2024 Donald C. Brace Lecture
COPYRIGHTING PEOPLE

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Delivered November 20, 2024
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This Essay, delivered as the 2024 Donald C. Brace Lecture, reveals the increasing convergence of right of publicity and copyright laws. This convergence requires us to reconsider some accepted conclusions about copyright and to question whether copyright is the appropriate or best frame going forward to address the rising challenges posed by deepfakes, digital replicas, and voice clones. Better understanding the ways in which copyright already extends control over a person's identity, and may expand further to do so, has never been more essential. Copyright law can protect personality rights and privacy, but if not properly circumscribed it can also be a mechanism for owning a person's attributes and controlling and silencing that person. If we address digital replicas and voice clones by extending copyright protection to them or using a copyright-based paradigm to do so—which is the direction we are going—we must revisit copyright doctrines that unduly limit the agency of subjects captured in copyrighted works and copyright law's allowance of largely unfettered transferability. We must better design copyright to protect people when they become captured in copyrightable works. If we do not embrace this personality-inclusive vision of copyright law, then we must instead more rigorously enforce copyright's boundaries, and limit its encroachment on personality rights.

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INTRODUCTION

Thank you to The Copyright Society and the organizers for inviting me to give the 2024 Donald C. Brace Lecture. These lectures have long provided insights about copyright's past and its future. Today, I hope to provide insights about both. The title of my lecture is "*Copyrighting People*." This may sound like a misnomer. Many of you may be on the verge of jumping out of your seats to proclaim, "you can't copyright people!" And at one level this is true—people, in and of ourselves, as human beings, are not copyrightable subject matter. But the interplay between copyright law and people is far more complicated than this truism reveals. Copyright has long been employed, and sometimes weaponized, to assert rights over people captured as subjects in photographs, films, sound recordings, and beyond. Copyright law also has increasingly clashed with state privacy and publicity rights that protect against unauthorized uses of a person's identity.

Understanding the many facets of copyright law that intersect with rights of people to control uses of their likenesses, voices, and performances is more important than ever as state and federal rights that protect a person's identity are increasingly not only colliding with copyright law but also seemingly on a path of *convergence*. Generative artificial intelligence ("AI") and other ever-improving technology can create convincing digital replicas of real people. These replicas and other types of deepfakes have become so convincing that they have and will continue to deceive the public. These digital replicas epitomize the merger of personality rights and copyright. This is true in part because Congress and state legislatures are considering (and some have already passed) laws that look to copyright as a model for addressing AI and digital replicas.[1] This merger is also true because these replicas themselves may be held copyrightable or the Copyright Act itself could be amended to bring them into its ambit, as some have already floated.

Although copyright law could incorporate consideration of and protection for personality rights within its framing, it largely has not done so in the United States. The dominant frame of U.S. copyright law focuses on economic incentives to produce works (and incentives to distribute those works). Even when copyright law is used as a tool to protect personality-based interests, this role is not routinely

[1] *See, e.g.*, Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2024 ("NO FAKES Act"), S. 4875, 118th Cong. (introduced July 31, 2024 in Senate, Sept. 12, 2024 in House); No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024 ("No AI FRAUD Act"), H.R. 6943, 118th Cong. (introduced Jan. 9, 2024); Cal. A.B. 1836 (2024) (enacted); Elvis Act, Tenn. H.B. 2091 (2024) (enacted); U.S. COPYRIGHT OFFICE, PART I: DIGITAL REPLICAS, COPYRIGHT AND ARTIFICIAL INTELLIGENCE (JULY 2024) [hereinafter "DIGITAL REPLICAS"] (framing digital replica issue in copyright terms and supporting passage of legislation using that model).

recognized.[2] But using such a market-focused approach to protect identity rights—whether within copyright itself or adjacent to it—is the wrong approach. This market approach risks stripping each of us of control over our own voices and likenesses and worsening the circulation of misinformation and deceptive deepfakes that threaten our dignity and democracy itself.

To mediate the growing clash and increasing convergence between publicity rights and copyright requires paying greater attention to copyright's longstanding relationship with the subjects captured within copyrightable works. We must better understand the ways in which copyright law limits personality rights and individual agency, as well as the ways in which it furthers these interests, in order to address the threats of AI and concerns over a rise in the creation and use of unauthorized digital replicas.

Copyright law can protect personality rights and privacy, but if not properly circumscribed it can also be a mechanism for owning a person's attributes and controlling and silencing that person. If we address digital replicas and voice clones by extending copyright protection to them or using a copyright-based paradigm to do so—which is the direction we are going—we must revisit copyright doctrines that unduly limit the agency of subjects captured in copyrighted works and copyright law's allowance of largely unfettered transferability. We must better design copyright to protect people when they become captured in copyrightable works. If we do not embrace this vision of copyright law, then we must instead more rigorously enforce copyright's boundaries, and limit its encroachment on personality rights.

In Part I of the Lecture, I will consider the accepted claim that you cannot copyright people. In Part II, I will problematize this basic proposition by looking at a variety of complications to this reading of copyright law. Given this background, I will consider in Part III ways in which copyright law has been weaponized to protect the personality rights of its subjects, as well as concerningly to thwart them. Finally, I will conclude with some suggestions for how better to calibrate copyright law and digital replica laws to address their "collision" course with publicity and privacy rights.[3]

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[2] *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 554–55 (1985) (rejecting fair use defense in context of unpublished memoir and focusing on economic basis for copyright more so than privacy concerns); DIGITAL REPLICAS, *supra* note 1 (identifying solely market-based justifications for copyright in the context of considering digital replicas protection); *see also* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012) (recognizing noneconomic aspects of copyright law but viewing them as part of the utilitarian incentive rationale for copyright law). I discuss this aspect of copyright law further in Part III.A.

[3] *Cf.* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 160–79 (2018) (considering right of publicity law's increasing "collision course with copyright").

I. PEOPLE ARE NOT COPYRIGHTABLE

It is widely agreed that people are not copyrightable.[4] This declaration often arises when courts consider clashes between copyright law and state publicity and privacy-based misappropriation claims. The Copyright Act explicitly preempts the enforcement of state laws that are "equivalent to any of the exclusive rights" of copyright and that "come within the subject matter of copyright."[5] In this context, courts have concluded that a person's name, voice, and likeness are not "within the subject matter of copyright."[6]

This conclusion—that people are not copyrightable subject matter—seems so immediately obvious that it almost doesn't bear elaboration. Nevertheless, I will ask you to indulge me in elaborating why this is so. Such a detailed understanding is required because, as will soon become clear, copyright plays a much larger role in propertizing and controlling people than is often thought and this function is likely to grow in the era of AI. There is already increasing pressure to extend copyright or quasi-copyright protection to digital versions of people. It therefore is necessary to truly understand why people cannot be copyrightable works to see where the boundaries of such protection are and how they could shift to encompass protection very close to covering people in and of themselves.

The Progress Clause of the Constitution provides protection to "*Authors*" for their "*Writings*" for the purpose of "promot[ing] the Progress of Science and Useful Arts."[7] One might immediately conclude that people are neither "authored" nor "writings." But the boundaries set forth in the Progress Clause as a constitutional limit on congressional power have repeatedly been interpreted expansively to allow a broader understanding of what is meant by authorship,

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[4] *See, e.g.*, Brown v. Ames, 201 F.3d 654, 656 (5th Cir. 2000) ("[A] person's name and likeness in themselves are not copyrightable.").

[5] 17 U.S.C. § 301.

[6] *See, e.g.*, *Brown*, 201 F.3d at 656–59 (concluding that "[a] *persona* does not fall within the subject matter of copyright—it does not consist 'of a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution'") (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01 [B][1][c] (1999)) (emphasis in original) (now in § 1.17); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1099–1100 (9th Cir. 1992); KNB Enters. v. Matthews, 78 Cal. App.4th 362, 374–75 (2000). *See also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. i (AM. L. INST. 1995) ("Personal identities and the indicia by which they are recognized, however, are not generally within the subject matter of copyright. No copyright can be obtained, for example, on a person's name, voice, or physical likeness. . . . Thus, the subject matter of the right of publicity generally lies outside the scope of copyright.").

[7] U.S. Const. Art. I, Sec. 8, cl. 8 (emphasis added). I note that scholars and courts sometimes refer to this clause as the Intellectual Property, the IP Clause or the Copyright and Patent Clause, but the clause expressly highlights its goal to promote "progress," and does not use the terms Patents, Copyrights, or intellectual property. This distinction is important to highlight here as the boundaries of the Progress Clause are likely to increasingly be tested in some of the ways this Lecture identifies, as well as by artificial intelligence more generally.

"writings," and "for limited Times."[8] Of particular relevance, what constitutes a "writing" has greatly broadened since the 1700s and encompasses many things that would not colloquially be considered "writings."[9] Many forms of creative expression that did not exist at the time of the Founders are now within the scope of copyright's subject matter, such as photographs, motion pictures, sound recordings, video games, and computer software.[10] People, however, are not a new technological advancement.

People are also not authored, we are born. Even if we paint with a broader brush as we have with the meaning of "writings," and consider our choices about how we present ourselves to the world and our development over time as a form of *self*-authorship, this is not the sort of authorship imagined by the drafters of the Constitution. The Progress Clause on its face contemplates authors who create or produce "writings" external to themselves, not protection for authors in and of themselves.[11]

The Copyright Act has built upon these constitutional requirements the rule that to be copyrightable a "work[] of authorship" must be "original" and "fixed in any tangible medium of expression."[12] People do not meet these additional hurdles

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[8] *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (extending an understanding of authorship and writings to encompass photographers and their photographs); Eldred v. Ashcroft, 537 U.S. 186 (2003) (holding retroactive extension of copyright term constitutional despite arguments that 70 years after an author's death was far from a "limited time" and dramatically longer than the initial 14 year term (renewable for another 14) provided by the Copyright Act of 1790, 1 Stat. 124).

[9] *Compare* 17 U.S.C. § 102(a) *with* Copyright Act of 1790, *supra* note 8, at § 1 (expressly providing protection only for "map[s], chart[s]," and "books").

[10] 17 U.S.C. § 102(a); *see also Burrow-Giles Lithographic Co*, 111 U.S. at 58–61 (noting the addition of "photographs" to copyright statute and holding that the Progress Clause constitutionally applied to this new medium of artistic expression); Pamela Samuelson, *The Uneasy Case for Software Copyrights Revisited*, 79 GEO. WASH. L. REV. 1746 (2011) (discussing the explicit addition in 1980 of computer software to the Copyright Act and the controversies surrounding it). Some of the enumerated categories now in Section 102 of the Copyright Act did exist at the time of the drafting and ratification of the Constitution but were not initially covered by the Copyright Act, such as choreography.

[11] Some have also suggested that people cannot be copyrightable because we are more akin to "facts" in the world, rather than to "expression." *Cf.* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1066 (2000) (observing in context of analyzing free speech protections for referring to real people that copyright excludes facts from its protection); *see also* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1592–95 (1993) (supporting biographers' latitude to write about real people and to include quotes and excerpts from their copyrighted material without permission); Jessica Silbey, *A Matter of Facts: The Evolution of the Copyright Fact-Exclusion and its Implications for Disinformation and Democracy,* 70 J. COPYRIGHT SOC'Y 365 (2024) (considering the exclusion of facts from copyright protection).

[12] 17 U.S.C. § 102.

for copyrightability—though it is worth noting that these hurdles may not be constitutionally required. Nevertheless, accepting them as requirements for the moment: people may be original in the sense of being unique, but they are not original in the sense intended in the Copyright Act, which focuses on having originated from the mind of an author. People are also not fixed—at least not in the sense meant by the Copyright Act.[13] While we can be captured on celluloid or vinyl or in pixels or perhaps now in code, we remain (at least while living) independently free to move around the world.

In spite of the conclusion that people are not copyrightable, the exclusion of human beings from copyright's scope is increasingly unstable. There is rising pressure to copyright the attributes of people, including the code for our digital selves. And the Copyright Act could be amended or other laws passed to provide copyright or copyright-like protection to people's voices, likenesses, and performances (unmoored from a particular fixation). This makes it essential to consider the constitutional justification for extending copyright protection in the first place. The Constitution expressly roots copyright law in an incentive rationale—we extend a monopoly right to authors not for their sake alone but to "benefit the public" by encouraging the production of creative works that can then be enjoyed and accessed by the public.[14] This justification for extending an exclusionary property right justified the Supreme Court's extension of copyright law in the late 1800s to cover photographs.[15] But the incentive rationale for copyright law does not support providing an exclusionary right in people. People do not need incentives to manifest ourselves, nor even to encourage us to develop more flamboyant, creative, or even marketable personalities. Individuals already have many incentives to create commercially valuable personas should we wish to do so.

Extending exclusionary property rights in people, such as under state publicity laws, is meant to give us control over whether we want to be in the public eye or not, and if we do, to have a say about when and how we appear. But this basis to extend property or quasi-property rights in people's identities is not rooted in incentivizing the creation of more people or encouraging more creative or more marketable people. People are therefore an awkward fit with copyright's explicit objectives.

In sum, the best interpretation of Article I, Section 8 is that human beings are neither "author[ed]" nor "writings." This suggests that efforts to use the Progress Clause to protect a person's voice or likeness may be unconstitutional. Federal efforts to do so therefore must be located elsewhere, such as within the Commerce

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[13] *See* Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) ("A voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectible here is more personal than any work of authorship.").

[14] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting)).

[15] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–61 (1884).

Clause. Nevertheless, in spite of my conclusion that the Progress Clause does not empower Congress to extend copyright protection to human beings, the expanding breadth of copyright's coverage over time makes the conclusion that people are not copyrightable somewhat misleading. As I will discuss next, a person's digital replica, chatbot, or voice clone may be copyrightable and, if they are, these come very close to being copyrights in people. In addition, Congress and the Copyright Office have turned to a copyright-like model to propose federal legislation to address digital replicas without considering whether this is the best or even the appropriate frame for such protection. If these laws are adopted, as some state laws already have been, and they are held constitutional, they will create quasi-copyrights in people.

II. COPYRIGHT IN PEOPLE

The steadfast confidence with which we hold the conclusion that people are not copyrightable has obscured deeper thinking about the ways that copyright law already extends exclusionary control over people and how it may increasingly do so in the future. We must confront this reality more squarely. People's likenesses, voices, and performances can be captured in a fixed form that is protected by copyright. While courts, scholars, and lawyers alike have correctly distinguished such individual fixation from having a copyright in the underlying person,[16] they have overlooked or been dismissive of the ways in which copyright in the fixation of a person can be wielded to exert control over that person. In this Part, I will consider the various and possibly expanding ways in which people can be captured and claimed in copyrightable works. I will then consider how copyright infringement analysis, combined with the derivative works right, make it possible, and in some instances likely, for works with accurate audio or visual recordings of a person to be substantially similar to other works that capture the same person as their subject. This raises challenges for copyright infringement analysis that will increasingly be put to the test by copyrighted works that come closer and closer to being copyrights in people.

A. Revisiting Copyrightable Subject Matter

Even though people are not copyrightable in and of ourselves, our likenesses, performances, and voices can be captured in a photograph, painting, video, film, sound recording, and even in computer code. These fixations of a person *are* copyrightable. And the ways in which people can be captured in copyrightable works is growing. AI-supported chatbots and voice clones can speak in the voice

[16] *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1100 (9th Cir. 1992); *Midler*, 849 F.2d at 462; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 cmt. i (concluding that copyright in a photograph, portrait, film, videotape, or sound recording of a person "does not extend to the personal likeness or other identifying characteristics of the performer" or "create exclusive rights in the identifying characteristics of the performer's voice.").

of a real person.[17] Digital replicas use scans, videos, and sometimes motion capture of a real person combined with AI to produce a digital version of the person that can be reanimated in new contexts without the person's participation in these new performances.

The visual effects house Metaphysic has already submitted an application to the Copyright Office to register its founder's digital replica and has proposed registering its clients' digital replicas with the Copyright Office to protect against others using or creating digital replicas of them. Metaphysic counts among its clients Tom Hanks, Octavia Spencer, and Eminem, among other high-profile performers. The company claims that its approach could leverage copyright law to protect individuals from losing control over their identities by seeking copyright protection for their digital replicas.[18]

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[17] Eileen AJ Connelly, *YouTube Reveals 'Dream Track,' an AI Music Generator Using 9 Famous Singers' Sounds*, The Wrap (Nov. 16. 2023), https://www.thewrap.com/youtube-dream-track-explained-ai-songs-charlie-puth-demi-lovato/ [perma.cc/T5TN-Z8Y2]. Richard Deitsch, *AI Recreation of Al Michael's Voice Will be Part of Peacock's Olympics Coverage*, N.Y. Times (June 26, 2024), https://www.nytimes.com/athletic/5594546/2024/06/26/al-michaels-peacock-olympics-ai/ [perma.cc/QUW4-6B7V]. During the live lecture, I showed Google's Dream Track demo using Charlie Puth's voice, which is available at *Introducing Dream Track - an experiment on YouTube Shorts - featuring Charlie Puth*, YouTube (Nov. 14, 2023), https://www.youtube.com/watch?v=1gjuHUy0IMM [perma.cc/JDT7-FA9H].

[18] Press Release, Metaphysic CEO Tom Graham Becomes First Person to File for Copyright Registration of AI Likeness Creating New Digital Property Rights, Business Insider (Apr. 5, 2023), https://markets.businessinsider.com/news/stocks/metaphysic-ceo-tom-graham-becomes-first-person-to-file-for-copyright-registration-of-ai-likeness-creating-new-digital-property-rights-1032216732?op=1 [perma.cc/525R-NWHU]; Carl Franzen, Metaphysic PRO wants Performers to Copyright, Manage, and Monetize their Digital Twins, Venture Beat (Sept. 15, 2023), https://venturebeat.com/business/metaphysic-pro-wants-performers-to-copyright-manage-and-monetize-their-digital-twins/ [perma.cc/E3TG-BBWW] (reporting that many celebrities are already on board with this approach, including "Tom Hanks and his actor spouse Rita Wilson; Anne Hathaway; Octavia Spencer; Paris Hilton; and the athlete and model Maria Sharapova"); Press Release, Metaphysic, Metaphysic Launches Groundbreaking Platform to Protect One's AI Likeness and Performance (Sept. 14, 2023), https://www.prnewswire.com/news-releases/metaphysic-launches-groundbreaking-platform-to-protect-ones-ai-likeness-and-performance-metaphysic-pro-301927235.html [perma.cc/LA5X-H5YQ].

Metaphysic created a replica of Eminem for use in the music video for his new song *Houdini*. The video shows Eminem dancing with a younger, digital-replica version of himself. An excerpt of this video was shown during the live lecture and can be accessed at *Eminem - Houdini [Official Music Video]*, YouTube (May 31, 2024), https://www.youtube.com/watch?v=22tVWwmTie8 [perma.cc/5ST3-782Z]. Metaphysic also used its digital replica technology to de-age Tom Hanks and Robin Wright in *Here*, a new film by director Robert Zemeckis. Metaphysics Homepage, https://metaphysic.ai/ [perma.cc/KH77-MT32] (describing work on both projects).

Because AI plays a significant role in generating and animating these digital replicas and voice clones, their registration and copyrightability is part of the larger debate within the Copyright Office about whether works authored by or created with the help of AI should be copyrightable and when.[19] Either way, fixed versions of these AI-assisted outputs seem destined for copyright protection, much as films that include AI-assisted visual effects and video games have been registered and protected by copyright.[20]

The copyrightability of performances is longstanding and highlighted in the Supreme Court's best-known right of publicity case, *Zacchini v. Scripps-Howard Broadcasting*.[21] In that case, the Court held that the First Amendment did not insulate a news station from liability for filming and broadcasting Hugo Zacchini's human cannonball act. Even though the live performance was unfixed and therefore not copyrightable, the Court understood Zacchini's claim as a quasi-copyright claim and recognized that if his human cannonball act had been recorded by him before the reporter filmed it, Zacchini would have been able to bring a *copyright* claim and use that right to control the use of his performance and identity.[22] This highlights that if a person's digital replica is understood as a fixation of a person's performance, even if it is a reusable and changeable one, the replica may fall within copyrightable subject matter.

In the context of trademark law, the U.S. Patent and Trademark Office has seen an increase in applications for marks composed of a person's likeness fixed in a photograph. These applications have been submitted primarily by models, celebrities, athletes, and other performers, and have often been registered as service marks for endorsement, modeling, and entertainment services.[23] William

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[19] *See* Artificial Intelligence Study: Notice of Inquiry, 88 Fed. Reg. 59942, 59948–49 (Aug. 30, 2023) (seeking comments on copyrightability of AI-generated and AI-assisted works); U.S. Copyright Office, Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence (2023), https://copyright.gov/ai/ai_policy_guidance.pdf [perma.cc/HG49-RAGJ].

[20] There is also an open question of whether multiple digital replicas of the same person could potentially be registered, much as multiple photographs of the same person can now be registered.

[21] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[22] *See id.* at 573–76; *see also* Zacchini v. Scripps-Howard Broad. Co., 1975 WL 182619, at *4–*5 (Ohio Ct. App.) (considering the case as one of common-law copyright and conversion), rev'd Zacchini v. Scripps-Howard Broad. Co., 351 N.E. 2d 454, 457 (Ohio 1976) (observing that the performance was not copyrightable under state common law); Rothman, *supra* note 3, at 79–81, 141; Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 96–102 (2020); Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 Colum. L & Arts 277, 302–06 (2019).

[23] See, e.g., William McGeveran, *Selfmarks*, 56 Houston L. Rev. 333 (2018); Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 Harv. L. Rev. 1271, 1278, 1319–20 & nn. 236–

McGeveran has dubbed these "selfmarks," and noted their deployment to limit unauthorized uses of a person's identity.[24] We may see a similar rise in what could be called "*selfrights*" in the context of copyright. For example, we may see an increase in registrations for photographs and performances capturing a person and filed by the subject as the author of these works. Such copyrighted works (and registrations) could be used not only to protect the underlying photograph or work, but also as a mechanism for controlling uses of the person depicted within.

Photographs, recordings, and perhaps soon voice clones and digital replicas are not the only way copyright potentially extends its protection to cover aspects of people. Consider that choreography is copyrightable when captured in writing, diagrams, or on a recording.[25] It is possible that a person's "signature moves," unique facial structure, expressions, mannerisms, and gait could be set forth in diagrams or a recording and be claimed as a fixed work. Similarly, performers can set forth details of the specific "characters" they play in the public eye and seek protection for them. Consider a television series' show bible which is in written form and copyrightable as a blueprint for the entire show and episodes to come. Could people draft their own public persona bibles and seek copyright protection for them? Consider the numerous performers who perform using coined stage names and develop explicitly distinct public personalities, such as Chapelle Roan or SZA.[26] Although there has been some controversy about whether characters can be copyrightable apart from the underlying works in which they appear, the weight of authority has moved in the direction that characters can be independently copyrightable or at least independently infringed.[27] These

239 (2022) (considering and providing examples of such registrations); see also Alexandra Roberts, *Of Marks and Minors*, 62 HOUSTON L. REV. 307 (2024) (considering this phenomenon in the context of parents registering their children's names).

[24] McGeveran, *supra* note 23; *but see* ETW Corp. v. Jireh Publishing, Inc., 332 F.3d 915, 921–22 (6th Cir. 2003) (noting that a person cannot be a "walking talking trademark").

[25] 17 U.S.C. § 102(a)(4); Hanagami v. Epic Games, Inc., 85 F.4th 931 (9th Cir. 2023); Horgan v. Macmillan, 789 F.2d 157 (2d Cir. 1986).

[26] *See, e.g.*, Constance Grady, *Chappell Roan Spent 7 Years Becoming an Overnight Success*, VOX (Aug. 21, 2024), https://www.vox.com/culture/358464/chappell-roan-rise-and-fall [perma.cc/35HM-Q62E] (describing Kayleigh Amstutz's transformation into the public persona and pop star Chappell Roan); Danyel Smith, *SZA's Ruination Brought Her Everything*, N.Y. TIMES MAG. (Feb. 8, 2023), https://www.nytimes.com/2023/02/08/magazine/sza.html [perma.cc/V3NY-J4YX] (SZA was born as Solána Imani Rowe and studied marine biology in college before becoming the famous recording artist known as SZA).

[27] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (concluding that characters can be protected by copyright but will only be infringed when there are nearly identical features of the characters); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (2024); *see also* Groucho Marx Productions, Inc. v. Day and Night Co., Inc., 523 F. Supp. 485 (S.D.N.Y. 1981) (recognizing that characters developed by particular performers could be protected by copyright law and infringed by other actors performing as those characters), rev'd on other grounds, 689 F.2d 317 (2d Cir. 1982) (rejecting descendibility of Marx Brothers' publicity rights).

constructed public personalities could be considered characters eligible for copyright protection.

The existing and expanding protection of copyrightable material that fix human beings within copyrighted works will likely increasingly be leveraged to limit unauthorized uses of a person's voice or likeness. Worrisomely, however, these copyrights will not necessarily protect the person depicted but instead may empower others to limit the ability of the person to perform in new works, and even allow the copyright holder and licensees to force the person to virtually perform without the person's specific knowledge, or authorization, or actual performance. I will consider these concerns further in Part III.

B. People are Substantially Similar to Themselves

The ability to leverage copyright in this way is not only true when exact copies of works are made, but also potentially when new works are made with the same person as the central feature of the allegedly infringing work. In such instances, it is hard to say that the two works are not substantially similar with one another; after all, people are substantially similar to themselves.[28] Consider the photograph at the heart of *The Andy Warhol Foundation for the Visual Arts v. Goldsmith* case recently decided by the Supreme Court.[29] This dispute involved a photograph taken by Lynn Goldsmith of the recording artist Prince and Andy Warhol's use of that same photograph to produce an altered version of the black and white image, reframed, reprinted, and silkscreened in color.[30] (*See* Figure 1.)

[28] One of the main determinants of copyright infringement is whether a defendant's work is substantially similar to that of the plaintiff's. *See* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020). Substantial similarity analyses can actually serve two distinct inquiries—one as a way to establish that a work was actually copied and the other as a way to determine whether the copying rises to the level of an infringement of the copyrighted work at issue. The recent substantial revision of NIMMER ON COPYRIGHT, in a part co-authored with Shyamkrishna Balganesh, criticizes the collapse of these two distinct inquiries and suggests a preference for using different terms for the two distinct inquiries: "probative similarity" for evidence of factual copying and "improper appropriation" for the determination of "legal copying" or infringement. 4 NIMMER ON COPYRIGHT § 13D.06 *et seq.*, *supra* note 27. My focus here is on the latter inquiry, but I will retain use of the term "substantial similarity" here because it is the term routinely used by attorneys and courts.

[29] Andy Warhol Foundation for the Visual Arts v. Goldsmith, 598 U.S. 508 (2023).

[30] *Id.* at 516–522.

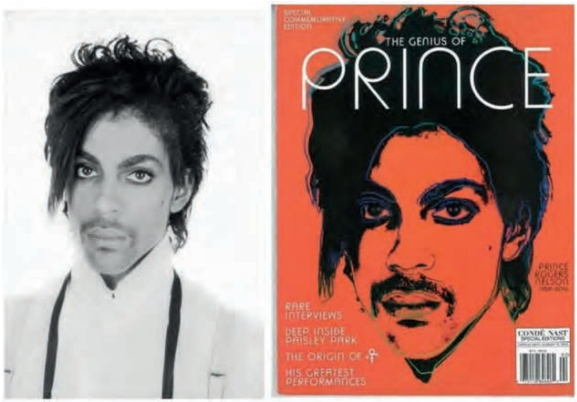


Figure 1. Lynn Goldsmith's photograph is on the left, and Andy Warhol's silkscreen is on the right, as it appeared on the magazine cover at issue in the litigation. Images from Andy Warhol Foundation for the Visual Arts v. Goldsmith*, 382 F. Supp.3d 312, 321 (S.D.N.Y. 2019).*

Stylistically the two images are quite different, but fundamentally they are the same likeness of Prince, fixing him at the same original moment in time. As I have written elsewhere, how "[c]ould one photograph of Prince *not* be substantially similar to another image of Prince in at least a fundamental sense? The subject of each image would need to be removed from consideration—or filtered out—to make sense of such an inquiry."[31] In some instances, such filtering might be possible, but here, Prince is the very heart and "essence" of both the original photograph and Warhol's silkscreen.[32] It therefore is no surprise that the Second Circuit concluded that the works were "substantially similar" to one another as a matter of law.[33]

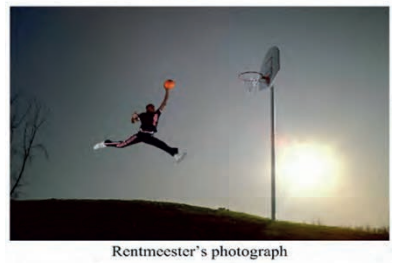
Andy Warhol Foundation is an easy case from an infringement standpoint, apart from the fair use analysis, because there is no dispute that Warhol did not independently create his own image of Prince. Instead, he reproduced Goldsmith's photo as a starting point and then produced a derivative work from it. The more difficult question is what would have happened if Warhol had independently fixed his own picture of Prince (whether using the Goldsmith photo as a reference or

[31] Jennifer E. Rothman, *The Absent Prince: Reflections on Personality Rights and* Andy Warhol Foundation v. Goldsmith, 94 Grey Room 51, 53 (2024).
[32] Andy Warhol Foundation for the Visual Arts v. Goldsmith, 11 F.4th 26, 43 (2d Cir. 2021).
[33] *Id.* at 52–54.

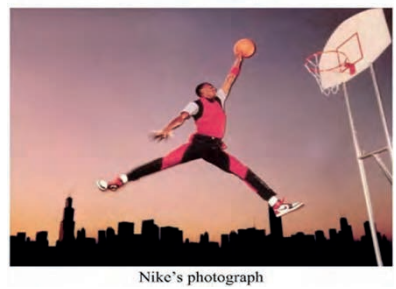
simply having been exposed to her image and been influenced by it) and the image ultimately looked similar to the Goldsmith photo.[34]

As Judge Berzon, writing for the Ninth Circuit, correctly points out, "no photographer can claim a monopoly on the right to photograph a particular subject just because he was the first to capture it on film."[35] Nevertheless, determining when subsequent images of the same person are infringing is a tricky matter. Let's contrast the decision in *Andy Warhol Foundation* with that in *Rentmeester v. Nike, Inc.* In *Rentmeester*, the plaintiff Jacob Rentmeester took a photograph of basketball legend Michael Jordan. Later, the defendant Nike took a similar picture of Jordan doing what is now considered Jordan's signature "jumpman" pose.[36] (*See* Figure 2.)

Appendix



Rentmeester's photograph



Nike's photograph

Figure 2. Photographs at issue in Rentmeester and included in its Appendix. Rentmeester v. Nike, Inc., *883 F.3d 1111, 1126 (9th Cir. 2018).*

[34] This issue is raised in part in *Sedlik v. Drachenberg*, 2022 WL 2784818 (C.D. Cal. 2022), appeal docketed, sub nom. *Sedlik v. Von Drachenberg*, No. 24-3367 (9th Cir., filed May 22, 2024) (after reconsideration in Sedlik v. Drachenberg, 2023 WL 6787447 (C.D. Cal. 2023)). In *Sedlik*, the district court allowed a substantial similarity determination to go to a jury in a copyright infringement case brought by a photographer against a tattoo artist, who used the plaintiff's photograph as a reference image for a tattoo of Miles Davis that the defendant inked on her client. *Sedlik*, 2022 WL 2784818.

[35] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1119 (9th Cir. 2018).

[36] *Id.* at 1116. Rentmeester apparently came up with the idea for the pose, wanting to evoke a ballet move, the *grand jeté*, in the context of basketball. *Id.* at 1115–16.

The Ninth Circuit highlighted that the two photos of Jordan had different backgrounds, framing, and even somewhat different poses that led to a different "visual impact." The court therefore concluded that they were not substantially similar works and therefore the defendant's photo was not infringing.[37] But what if the photographs had been close-ups of Jordan in isolation in the sky doing the jumpman/grand jeté pose? (*See* Figure 3.)

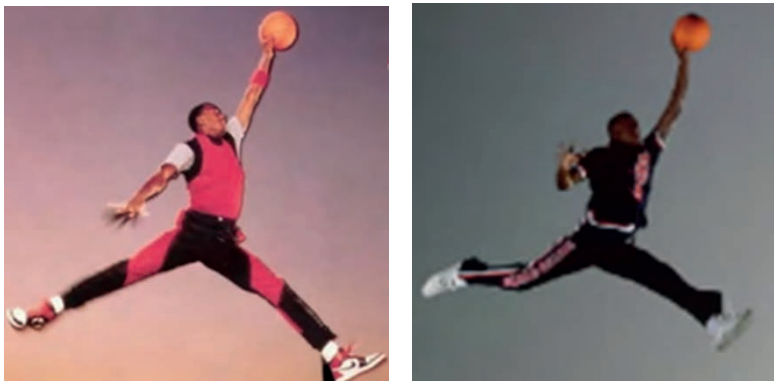


Figure 3. Images created by Author enlarging and isolating Jordan in frame from the two photographs at issue in Rentmeester.

The Ninth Circuit's distinctions then between different backgrounds, lighting, and framing would not have been possible. Some would contend that in such instances, the copyrightability of the underlying photograph should be challenged or infringement limited to an exact reproduction, but today's copyright doctrine is generous in its extension of copyright protection to photographs as an initial matter, including to portraits. In fact, the landmark case

[37] *Id.* at 1121–23.

in which the Supreme Court extended copyright protection to photographs was a portrait-style photograph of the author Oscar Wilde.[38] (See Figure 4.)

Figure 4. Photograph of Oscar Wilde at issue in Burrow-Giles Lithographic Co. v. Sarony, *111 U.S. 53 (1884).*

When the focus of the image is of the underlying person, the person is the heart of the photograph. Applying a "lay observer" or "total concept and overall feel" approach to determine substantial similarity makes it possible (maybe even likely) that a jury would find two photographs or other works depicting the same person (if the person is the central feature of the image) substantially similar.[39] Some have suggested that we can address this best by filtering out from consideration all material that is not copyrightable and not "original" to the photographer; since people are not original to the photographer nor copyrightable themselves, this approach could justify filtering out the subjects of photographs and other works.[40] But it seems nonsensical to filter out a person as an unprotected element of a work if the person is the central feature of the work and the primary visual element—which would certainly be the case with digital replicas and voice clones.

The claim that people are a protectable element in copyrighted works is currently being argued in the context of the distribution of AI-generated sound

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

[39] *See* Structured Asset Sales, LLC v. Sheeran, 120 F.4th 1066, 1078, 1081 (2d Cir. 2024); Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1164–67 (9th Cir. 1977); 4 NIMMER ON COPYRIGHT, *supra* note 27, at § 13D.14 (in section co-authored by Shyamkrishna Balganesh).

[40] *Cf.* Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 2 HARV. J. L. & TECH 339, 388-90 (2012) (calling for higher originality requirements in the context of photographs and contending that the capturing of President Obama's face and expression in a photograph was not a protectable element of the photograph that was later made famous in Shepard Fairey's iconic Hope poster used in the campaign).

files that confusingly emulate the voice of known recording artists. The recent viral AI-generated song "Heart on My Sleeve," sometimes referred to as the "Fake Drake," sent chills through the music industry and led Congress (and many states) to rush in to propose and pass new legislation.[41] The song was created by a songwriter who used an AI model to produce a sound file that sounded as if it were sung by Drake, with additional vocals by The Weeknd, when in reality it was not.[42] The song confused some listeners into thinking it was an authentic recording of the pair and it quickly rose on the Spotify charts.[43] Universal Music Group got platforms, such as Apple Music and Spotify, to take the song down, claiming that the use infringed their copyrights in existing sound recordings and musical compositions.[44]

Universal and other record labels have now filed a number of copyright infringement cases claiming that both the training of these AI models on copyrighted sound recordings and their outputs infringe the record companies' sound recordings. Their complaints allege that the outputs are infringing in part because they "contain vocals that are instantly recognizable due to their resemblance to those of famous recording artists," whose voices are captured in sound recordings that the record companies own.[45] Depending on how these cases are decided, they may shore up and demonstrate how copyright can be used to protect not only specific sound recordings, but perhaps also a person's voice more generally on the basis of its prior capture in copyrighted works.[46]

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[41] *See, e.g.*, Cal. A.B. 1836, *supra* note 1; Elvis Act, *supra* note 1; No AI FRAUD Act, *supra* note 1; NO FAKES Act, *supra* note 1.

[42] *See The Ballad of 'Deepfake Drake,'* THE DAILY (Apr. 28, 2023), https://www.nytimes.com/2023/04/28/podcasts/the-daily/ai-deepfake-drake.html [perma.cc/A9WH-36JB]. During the live lecture, I played a clip of the "Heart on My Sleeve" audio file. (Excerpts of the audio file are available at *id.* starting at approximately 6:00).

[43] *Id.*; *see also* Larisha Paul & Ethan Millman, *Viral Drake and the Weeknd AI Collaboration Pulled from Apple, Spotify*, ROLLING STONE (Apr. 17, 2023), https://www.rollingstone.com/music/music-news/viral-drake-and-the-weeknd-collaboration-is-completely-ai-generated-1234716154/ [perma.cc/HV59-2GUV].

[44] *Id.*; Chris Willman, *AI-Generated FAKE 'Drake'/'Weeknd' Collaboration, 'Heart on My Sleeve,' Delights Fans and Sets Off Industry Alarm Bells*, VARIETY (Apr. 17, 2023), https://variety.com/2023/music/news/fake-ai-generated-drake-weeknd-collaboration-heart-on-my-sleeve-1235585451/ [perma.cc/K67U-NK3S].

[45] Complaint, UMG v. Suno, Inc., No. 1:24-cv-11611, at 23 (D. Mass., filed June 24, 2024); *see also* Complaint, UMG v. Uncharted, Inc., No. 1:24-cv-04777 (S.D.N.Y., filed June 25, 2024) (objecting to use of recording artists' "vocal style" from copyrighted recordings in AI-generated output, including outputs similar to Mariah Carey, Bruce Springsteen, and Frank Sinatra).

[46] The Copyright Act could limit some of these claims because it does not extend to copyright holders of sound recordings the right to stop newly created sound-alike recordings. Section 114(b) provides that "[t]he exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound

Suits arising from digital replica claims are also on the rise. The estate of comedian George Carlin recently sued when an allegedly AI-generated version of Carlin was used to produce a new and unauthorized performance by the late Carlin.[47] The suit settled but included a copyright infringement claim.[48] It is early days for these generative AI lawsuits, and it may take years for many of the surrounding questions about copyright infringement to be jurisprudentially resolved. But these claims are proliferating and there are colorable arguments that both the inputs and outputs are infringing.[49]

Given the breadth of the derivative works right, preexisting works primarily composed of the fixation of a person's performance, perhaps including digital replicas, might be infringed by new performances by the same person, whether AI-generated or authentic. This could be true even if the output is *not* a close reproduction of a particular recording.[50] While many uses of a person's voice or image may be fair or protected by the First Amendment, this is a different question

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recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." 17 U.S.C. § 114(b). This allows new sound recordings to be made even if they imitate a prior person's performance and vocal style (subject to meeting the applicable requirements for licensing the underlying musical compositions). The ongoing allowance of sound-alikes, however, is unstable and the Copyright Act might be amended to remove this provision. The revocation or limitation of the sound-alike provision has already been floated at several hearings and meetings surrounding Congress's consideration of various digital replica laws. Digital replica laws themselves could limit the scope of Section 114(b), particularly if passed at the federal level. Regardless, many of the AI-generated sound files are not sound-alikes of existing sound recordings, even if they are similar to them, and would therefore not qualify for the § 114 exemption. In addition, state publicity laws may create liability for sound-alikes using a person's voice (or something similar) even if the copyright in the underlying sound recording is not infringed. *See* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. Davis L. Rev. 199, 219–22 (2002) (discussing this issue).

[47] Complaint, Main Sequence v. Dudesy, No. 2:24-cv-00711 (C.D. Cal., filed Jan. 25, 2024). The defendants used Carlin's voice in the performance but only his name and likeness to promote the comedy special on their podcast. *Id.*

[48] *See id.*; Kyle Orland, *Following Lawsuit, Rep Admits "AI" George was Human-Written*, Ars Technica (Jan. 27. 2024), https://arstechnica.com/ai/2024/01/george-carlins-heirs-sue-comedy-podcast-over-ai-generated-impression [perma.cc/7Q5D-ML7B] (reporting that the material performed turned out not to be AI-generated).

[49] Although a recent lawsuit by voiceover artists against an AI company that created digital clones of their voices did not include a copyright claim, the plaintiffs could have done so if the copyright holders of prior fixations of these artists' works had been joined as plaintiffs or if the artists had held copyrights in fixations of their own performances. *Cf.* Lerhman v. Lovo, No. 1:24-cv-03770 (S.D.N.Y., filed May 16, 2024).

[50] *See* 17 U.S.C. §§ 101, 106(2); Andy Warhol Foundation for the Visual Arts v. Goldsmith, 598 U.S. 508, 529, 531–32, 535–49 (2023); *see also* Brief of Professors Peter S. Menell, Shyamkrishna Balganesh & Jane C. Ginsburg in Support of Respondents, Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, No. 21-689 (U.S., filed Aug. 11, 2022) (focusing on derivative works right as basis to reject fair use claim).

than whether two works that capture the same person's likeness, voice, or performance are substantially similar to one another as a matter of copyright law and infringe as a prima facie matter the rights of reproduction, display, performance, distribution, and, in particular, the right to prepare derivative works.

III. WEAPONIZING COPYRIGHT LAW

Given the increasing pressure to wield existing and future copyright (and quasi-copyright) protection to control a person's likeness, voice, and performances, it is essential to acknowledge some of the ways that copyright law can be used to control the attributes of subjects captured within protectable works. Recognizing this power is crucial at this juncture so that copyright can either be better calibrated to protect its subjects or so that it can be properly bounded to allow for the enforcement of other laws that protect against unauthorized uses of a person's identity.

A. Copyright for Privacy

Copyright has long been a tool for protecting privacy. Copyright provides a basis to exclude others from circulating one's works, including private diaries, drawings, photographs, and home movies that a person may not want to be publicly distributed or revealed. Even when a person wants to share a work with the world, copyright allows them to control how these works get distributed and adapted. To the extent we recognize—as we should—that such rights have nonmarket bases, we most often think of these aspects of copyright law as being about protecting authorial or moral rights. This understanding focuses on the rights of first dissemination and publication, attribution, and artistic integrity.[51] But copyright also has been wielded to extend broader privacy protection in which the copyright holder is focused on controlling how their likenesses, voices, and other aspects of themselves are used.[52] Such objectives go beyond authorial interests or financial or career objectives. Shyamkrishna Balganesh has termed these claims "privative copyright claims," and noted that in these instances copyright law does not function solely as a market-based interest but instead "melds considerations of privacy, personality, and autonomy."[53]

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[51] *See* Shyamkrishna Balganesh, *Privative Copyright*, 73 VANDERBILT L. REV. 1, 11 (2020); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 23–25 (1992).

[52] *See, e.g.*, Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012) (using copyright to limit circulation of plaintiff in wet t-shirt contest); Michaels v. Internet Entm't Grp., Inc., 5 F. Supp.2d 823 (C.D. Cal. 1998) (using copyright to limit circulation of sex tape); *see also* Balganesh, *supra* note 51, at 4–5 (noting uses of copyright to limit the circulation of intimate images); *infra* notes 71–75 and accompanying text.

[53] Balganesh, *supra* note 51, at 3. I note that Balganesh focuses on this from an author's perspective, but these claims are broader than only those that are authorial in nature.

These privacy and personality-oriented aspects of copyright served as an important model for developing and recognizing the independent right of privacy in the United States. When confronted in the mid-nineteenth century with the advent of improved technology that allowed anyone to snap a photo of an unwitting person on the street or to print a person's likeness without their permission, legal scholars and other commentators gravitated toward copyright law to address the problem.[54] Numerous articles at the time called for the subjects of photographs to own the images taken of them and to be able to have control over future prints. In 1869, an article in the *American Law Register* contended that we each have a "natural copyright" in our own "features."[55] Other essays called for a new right, one modeled on copyright, called a "portrait right" which would provide the ability to control "publicity" about oneself and particularly the use of one's image.[56] In Samuel Warren and Louis Brandeis's influential 1890 article, *The Right to Privacy*, they located the right of privacy in a variety of already-existing legal doctrines. They particularly highlighted the way common law copyright prevented the unauthorized publication of works intended to remain private.[57] The *Prince Albert v. Strange* case to which Warren and Brandeis cited illustrates this aspect of copyright law. In the case, the court extended copyright protection to prevent the unauthorized publication of Prince Albert and Queen Victoria's personal etchings. Some of the etchings at issue were images of the two

[54] For further background on these technological shifts and "[c]alls for redress" *see* ROTHMAN, *supra* note 3, at 12–20.

[55] John A. Jameson, *The Legal Relations of Photographs*, 17 AM. L. REG. 1 (1869) (calling for allowing copyright-like suits by sitters brought against those who used their photographs without permission, including the photographers who had taken the images).

[56] *See, e.g.*, *Portrait Right*, 12 WASH. L. REP. 353 (1884); *See also* ROTHMAN, *supra* note 3, at 17 & n. 11. Some initially justified the extension of a right to control unauthorized uses of a person's likeness on the basis that one had ownership rights in oneself. *See, e.g.*, Brown Chemical Co. v. Meyer, 139 U.S. 542 (1891); Edison v Edison Polyform Mfg. Co., 67 A. 392 (N.J. Ch. 1907); Roberson v. Rochester Folding Box Co., 64 N.E. 442, 449–50 (N.Y. 1902) (Gray, J., dissenting) (suggesting that every person has a "property right" in their own "person" and image, *id.* at 450); *The Right to Privacy*, 6 GREEN BAG 498, 499 (1894). *See also* Rothman, *supra* note 23, at 1297 & nn. 108–110.

[57] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–209 (1890). *See also* Balganesh, *supra* note 51, at 28–33 (discussing this aspect of the Warren & Brandeis article and critiquing the subsequent interpretation of it as narrowing the privacy-oriented aspects of copyright law). Notably, the divide between property and personality is far muddier than Warren and Brandeis acknowledged, particularly when it comes to property rights in people. *See id.*; Jennifer E. Rothman, *Postmortem Publicity Rights at the Property-Personality Divide*, in PRIVATE LAW THEORY & INTELLECTUAL PROPERTY (Shyamkrishna Balganesh, Poorna Mysoor & Henry Smith eds., forthcoming 2025) (hereinafter "*Postmortem Publicity Rights*"); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 204–08 (2012) (hereinafter "*The Inalienable Right*").

of them, as well as likenesses of their children.[58] The English court concluded that the Prince and Queen's property right in the etchings supported an injunction against any use of the etchings, even including a bar on any description of the etchings. The court explicitly noted that this "*property*" interest protected the royals' right to "*privacy*."[59] In such an instance, copyright law was being used in the same way that we see state privacy and publicity laws function today.[60]

Even though this privacy-oriented role of copyright law is often forgotten or dismissed, it was widely understood as an important part of copyright in the late 1800s and early 1900s. And as courts (and legislatures) embraced the more explicit protection of a person's name and likeness under state privacy law, they understood this right to be a powerful exclusionary property right analogous to the privacy-focused aspects of copyright. In 1894, a Massachusetts court recognized a "personal portrait" right and viewed it in the "same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk."[61]

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[58] Prince Albert v. Strange, (1849) 41 Eng. Rep. 1171 (Ch.); *see also* Molly Torsen Stech, *Co-Authorship between Photographers and Portrait Subjects*, 25 VAND. J. ENT. & TECH. L. 53, 72–73 (2023) (describing the etchings).

[59] *Prince Albert*, 41 Eng. Rep. at 1179 (emphasis added).

[60] Countries considered part of the Commonwealth have historically vested more control into subjects of photographs as part of their copyright laws than the U.S. has. *See* New Zealand Copyright Act § 4 (1896), PRIMARY SOURCES ON COPYRIGHT (1450-1900) (eds. L. Bently & M. Kretschmer) (restricting reproduction or publication of "portraits of an individual or individuals" without written permission); ELENA COOPER, ART & MODERN COPYRIGHT 163–203 (2018) (considering the role copyright played during the nineteenth century to protect the privacy and publicity rights of those who sat for portraits and photographs particularly in Commonwealth countries). This protection for subjects, at least those viewed as commissioning works, continues to exist in some Commonwealth jurisdictions. *See, e.g.*, New Zealand Copyright Act § 105, "Right to privacy of certain photographs and films" (1994) (allowing a person who commissioned a photograph or film "for private or domestic purposes" to restrict the distribution, publication, and exhibition of such works even if they are not the copyright holder); Durand v. Molino [2000] E.C.D.R. 320 (U.K. Ch. 1999) (holding that a commissioner of a portrait could "prevent reproductions by others of his portrait" and was entitled to a "perpetual exclusive license under the copyright").

[61] Corliss v. E. W. Walker Co., 64 F. 280, 282 (D. Mass. 1894). The court nevertheless rejected the plaintiff's claim because the decedent was a well known inventor and the use of his name and likeness was in a "biographical sketch" about him. *Id. See also Roberson*, 171 N.Y. at 564 (Gray, J., dissenting) (contending that each person has control over their own likeness for the same reasons copyright protects works from unauthorized dissemination). Judge Gray's dissent in *Roberson* ultimately persuaded New York to adopt a right of privacy by statute and the Supreme Court of Georgia to adopt his opinion in its own decision extending such a privacy right under the state's common law. *See* Act of Apr. 6, 1903, ch. 132, 1903 N.Y. Laws 308; Pavesich v. New England Life Ins. Co., 50 S.E. 68,

Today, copyright continues to function to protect the privacy and personality interests of those depicted or recorded in a copyrighted work—but this is only true if the subjects of these works hold the copyrights to them. In such instances, people have been able to use copyright to stop unauthorized uses of their likenesses, voices, and performances. In fact, this feature of copyright has often outperformed state right of publicity and privacy claims. One reason this is true is because copyright does not require additional showings that many state publicity laws do, such as that a use was for a defendant's advantage or for a commercial or trade purpose.[62] Nor does a plaintiff in a copyright claim have to establish that the person whose identity was used is commercially valuable, as some misguided state publicity and privacy laws require.[63] The Copyright Act also provides significant statutory damages that help ordinary people bring claims when a right of publicity claim, even if meritorious, might not be worth the cost of litigation.[64] Some states' publicity laws also provide broad public interest or newsworthy exceptions, as well as statutory exemptions for expressive works that far exceed what fair use analysis in copyright law would allow.[65] Copyright law is also not usually subject to independent First Amendment analysis, in contrast to right of publicity and privacy claims.[66] In addition, when right of publicity and copyright claims are both possible, some courts have concluded that the publicity claims are

76–77 (Ga. 1905) (adopting Judge Gray's dissent as the law in Georgia in part on the basis that each person holds a property right in their own "features".)

[62] *See, e.g.*, Cal. Civ. Code § 3344 (West 2023) (limiting claims to those "for purposes of advertising or selling" in context of "products, merchandise, goods or services"); N.Y. Civ. Rights L. §§ 50, 51 (McKinney 2023) (limiting to uses for "advertising purposes or for the purposes of trade"); Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (1983) (stating common law rule that use must be for the "defendant's advantage, commercially or otherwise").

[63] *See, e.g.*, Ind. Code Ann. § 32-36-1-6 (West 2024); 42 Pa. Stat. and Cons. Stat. Ann. § 8316 (West 2024); Balsley v. LFP, Inc., 2010 WL 11561844 (N.D. Ohio 2010) (rejecting publicity claim because the use did not exploit the commercial value of the plaintiff); *see also* Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 Virg. L. Rev. 1929, 1951–52 (2015) (discussing the different state approaches to a commercial value requirement).

[64] 17 U.S.C. § 504 (providing statutory damages up to $150,000 for copyright claims).

[65] *See, e.g.*, Cal. Civ. Code §§ 3344, 3344.1 (West 2023); 765 Ill. Comp. Stat. Ann. 1075/35 (West 2023); Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1184 (9th Cir. 2012) (noting that use of images was newsworthy, defeating the publicity and privacy claims under California law but not the copyright claim); *Balsley*, 2010 WL 11561844 at *10 (rejecting privacy and publicity claims under Ohio law because the use was "in the public interest").

[66] *Compare* Golan v. Holder, 565 U.S. 302, 327–30 (2012) (concluding that there will rarely be First Amendment review in copyright cases) *with* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (applying First Amendment analysis in right of publicity case); Sarver v. Chartier, 813 F.3d 891, 903–06 (9th Cir. 2016) (same).

preempted by copyright law and have limited plaintiffs exclusively to a copyright claim for a possible remedy.[67]

Another reason copyright claims have played an increasing role in protecting against unauthorized uses of people's likenesses and performances in recent decades is Section 230 of the Communications Decency Act. Section 230 protects websites and other interactive computer services from liability for third-party speech.[68] There is a circuit split on whether state right of publicity claims fall within this provision,[69] but other privacy, defamation, and infliction of emotional distress claims have all been held barred under Section 230. Copyright claims, however, are not subject to Section 230 immunity, because they fall within its exception for intellectual property laws.[70] Accordingly, copyright has been an effective way to get unauthorized images and recordings taken down from the internet.[71]

Given these supercharged powers of copyright law, there are unsurprisingly numerous examples of plaintiffs using copyright as an alternative to or in addition to right of publicity and privacy claims. I will highlight two illustrative examples. The first involves a non-author copyright holder, Catherine Balsley, who acquired the copyright to photographs taken of her specifically to stop their dissemination. Balsley participated in a wet t-shirt contest during which her photograph was taken without permission. The photographs were posted online and then ultimately in *Hustler* magazine. She tracked down the photographer, purchased the copyrights to the photos, and then wielded copyright to win her claim against the publisher.[72] Notably, the copyright claim prevailed while Balsley's publicity and privacy claims were rejected.[73]

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[67] *See, e.g.*, Jules Jordan Video, Inc. v. 144942 Canada, Inc., 617 F.3d 1146 (9th Cir. 2010) (holding that right of publicity claim was preempted because the primary complaint was the copying of a performance captured in a copyrighted work); *see also* Fleet v. CBS, Inc., 50 Cal. App. 4th 1911 (1996) (rejecting right of publicity claim by actors when a movie they had agreed to be in was circulated without their being paid for their performances because claim was preempted by copyright law); *but see* Michaels v. Internet Entm't Grp., Inc., 5 F. Supp.2d 823 (C.D. Cal. 1998) (allowing both copyright and publicity claims arising out of unauthorized circulation of videotape showing plaintiff engaging in sex).

[68] 47 U.S.C. § 230.

[69] *Compare* Hepp v. Facebook, 14 F.4th 204 (3d Cir. 2021) *with* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

[70] 47 U.S.C. § 230 (e)(2).

[71] *Cf.* Garcia v. Google, Inc., 786 F. 3d 733 (9th Cir. 2015) (noting that Google would not take a video down of plaintiff based on publicity, privacy, or other tort claims, but was initially ordered to do so on the basis of a copyright claim).

[72] Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012).

[73] The district court concluded that the publicity and privacy claims failed because the plaintiff was a newscaster and the use in the magazine was deemed in the "public interest." The court also thought that the publicity claim failed because the use did not focus on exploiting her "commercial value." Balsley v. LFP, Inc., 2010 WL 11561844 (N.D. Ohio 2010).

Similarly, in *Monge v. Maya Magazines, Inc.*, the Ninth Circuit Court of Appeals held that copyright law provided a claim against the unauthorized circulation of wedding photographs of a celebrity couple that were used in a gossip magazine. As in *Balsley*, the trial court had dismissed the plaintiffs' right of publicity and privacy claims. But because the plaintiffs held the copyrights to the photographs, copyright again succeeded where the privacy and publicity claims had failed.[74] In its decision allowing the copyright claim, the appellate court emphasized the privacy-oriented nature of their complaint. The court favored rejecting the fair use defense in the case in part because of the plaintiffs' "privacy" interest and the couple's intention to keep the photographs solely for their "private use." The court highlighted the importance of privacy in copyright law, particularly when evaluating the fair use of unpublished works.[75]

Even when these personality and privacy-protective features of copyright are recognized, this aspect of copyright has often focused on an understanding of privacy in the sense of secrecy or "potentially embarrassing content."[76] But these aspects of copyright are far broader and more akin to right of publicity claims. Copyright can protect against the dissemination of things that are not secret or confidential but are aspects of a person that they wish to exercise control over, such as their voice, likeness, and performances. We could think of these uses of copyright as an unintended consequence of copyright protection but, given the longstanding recognition dating back at least to the 1700s of this privacy-protective aspect of copyright law, it may make more sense to understand them as a *feature* of copyright law rather than a bug or defect.

I note that copyright law's ability to protect against unauthorized uses of a person's identity adds to what I have dubbed elsewhere as the "identity thicket."[77] Copyright law, like trademark, unfair competition, and consumer protection laws, combines with state privacy and publicity laws to create a series of overlapping and sometimes conflicting entitlements to both use and bar the use of a person's name, likeness, voice, and other indicia of their identity.

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[74] Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012).

[75] *Id.* at 1176, 1178, 1182. The Ninth Circuit's privacy-oriented understanding of copyright's fair use doctrine derives in part from the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). In *Harper & Row*, THE NATION published excerpts of former President Ford's memoir in advance of the memoir's publication. The Court held that the story about Ford's forthcoming memoir infringed the publisher's copyright, rejecting a fair use defense. The Court endorsed robust protection for unpublished works and highlighted copyright law's role in protecting "interests in confidentiality and creative control." *Id.* at 564, 555. Even though Congress amended the Copyright Act in 1992 to emphasize that the unpublished nature of a work did not "bar a finding of fair use," the disfavoring of fair use in such instances remains. *See* H.R. Rep. No. 102–286, at 9 (1992), reprinted in 1992 U.S.C.C.A.N. 2553, 2561; *Monge*, 688 F.3d at 1178.

[76] Balganesh, *supra* note 51, at 40.

[77] Rothman, *supra* note 23, at 1273, 1278–89.

While sometimes these claims work in harmony to protect what I call the identity-holder, in other instances copyright law can work against the interests of identity-holders who have been captured as subjects in copyrighted works.[78] In these instances copyright is weaponized against the subjects captured in works rather than functioning to promote their interests. I will consider this aspect of copyright law next.

B. Copyright Against Its Subjects

The flipside of copyright being able to protect the privacy and identity rights of authors and other holders of copyrighted works that depict them is that the same powers of copyright can be weaponized against them if they do *not* hold the copyrights. Copyright holders can not only enforce their rights against third parties, but also against the human *subjects* of these works if the subjects use the works without permission or create new works that are deemed substantially similar or derivative of the copyright holder's work.

Celebrity photographers, often referred to as the paparazzi, have notoriously sued their prey for sharing the photographs taken of them.[79] For example, a photographer sued Emily Ratajkowski, a model and actress, for posting a photo of herself on Instagram that he had taken of her without her permission. The photo displayed her walking down the street with a flower arrangement purposefully in front of her face. (*See* Figure 5.)

[78] I developed the term "identity-holder" in earlier work. *See* Rothman, *The Inalienable Right*, *supra* note 57, at 186–87. I use the term *identity-holder* to designate the underlying natural person upon whom the right of publicity and sometimes trademarks are based. *See also* Rothman, *supra* note 23, at 1273–74, 1280–89 & n. 2. The same framework could be employed to distinguish identity-holders from copyright holders.

[79] *See, e.g.*, O'Neil v. Ratajkowski, 563 F. Supp.3d 112 (S.D.N.Y. 2021) (allowing copyright claim to proceed against model for posting plaintiff's photo of her on Instagram when image taken was without her permission by the "paparazzi photographer"); Sands v. Lopez, No. 1:20-cv-3126 (S.D.N.Y., filed Apr. 20, 2020) (actor sued for posting photo of herself); Xclusive-Lee, Inc. v. Hadid, 2019 WL 3281013, No. 19-CV-520 (E.D.N.Y. 2019) (allowing motion to dismiss in copyright infringement claim by photographer against model who posted photograph of herself on Instagram but only because photograph was not registered); *see also* Kelly Leigh-Cooper, *Why Celebrities are Being Sued Over Images of Themselves*, BBC (Feb. 5, 2019), https://www.bbc.com/news/world-us-canada-47128788 [perma.cc/447G-X73T]; Stech, *supra* note 58, at 74–80 (describing some of these examples).

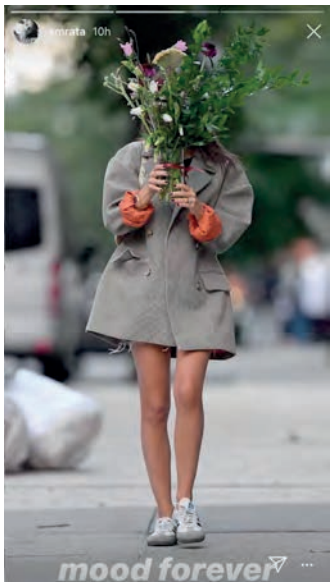

Figure 5. Photograph as posted with Ratajkowski's added comment "Mood Forever," Exhibit B, Complaint, O'Neil v. Ratajkowski, *563 F. Supp.3d 112 (S.D.N.Y. 2021).*

Ratajkowski claimed that she pointedly posted this image on her social media to comment on how even when she tried to "shield" herself from the paparazzi, her picture was taken and published and there was little she could do to stop it.[80]

In a different context, the actor Brooke Shields was forced to license a copyrighted photograph of herself for use in her autobiography (after she had failed to stop the photographer who took it from circulating it and other images of her naked that he had taken when she was only ten years old). The right of publicity claim she brought against the photographer had failed because her mother had given permission for him to take Shields's picture. To add salt to her wounds, when Shields wanted to write about this traumatic experience and share an illustrative image, she had to get the photographer's permission to do so.[81]

In some contexts, subjects of copyrighted works can use other laws, such as right of publicity, privacy, defamation, intimate image, trademark, and unfair competition laws to bring claims when someone incorporates them into a copyrighted work without permission or circulates that work. But as Shields's and Ratajkowski's experiences reveal, in many instances a person will not be able to

[80] Emily Ratajkowski, *Buying Myself Back: When Does a Model Own Her Own Image?*, The Cut (Sept. 15, 2020), https://www.thecut.com/article/emily-ratajkowski-owning-my-image-essay.html [perma.cc/D79N-7P8U].
[81] Shields v. Gross, 448 N.E.2d 108, 109 (N.Y. 1983).

stop others from fixing them in a copyrighted work and profiting from that work. This is so for some good reasons, but also sometimes reasons that are overly deferential to the power of copyright. Many fixations of a person's identity will be (and should be) protected by the First Amendment or other defenses. Copyright law also frequently and appropriately preempts state publicity claims. But sometimes copyright can unduly limit the autonomy and dignity of people who do not hold the copyrights to the works in which they are captured. Even when an initial fixation was with authorization, copyright's derivative works right empowers copyright holders to create new works that include the person without seeking additional consent. The boundaries of when copyright is or is not limited by publicity rights is particularly muddled in such derivative-works contexts.[82]

In sum, copyright provides many ways for copyright holders and their licensees to force people's likenesses, images, and performances to appear without the person's consent. With improvements in technology, there is increasing concern that when a person gives permission to appear in one copyrighted work, they could be replicated in new works without additional permission. This issue drove SAG-AFTRA's recent strike and negotiations with television and movie producers. SAG successfully limited how studios could use digital replicas of an actor (at least for the term of the current contract).[83] The union and its members rightly are worried that once an actor's performance is captured it could be reused to produce new performances of that person without additional compensation and without hiring that actor or another actor to perform in a new role. These concerns have also led SAG to successfully get state legislatures to amend state labor codes to limit the enforcement of contracts that may allow for such reuses. However, as drafted, some of these laws problematically allow a third party to own or control a person's digital replica forever—and do not sufficiently protect those who do not have union representation.[84]

Even before the improvements in AI technology that we are confronting today, copyright has been wielded to reuse a person's performance in new works. The 1997 decision in *Ahn v. Midway Manufacturing* provides such an example. In *Ahn*, a number of martial artists, dancers, and actors sued a video game company after they were recorded and used in the arcade games *Mortal Kombat*

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[82] *See* ROTHMAN, *supra* note 3, at 170–77.

[83] SAG-AFTRA, TV/THEATRICAL CONTRACTS 2023 (2023), https://deadline.com/wp-content/uploads/2023/11/2023-SAG-AFTRA-TV-Theatrical-MOA_F.pdf [perma.cc/H938-XJZ7].

[84] *See, e.g.*, Cal. Labor Code § 927 (added by Cal. A.B. 2602, signed Sept. 17, 2024); N.Y. S.B. 7676 (signed by Governor Dec. 13, 2024). Although the recent California and New York laws require a lawyer or union representation for digital replica contracts to be enforceable, this will not sufficiently protect people. Lawyers will be of little use to those with limited bargaining power. Student-athletes and aspiring recording artists and models may be particularly vulnerable, as well as actors who are not yet protected by a union or who sign agreements with non-signatories to labor agreements.

and *Mortal Kombat II*. The initial uses were authorized but the plaintiffs' performances were subsequently reused without additional consent in home video game versions. The court held that copyright law preempted the plaintiffs' right of publicity claims because the copyright holder—the video game maker—had a right to prepare derivative works based on the original copyrighted fixations of the plaintiffs' performances.[85] Copyright holders have long used copyrighted works in new contexts without seeking additional permission from performers captured in the original. Consider Debra Laws's failed lawsuit against Sony Music which had licensed the sound recording that captured Laws's voice for use in a new song by Jennifer Lopez and L.L. Cool J. The Ninth Circuit held that copyright law preempted Laws's right of publicity claim.[86] Whatever the merits of preemption in these two cases, they suggest that if we allow the copyrightability of voice clones and digital replicas, or provide copyright-like protection of them through new laws, then the restrictions on captured subjects could be extreme—at least if those whose attributes are captured in the clones and replicas do not hold the copyright to these works.

Consider how the next up-and-coming Taylor Swift might be asked to sign the rights to her digital replica or voice clone to a record label to get her first recording contract. The label could then force her to virtually appear as a hologram in concerts or create songs using her voice that she never performed. And the record label could even block her from recording her own songs or performing if the label either holds an independent digital replica right or copyright is read broadly to include as copyrightable her digital replica, voice clone, or even her voice as captured in sound recordings.[87] If copyright law is read this broadly, Swift's new recordings will be deemed substantially similar to her voice, digital replica, and prior performances to which the record label holds the rights. Even if copyright isn't read to extend this far, the proposed legislation in Congress and already passed in some states would enable such property rights in digital replicas to be held or controlled by others. It is not just recording artists and actors who are at risk. Consider student athletes who are increasingly being pursued by managers and agents to commercialize their names and likenesses.

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[85] Ahn v. Midway Mfg. Co, 965 F. Supp. 1134 (N.D. Ill. 1997); *see also* ROTHMAN, *supra* note 3, at 175–77 (describing litigation and settlement arising out of use of prior footage to deceive viewers into thinking that the original actor who played George McFly in the 1985 movie *Back to the Future*, Crispin Glover, also performed in its sequel when he did not).

[86] Laws v. Sony Music Entm't, Inc., 448 F.3d 1134 (9th Cir. 2006).

[87] This hypothetical is adapted from one I shared with Congress during my testimony on several draft bills proposed to address concerns over AI and digital replicas. *See* Statement of Jennifer E. Rothman at 10, Hearing on Artificial Intelligence and Intellectual Property: Part II – Identity in the Age of AI Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary, 118th Cong. (Feb. 2, 2024), available at https://rightofpublicityroadmap.com/wp-content/uploads/2024/02/Rothman_Statement_Subcommittee-on-IP_February-2_2024_Submitted.pdf [perma.cc/HJ2K-4E3E].

Could copyright or digital replica laws be weaponized against them? History suggests that this is a strong possibility.

Given that digital replicas could be increasingly difficult to differentiate from authentic performances and could potentially be copyrightable or protected by a copyright-like right, what should copyright law do?

IV. RECLAIMING COPYRIGHT'S PERSONALITY

Going forward, we have important choices to make about the direction of copyright law. In broad strokes, we could have copyright more robustly embrace its personality-protective features or instead have it back away from them. Courts and scholars have long recognized that copyright law can help protect the personality interests of both authors and the subjects of copyrightable works. This aspect and history of copyright law is often forgotten and overlooked but it continues to play a role in the application of copyright law today.[88] More robustly recognizing this aspect of copyright law in the slice of copyright cases that involve the capture and reuse of people is a viable option and more important than ever. If copyright law amplifies these personality-oriented aspects, then it must recognize that these features of copyright are not always in harmony with the dominant market-based understanding of copyright. If instead copyright law takes the second path—of copyright stepping back—it must then allow the protection of personality rights under different laws. Under such a solely market-driven vision of copyright law, digital replica laws must be understood as something quite different.[89]

What follows are some recommendations of how copyright should handle the coming (and existing) deluge of copyright or copyright-adjacent claims to key attributes of people. These recommendations should hold true whichever path copyright takes and can be understood either as internal or external limits on copyright. These principles should also apply to independent digital replica laws.

Human Subjects are Different. First off, copyright law must treat people differently. Capturing a vase of flowers in a photograph or film is not the same as capturing the image or voice of a real, living person. The mere fact that a person has been captured in a copyrighted work should not give an author or copyright holder or licensee control over how that person shows up in other contexts. For example, a record label's ownership of a sound recording should *not* entitle it to block future vocal performances by the person whose voice is captured in the

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[88] *Cf.* Rothman, *supra* note 23 *passim* (documenting a similar story in trademark and unfair competition law).

[89] *See* Jennifer E. Rothman, *Copyright Office Calls for Congressional Action on Digital Replicas*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Sept. 12, 2024), https://rightofpublicityroadmap.com/news_commentary/copyright-office-calls-for-congressional-action-on-digital-replicas/ [perma.cc/WGY3-CGZC] (noting the understandable copyright-oriented frame of the report but also its worrisome failure to consider "the impact of digital replicas on individuals' autonomy, livelihood, and dignity, as well as the danger of deepfakes to deceive the public").

copyrighted recording. Nor should a record company be able to reuse that vocal performance in a new context without obtaining further consent from that person. The same holds true—especially true—if digital replicas or voice clones are brought into the fold of copyrightable subject matter. And, if digital replica laws are separately enacted, they too must be significantly circumscribed to give control over a person's identity to that person themselves rather than importing wholesale a copyright model that allows for free transferability and broad licensing of all works.[90]

Self-Ownership. Second**,** and relatedly, no one other than the person themselves should be able to own that person's name, likeness, or voice and these rights should not be transferable during a person's lifetime. This holds true whether within or outside the copyright frame. Digital replica and voice clone rights must be treated differently than other forms of copyright or IP so that the underlying person remains in control of their own identities. Even though the licensing of replicas and clones should be allowed, it must be limited to instances in which the person themselves exercises ongoing control over how their likeness and voice is used. This requires more than general knowledge that a licensee might use a person's performance in audiovisual works—specific knowledge of the context and approval must be required. Otherwise, on day one of a broad license, a person's digital replica or likeness might appear in pornography and be widely circulated under the guise of "consent." Similarly, a digital replica might be animated saying or doing racist or other offensive things that the person never said in ways that will seem authentic to an audience—again under the cloak of authorization.

Such possibilities evoke broader policy concerns about the undermining of authenticity and potentially democracy itself, as well as the replacement of human labor. These concerns go far beyond the objectives of copyright, but copyright law either needs to recognize at least some of them as part of the slice of copyright law that protects personality-based interests, or it needs to provide greater breathing room for the protection of such interests, even when copyrighted works are involved.

Respecting Human Subjects. Third, copyright's human subjects deserve greater respect. There will be some instances in which a person's image or performance needs to be captured without permission—for example, this is the essence of photojournalism. But in many instances the capture and use of a person's image, voice, or likeness can be, and should be, with permission.

[90] There may be instances in which copyright law would preempt some of these claims, *see, e.g., Laws*, 448 F.3d 1134, or where some contractual limits might be enforceable, but there should be significant limits on when old performances can be used in new contexts or to create new performances without additional consent by the identity-holder, particularly when the new uses are deceptive as to the person's actual participation. Disclaimers disclosing whether the person participated in the new work may be helpful, but would not fully address the harms to the identity-holder or the likely deception of the public.

Consideration of who should own the copyright to photographs of a person, the sitter or the photographer, dates back to the 1800s. While photographers have largely won this debate as a default matter, this does not mean that their subjects should not have rights to determine how such images are used. And in some instances, the person captured should (and may well) have authorial rights. For example, when a person's performance is captured, the person may have an authorial claim over the performance if they developed it themselves. This is distinct from instances in which an actor is performing in a scene created by another and in which they have agreed to appear. Even in these instances, actors should have a say if these captured performances are altered or reused in new works without additional permission.[91] Again, this is distinct from the usual post-production editing and visual effects process that takes place in the process of putting together the original work, such as a film or television show.

Respecting subjects also means that those captured should have broader latitude to use these copyrighted works to describe their own lives. This could be understood as a thumb on the scale in fair use analysis in favor of subjects' uses of their own images and performances. Although reproducing multiple copies of a copyrighted work for commercial exploitation would be disfavored, a subject of a copyrighted work should be able to describe their lived experiences, especially in instances in which their image or performance was captured without their permission.[92]

Preemption and Personality Rights. Fourth, the balance of when copyright preempts publicity and privacy-based claims may need to be revisited. The convergence of personality rights and copyrightable subject matter threatens to upend not only existing copyright preemption doctrine, but also the important and longstanding control each of us has over our own voices, likenesses, and performances. Technology has long allowed people's voices and likenesses once captured to be reused in new contexts. However, current technology makes it increasingly possible to create new performances that an audience would have difficulty distinguishing from an authentic performance or appearance by the real person, making the threat posed by digital replicas and voice clones different from what has come before. Copyright law gives copyright owners the rights to reproduce copyrighted works and to prepare derivative works based on them. But the power of digital replicas to replace the underlying person's future performances should shore up the argument that permission to give one performance does not give endless permission to others to create new performances using the captured material. In the context of this Lecture, I cannot

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[91] *Cf.* Beijing Treaty on Audiovisual Performances, adopted June 24, 2012, WIPO Doc. AVP/DC/20, 51 I.L.M. 1211 (providing a variety of rights to performers in a treaty that the U.S. has signed but not yet enacted).

[92] *Cf.* Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463 (2010) (contending that "identity-based uses of copyrighted works [] that are integral to constructing personal identity" deserve greater protection from liability for copyright infringement).

do a deeper dive into preemption analysis—though I have elsewhere—but it is essential to think through what it means if digital replicas, voice clones, and other attributes of people are more robustly protected under copyright law or a novel federal digital replica law.[93] If such federal laws preempt state publicity and privacy laws, it is even more essential that these federal laws robustly protect the interests of identity holders and their retention of the ownership and control of their digital replicas, voices, and likenesses.[94]

Postmortem Digital Replica Rights. Finally, just as digital replica laws should not simply grab off the shelf a copyright-based model to determine the scope of rights and their transferability, digital replica laws should also not be moored to copyright when it comes to the term and scope of postmortem rights. I have recently developed this consideration at greater length in a co-authored article with Anita Allen, titled *Postmortem Privacy*.[95] In the article, we conclude that postmortem publicity and digital replica rights should likely be much shorter in duration than the copyright term. Such postmortem laws should not be constructed to maximize the wealth of unrelated companies or even of relatives of the deceased or to incentivize the creation of a market in dead people. Instead, postmortem terms should further the decedents' wishes of how they would want to be treated in the afterlife and allow those close to the deceased to limit the commercialization of their loved ones in the aftermath of their death. The current proposed (and passed) digital replicas laws have it exactly backwards, extending longer terms for those who exploit rather than protect the deceased from such commercialization. These misguided bills and laws are in part a result of the thoughtless importation of a copyright frame to a complicated area that involves privacy and personality-based interests more so than market-based ones.[96]

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[93] *See* ROTHMAN, *supra* note 3, at 160–79; Jennifer E. Rothman, *The Other Side of* Garcia*: The Right of Publicity and Copyright Preemption*, 39 COLUM. L & ARTS 441 (2016); Rothman, *supra* note 46. I note that some of my recommendations for where to draw the lines of preemption of state publicity laws have shifted over time and must continue to shift in favor of allowing publicity claims in the context of indistinguishable digital replicas and voice clones. *See* ROTHMAN, *supra* note 3, at 160–79 (recommending greater deference to publicity laws in the context of some derivative works and digital replicas).

[94] By so contending, I am not suggesting that a preemptive federal law should not be undertaken. It may be the best way to generate more uniformity and clarity, and even better protection of identity-holders, but if digital replica laws (whether at the federal or state level) are only understood narrowly as market-based they will thwart rather than achieve such objectives.

[95] Anita L. Allen & Jennifer E. Rothman, *Postmortem Privacy*, 123 MICH. L. REV. 285 (2024).

[96] *See id.* at 343–44, 348–49 & n. 298. In addition, in contrast to copyright law it does not make sense to consider postmortem publicity rights (or digital replica rights) as a continuation of a property right that existed when a person was alive. *See* Rothman, *Postmortem Publicity Rights*, *supra* note 57.

CONCLUSION

So where does this leave us? Today, it is true that people are not copyrightable. But if we stay on our current path, this may not remain the case. Already copyright law is and will increasingly be leveraged to assert rights very close to those that would be provided by allowing copyrights in people or at least to our external attributes. We have a choice going forward. We can either make copyright take personality rights more seriously or copyright should leave room to allow other laws that protect personality rights to do their job. Regardless of which path we choose for copyright law, the expanding ways in which copyright and technology will allow increasing control over people's likenesses, voices, and performances require us to rethink copyright's relationship with its subjects.

Failing to address this reality risks each of us losing control over our own voices and likenesses as copyright moves in to assert a one-size-fits-all approach to something that is fundamentally different and requires a customized fit. Copyright cannot be imported wholesale to protect against a worrisome rise in unauthorized digital replicas—or at least not a version of copyright that is solely market-focused. Copyright law could, however, more robustly protect personality rights and recognize that when people are captured in copyrightable works copyright must function differently.

Even though it is often overlooked, copyright has served personality interests and has been utilized to protect them in ways even stronger than state publicity and privacy laws. This is what trademark and unfair competition law has sometimes done, and, as I have recently contended, should do more explicitly and reliably.[97] Copyright could as well. Such an embrace of personality rights within copyright law would not require making people copyrightable or even part of a copyright-like system. Instead, it would empower subjects to not be burdened forever by being captured in copyrighted works and would empower them with some latitude to use these works. This understanding may suggest that digital replicas and voice clones should not be considered copyrightable subject matter. Alternatively, if they are, they must be understood as a unique form of copyrightable matter that must only be held by the underlying person, at least while they are alive.

If copyright does not take on this more robust role of protecting personality interests, then it must give greater respect to state publicity laws (or alternatively Congress must adopt a genuinely personality-protective federal law) that would restrict these aspects of copyright law. Similarly, the exponentially growing digital replica laws must look to privacy and publicity rights as their model, instead of to copyright. When doing so, however, these replica laws must embrace a view of

[97] *See* ROTHMAN, *supra* note 23, at 1323–32, 1349–50.

publicity and privacy laws rooted in protecting personality-based interests as well as economic ones.[98]

Remaining on the current trajectory is not a good option. We will either upend state right of publicity and privacy laws with overly restrictive copyright or digital replica laws, or we will upend copyright in ways we do not want. State publicity and privacy laws should not thwart the legitimate exploitation of existing works by copyright holders, but they should allow identity-holders to control how and when they appear in public and in copyrightable works. Taking the personhood out of rights to a person's own identity is a dangerous path and one copyright law should not take. The central rights to a person's own voice, likeness, and future performances have to remain within the hands of the person themselves, at least while they are alive. This should be true under state publicity laws and must also be the case when copyright enters the stage.

[98] *See* Rothman, *supra* note 3, at 11–44; Post & Rothman, *supra* note 22, at 93–125 (documenting and analyzing the current incorporation of both economic and noneconomic rights and concerns within today's right of publicity laws).