

> But as a world opens itself the earth comes to rise up. It stands forth as that which bears all, as that which is sheltered in its own law and always wrapped up in itself. World demands its decisiveness and its measure and lets beings attain to the Open of their paths. Earth, bearing and jutting, strives to keep itself closed and to entrust everything to its law. The conflict is not a rift (Riss) as a mere cleft is ripped open; rather, it is the intimacy with which opponents belong to each other.

[90] *Id*. at 60 ("Truth is present only as the conflict between lighting and concealing in the opposition of world and earth.").

[91] Thomson, *supra* note 22, at 63–64.

> withstood want, and trembling before the impending childbed and shivering at the surrounding menace of death. This equipment belongs to the earthy and it is protected in the world of the peasant woman.[92]

Ironically, while zealously advocating for art as revealing the hidden truth, what seemed to Heidegger to be the shoes of a female farmer representing the Dutch peasantry, were actually the shoes of Van Gogh (who lived in Paris during the relevant period)—thus, not only a far cry from the subject or the place related to his work but an amalgamation in Heidegger's memory of several of Van Gogh's paintings that dealt with the same theme.[93] In short, Heidegger's language games created the reality he believed to exist, not vice versa. As Meyer Schapiro sums up his research:

> Alas for him, the philosopher has deceived himself. He has retained from his encounter with Van Gogh's canvas a moving set of associations with peasants and the soil, which are not sustained by the picture itself. They are grounded rather in his social outlook with its heavy pathos of the primordial and earthy. He has indeed "imagined everything and projected it into the painting."[94]

According to Schapiro, Heidegger missed the artist's presence in his art.[95] From a philosophical point of view, this proved to be a disaster as the whole bridge that Heidegger attempted to build between phenomenology and the ontological truth of art collapsed once his premise was proven wrong.[96] In short, a theory about the origin of art has no source. It is Plato's nightmare coming to life. Namely, the fear of art as falsehood, detached from the source or origin of truth.[97] This is the same ancient fear reflected in all relevant adjudications regarding generative AI's ability to create deepfakes severed from a real source, pretending to replace it.

Derrida realized the mutual failure of both Heidegger and Schapiro as derived from the false axiom "that the desire for attribution is a desire for appropriation."[98] For Derrida, both missed the role of art by insisting on art as a reproduction of reality. Schapiro reproaches Heidegger for not being acute to facts, as if Van Gogh could not paint a peasant woman while in Paris, and thus reflects on the picture in his narrative, which is what he blames Heidegger for. Likewise, Heidegger could assert his theory by a simple chalk drawing.[99]

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[92] *Id.* at 33.

[93] Schapiro, *supra* note 22, at 404.

[94] *Id.*

[95] *Id.* at 405–06.

[96] Thomson, *supra* note 22, at 86–92 ("[I]f Heidegger is wrong that the shoes belonged to a farmer then the phenomenological bridge he is trying to build between a particular ("ontic") work of art and the ontological truth of art in general would collapse before it even gets off the ground, severed at its very first step.") (attempting to reconcile Heidegger's theory with Schapiro's criticism).

[97] GILLES DELEUZE, THE LOGIC OF SENSE 257 (Constantin V. Boundas ed., M. Lester et al. trans., The Athlone Press 1990) (1969) (referring to Platonic philosophy regarding the Simulacrum, not only as a bad imitation, but as a threat to truth).

[98] DERRIDA, *supra* note 22, at 260; *id*. at 272 (regarding the prima facie contradictory empiric premise of Heidegger and Schapiro).

[99] *Id.* at 311 ("Why explicate so heavily what stems from the problematical identification of these shoes as peasants' shoes? At the stage where we are at the moment, and Heidegger says so, some real shoes (peasants' or not) or shoes drawn vaguely in chalk on the blackboard would have rendered the same service. The blackboard would have sufficed.").

The combat between Heidegger and Schapiro is superfluous as neither possesses any superiority regarding the truth: "[w]hat is said of belonging to the world and the earth is valid for the town and for the fields. Not indifferently, but equally."[100] Schapiro's attribution is classified as the most empiricist kind in the aesthetics of representation, attempting to "tighten the picture's laces around 'real' feet."[101] Heidegger offers the truth of unveiled presence.[102] The fuss is over nothing, as the proof of a static truth and a sole appropriation "[w]ill always be lacking."[103] Namely, no language game is superior to others.

Nevertheless, Platonic hubris and fear are still embedded in the language game of attribution, whose effective ambassador is the originality narrative—both as its sword and as its shield. As a sword, the author is solely entitled to all property rights that follow the originality attributed to the author.[104] As a shield, defenses, such as the idea and expression dichotomy or transformative use, assume either the idea is not original and hence uncopyrightable or that the use transformative—to add originality to the allegedly infringed source—and hence not infringing.[105] In practice, the outcome is that attribution and appropriation evolve into contradictory language games.

E. ATTRIBUTION AND APPROPRIATION LANGUAGE GAMES IN PRACTICE

Prima facie, the attribution language games, as manifested by the concept of originality, should be the same in all facets of copyright law since *Campbell v. Acuff-Rose Music, Inc.*, which attempted to set the criterion differentiating between an infringing-derivative work and a copyrightable-transformative work that qualifies for authorship.[106] In *Campbell*, a lawsuit for copyright infringement of Roy Orbison's rock ballad "Oh, Pretty Woman," to which respondent Acuff-Rose Music held the copyright, the Supreme Court rendered the first statutory factor of fair use—the purpose and character of the use—to be the newly dominant criterion of the fair use doctrine.[107]

By holding that the more transformative the new work, the less significant the commercialism, the Supreme Court weighed creativity as the

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[100] *Id.* at 312.

[101] *Id.* at 313.

[102] *Id.* at 318 ("This is perhaps one of the secrets of this correspondence, of its dissymmetry or its excessive symmetry: in the contract of truth ('I owe you the truth in painting'), between truth as adequation (of a representation, here an attributive one, on Schapiro's side) and the truth of unveiled presence (Heidegger's side).").

[103] *Id*. at 364 ("[N]othing proves or can prove that 'they are the shoes of the artist, by that time a man of the town and city' . . . .[T]he proof will always be lacking.").

[104] See Moldawer, *Myths and Clichés*, *supra* note 27, at 75–83, for the false narrative of originality in our current legal system (originality as the evil twin of the artistic taste of the judiciary).

[105] See Mira Moldawer, "*What is an Author" of a Persona? The Taming of the Shrew—Rephrasing Publicity Right*, 20 VA. SPORTS & ENT. L J. 156, 167–70 (2021) [hereinafter Moldawer, *What is an Author?*] for the direct and indirect originality narratives. *See also* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 552 (2004) ("[T]he logical chain linking criticism, the First Amendment, and transformative fair use can make those concepts seem coterminous with one another as far as copyright defendants are concerned. The values of public access and dissemination that were also traditionally part of fair use, and part of many theories of free speech, get left behind.").

[106] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[107] *Id*. at 580.

dominant factor of the fair use doctrine in its interpretation of the attribution language game. However, this interpretation is dependent on the genre involved. While parody is copyrightable and attributable according to *Campbell*, satire is not.[108] The eternal combat within the four fair use factors regarding attribution through originality versus appropriation through commerciality evolved to different tests and classifications[109]—thus, morphing into too many language games for too many people, shifting from a defense into a privilege.[110] Whereas some scholars treat fair use as a question of substantive law rather than a question of remedies, others regard fair use as a doctrine that tries to define the boundary between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment—or lament its failure to do so.[111] Consequently, the criteria for what counts as attributable is still a mystery.

Recently, *Goldsmith* (the Supreme Court case) rephrased *Campbell*, illustrating how attribution morphs into appropriation.[112] What was previously considered transformative use was altered by *Goldsmith*, resulting in the unpredictable spectrum of the different language games and artistic judgments of the arbitrary panel sitting on the bench. The District Court for the Southern District of New York, most heavily influenced by the first factor as the dominant language game, held that the Prince Series works which made fair use of the respondent's photograph was entitled to attribution.[113] Accordingly, transformative use was acknowledged because a comparative look convinced the court that Warhol's work "employ[ed] new aesthetics with creative and communicative results distinct from

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[108] Accordingly, whereas "the heart of any parodist's claim to quote from existing material," thus bound 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," a satire "can stand on its own two feet and so requires justification for the very act of borrowing." *Id*. at 580–81.

[109] *Compare* the premise of Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990), *with* Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 404 (2001) (explaining the transformative use test, as the legal license to appropriate an original work in the service of creativity), *and* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (discussing the predominant use test, which requires the work in question to be primarily expressive, rather than primarily commercial), *and* Hoffman v. Cap. Cities/ABC Inc., 255 F.3d 1180, 1186 (9th Cir. 2001) (holding only "reckless disregard" or a "high degree of awareness of probable falsity" as sufficient to relinquish the transformative use protection).

See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (AM. L. INST. 1995). The relatedness/restatement test stresses the use of the other's identity solely to attract attention to the defendant's work, with no justified nexus to it. *See also* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 937 (6th Cir. 2003); Rogers v. Grimaldi, 875 F.2d 994, 1005 (2d Cir. 1989) (holding that "section 43(a) of the Lanham Act does not bar a minimally relevant use of a celebrity's name in the title of an artistic work where the title does not explicitly denote authorship, sponsorship, or endorsement by the celebrity or explicitly mislead as to content.").

[110] *See generally* CCH Canadian Ltd. v. Law Soc'y of Upper Can. (2004), 1 S.C.R. 339, 364 (Can.) (holding that "[t]he fair dealing exception, like other exceptions in the [Act], is a user's right."). *Compare id.*, *with* Jacqueline D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, 109 NW. U. L. REV. 383, 415–16 (2015) (demonstrating how the fair use doctrine fails to delineate the boundary between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment).

[111] *Compare* Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 405 (2005) (treating fair use as a question of substantive law rather than as a question of remedies), *with* Sonia Katyal, Paul Aiken, Laura Quilter, David O. Carson, & John G. Palfrey, *Fair Use: Its Application, Limitations and Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1077–78 (2007) (claiming transformative use to be a derivative work, for which there is a right).

[112] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

[113] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 316 (S.D.N.Y. 2019).

Goldsmith's."[114] Warhol's recognizable style also contributed to this artistic conclusion, as distinctiveness merits attribution.[115]

The Court of Appeals for the Second Circuit reversed and remanded the lower court's verdict, holding that all four fair use factors favored the respondent.[116] Regarding the first fair use factor, the appellate court rejected a mere new aesthetic or expression as sufficient, and required "[a] fundamentally different and new artistic purpose and character."[117] The works in question seemed identical to this court. In addition, the court of appeals refused to change the criteria of the first fair use factor because of a famous artist's recognizable style, refusing to "create a celebrity-plagiarist privilege."[118] Thus, the distinction of style is not satisfactory to overcome the attribution language game.

The majority opinion of the Supreme Court held that the "purpose and character" of the first fair use factor is a matter of degree, in which assessment of the commercial use should be considered, thus reversing the language game of attribution to appropriation.[119] Although it strengthened the commercial fourth fair use factor, the majority saw merely the same copied picture, only with a different color than the infringed photo. In contrast, the district court and Justice Kagan (dissenting) saw artistic value in Warhol's works—thus, demonstrating that language games are part of cultural context and the nexus of the beholder.

To decipher what the attribution language game stands for, the first step is its analysis when contested. Due to the legacy of the Supreme Court's 1903 *Bleistein v. Donaldson Lithographing Co.* decision, once copyrightability regarding transformative use is disputed as the quintessence of fair use, the amount of originality required for attribution transforms into a different phenomenon compared to the minimal threshold required regarding the underlying work.[120] George Bleistein, an employee of the Courier Lithographing Company, designed and produced several chromolithographs used to produce posters promoting a traveling circus called the "Great Wallace Show." When the circus owner ran out of posters, he hired a competing company named the Donaldson Lithographing Company to produce copies of three of those posters in a reduced form. The Supreme Court held that advertisements were copyrightable.[121]

While commonly held as the Magna Carta of the minimal originality required for copyrightability, Barton Beebe reads into the *Bleistein* case a different language game—namely, the language game of appropriation required for attribution.[122] In addition, contradictory adjudication begets

[114] *Id*. at 325–326 (internal quotation marks and alterations omitted) (quoting Cariou v. Prince, 714 F.3d 694, 707–08 (2d Cir. 2013).
[115] *Id*. at 326.
[116] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 54 (2021).
[117] *Id*. at 42.
[118] *Id*. at 43.
[119] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 523–33 (2023).
[120] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–51 (1903).
[121] *Id*. at 251 (majority opinion) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").
[122] Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 375 (2017) [hereinafter Beebe, *Aesthetic Progress*]

different results concerning the language games of originality required for copyrightability for the underlying work versus its transformative use.

i. Attribution as an Originality Language Game

In *Gracen v. Bradford Exchange*, the appellant—who won a contest arranged by *The Wizard of Oz* copyright holders for painting the character Dorothy—registered her work independently, as she refused to accept the respondent's contractual terms.[123] The gist of the matter was the requirement of originality in derivative works sufficient for attribution. Justice Richard Posner's premise differentiated between the "source" of a picture and a picture as a derivative work by claiming:

> If a painter paints from life, no court is going to hold that his painting is not copyrightable because it is an exact photographic likeness. If Miss Gracen had painted Judy Garland from life, her painting would be copyrightable even if we thought it Kitsch; but a derivative work must be substantially different from the underlying work to be copyrightable.[124]

The "substantially different" standard for derivative work was rejected in *Schrock v. Learning Curve International, Inc.*, which dealt with similar circumstances.[125] Namely, what is the status of a commissioned work once the copyright holders and the artist who created the work in question dispute? The *Schrock* court refused "to require a heightened standard of originality for copyright in a derivative work."[126] Ironically, the silence of the Copyright Act regarding what constitutes originality as the chief vehicle of attribution, let alone the required standard of originality in a derivative work in comparison to any other works of authorship, was interpreted by the *Schrock* court as supporting the "no discrimination" argument.[127] Consequently:

> (1) [T]he originality requirement for derivative works is not more demanding than the originality requirement for other works; and (2) the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the underlying work in some meaningful way.[128]

However, the seminal case that led the evolvement of transformative use from theory to practice took a different trajectory. Historically, transformative use, offered by Justice Pierre Leval in his seminal article, intended to cure copyright law balance from within by enhancing its initial

(demonstrating how, in the *Bleistein*, Judge Oliver Holmes replaced his "if personality, then progress" logic with "if personality, then property right" logic).

[123] Gracen v. Bradford Exch., 698 F.2d 300, 301–02 (7th Cir. 1983).

[124] *Id*. at 305.

[125] Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 516 (7th Cir. 2009).

[126] *Id*. ("*Gracen* said that 'a derivative work must be substantially different from the underlying work to be copyrightable.' This statement should not be understood to require a heightened standard of originality for copyright in a derivative work.") (quoting Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983)).

[127] *Id*. at 521 ("But nothing in the Copyright Act suggests that derivative works are subject to a more exacting originality requirement than other works of authorship.").

[128] *Id.*

goal to enhance creativity.[129] Hence, the traditional fair use factors were rephrased to include a new value in terms of originality and creativity added to the allegedly infringed work. Campbell, while following Justice Leval, created a new attribution chaos.

It should be noted that Campbell was far from trivial compared to how the court of appeal interpreted the four Section 107 factors. The court held that the commercial nature of the parody was presumptively unfair under the first Section 107 factor by using the "heart" of the original as the "heart" of the new work, thus qualitatively taking too much under the third Section 107 factor and causing that market harm for purposes of the fourth Section 107 factor. The Supreme Court reversed this reasoning, holding the commercial parody to be fair use; and although it regarded transformative use as the gist of fair use, it refused to regard commercialism as a threat to fair use or attribution.[130]

Not only did Campbell create a new dichotomy of originality (depending on the genre) but the "substantially different" test of Gracen was brought back and, subsequently, the attribution criterion for a work of authorship and a derivative work no longer the same. The point is that this dichotomy is only one facet of the "substantially different" requirement of attribution. Goldsmith changed the already blurry balance between the language games of commerciality and creativity regarding attribution versus appropriation.

ii. From Originality to Appropriation Language Game

Goldsmith reversed Campbell's legacy concerning the supremacy of the first fair use factor. The majority opinion of the Supreme Court, delivered by Justice Sotomayor, not only insisted the "purpose and character" of the first fair use factor was a matter of degree but also included in the assessment of the degree required by the commercial use.[131] Ironically, while quoting *Campbell,* the Supreme Court weakened it considerably.

While both the majority opinion and Justice Kagan's dissent quoted *Campbell,* the former transformed the attribution requirement completely. First, *Campbell* was not satisfied with the musical transition of the original rock ballad into rap, but a new level of parodied content was added—hence, so far concurring with the *Gracen* court. Second, the heightened degree of originality as the vehicle required for a derivative work to be considered transformative and attributable is a hybrid concept that can be understood as a dynamic spectrum in which commercial use is an important factor.

Whereas Justice Kagan believes *Campbell* prioritized the first fair use factor, this supremacy is now in question, as commerciality is now a factor in the attribution mechanism for assessing the purpose and character of the use. While *Campbell* did not bother about the whole heart of the

[129] *See generally* Leval, *supra* note 109, at 1111. Tushnet, *supra* note 105*,* at 550.

[130] See generally Neil Netanel, *Israeli Fair Use from an American Perspective, in* CREATING RIGHTS: READINGS IN COPYRIGHT LAW 389 (Michael Birnhack et al. eds., Nevo Press 2009) (Heb.) for the pendulum between commercialism and creativity in the fair use interpretation in American law.

[131] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 523–33 (2023) ("In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use.").

underlined work to be taken and its obvious commercial use, *Goldsmith* did. The mechanism of originality as a spectrum strengthened the commercial factor, which was what Justice Leval challenged.[132] Thus, instead of absorbing new modes of creativity through the first fair use factor, it is unresolved as how this factor differs from the fourth.[133] In short, the language game of appropriation gained supremacy over the former language game of attribution, changing its essence within.

While the sole question presented to the Supreme Court concerned the first fair use factor, the "shadow" of the fourth factor was there, as the contested portraits of Prince were relevant to magazine stories about Prince, in which both parties took commercial interest.[134] Only the title now is "[s]haring substantially the same purpose" instead of sharing the same market.[135] As long as the majority dwelt on the infringing work, the innovative point was the addition of a commercial twin to the first fair use factor.[136] As phrased by Justice Kagan in her dissent, "[b]ecause the artist had such a commercial purpose, all the creativity in the world could not save him."[137]

The focus changes while dwelling on the artist. Whereas Justice Kagan saw in Warhol's work a new work distinguishingly embedded with his unmistakable style, the majority refused to create a class of artists whose unique style might transform a derivative work into a transformative one with no legal justification and let a unique artistic style take over in essence[138] —which would thus create a "celebrity-plagiarist privilege."[139] While moral rights were not discussed at all, Justice Sotomayor and Justice Kagan tell different stories because they use different language games.

It is hard to ignore what Justice Sotomayor reasons. First, she explains the price differences that each party obtained—namely, a mere four hundred dollars for the original work in comparison to ten thousand dollars for one of the derivative works published by Condé Nast for which the respondent received nothing. Second, the respondent received no credit. Third, while the late Warhol was licensed to use the respondent's picture of Prince for "one time" and for an "artist reference," he derived fifteen additional works from her picture. Finally, years after Warhol's death, when the respondent informed the appellant that she believed the use of her photograph infringed her copyright, the appellant sued her.

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[132] Leval, *supra* note 109, at 1116 (contemplating a different view of the first fair use factor as "the soul" of fair use).

[133] Mark A. Lemley, *How Generative AI Turns Copyright Upside Down*, 25 COLUM SCI. & TECH. L. REV. 21 (2024) (regarding *Goldsmith* as a radical cut back on the scope of the fair use doctrine as it left the idea/expression dichotomy as the only doctrine that renders copyright law constitutional).

[134] *Goldsmith*, 598 U.S. 508 at 509 ("As portraits of Prince used to depict Prince in magazine stories about Prince, the original photograph and AWF's copying use of it share substantially the same purpose. Moreover, [the copying] use is of a commercial nature."). *See id*. at 578 (Kagan, J., dissenting) ("But the majority transplants factor 4 into factor 1.").

[135] *Id*. at 537–38.

[136] *Id.* at 553 (Gorsuch, J., concurring) (regarding the first fair use factor as forbidding the creation of a commercial substitute to the underlying work).

[137] *Id*. at 560 (Kagan, J. dissenting).

[138] *Id.* at 543–44 (majority opinion) (following the logic of *Goldsmith*, 11 F.4th 26, 54 (2021), requesting transformative purpose and character to "comprise something more than the imposition of another artist's style on the primary work").

[139] *Goldsmith*, 11 F. 4th at 43.

The Supreme Court was not meant to analyze moral rights (the most important of which are the rights of attribution and integrity), as the focus was on the first fair use factor.[140] However, commercial importance, while weighted against creativity, is the relevant context for understanding why the Supreme Court adapted to a different language game. Consequently, refusing to create a "celebrity-plagiarist privilege" does not sound like a bad idea considering the liberties Warhol allowed himself.

Ironically, William Landes and Posner considered Warhol's art to be a form of philosophy, "illustrating the philosophical proposition that art has no essence—that anything can be art because the only criterion of art is whether it is accepted as art by the relevant community."[141] It follows that attribution is part of arbitrary thinking. Accordingly, Landes and Posner regarded an art of ideas as unfit for copyrightability.[142] Warhol's unique style, while captivating to Justice Kagan in her dissent, was regarded by the majority as a mere copy of the respondent's work—only with a different color—due to the very same style that creates the impression that anyone replicate it.[143]

Consequently, the pendulum between creativity and commerciality in terms of attribution versus appropriation is far from clear. However, the dichotomy between the two will differentiate between the derivative work, exaggeratedly protected even by a fraction of a commercial suspicion, and the transformative work, which survives this fate. The outcome of this blurry dichotomy begets the very phenomenon transformative use was meant to avoid: the closure of the cultural public common, echoing Jed Rubenfeld's claim that "copyright's prohibition of unauthorized derivative works is unconstitutional."[144]

While our society is characterized by a culture of celebrities and brands based on spectacle, narcissism, and compulsive consumption that manipulates us into purchasing illusionary images in our eternal quest for the artificial satisfaction of our desires, we still retain the Platonic fear of losing control.[145] Therefore, regarding generative AI authorship, while the judiciary could easily follow *Goldsmith's* language game of appropriation by focusing on who owns the outputs, the ancient Platonic fear leads to the same result: the banishment of the seemingly uncontrollable.[146]

Likewise, generative AI challenges the language game of originality, as copyrightability was denied to AI-generated works—but not because they

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[140] *See generally* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 363–64 (2006). See *Goldsmith*, 598 U.S. at 525 (clarifying the scope of discussion granted by certiorari).

[141] WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 258 (2003).

[142] *Id*. at 259.

[143] *Goldsmith*, 598 U.S. at 559 (Kagan, J., dissenting) (blaming the majority for classifying Warhol's art as such).

[144] Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 5 (2002) ("I conclude that copyright's prohibition of unauthorized derivative works is unconstitutional, but that it could be saved if its regime of injunctions and damages were replaced by an action for profit allocation."); *id*. at 3 ("Copyright law is a kind of giant First Amendment duty-free zone.").

[145] DEBORD, *supra* note 31, at 60. *See generally* LASCH, *supra* note 31; LYOTARD, *supra* note 31.

[146] *See* Shlomit Yanisky-Ravid, *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era—The Human-Like Authors are Already Here—A New Model*, 2017 MICH. ST. L. REV. 659, 670–71 (2017) (for resolving generative AI authorship through the perspective of ownership in copyright law by applying the "Work Made for Hire" doctrine).

lacked originality. Had humans created such AI-generated works, they would be considered far more original than the threshold required by the *Bleistein* case. Hence, the court's reasoning is phrased in terms of human creativity, claiming it to be "the sine qua non at the core of copyrightability," thus creating a new language game replacing the originality requirement—which is not explicitly defined as human in either the Copyright Clause of the Constitution or the Copyright Act.[147]

Publicity rights sharing conjoined authorship with copyright law since *Zacchini* challenge the essence of what constitutes authorship from a different angle of generative AI. Whereas the ancient Platonic fear arose from truth and reason losing to uncontrollable passions, publicity rights as the quintessence of our celebrity culture have very little to do with absolute truth and reason. Yet, relevant legislation and adjudication enhance the axis of copyright law.

II. THE AXIS OF PUBLICITY RIGHTS VERSUS GENERATIVE AI

The axis of publicity rights, which enhances the denial of authorship to generative AI, is far from trivial, considering the major traits of publicity rights that could lead to a different trajectory in two essential aspects. First, in its current meaning, publicity rights reflect mostly the legal power of celebrity's public image or persona while functioning socially as a public "commodity."[148] Thus, we can also understand the persona or celebrity by what they are not. For a celebrity appearing as an individual, it is how the celebrity organizes themself publicly that matters.[149] Regarded by prominent scholars as the ambassadors of *The Society of the Spectacle*, the celebrity is:

> [T]he spectacular representation of a living human being, embodies this banality by embodying the image of a possible role. Being a star means specializing in the seemingly lived; the star is the object of identification with the shallow seeming life that has to compensate for the fragmented productive specializations which are actually lived.[150]

Therefore, the quintessence of a culture that embraces contradictory values to Platonic reason and ultimate truth might lead to a different attitude toward representatives of desire and mere spectacle. Second, the celebrity or persona is regarded as replacing reality altogether, being both the means and the end that establishes the dominant, obsessive consumption culture based on false substitutes for real life. Implementing Jean Baudrillard's vocabulary,

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[147] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 146 (D.D.C. 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."). *See* Moldawer, *The Shadow of the Law*, *supra* note 8, at 20–27 (interpreting legislation requiring the human factor as penumbral thinking, both regarding the constitutional and the statutory arenas).

[148] *See* TURNER, UNDERSTANDING CELEBRITY, *supra* note 28, at 6, 8–10, 14–15 (regarding the tension between the persona as a personality and her diverse aspects as a public commodity); Moldawer, *What is an Author?, supra* note 105, at 156–57, 159–61.

[149] P. DAVID MARSHALL, CHRISTOPHER MOORE & KIM BARBOUR, PERSONA STUDIES: AN INTRODUCTION 3 (2020) ("Persona is a projection and a performance of individuality.").

[150] DEBORD, *supra* note 31, at 60.

the celebrity is the embodiment of an image that is utterly severed from its source: a simulacrum—a reference with no referent.[151]

In *Sophist,* the conflict between the Idea (the ultimate truth) and its opposition (falsehood), is not only between truth versus its mimesis but also between truth versus falsehood as a simulacrum.[152] The simulacrum personified by the sophist is not merely a bad imitation, but it threatens to blur any distinction between the copy and the model. Unlike an imitation that might be acceptable even as the second-best truth, the simulacrum lacks the "resemblance" component that relates a copy to reality.[153] Hence, the sophist's simulacrum—which is devoid of any real contact with the Idea—threatens the whole Platonic hierarchy between a source and a copy, between reality and its representation.[154]

As a legal hybrid that shares theoretical infrastructure with copyright law—due to *Zacchini*'s legacy—why should a copy, in essence, that would be banished from Plato's Republic be protected by an IP system heavily influenced by the Hegelian's value of art as reflecting ultimate truth? After all, Hegelian's reconciliation with Plato's legacy is based on the shared values of reason and truth. Analyzing both the new federal and state legislation regarding publicity rights infringement by generative AI might provide us with the answers.

A. PUBLICITY RIGHTS LEGISLATION

i. The Federal Level of Publicity Rights Legislation

Although publicity rights are currently governed by state law, it is interesting to note that federal legislation is also in motion regarding generative AI. The first striking characteristic common to the proposed legislation is its negative title. First, the NO FAKES Act—sponsored by Senators Chris Coons, Marsha Blackburn, Amy Klobuchar, and Thom Tillis—federalizes NIL state laws, which currently vary from state to state. On the one hand, the NO FAKES Act holds any relevant person involved in producing or distributing an unauthorized AI-generated replica of an individual in an audiovisual work or sound recording liable,[155] thus standardizing the relevant traits to incur liability.[156] On the other hand, the NO FAKES Act exempts from liability works protected by the First Amendment, such as news, public affairs, biographical works, documentaries, parodies, satire, and criticism.[157] Echoing copyright law's posthumous rights, the NO FAKES Act's duration applies throughout a person's lifetime plus seventy years posthumously.[158]

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[151] JEAN BAUDRILLARD, SIMULACRA AND SIMULATION 1 (Sheila Faria Glaser trans., Univ. of Mich. Press 1994) (1981).

[152] *See generally* PLATO, SOPHIST, *supra* note 51; DELEUZE, *supra* note 97, at 253–63 (referring to Platonic Philosophy regarding the Simulacrum).

[153] DELEUZE, *supra* note 97, at 257.

[154] *Id*. at 262.

[155] NO FAKES Act of 2024, S.4875, 118th Cong. § 2(a) (2024).

[156] See *Right of Publicity, Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes [https://perma.cc/L8ND-RM67] for the current legal status of the right of publicity in each state. *See also Right of Publicity State-by-State*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com [https://perma.cc/9595-NZLY].

[157] NO FAKES Act of 2024, S.4875, 118th Cong. § 2(c)(3) (2024).

[158] *Id*. § 2(b)(2)(A)(iii).

Second, the No AI FRAUD Act uses a similar mechanism to the NO FAKES Act.[159] On one hand, the No AI FRAUD Act imposes liability on any entity that unauthorizedly simulates the voice or likeness of an individual, whether dead or alive; on the other hand, it exempts works protected under the First Amendment from liability.[160] In comparison to the NO FAKES Act, the exempted works are not enumerated according to the usual categories, such as news, parody, or criticism, but refer to criteria that resemble copyright law such as "intellectual property interest" in which transformative use should be balanced against commercial use.[161]

Hence, while aiming at the same target, the NO FAKES Act and the No AI FRAUD Act use the same language games in their titles and stress the negative impact of generative AI, they apply different language games concerning the relevant defense. Likewise, while attempting to impose a common standard for publicity rights, which is lacking in state laws, the two proposals differ in their posthumous aspects. Whereas the NO FAKES Act resembles copyright law, the No AI FRAUD Act is satisfied with a posthumous period of ten years.[162]

Finally, the FTC issued a Supplemental Notice of Proposed Rulemaking ("SNPRM") on February 15, 2024, to expand a new trade regulation rule prohibiting the impersonation of government and businesses (16 C.F.R. §§ 461.1–461.3) ("Impersonation Rule"). The SNPRM recommends (1) prohibiting the impersonation of any individual and (2) imposing liability on any technology suppliers that know or reasonably should have known the technology would facilitate such impersonation.[163] The finalization of the Impersonation Rule and the SNPRM are meant to give the FTC "stronger tools to combat scammers who impersonate businesses or government agencies, enabling the FTC to directly file federal court cases aimed at forcing scammers to return the money they made from government or business impersonation scams," as stated by the agency.[164]

All the suggested legislation deals basically with generative AI's potential harm but leaves room for doubt as to whether it will create a chilling effect on AI development because of the high sanctions. Further, the criteria for what is satisfactory knowledge to cross the threshold of liability is unclear, bearing in mind that AI's deep learning outcomes may not be within the reasonable knowledge of their programmers, users, or suppliers. In addition, the suggested legislation reflects the hybrid legal infrastructure of publicity rights, which makes it dangerous as the interests at stake are blurry.

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[159] No AI FRAUD Act, H.R. 6943, 118th Cong. (2024).

[160] *Id*. § 3(c).

[161] *Compare id*. § 3(d) ("First Amendment protections shall constitute a defense to an alleged violation of subsection (c). In evaluating any such defense, the public interest in access to the use shall be balanced against the intellectual property interest in the voice or likeness."), *with id*. § 3(e)(4) ("[A]lleged harms shall be weighed against . . . (B) whether the use is transformative . . . .").

[162] *Id*. § 3(b)(3).

[163] Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15072 (proposed Mar. 1, 2024), https://www.federalregister.gov/documents/2024/03/01/2024-03793/trade-regulation-rule-on-impersonation-of-government-and-businesses [https://perma.cc/GH6N-XJUP].

[164] Press Release, FTC, FTC Proposes New Protections to Combat AI Impersonation of Individuals (Feb. 15, 2024) (on file with author) ("This is particularly important given the Supreme Court's April 2021 ruling in AMG Capital Management LLC v. FTC, which significantly limited the agency's ability to require defendants to return money to injured consumers.").

While some scholars would locate publicity rights under trademark law, thus aligning with the FTC's initiative, *Zacchini*'s legacy of embedding publicity rights within copyright law is echoed in the No AI FRAUD Act regarding its exemptions from liability and in the NO FAKES Act regarding its posthumous durability.[165]

The same mechanism is enhanced by state-level legislation. While it is plausible to assume that the federal level will influence state-level legislation, the trajectory is reversed. As remarked by practitioners, a group of lawmakers introduced the No AI FRAUD Act immediately after the ELVIS Act was proposed.[166] Consequently, the question arises: what are the implications of state-level legislation regarding generative AI?

ii. The State Level of Publicity Rights Legislation

The flood of states' publicity rights legislation concerning generative AI, while unanimously designed to target deepfakes, enhances the already dangerous language games of the federal level of publicity rights legislation in terms of curtailing creativity and limiting the scope of the First Amendment. Following Tennessee's ELVIS Act, Kentucky, Illinois, California, and Louisiana embraced the legal path paved by the No AI FRAUD Act and the Senate's NO FAKES Act relating to music, entertainment, and politics.[167] Accordingly, free expression is the exception, not the rule, as demonstrated by California's A.B. 1836.[168]

A.B. 1836 attempts to amend Section 3344.1 of the California Civil Code, which already grants postmortem publicity rights to "a deceased individual's name, likeness, or voice" used "for purposes of advertising and selling."[169] In addition, California's common law acknowledged publicity rights as IP rights capable of assignability.[170] Creating a new digital replica right comes with a price, illustrating why fear alone as the motivation for the new legislation creates bad law.

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[165] *Compare* Lemley, *Privacy*, *supra* note 6 (arguing for locating publicity rights under trademark law), *with* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 2:6 (2d ed. 2024), *and* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (5th ed. 2024) (referring to publicity rights in McCarthy's treatise on trademark law).

[166] Sy Damle, Britt Lovejoy, Alli Stillman & Ivana Dukanovic, *The ELVIS Act: Tennessee Shakes up Its Right of Publicity Law and Takes on Generative AI*, LATHAM & WATKINS: CLIENT ALERT COMMENT. (Apr. 8, 2024), https://www.lw.com/en/admin/upload/SiteAttachments/The-ELVIS-Act-Tennessee-Shakes-Up-Its-Right-of-Publicity-Law-and-Takes-On-Generative-AI.pdf [https://perma.cc/BR4F-AT5X]. See The Ensuring Likeness, Voice, and Image Security Act of 2024, H.R. 2091, S. 2096, 118th Cong. (2024), for a discussion of the ELVIS Act (replacing the Personal Rights Protection Act of 1984, TENN. CODE ANN. § 47-25-1103 (2021)). See Mira Moldawer, *ELVIS Act: From Authorship to Ownership in Intellectual Property Law*, 33 TEX. INTELL. PROP. L.J. (forthcoming 2024), for the history and implications of the ELVIS Act.

[167] S.B. 317, 2024 Leg., Reg. Sess. (Ky. 2024); H.B. 4875, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024) ("Grant[ing] additional enforcement rights and remedies to recording artists. Provides for the liability of any person who materially contributes to, induces, or otherwise facilitates a violation of a specified provision of the Act by another party after having reason to know that the other party is in violation."); A.B. 1836, 2023-24 Leg., Reg. Sess. (Cal. 2024); S.B. 217, 2024 Leg., Reg. Sess. (La. 2024) (defining "deep fake" in the Election Code).

[168] *See generally* Montgomery, *supra* note 35.

[169] Jennifer E. Rothman, *California Considers a Digital Replica Law for the Dead*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Mar. 21, 2024), https://rightofpublicityroadmap.com/news_commentary/california-considers-a-digital-replica-law-for-the-dead [https://perma.cc/QJ8R-LUF9].

[170] Alterra Excess & Surplus Ins. Co. v. Snyder, 234 Cal. App. 4th 1390, 1405 (2015); Timed Out, LLC v. Youabian, Inc., 229 Cal. App. 4th 1001, 1008 (2014).

The problem with California's A.B. 1836, as the gist of legislators' bias against generative AI, is not the creation of a new digital replica right but its legal scope in terms of the exaggerated cultural control granted to publicity rights holders, especially posthumously. On the one hand, California's A.B. 1836 enlarges the postmortem aspect of publicity rights by imposing liability on "[a]ny person who uses a deceased personality'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 prior consent,"[171] thus, letting the relevant estate control "nearly any expressive audio or visual work depicting them through AI simulation."[172]

On the other hand, A.B. 1836 considerably narrows the prior exemptions to liability under the First Amendment. The existing law specifies a large variety of classifications of works that are not considered infringing if they are fictional or nonfictional entertainment, or dramatic, literary, or musical works.[173] A.B. 1836, while establishing broad liability deriving from almost any use of generative AI, omits the traditional defenses of protected speech by the First Amendment[174]— and thus raises doubts about its constitutionality.[175] While scholars warn that "[t]his gets incentives backward, commodifying the past to benefit heirs more interested in licensing profits than protecting legacy," this is no surprise to publicity rights legal trajectory.[176]

B. THE MISSING AUTHORSHIP OF PUBLICITY RIGHTS

Tracing the history and evolution of publicity rights leads to the argument that the right of publicity challenges the very concept of authorship and cultural control. In the nineties, important caveats regarding the dangers of publicity rights to freedom of speech and curtailing creativity were given by judges and scholars.[177] The most far-seeing to what publicity rights morphed to be—namely, an exaggeratedly strong IP right with no satisfactory theoretical justifications—was Judge Kozinski's dissent in *White*

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[171] A.B. 1836 § 2, 2023-24 Leg., Reg. Sess. (Cal. 2024) (amending Cal. Civ. Code § 3344.1).

[172] Montgomery, *supra* note 35.

[173] *AB 1836: Use of Likeness: Digital Replica*, CALMATTERS: DIGITAL DEMOCRACY: SUMMARY (Sep. 17, 2024), https://digitaldemocracy.calmatters.org/bills/ca_202320240ab1836 [https://perma.cc/Q9CQ-4RYX] ("a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works") (referring to current § 3344.1(2)(A) in the amended version).

[174] A.B. 1836 § 2(B), the amended clause states:

(B) Notwithstanding subparagraph (A), any person who produces, distributes, or makes available the digital replica of a deceased personality in an audiovisual work or sound recording, in any manner related to the work performed by the deceased personality while living, shall be liable to the injured party or parties in an amount equal to the greater of ten thousand dollars ($10,000) or the actual damages suffered by the person or persons controlling the rights. For purposes of this clause, "digital replica" means a simulation of the voice or likeness of an individual that is readily identifiable as the individual and is created using digital technology.

[175] Rothman, *supra* note 169 ("The elimination of this exclusion would significantly restrict constitutionally-protected speech and provides no safe harbors or guidelines for fair uses."); Montgomery, *supra* note 35 (characterizing the outcome of California's A.B. 1836 as risking "throwing out the baby with the bathwater.")

[176] Montgomery, *supra* note 35.

[177] *See generally* Madow, *supra* note 29.

v. Samsung Electronics America, Inc.[178] Plaintiff Vanna White, known for her role in the *Wheel-of-Fortune* television game show, sued the respondent for infringing upon her publicity rights under California law through the appropriation of her identity in its campaign—which used a robot in her place, dressed and jeweled in a manner like herself,—claiming Samsung would still exist twenty years in the future.[179]

The *White* court was satisfied with anything that evoked a personality without authorization to answer for publicity rights infringement, so potential infringers could not bypass California law by reminding people of celebrities without explicitly using their NIL, as the hard core of publicity rights.[180] As a new language game, the right to evoke granted White excessive appropriation rights without adhering to any of the attribution thresholds required by copyright law.[181] First, as marked by Judge Kozinski, the right to evoke the idea of White as the new mutation of publicity rights trespassed on the idea/expression dichotomy that made copyright law constitutional.[182] Second, the court ignored the text denoting parody at the bottom of Samsung's campaign—which is protected as fair use to square with the First Amendment—and thus ignored *Campbell*'s legacy.[183] Consequently, *White* demonstrated why the conjoined authorship of publicity rights with copyright law is dangerous in terms of freedom of speech and nonexistent.

Judge Kozinski's lamenting of the outcome of publicity rights being a legal hybrid, thus bypassing both copyright law's balance of authorship with the public domain and the First Amendment, proved to be right.[184] First, the following adjudication is not consistent, depending on the celebrities' whims and the judiciary's discretion. While the late Bette Davis liked the smash hit "Bette Davis Eyes," Paris Hilton liked "That's hot" on greeting card cards much less, settling her infringement of publicity rights lawsuit out of court.[185] The defendant parodied Hilton's famous sentence from her old reality show *The Simple Life* by linking it with the title "Paris's First Day as a Waitress" and thus was plausibly protected as transformative use due to *Campbell*'s legacy—but so was the case in *White* according to Justice Kozinski's dissent. Second, the current AI legislation enhanced the already dangerous consequences of publicity rights authorship being an unresolved issue, as California's A.B. 1836 is stronger than any celebrity's whim. In short, as the

[178] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1515–16 (9th Cir. 1993).
[179] *Id*. at 1514.
[180] *Id.*
[181] *Id.* at 1515–16.
[182] *Id*. at 1516.
[183] *Id*. at 1517–18; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[184] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1516 (9th Cir. 1993).
[185] Alli Patton, *Meaning Behind the Song "Bette Davis Eyes" by Kim Carnes*, AM. SONGWRITER (Apr. 20, 2023), https://americansongwriter.com/meaning-behind-the-song-bette-davis-eyes-by-kim-carnes [https://perma.cc/3U4Q-K4YT] (describing the origins of the song); Tom Breihan, *The Number Ones: Kim Carnes' "Bette Davis Eyes,"* STEREOGUM (May 6, 2020), https://www.stereogum.com/2083227/the-number-ones-kim-carnes-bette-davis-eyes/columns/the-number-ones [https://perma.cc/85UL-U479] (describing the history and impact of the song); Eriq Gardner, *That's Hot: Paris Hilton Settles Hallmark Lawsuit*, REUTERS (Sept. 26, 2010), https://www.reuters.com/article/us-hilton/thats-hot-paris-hilton-settles-hallmark-lawsuit-idUSTRE68Q04Z20100927 [https://perma.cc/P7GJ-RLNM]. *See White*, 989 F.2d at 1516 (Kozinski, J., dissenting) ("Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of 'appropriation of identity,' claims often made by people with a wholly exaggerated sense of their own fame and significance.").

dominant language game is the game of appropriation, what merits attribution to start with is omitted.

While simultaneously described as "a red herring," the infrastructural maze of copyright law, due to *Zacchini*'s legacy, is still a crucial factor of publicity rights' legal justifications.[186] However, even ignoring *Zacchini,* the unsettled legal justifications for publicity rights are problematic when attempting to create the theoretical infrastructure satisfactory for independent rights, as the focus shifts from privacy and dignitary interests, reflecting publicity rights initiation as a privacy tort to pecuniary interests to the quintessence of property rights.[187]

The arsenal of publicity rights authorship's legal infrastructure as a right per se offers a contradictory legal spectrum, ranging from publicity rights' inception as a tort of privacy to the restitution paradigm of unjust enrichment, from unfair competition to a right of property.[188] Rebecca Tushnet sums up the outcome of this classification:

> The right of publicity overlaps with trademark in its protections against false endorsement, with copyright in its (supposed) justifications in incentivizing performances, and with traditional privacy and defamation torts in protecting personal dignity and control over one's own presentation of the self. Yet the right of publicity has been used to extend plaintiffs' control over works and uses that don't violate any of the rights with which it shares a justification. This quicksilver nature is what makes the right of publicity so dangerous.[189]

In addition, the massive AI legislation reflects an unsolved paradox of the conjoined authorship of publicity rights with copyright law regarding the language games of the incentive approach.

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[186] 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 Rebecca Tushnet, *Raising Walls Against Overlapping Rights: Preemption and the Right of Publicity*, 92 NOTRE DAME L. REV. 1539 (2017) [hereinafter Tushnet*, Raising Walls*] for the doctrinal maze of publicity rights legal infrastructure.

[187] For a justification of publicity rights as equivalent to moral rights, see KWALL, *supra* note 30, at 119 ("The effort in constructing the celebrity persona-text . . . requires protection, not just from economic encroachment, but also from damage to the human spirit as a result of unauthorized uses of the persona the celebrity would find objectionable on moral grounds.").

Compare id., with Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (creating publicity rights as property rights), *and* Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 216 (1954) (arguing that the right of publicity is an independent legal right designed to protect celebrities' commercial interests in their identities).

[188] See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 152–53 (1992), for a discussion of how publicity rights are anchored in the restitution paradigm (demonstrating how the tort of "misappropriation" was the first stage of the ideology of publicity rights, which was created in *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918) by creating legal doctrines based on the "restitutionary impulse.").

Compare id., *with* 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 . . . 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.").

[189] Tushnet, *Raising Walls, supra* note 186.

C. THE LANGUAGE GAMES OF THE INCENTIVE APPROACH

The incentive approach, classified also as an instrumental approach, is considered the dominant legal justification for all IP rights in American law.[190] The incentive approach is regarded by the Supreme Court as embedded in the core of Article I, Section 8, Clause 8 of the Constitution.[191] Yet, the interpretations regarding the meaning of the Copyright Clause of the Constitution vary, creating different language games that beget contradictory legal results.[192]

The common perception of the incentive approach of copyright law incorporates the Benthamian value of increasing the common good by granting creators property rights to incentivize their enriching contributions to society.[193] The balance between incentivizing creators and the common good is supposed to be achieved by the mechanism of copyright law which, while granting property rights to creators, limits not only the duration of those rights but also their scope through the idea/expression dichotomy and fair use.[194] Otherwise, creators will not be motivated to work, out of fear that their endeavor was for literally nothing due to free and cheap copying.[195] As summed up by Robert Merges:

> The current convention has it that IP law seeks to maximize the net social benefit of the practices it regulates. The traditional utilitarian formulation the greatest good for the greatest number—is expressed here in terms of rewards. Society offers above-market rewards to creators of certain works that would not be created, or not created as soon or as well, in the absence of reward. The gains from this scheme, in the form of new works created, are weighed against social losses, typically in the form of the consumer welfare lost when embodiments of these works are sold at prices above the marginal cost of their production. IP policy, according to this model, is a matter of weighing these things out, of striking the right balance.[196]

Adapting the incentive approach to publicity rights conjoined authorship with copyright law means motivating the celebrity to work hard and excel in the creation of their unique public image so it will accumulate an economic

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[190] Fromer & Lemley, *supra* note 39. *See* TREIGER-BAR-AM, *supra* note 73, at 167 (classifying the incentive approach as instrumental and distinguishing it from other approaches both in American and European law).

[191] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating that the main purpose of copyright is to "to stimulate artistic creativity for the general public good" by creating this incentive to "secure a fair return for an 'author's' creative labor").

[192] *See generally* NIMMER & NIMMER, *supra* note 37, § 1.03.

[193] Corinna Coors, *Morality, Utility, Reality? Justifying Celebrity Rights in the 21st Century*, 44 SYRACUSE J. INT'L L. & COM. 215, 223–24 (2017).

[194] WILLIAM F. PATRY, PATRY ON FAIR USE § 1:3 (2024) [hereinafter PATRY ON FAIR USE] ("In the case of copyright, this means that fair use must be viewed as an integral part of the system, and not a begrudging exception to a Hobbesian state of nature where ruthless enforcement of exclusive rights as private property is the ideal.") (following Judge Leval's legacy with an overall vision of copyright law as a system and not as a narrow perspective of a property rights mechanism).

[195] Coors, *supra* note 193, at 224.

[196] ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2 (2011).

value that will justify the investment in terms of the celebrity's time and resources.[197]

The incentive approach is theoretically, empirically, and normatively criticized both in general and regarding its reflection on publicity rights in particular. First, from a theoretical perspective, utility is not mentioned in the Copyright Clause of the Constitution, which focuses on promoting progress but not on its market worth.[198] Second, miscellaneous domains of creativity—ranging from surgery to "fan fiction"—are done for the sake of sharing creativity, regardless of any financial consideration.[199] As Eric von Hippel notes, "[t]oday, commercial publishers and popular authors are increasingly understanding that fan fiction is a commercially valuable free complement to their intellectual property, and so increasingly seek to support fan fiction rather than suppress it."[200]

Third, from a normative point of view, not only does the legal system enhance a shallow celebrity culture (regardless of its initiation or social contribution), but it also greatly threatens the public domain in terms of cultural control and freedom of speech.[201] Hence, much scholarship focuses on the core question: why should we incentivize fame altogether?[202]

The legislation regarding AI enhances this paradox. While the incentive approach is heavily criticized regarding human creativity, once generative AI is concerned, prominent scholars cling to it to justify their denial of AI authorship, as "AI does not respond to financial incentives to create output."[203] This is an oversimplification. Generative AI is trained, programmed, and used by human beings—the same factors that the new AI legislation attempts to deter. The famous Alan Turing Test, according to which generative AI might justify authorship if its output were indistinguishable from a human output by a human beholder, does not

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[197] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 840 (Cal. 1979) (Bird, C.J., dissenting) ("[P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition.").

[198] *See* Beebe, *Aesthetic Progress*, *supra* note 122, at 373 ()—"Instead, to find evidence that the works promoted progress, Holmes retreated to the market's judgment of their worth or otherwise to the infringer's judgment of their worth.") (criticizing Judge Holmes's approach in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)).

[199] ERIC VON HIPPEL, FREE INNOVATION 152 (2017); LUNNEY, *supra* note 39 (proving that, from 1962 to 2015, more money for creators not only did not lead to more or better music but quite the contrary).

[200] VON HIPPEL, *supra* note 199. See Mira Moldawer, *Cassandra's Curse or Cassandra's Triumph: Three Tales of Intellectual Property Revised*, 43 LOY. L.A. ENT. L. REV. 111, 166 (2023) [hereinafter Moldawer, *Cassandra's Triumph*] for an opposite approach that calls users to piratically load *Game of Thrones*.

[201] *See generally* MERGES, *supra* note 196 (advocating for distributive justice as the plausible ground for IP rights). NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (2008); Patrick Goold & David A. Simon, *On Copyright Utilitarianism*, 99 IND. L.J. 721, 738 (2024); Madow, *supra* note 29, at 189 (arguing against the unjustified control of public assets by instant, undeserving celebrities).

[202] *See generally* Lemley, *Privacy*, *supra* note 6; ROTHMAN, *supra* note 41 ("If the right of publicity incentivizes anything, it is not clear that it is incentivizing anything we might wish to encourage."). Rothman repeats Dogan and Lemley's argumentation from Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187–88 (2006).

[203] Abbott & Rothman, *supra* note 40, at 1143–44 ("Most commentators believe that AI-generated works should not receive protection, either for moral reasons—because AI-generated works are not the right sort of thing to protect—or for economic ones—because AI does not respond to financial incentives to create output, because protection is unnecessary for other reasons, or because there are greater costs associated with protection."). *See* Daniel J. Gervais, *The Machine as Author*, 105 IOWA L. REV. 2053, 2062 (2020) (providing economic argumentations against AI-generated works as machines need no economic incentive).

contradict the incentive approach; this is in contrast to the Lockean labor and personhood approaches of copyright law, which focus on the human author.[204]

The quintessence of the incentive approach is the public good; according to which the greater the investment, the greater the reward. Thus, while the law should adhere to the Turing Test when it serves the public good, it instead denies it, using the proper language game of ancient fears and neglecting the language game used in American adjudication for what the incentive approach stands for. If the incentive approach does not fulfill its ideology as it is so heavily criticized, then it should not be a barrier to generative AI authorship. Otherwise, why is such an unsatisfactory approach to human authorship enough to construe any other form of authorship?

The incentive approach paradox does not stop here. Regarding publicity rights, the criticism against its embedment in the incentive approach is even harsher in comparison with its copyright counterpart.[205] Publicity rights are already too strong in terms of cultural control versus personal appropriation, regardless of the still unanswered question as to why we should incentivize fame altogether. Yet, the current AI legislation enhances the legal power of publicity rights by creating a new language game of the incentive approach. Logically, if publicity rights should not be incentivized, why are they given such legal power?

Thus, a legal system based on ancient fears can offer us only a frail language game full of inner contradictions. The incentive approach is unsatisfactory for justifying human authorship, yet, while it could justify generative AI authorship, it is used as an important vehicle to deny it. In the same breath, while it is unable to justify publicity rights' exaggerated legal power or why we incentivize them, this is exactly what the new AI legislation does. Generative AI legislation and adjudication on the one hand, and copyright law and publicity rights conjoined authorship on the other hand, share the same philosophy with the Luddites who rioted for the destruction of the textile machinery, using their fear in terms of control by destruction.[206] While copyright law's paradigms are embedded in the rational thinking of the pillars of the Enlightenment era and publicity rights reflect a society based on a libidinal economy attempting to fulfill our desires, regarding generative AI, the reaction is the same.

Using harsh legal weapons against generative AI authorship, our legal system pretends such authorship does not exist. It should be the opposite: the legal system should target those liable for generative AI authorship, and it should not only enforce sanctions when abused but also protect its benefits as well—especially in a legal IP system based on utilitarian thinking, in which the premise is what benefits society. The convergence of the newest technology with the ancient Platonic fear of losing control proves Pascal's

[204] A.M. Turing, *Computing Machinery and Intelligence*, 59 MIND 433, 434 (1950). See JOHN LOCKE & PETER LASLETT, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS 91–120 (1960) for the Lockean labor approach, and see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–60 (1982) for the personhood approach.

[205] *See generally* Madow, *supra* note 29.

[206] The Editors of Encyclopedia Britannica, *Luddite*, ENCYC. BRITANNICA (Mar. 7. 2024), https://www.britannica.com/event/Luddite[https://perma.cc/2UWP-AZGC].

quote right, whenever a legal system is based on language games, that attempt to replace a plausible theoretical infrastructure:

> [C]reates the whole of equity, for the simple reason that it is accepted. It is the mystical foundation of its authority; whoever carries it back to first principles destroys it. We must not see the fact of usurpation; law was once introduced without reason, and has become reasonable. We must make it regarded as authoritative, eternal, and conceal its origin, if we do not wish that it should soon come to an end.[207]

CONCLUSION

Long before generative AI became the subject of legislation frenzy, the question of whether the information era required "The Law of the Horse" was a contested subject.[208] The Law of the Horse is the term used by Justice Easterbrook in his seminal article *Cyberspace and the Law of the Horse*, in which he argues against specific litigation for new technological developments, claiming that the current law is sufficient to deal with them.[209] Regarding generative AI authorship, the legal system is showered with miscellaneous laws of the horse, which do not deal with what counts as authorship but with its abuse. While this is done in two parallel axes—the axis of copyright law and the axis of publicity rights—the challenge of what constitutes generative AI authorship reflects the unsolved issue of copyright law and publicity rights conjoined authorship due to *Zacchini*'s legacy.

This is not to say deepfakes or other risks should not be fought. However, the current logic of legislators both on federal and state levels is based solely on the ancient fear of losing control instead of creating a better balance between progress and its price, in contrast to the Copyright Clause of the United States Constitution. Whereas the sovereignty of Plato's reason rejected human authorship altogether because of the risks caused by art to reason and truth, the legislation and adjudication concerning publicity rights and copyright law conjoined authorship use the same mechanism to reject generative AI authorship in a cultural system governed by desire.

Generative AI and publicity rights conjoined authorship with copyright law arouse the question of what constitutes authorship from different angles. The language game of attribution that shifted authorship from divine inspiration to the unprecedented originality of the artist—created by Kant and developed by Fichte and Hegel—morphed into the language games of appropriation, which are dominant in the current interpretations of copyright law's fair use, especially after the Supreme Court's decision in *Goldsmith*. Publicity rights morphed into the strongest IP rights as their theoretical infrastructure is still unresolved in terms of authorship, yet the attribution

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[207] PASCAL, *supra* note 1, § 294.

[208] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 214 (1996) (explaining that the first to coin "the law of the horse" was Karl Llewellyn at the inception of the project that led to the Uniform Commercial Code).

[209] *Id.* at 208. Ironically, Judge Easterbrook created his law of the horse regarding shrink-wrap contracts, as demonstrated in ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding that shrink-wrap licenses are, in general, valid contracts under the Uniform Commercial Code (UCC)). *See* U.C.C. § 2-207(1) (AM. L. INST. & UNIF. L. COMM'N 1978); Moldawer, *Cassandra's Triumph, supra* note 200, at 117 (discussing the implications and criticism of Judge Easterbrook's law of the horse).

language game is far stronger than its copyright counterpart due to its more fragile balance with the public domain and its posthumous duration, unbound by the preemption doctrine in copyright law.

Generative AI legislation maintains this anomaly by focusing on appropriation language games, sanctioning misappropriation but ignoring the need to deal with what counts for authorship—in other words, to whom or to what we should attribute generative AI creativity. Like the Cheshire Cat in *Alice's Adventures in Wonderland,* the mischievous grin stays with us long after the cat is gone.[210] Whereas in copyright law the disappearance of attribution for appropriation's sake is gradual, the same is the gradual disappearance of the Cheshire Cat; in generative AI legislation and adjudication, attribution is utterly denied, as if the cat never was.

The changing language games attempt to disguise ancient fears with new ideologies, in which appropriation is answering the urge to defend IP rights at the expense of further creativity with the same zeal that led Plato to banish poets from his Republic to defend eternal truth from human creativity. Maybe questioning the mystical foundation of authority and its ancient mechanism since Plato, according to whom uncontrollable factors are either abolished or ignored, might shake the acceptable custom; but it is better than being left with the Cheshire Cat's grin, which is not funny.[211] Otherwise, we are no different from the Luddites who rioted for the destruction of the textile machinery, using their fear in terms of control by destruction—our current legal system is doing the same by pretending the cause of its fear does not exist.

The unanswered question is thus: why does our IP system, which was meant to promote progress, echo ancient fears and let those same fears prevail over new technologies by using the incentive approach as a new language game to deny authorship to generative AI? As the current system clings to the ancient mechanism of banishing the uncontrollable from the legal frame while using different language games, we are left with Pascal's quote— "[a]nd thus being unable to make what is just strong, we have made what is strong, we have made what is strong just."[212]

[210] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 94 (VolumeOne Publ'g 1998) (1865) ("'Well! I've often seen a cat without a grin,' thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in all my life!'").

[211] PASCAL, *supra* note 1, § 294 ("[L]aw was once introduced without reason and has become reasonable."); *id*. § 325 ("Custom should be followed only because it is custom, and not because it is reasonable or just.").

[212] *See id.* § 298; *id.* § 299 ("No doubt equality of goods is just; but, being unable to cause might to obey justice, men have made it just to obey might. Unable to strengthen justice, they have justified might; so that the just and the strong should unite, and there should be peace, which is the sovereign good.").