ELVIS Act: From Authorship to Ownership in Intellectual Property Law

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Abstract

ELVIS Act, being the quintessence of the exaggerated power of publicity rights, demonstrates how authorship in both copyright law and publicity rights is devoured by ownership, as analyzed in two axes: the axis of ideology and the axis of technology. The axis of ideology is discussed in the survey of the evolution of Elvis's publicity rights in contradictory adjudication and legislation, focusing on its posthumous trait as a main vehicle of cultural control. The axis of technology demonstrated how the fear of technology leads to the strengthening of private ownership of publicity rights at the expense of the public from the enactment of the DMCA to the ELVIS Act. Publicity rights morphed into a legal hybrid, culminating in conjoined authorship with copyright law, due to their blurry theoretical infrastructure. Analyzing what constitutes authorship through the different components of the "if value, then right" ("IVTR") principle, which seems to govern the evolution of authorship since its inception, results in the conclusion that enhanced ownership is legally granted for diminished authorship in terms of cultural values. The price is paid by the public as demonstrated by the implications of the ELVIS Act on the Elvis impersonators phenomenon.

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Introduction

Elvis's name does not need an explanation unless you are a newcomer from Mars. Even his surname is superfluous. Also known as the "King of Rock and Roll," (or simply, "the King"), Elvis completely dominated the pop music charts from 1956 through 1958, in addition to setting unprecedented records for the size of his audiences in Ed Sullivan's Sunday night variety show, acting in box office smash films, and amassing a large fandom.[1] Elvis's cultural influence and impact are far more important than being the "teen idol of his decade, greeted everywhere by screaming hordes of young women."[2] Elvis inspired generations of musicians, including the first generation of rockabillies, such as Jerry Lee Lewis and Carl Perkins, and prominent figures like John Lennon, Bruce Springsteen, Bob Dylan, and Prince.[3] While the embodiment of "rags to riches" and the quintessence of the American dream, "Elvis" transformed into a cultural myth. As phrased by Dave Marsh:

> You did not have to want to be a rock and roll star or even a musician to want to be like Elvis—which meant, ultimately, to be free and uninhibited and yet still a part of the everyday. Literally millions of people—an entire generation or two—defined their sense of personal style and ambition in terms that Elvis first personified. [4]

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1 Dave Marsh, *Elvis Presley*, ENCYCLOPEDIA BRITANNICA, (24 May. 2024), https://www.britannica.com/biography/Elvis-Presley.

2 *Id.*

3 *Id.*: "It was impossible to think of a rock star of any importance who did not owe an explicit debt to Presley."

4 *Id.*

The Elvis myth is still very much alive long after the King is dead.[5] Legally, Elvis's publicity rights are protected by the Ensuring Likeness, Voice, and Image Security Act of 2024 ("the ELVIS Act"), which goes into effect on July 1, 2024, replacing the previous 1984 Act and defining anew the ancient conflict of authorship versus ownership in one's name, image, and likeness in terms of cultural control.[6] The right of publicity is often summarized as "the right to prevent unauthorized commercial uses of one's name, image, or likeness (NIL) or other aspects of one's identity (such as one's voice)."[7] In practice, publicity rights developed to become the strongest Intellectual Property ("IP") right regarding celebrities, illustrating the exaggerated cultural power of cultural myths in their legal authorship. Tracing the history and evolution of Elvis's publicity rights leads to the argument that the right of publicity challenges the very concept of authorship and cultural control devoured by private ownership in three interfacing legal IP rights: copyright law, publicity rights in general, and Elvis's publicity rights in particular.

Scholars claim that "Tennessee's right of publicity was developed not just because of Elvis, it was developed for Elvis."[8] At its first step, the right of publicity as a privacy tort meant "the right to be left alone."[9] The second crucial step was Dean William Prosser's article analyzing the right of privacy as composed of four independent torts, wherein the fourth one is characterized as using the plaintiff's name or likeness for the defendant's benefit.[10] Thus, the right to privacy is unsatisfactory for the protection of celebrities' commercial interests.[11] While the right of publicity is intended to control the commercial use of one's identity and prevent its unauthorized appropriation, the right to privacy is meant to protect hurt feelings.[12]

The third step in creating publicity rights as property rights came from Judge

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5 *Id.*: Impersonators are legion. His biggest fans—working-class white women, almost exclusively—passed their fanaticism on to their children, or at least to a surprising number of daughters. "Elvis has left the building," but those who are still inside have decided to carry on regardless.

6 THE ENSURING LIKENESS, VOICE, AND IMAGE SECURITY ACT OF 2024 (HB 2091/SB 2096) (replacing THE PERSONAL RIGHTS PROTECTION ACT OF 1984, TENN. CODE ANN. § 47-25-1103 (2021) ("the 1984 Act")) [hereinafter THE ELVIS ACT].

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

8 Peter Jr. Colin, *Elvis and Prince: Personality Rights Guidance for Dead Celebrities and the Lawyers and Legislatures Who Protect Them,* THE NATIONAL LAW REVIEW, (9/1/2020), https://www.natlaw-review.com/article/elvis-and-prince-personality-rights-guidance-dead-celebrities-and-lawyers-and; Jennifer E. Rothman, *Tennessee Legislature Sends Right of Publicity Bill to Governor's Desk,* (March 18, 2024), https://rightofpublicityroadmap.com/news_commentary/tennessee-legislature-sends-right-of-publicity-bill-to-governors-desk/ [hereinafter Rothman, *Tennessee Legislature*]: "Tennessee's right of publicity law has long been driven by the ghost of Elvis."

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

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

11 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953). *See also* Tonia Hap Murphy, *The Right of Publicity: Worth a Closer Look in the Classroom*, 36 J. LEGAL STUD. EDUC. 237 (2019); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 167 (1993).

12 Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1345–46 (2009) [hereinafter Rosenthal Kwall, *A Perspective*].

Jerome Frank in *Haelan Laboratories*.[13] *Haelan Laboratories* dealt with two rival companies selling chewing gum.[14] The plaintiff made a contract with a ballplayer, according to which the latter granted the former the exclusive right to use the photographs of leading baseball players for a stated term plus an option for extension to enhance the plaintiff's sales.[15] While aware of this contract, the defendant induced the same ballplayer to let him use his photograph for the same period and purpose as previously agreed to with his rival, claiming publicity rights as a tort of privacy.[16] Thus, the consent to use the players' pictures released him of the liability for invasion of privacy that could be incurred due to the unauthorized use under Sections 50 and 51 of the New York Civil Rights Law (N.Y. CIV. RIGHTS LAW).[17] It follows, that as the statutory right of privacy is not a property right, this is not an assignable right.[18] Hence, the plaintiff had no cause of action, as no legal interest was invaded.[19]

Haelan Laboratories held that the celebrity should have an independent right to the publicity value of its photographs, and this right could be licensed or assigned, with the licensee or assignee able to enforce such right against third parties.[20] Thus, transforming the right of publicity from a privacy tort into a property right. The *Haelan Laboratories's* rationale was that the privacy tort meant to protect hurt feelings is not sufficient for the protection of celebrities' commercial interests.[21]

The fourth step in morphing publicity rights into pure property rights was Melville Nimmer's seminal article, in which he argued that the right of publicity is an independent legal right designed to protect celebrities' commercial interests in their identities.[22] The fifth step in the evolution of the right of publicity is its embedment in copyright law, as seen in the only publicity rights case to reach the Supreme Court, *Zacchini v. Scripps-Howard Broadcasting Co*., in which the plaintiff's entire 15-second act was copied by the defendant.[23] Zacchini's act, known as the "human cannonball" act, in which he was shot from a cannon into a net 200 feet away, was wholly broadcasted in the defendant's evening news despite the appellant's objection, for which he sued for publicity rights infringement.[24] The Ohio

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13 *Halean Laboratories, Inc.*, 202 F.2d.
14 *Id.* at 867.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id. See also* Hap Murphy, *supra* note 11.
21 *Halean Laboratories, Inc.*, 202 F.2d at 868:

> We think that, in addition to and independent of that right of privacy. . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture. . . For it is common knowledge that many prominent persons. . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements.

22 Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).
23 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
24 *Id.* at 563–64.

Supreme Court found the defendant constitutionally privileged under the First Amendment, as the public interest in its newscasts matters gained supremacy over Zacchini's state-law right of publicity.[25]

The Supreme Court of the United States held that the First and Fourteenth Amendments do not immunize the news media when they broadcast a performer's entire act without his consent, thereby violating the right of publicity.[26] The fact that Zacchini's entire act was broadcast made the analogy to forbidden copying, which is the focus of copyright infringement lawsuits, seem natural. Regardless of scholarship that claims that the right of publicity should have been initially embedded in trademark law, due to the *Zacchini* case, the conjoined authorship of the right of publicity with copyright law was born.[27]

Unauthorized appropriation of the right of publicity requires no misrepresentation.[28] The scope of the right can encompass all of a celebrity's personality characteristics.[29] Internally, the fair use doctrine that was meant to reconcile publicity rights with both copyright law and the First Amendment to the U.S. Constitution morphed into different and contradictory approaches that rendered their implementation even blurrier.[30] Therefore, while the right of publicity is copyrightable, it is not subordinate to the fragile balance in copyright law between authorship and the public domain. In addition, because of its commerciality, the right of publicity is out of constitutional scope, which shields news, entertainment, and commerce differently, particularly with the rise of so-called "hybrid speech," which

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25 *Id.* at 582.

26 *Id.* at 575.

27 Mark A. Lemley appropriates this continuous error to the *Zacchini* case, *supra* note 23, in which the whole plaintiff's show was copied by the defendant, rendering the case to look "more like a common law copyright claim than a traditional right of publicity claim." *See generally* Mark A. Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153, 1170 n.76 (2019) [hereinafter Lemley, *Privacy*].

28 *See Zacchini*, *supra* note 23, at 573 ("'false light' cases . . . minimize publication of the damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing").

29 For the current legal status of the right of publicity in each state, *see Right of Publicity, Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes [hereinafter RIGHT OF PUBLICITY]; *Right of Publicity State-by-State*, ROTHMAN'S ROADMAP TO RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com [hereinafter ROTHMAN'S ROADMAP].

30 Rosenthal Kwall, *A Perspective*, *supra* note 12, offers the Transformative Use Test (*id.* at 1357–58), the Predominant Use Test (*id.* at 1357–59), the Actual Malice Test (*id.* at 1359–60), the Relatedness/Restatement Approach (*id.* at 1361), and the Ad Hoc Balancing (*id.* at 1362). *See also* Matthew Savare & John Wintermute, *A Haystack in a Hurricane: Right of Publicity Doctrine Continues to Clash with New Media*, 32(8) COMPUT. & INTERNET LAW. 1, 2 (Aug. 2015). In comparing Rosenthal Kwall's classifications to Savare & Wintermute's, what Rosenthal Kwall regards as the ad hoc balancing approach, is not existent in Savare & Wintermute's, who refer to the Rogers test, from Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989), which, in turn, is not considered to be an independent test in its merit, in Rosenthal Kwall's classification. The courts complicate this unsolved matter by using a combination of those tests, or by creating new ad hoc tests, thus, lacking consistency and clarity. So, as Rosenthal Kwall, *id.* at 1361–62, demonstrates, in ETW Corp. v. Jireh Publishing, Inc., 332 F.3d 915 (6th Cir. 2003), three tests were in use: the transformative test, the relatedness/restatement approach, and the actual malice test.

blends them all.[31]

Externally, the preemption doctrine that should restrain the legal power of publicity rights was not implemented by the judiciary in its interpretation of copyright law.[32] The preemption doctrine aims to keep the Constitution's supremacy by nullifying a state statute or common law that contradicts an act of Congress.[33] Prima facie, Section 301 of the U.S. Copyright Act of 1976 is in harmony with the supremacy clause.[34] In practice, the preemption doctrine demonstrates the conjoined—yet different—authorship of publicity rights and copyright law. It clarifies that only copyrightable subject matter and rights equivalent to those granted under federal copyright law will be preempted.[35] However, the sine qua non of copyrightability is the fixation of the relevant work in a tangible form.[36] Regarding celebrity authorship, the very dynamic personality is the work in question, hence, tangibility is irreconcilable with the celebrity's lack of fixation.[37]

Therefore, the celebrity is not regarded as a text within the scope of "writings" within the meaning of the Copyright Clause, as personality traits that characterize publicity rights are not considered the "tangible form" required for fixation in copyright; thus, the celebrity fails to cross the threshold of copyrightability.[38] However, this is only the first prong, known as the subject matter prong.[39] Even if the first prong is met, there is still the second prong—known as the general scope requirement—to consider.[40]

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[31] White v. Samsung Electronics. America, Inc., 989 F.2d 1512, 1516 (9th Cir. 1993) (for the exaggerated legal power of publicity right due to its bypassing copyright law's constraints); Matthew Savare, *Image is Everything*, INTELLECTUAL PROPERTY MAGAZINE 52 (Mar. 2013), https://www.lowenstein.com/media/4712/publicity-rights.pdf, claims the issue of the "hybrid speech" to be the most complicated and disputed in copyright claims.

[32] For the failure of implementing the preemption doctrine as a potential restraint of publicity right, *see generally* Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUM. J.L. & ARTS 441, 446 (2016); David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 702–03 (1981); ROSENTHAL KWALL, *supra* note 7, at 113.

[33] Rothman, *The Other Side of Garcia*, 39 COLUM. J.L. & ARTS at 446.

[34] 17 U.S.C. § 301 (Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. III 1979)) [hereinafter U.S. COPYRIGHT ACT OF 1976].

[35] 17 U.S.C. § 301(b)(1).

[36] Shipley, *supra* note 32, at 704.

[37] Rothman, *The Other Side of Garcia*, *supra* note 32, at 441:

> Are we talking about the author of the underlying film or the underlying work, or instead, are we perhaps talking about a different type of authorship—meaning authorship over oneself, one's name, or one's likeness? This latter notion of being the author of oneself is the purview of the right of publicity.

[38] 1 NIMMER ON COPYRIGHT, § 1.17 (2023) [hereinafter NIMMER ON COPYRIGHT]:

> To specify, the "work" that is the subject of the right of publicity is the *persona*, i.e., the name and likeness of a celebrity or other individual. A *persona* can hardly be said to constitute a "writing" of an "author" within the meaning of the Copyright Clause of the Constitution. A *fortiori*, it is not a "work of authorship" under the Act.

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

[40] *Id.*

The second prong reflects the core of the preemption's rationale "to ensure a nationwide, uniform federal copyright system, [by] ousting the states from imposing any control of the area."[41] Therefore, the next prong covers the works of authorship that copyright law protects, including the reproduction, adaptation, publication, performance, and display of those works.[42] Hence, the preemption doctrine protects only rights that are equivalent to copyright.[43] However, this does not apply to an alleged infringement of additional rights.[44] It follows, that the preemption doctrine that could restrain the right of publicity, especially regarding the duration after the celebrity's death, is left out of its legal scope.

As a result, the current 1984 Act of Tennessee, while initially granting publicity rights for ten years posthumously, actually allows the exclusive use of personality rights to continue in perpetuity, so long as publicities' heirs keep using them at least every two years afterward.[45] This striking contradiction with the Copyright Act cannot be preempted. However, this article attempts to demonstrate that this is only one aspect of Elvis's publicity rights, reflecting how celebrity authorship is devoured by private ownership.

Part I analyzes the ideology axis of Elvis's publicity rights—as demonstrated by Elvis's adjudication and legislation chronology, which interfaced and contradicted each other—and focuses on the main issue of publicity rights as posthumous rights. Thus, part I reflects the publicity rights history of indecisive doctrinal infrastructure, shifting from privacy tort to property rights, and evolving into a legal hybrid. Part II analyzes the consistent technology axis as the new measure for authorship from the Digital Millennium Copyright Act ("DMCA") enactment to the ELVIS Act.[46] Accordingly, technologies meant to ease the access to culture for the public ended up enhancing a contradictory trajectory, siding with strong lobbies that advocated private ownership at the expense of public authorship in its cultural myth. Both the DMCA and the ELVIS Act, while fighting technological threads for infringement, either regarding copyright law covered by the former or publicity rights concerning the latter, curtailed the public domain, letting the means reach much further than their designed end. Not only does the ELVIS Act broaden liability, but it also narrows its fair use exemptions. This outcome has nothing to do with its initial cause of fighting Artificial Intelligence (AI) deep fakes.

Part III discusses authorship as ownership since its inception through the "if

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41 In re Jackson, 972 F.3d 25, 42 (2d Cir. 2020).

42 U.S. Copyright Act of 1976, § 301(a).

43 Urbont v. Sony Music Entm't, 831 F.3d 80, 93 (2d Cir. 2016) (holding the U.S. Copyright Act of 1976 to preempt "state law claims asserting rights equivalent to those protected within the general scope of the statute.").

44 *See* Shipley, *supra* note 32, at 702–03.

45 PERSONAL RIGHTS PROTECTION ACT OF 1984, TENN. CODE ANN. § 47-25-1103 (2021); ROTHMAN'S ROADMAP, *supra* note 29, Tennessee, https://rightofpublicityroadmap.com/state_page/tennessee/. For a detailed history of Tennessee adjudication and legislation, *see* Colin, *supra* note 8.

46 DIGITAL MILLENNIUM COPYRIGHT ACT, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of the U.S. Copyright Act of 1976).

value, then right" ("IVTR") principle as a legal axiom of authorship, demonstrating how deconstructing each of its components and their interfacing relations led to different concepts of authorship in Western culture. The first component of the IVTR principle, the "if," deals with who is acknowledged in a given system as an author—namely, to whom a legal system is willing to attribute authorship. Therefore, the "if" component of the IVTR principle governs the attribution threshold. Second, does authorship offer any value that is worth its recognition? Only a positive answer will cross the threshold of the "value" component of the IVTR principle. Third, the "then" component of the IVTR principle requires an answer to the question of why authorship should merit rewards. Fourth, the "right" component of the IVTR principle requires an answer to the question of what kind of rights become authorship. Following the drastic changes both in the perceptions of each of the IVTR principle's components and their interface with each other might decipher the authorship constitution, by and large, and publicity rights conjoined authorship as a legal hybrid, in particular. Part III attempts to demonstrate not only how unsolved authorship is devoured by ownership, but its cultural price as well, focusing on the Elvis impersonation phenomenon as analyzed by adjudication and compared with the implications of the ELVIS Act.

I. The Axis of Ideology: Elvis's Adjudication and Legislation Chronology

A. From Assignability to Descendibility

This part argues that the publicity rights history of indecisive doctrinal infrastructure is reflected in each stage of the relevant adjudication and legislation regarding Elvis's publicity rights. Hence, the first step is the purveyance of the adjudication and legislation regarding Elvis's publicity rights, focusing on their interfacing influence. As this part attempts to demonstrate, the core of the matter is the right of publicity as a posthumous right, as this trait is the turning point of its evolution from a tort into a property right.

The conflict between contradictory approaches regarding the legal power of Presley's publicity rights is demonstrated by analyzing the different ideologies expressed by the United States Court of Appeal for the Second Circuit versus the United States Court of Appeal for the Sixth Circuit under similar circumstances. In *Factors Etc., v. Pro Arts, Inc.*, the court granted the plaintiffs-appellees ("Factors") injunctive relief and damages based upon the defendants-appellants ("Pro Arts") alleged misappropriation and unauthorized use of the name and likeness of Elvis due to the latter's printing and marketing of Elvis's poster immediately following his death entitled "IN MEMORY" and bearing the dates of his birth and death below the photograph shown in the poster.[47]

Pro Arts was warned by Factors that "if it did not discontinue the sale of the poster, it would be subject to a lawsuit for injunctive relief, damages, and an

[47] Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978).

accounting."[48] Notwithstanding, Pro Arts filed suit in "the United States District Court for the Northern District of Ohio seeking a declaratory judgment of non-infringement of the rights claimed by Factors."[49] When Factors discovered it had been sued in Ohio, it sued Pro Arts in the United States District Court for the Southern District of New York.[50] Although publicity rights as posthumous rights would be enacted in New York only in 2020, the assignability factor decided its postmortem legal power both in *Factors Etc., v. Pro Arts* and in a similar case tried in the same district court, namely *Factors Etc., Inc. v. Creative Card Co.*[51]

The creation of the "Elvis persona" and its capitalization when Elvis was alive both by himself and his manager, Colonel Tom Parker, caused Elvis's publicity rights to survive his death because it was exercised during his lifetime and legally assigned to Factors.[52] Neither the District Court nor the appellant court distinguished Elvis's publicity rights as intangible property rights whether exploited in his lifetime or posthumously.[53]

The United States Court of Appeals for the Sixth Circuit ruled differently in *Memphis Development, Etc. v. Factors Etc., Inc*. ("*Memphis Development*").[54] The issue in question was a lawsuit against the appellant, who wanted to erect a large bronze statue of Elvis in downtown Memphis in his honor, shortly after his death.[55] The appellant's initiative to encourage public donations by granting an eight-inch pewter replica of the proposed statue to donors of $25 or more was held by the District Court for the Western District of Tennessee as infringing the posthumous publicity rights of Elvis.[56]

Memphis Development held no posthumous rights regarding publicity rights, neither according to Tennessee law, nor according to the court's interpretation of "practical and policy considerations, the treatment of other similar rights in our legal system, the relative weight of the conflicting interests of the parties, and certain moral presuppositions concerning death, privacy, inheritability and economic opportunity."[57]

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48 *Id.* at 217.
49 *Id.*
50 Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288, 289-90 (S.D.N.Y. 1977).
51 Factors Etc., Inc. v. Creative Card Co., 444 F. Supp. 279, 283-85 (S.D.N.Y. 1977); for publicity rights as posthumous rights in New York, *see* Right of Publicity State-by-State, ROTHMAN'S ROADMAP, New York, https://rightofpublicityroadmap.com/state_page/new-york/.
52 *Factors Etc., Inc.*, 579 F.2d at 219.
53 Factors Etc. Inc. v. Creative Card Co., 444 F. Supp. 279, 284 (S.D.N.Y. 1977) and Factors Etc., Inc. v. Pro Arts, Inc., 444 F. Supp. 288, 290 (S.D.N.Y. 1977); Factors Etc. Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979). *See also* Estate of Elvis Presley v. Russen,513 F. Supp. 1339, 1354-55 (D.N.J. 1981) (reaching the same conclusion while applying New Jersey law).
54 Memphis Development, Etc. v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980).
55 *Id.* at 957.
56 Memphis Development Foundation v. Factors, Etc. Inc., 441 F. Supp. 1323, 1324 (W.D. Tenn. 1977).
57 *Memphis Development, Etc.*, 616 F.2d at 958.

The exploitation of publicity rights during Elvis's lifetime, which was the game changer for the United States Court of Appeals for the Second Circuit, did not change the *Memphis Development* court's view.

Heavily influenced by John Rawls's theory of distributive justice, according to which the basic motivations for success or excellence are linked to the desire for respect and goodwill of other persons while exercising skills and abilities, this rationale is weakened once the desire to exploit fame is left for the commercial advantage of one's heirs.[58] Consequently, making publicity rights posthumous has nothing to do with "inspiring the creative endeavors of individuals in our society."[59] Although *Memphis Development* does not mention *Zaccihini's* anchoring publicity rights under copyright law, the main argument to dismiss the claim is anchored in the most influential approach of copyright law infrastructure: the incentive approach.[60] Balancing the incentive argumentations versus the fact that Elvis exploited his publicity rights in his lifetime, while the latter was dominant in the previous adjudication, the *Memphis Development* Court refused to let it gain supremacy:

> The question is whether the specific identification and use of the opportunity during life is sufficient to convert it into an inheritable property right after death. We do not think that whatever minimal benefit to society may result from the added motivation and extra creativity supposedly encouraged by allowing a person to pass on his fame for the commercial use of his heirs or assigns outweighs the considerations discussed above.[61]

However, the battle between the two circuits was not over. Pro Arts appealed to the United States Court of Appeals for the Second Circuit, claiming the factual issues or legal questions still unsolved by the preliminary injunction it got should be decided by Tennessee law as manifested by the Sixth Circuit's ruling in *Memphis Development*.[62] Notwithstanding their differences, the Second Circuit accepted the Sixth Circuit's decision as the legally abiding authority.[63]

As a result, the Tennessee General Assembly enacted the 1984 Act, ensuring personality rights are posthumous rights as well.[64] Ironically, while the scope of the

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[58] JOHN RAWLS, A THEORY OF JUSTICE 426-27 (1971):

> [Such] activities are more enjoyable because they satisfy the desire for variety and novelty of experience, and leave room for feats of ingenuity and invention. They also evoke the pleasures of anticipation and surprise, and often the overall form of the activity, its structural development, is fascinating and beautiful.

[59] *Memphis Development, Etc.*, 616 F.2d at 959.

[60] *See generally Memphis Development, Etc.*, 616 F.2d.

[61] *Id*. at 960.

[62] *Id.* at 280.

[63] Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 282-83 (2d Cir. 1981), cert. denied, 456 U.S. 927 (1982).

[64] PERSONAL RIGHTS PROTECTION ACT OF 1984, TENN. CODE ANN. § 47-25-1103 (2021); ROTHMAN'S ROADMAP, *supra* note 29, Tennessee, https://rightofpublicityroadmap.com/state_page/tennessee/. For a detailed history of Tennessee adjudication and legislation, *see* Colin, *supra* note 8.

1984 Act is relatively narrow, covering only a person's "name, photograph, or likeness," its posthumous trait might be the strongest. While initially the 1984 Act grants publicity rights for ten years, once their heirs keep using them at least every two years afterward, the exclusive use of personality rights continues in perpetuity.[65] In short, the Tennessee legislature focused on the contested posthumous trait of publicity rights, neglecting other issues, especially a person's voice in legislation that owes its existence to the great singer's legacy.

In addition, the Tennessee Court of Appeals confirmed the descendibility of personality rights under common law in *Tennessee ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell* ("*Elvis Presley Int'l Mem'l Found*").[66] The appeal involved "a dispute between two not-for-profit corporations concerning their respective rights to use Elvis's name as part of their corporate names," while Elvis's "estate intervened on behalf of the defendant corporation," asserting it had given only the defendant corporation the coveted permission.[67] The plaintiff appealed, claiming no descendible right of publicity existed in Tennessee and that Elvis's name and image entered the public domain when he died.[68] The court sided with the Second Circuit ruling, focusing on publicity rights as a "species of intangible personal property" in contrast to the right to privacy, harshly criticizing the Sixth Circuit's approach.[69] Consequently, the right of publicity is descendible as any other property right according to Tennessee's common law.[70]

The final stage illustrating the right of publicity's transformation from a privacy tort into a property right is the ELVIS Act.[71] The ELVIS Act is titled "groundbreaking" because it goes beyond other states regarding AI-generated "deepfakes" in its prohibition on the unauthorized use of an individual's voice or likeness.[72] Not only is "voice" explicitly added to Tennessee's right of publicity, but its broad definition as "a sound in a medium that is readily identifiable and attributable to a particular individual, regardless of whether the sound contains the actual voice or a simulation of the voice of the individual" covers the use of AI technology, particularly in the recording industry.[73]

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[65] ROTHMAN'S ROADMAP, *supra* note 29, Tennessee, https://rightofpublicityroadmap.com/state_page/tennessee/.
[66] Tennessee ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 91-93 (Tenn. Ct. App. 1987).
[67] *Id.* at 91.
[68] *Id*. at 91–2.
[69] *Id*. at 95–7.
[70] *Id*. at 99: "We find this authority convincing and consistent with Tennessee's common law and, therefore, conclude that Elvis Presley's right of publicity survived his death and remains enforceable by his estate and those holding licenses from the estate."
[71] THE ELVIS ACT.
[72] JC Heinbockel, Lauren Gregory Leipold & Owen Wolfe, *The King is dead; long live the King: Tennessee's Updated Right of Publicity Statute,* SEYFARTH, (April 2, 2024), https://www.gadgetsgigabytesandgoodwill.com/2024/04/the-king-is-dead-long-live-the-king-tennessees-updated-right-of-publicity-statute/.
[73] THE ELVIS ACT § 3; ROTHMAN'S ROADMAP, *supra* note 29,

However, the real point of the ELVIS Act is the strengthening of publicity rights in both aspects: on the one hand, the ELVIS Act expands liability to any act of publishing, performing, distributing, transmitting, or otherwise "mak[ing] available to the public an individual's voice or likeness" without authorization, regardless of purpose, or the technology used.[74] On the other hand, under the ELVIS Act, the "fair use" exemption only applies "to the extent such use is protected by the First Amendment."[75] As summed up by Jennifer Rothman regarding the changes created by the ELVIS Act in comparison with the previous 1984 Act: "[t]hey greatly expand the sweep of Tennessee's statutory publicity protections, and greatly reduce the exemptions from liability at the same time."[76] The blurry legal infrastructure reflected in the aforementioned legislation leads us to our next step: the theoretical ground for publicity rights from their inception, which inevitably created a publicity rights legal hybrid, as discussed in the following section.

B. Elvis's Publicity Rights v. Publicity Rights Infrastructure

This part demonstrates how the crucial benchmarks of publicity rights' evolution are reflected in Elvis's publicity rights adjudication. First, the right of publicity grew out of the tort of appropriation when the courts acknowledged it as a privacy tort.[77] As Wendy Gordon has demonstrated, the tort of "misappropriation" was the first stage of the ideology of publicity rights, which was created in *International News Serv. v. Associated Press ("INS")* by creating legal doctrines based on the "restitutionary impulse."[78] The idea of sower against reaper was the anchor for the Court to enjoin the copying of uncopyrightable news on the ground, that the copyist was "reap[ing] where it ha[d] not sown."[79]

The tort of "misappropriation" was ground to the phenomenon called by Gordon "sisterly rights," or even "metastasis in the law," that begot publicity rights on the one hand, and dilution in trademark law, on the other hand, and which are all embedded in the restitution paradigm.[80] From a historical perspective, as long as the

https://rightofpublicityroadmap.com/news_commentary/tennessee-legislature-sends-right-of-publicity-bill-to-governors-desk/.

[74] THE ELVIS ACT § 6.

[75] *Id*. § 10.

[76] ROTHMAN'S ROADMAP, *supra* note 29, https://rightofpublicityroadmap.com/news_commentary/tennessee-legislature-sends-right-of-publicity-bill-to-governors-desk/; *see also Client Alert, Commentary*, *The ELVIS Act: Tennessee Shakes Up Its Right of Publicity Law and Takes On Generative AI*, LATHAM & WATKINS, April 8, 2024, Number 3244, file:///C:/Users/97252/Downloads/452e02f0-2d0b-4672-93c7-4c6b43c42191.pdf.

[77] Madow, *supra* note 11, at 167–72.

[78] Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 152-3 (1992); Int'l News Serv. v. Asso. Press, 248 U.S. 215, 239 (1918).

[79] Gordon, *supra* note 78, at 152.

[80] *Id.*; David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 467–68 (2003), regards publicity rights and dilution as a kind of metastasis in the law (relating to his previous article—David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981)):

> I turned then to what I had begun to see as a kind of metastasis in the law, particularly in the developing law of publicity, but no less so in the laws of trademark dilution

right of publicity as a privacy tort meant "the right to be left alone," it was plausible to deduce that publicity rights had no posthumous trait, as was ruled in *Memphis Development, etc. v. Factors Etc., Inc.*[81] The court rejected the idea of publicity rights as posthumous rights, ruling that "the law has always thought that leaving a good name to one's children is sufficient reward in itself for the individual."[82]

Even after *Haelan Laboratories,* which created a new economic conception of fame, *Memphis Development, etc. v. Factors Etc., Inc.* is not as contradictory as revealed by first impression because the distinction between the right of publicity as a tort of privacy and a property right was left unclear in *Haelan Laboratories*.[83] Judge Frank found that the "property right" label is immaterial, as the tag "property" simply symbolizes the fact that courts enforce a claim that has pecuniary worth.[84]

The first traits that indicate the transition of publicity rights from a tort to a property right are its assignability and duration.[85] However, both critical stages in publicity rights' evolution into a property right dealt explicitly only with its assignability. The *Haelan* court, which was the first to recognize publicity rights as a property right and to differentiate it from a tort of privacy, focused on the assignability factor.[86] Likewise, the gist of Nimmer's advocacy for publicity rights as a property right is their assignability and not their duration.[87]

Due to *Zacchini*'s legacy, as the fifth stage in the evolution of publicity rights, the right of publicity defends a variety of economic and noneconomic interests, begetting contradictory scholarship and an incoherent right. Therefore, some scholars stress the dignity and autonomy values that equate publicity rights to moral rights. [88] Being anchored in the restitution paradigm and evolving from a tort of privacy into a property right, while still being embedded in copyright law due to *Zacchini*'s legacy, morphed the right of publicity into a legal hybrid. Thus, conflicting theories attempt to justify the right of publicity conjoined, yet unequal, with authorship in copyright law.[89] It follows that each theory clings to a different historical source. Simply put,

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and unfair competition (of the misappropriation variety), both of which latter doctrines had troubled me before.

[81] Warren & Brandeis, *supra* note 9, at 193.

[82] *Memphis Development, Etc.*, 616 F.2d at 959.

[83] *See generally Haelan Laboratories, Inc.*, 202 F.2d.

[84] *Haelan Laboratories, Inc.*, 202 F.2d.

[85] Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 215 (2014) (describing how various states' enactments of a postmortem right of publicity statute were their reactions to the refusal of the courts to recognize publicity rights as posthumous while arguing that "the right of publicity should end with a person's death, or soon thereafter," to morph it back into a privacy tort).

[86] *Haelan Laboratories, Inc.*, 202 F.2d at 868.

[87] Nimmer, *supra* note 22, at 216.

[88] Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 166 [hereinafter Rosenthal Kwall, *Preserving Personality*].

[89] *See* Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1271 (2022) [hereinafter Rothman,

the question of controlling the celebrity's identity leads to a legal maze as the relevant causes for a lawsuit differ not only in different legislations, such as federal trademark law versus heterogeneous state laws, but in conflicting commercial and personal interests.[90]

Robert Post and Rothman classify the right of publicity into four distinct branches, reflecting its history: the right of dignity, the right of performance, the right of commercial value, and the right of control.[91] Accordingly, the right of commercial value correlates with trademark infringement, false endorsement, and dilution claims.[92] The right of performance correlates with *Zaccihini's* legacy.[93] The personal interests rooted in the right of publicity since its inception are divided into the right of control—reflecting the autonomy objective, and correlating with trademark and unfair competition laws—and the right of dignity.[94]

This legal maze is reflected in the contradictory adjudication concerning Elvis's publicity rights as posthumous rights. In *Factors Etc. v. Pro Arts*, the court held that the assignability of Elvis's publicity rights was satisfactory for its postmortem survival as well.[95] Quoting *Zaccihini,* the *Factors Etc*. court used the same rationale for defining the right of publicity as a property right rather than a privacy tort: "[t]he interest protected: is closely analogous to the goals of patent and copyright law, focusing on the right of individual to reap the reward of his endeavors and having little to do with protecting feeling or reputation."[96]

However, the ambiguity of the theoretical justification of publicity rights as manifested in *Haelan Laboratories* stays intact in *Factors Etc. v. Pro Arts*, as its label as a property right was considered negligible by the court, thus, enabling its

Navigating the Identity Thicket): ("Current jurisprudence provides little to no guidance on the most basic questions surrounding this thicket, such as what right to use a person's identity, if any, flows from the transfer of marks that incorporate indicia of a person's identity, and whether such transfers can empower a successor company to bar a person from using their own identity and, if so, when."); Gordon, *supra* note 78, at 152–53; Warren & Brandeis, *supra* note 9, at 193; Prosser, *supra* note 10, at 389; *Haelan Laboratories, Inc.*, 202 F.2d; Nimmer, *supra* note 22, at 216; *Zacchini* 433 U.S.

90 Rothman, *Navigating the Identity Thicket*, *supra* note 89, at 1273:

> Both trademark and unfair competition laws and state right of publicity laws protect against unauthorized uses of a person's identity. These distinct rights are thought to work in harmony to protect a person's commercial and personal interests. Increasingly, however, these rights are working at odds with one another and can point in different directions with regard to who controls a person's name, likeness, and broader indicia of identity. This creates an identity thicket of overlapping and conflicting rights over a person's identity.

91 Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 92–125 (2020).

92 *Id.* at 111–14.

93 *Id.* at 99–102.

94 *Id.* at 120–22.

95 *Factors Etc., Inc.*, 579 F.2d at 217; *Id*. at 221: "[t]he identification of this exclusive right belonging to Boxcar as a transferable property right compels the conclusion that the right survives Presley's death."

96 *Id.* at 220 (quoting Zacchini v. Howard Broadcasting, 97 S. Ct. 2849, 2856 (1977)) (internal citations omitted).

enforcement as a property right whereas the relevant New York legislation relates to the right of privacy, which was one of the main arguments for the appeal.[97]

In contrast, *Memphis Development* regarded publicity rights as affiliated with the individual soul in its desire to gain the appreciation of others by individual creativity, and not to its heirs' property interests.[98] The comparison of reputation to titles, friendship, or offices by the *Memphis Development* court equals publicity rights to its initiation as a tort of privacy, as all those assets terminate upon the individual's death. The *Memphis Development* court stated:

> Titles, offices and reputation are not inheritable. Neither are trust or distrust and friendship or enmity descendible. An employment contract during life does not create the right for heirs to take over the job. Fame falls in the same category as reputation; it is an attributes from which others may benefit but may not own.[99]

It is interesting to note that the *Memphis Development* court holding, while heavily criticized by the following adjudication and rendered obsolete by the Tennessee legislature, foresaw the fierce debate that followed the strengthening of publicity rights in a decade to come. Namely, not only does fame depend on the public and the media as well, regardless of any real value of the celebrity in question, but granting publicity rights posthumous legal power means "making fame the permanent right of a few individuals to the exclusion of the general public."[100] The comprehensive evolution of publicity rights is best demonstrated in *Elvis Presley Int'l Mem'l Found*. The core of the matter is not the mere reciting of publicity rights' seminal stages of evolvement, but how their narrative is told, as detailed in the following section.

C. The Narrative of Publicity Rights in Tennessee's Common Law

While it is tempting to regard the contribution of *Elvis Presley Int'l Mem'l Found.* to the ample adjudication concerning Presley's publicity rights as posthumous rights in Tennessee common law, this section offers a different view.[101] The narrative of publicity rights history in this case foresaw the development of Tennessee legislation as well as the embodiment of the publicity rights legal phenomenon.

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[97] *See generally Factors Etc., Inc.*, 579 F.2d.
[98] *See generally Memphis Development, Etc.*, 616 F.2d.
[99] *Memphis Development, Etc.*, 616 F.2d at 959.
[100] Compare Madow's seminal article, *supra* note 11, written in 1993 with the following quote from the *Memphis Development, Etc.*, 616 F.2d at 959 held thirteen years previously:

> Fame often is fortuitous and fleeting. It always depends on the participation of the public in the creation of an image. It usually depends on the communication of information about the famous person by the media. The intangible and shifting nature of fame and celebrity status, the presence of widespread public and press participation in its creation, the unusual psychic rewards and income that often flow from it during life and the fact that it may be created by bad as well as good conduct combine to create serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public.

[101] *See* Colin, *supra* note 8.

Before dwelling on the legal analysis, it is important to understand the premise of the *Elvis Presley Int'l Mem'l Found.* court. Acknowledging the celebrity culture manifested by Presley's death as even stronger than in his lifetime, the court focused on its financial implications.[102]

Quoting the confusion between the right of privacy and the right of publicity to characterize the state of the law as a "haystack in a hurricane" in previous adjudication, the *Elvis Presley Int'l Mem'l Found.* court starts with the origins of the right of privacy, paying the tributes to Warren and Brandeis' 1890 law review article.[103] It is obvious that the right of privacy designed by Warren and Brandeis is a far cry from the current publicity rights, hence, the court is willing to reread it in retrospect: namely, in terms of all the changes brought by "today's commercial exploitation of celebrities."[104] It is highly questionable if this condescending attitude is not emptying the right of privacy from its meaning, in cases even celebrities crave privacy and are not in a hurry to sell pieces of themselves. Indeed, Elvis's estate or other authorized corporations, while selling T-shirts, "are not selling clothing as much as they are selling the celebrities themselves," but the tort of privacy should not necessarily be devoured by publicity rights.[105]

While the next stage of publicity rights' evolution is Dean Prosser's four classifications of privacy tort, the *Elvis Presley Int'l Mem'l Found.* court proceeds to the third stage, namely, the *Haelan Laboratories* case. In doing so, the *Elvis Presley Int'l Mem'l Found.* court anchored the publicity rights theoretical infrastructure as stated by Dean Prosser in the *Haelan Laboratories* case, and not vice versa.[106] However, the blurry distinction between the tort of privacy and property rights that might lead to the conclusion of a new frame of property created by Dean Prosser is still unsolved as the *Elvis Presley Int'l Mem'l Found.* court has chosen to quote the problem, instead of solving it, as the court stated:

> In his later writings, Prosser characterized the right of publicity as an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trademark in his likeness. It seems quite

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[102] *Elvis Presley Int'l Mem'l Found.*, 733 S.W.2d at 92:

> These marketing activities presently bring in approximately fifty million dollars each year and provide the Presley estate with approximately $4.6 million in annual revenue. The commercial exploitation of Elvis Presley's name and likeness continues to be a profitable enterprise. It is against this backdrop that this dispute between these two corporations arose.

[103] *Id*. at 93 (quoting Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir. 1956)).

[104] *Id*. at 94:

> Writing in 1890, Warren and Brandeis could not have foreseen today's commercial exploitation of celebrities. They did not anticipate the changes that would be brought about by the growth of the advertising, motion picture, television and radio industries. American culture outgrew their concept of the right of privacy and soon began to push the common law to recognize and protect new and different rights and interests.

[105] *Id*. at 94.

[106] *See generally Haelan Laboratories, Inc.*, 202 F.2d.

> pointless to dispute over whether such a right is to be classified as "property;" it is at least clearly proprietary in nature.[107]

In a broader sense, the *Elvis Presley Int'l Mem'l Found.* court creates a whole arsenal of arguments for understanding the enlargement of publicity rights in Tennessee law. First, "In its broadest sense, property includes all rights that have value."[108] Second, the court recognizes the unjust enrichment principle as "one of the basic principles of Anglo-American jurisprudence."[109] The expansive view of the meaning of property makes the annulment between using publicity rights—either during the celebrity's life or posthumously—plausible.[110]

In this light, the third argument of the court that the descendibility of publicity rights "is consistent with a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death" gains its strength from the perception of property as a synonym to value.[111] Although recognized as a right *in rem*, the fourth argument is anchored in contract law because the exchanged value of publicity rights depends on their duration and exclusivity.[112] Consequently, the fifth argument strengthens the public's trust in avoiding deception regarding the authorization of goods and services, regardless of the use in the celebrity's lifetime or posthumously.[113]

No wonder that thinking in terms of trademark law leads the court to link the descendibility of publicity rights with avoiding unfair competition as well.[114] Thus, the *Elvis Presley Int'l Mem'l Found.* court followed the theoretical infrastructure of publicity rights as a legal hybrid, zigzagging between privacy, property rights, trademark law, and copyright law without a proper analysis of what is the value at stake, and is a property right the ultimate answer to the legal maze of publicity rights since their inception. The arguments regarding the property were broader in scope than the 1984 Act, as their common denominator was publicity rights as a property right posthumously. No wonder the Elvis Act went further, as discussed in the following part.

II. The Axis of Technology: Elvis Act v. Generative AI

A. Technology as the New Measure for Authorship

[107] *Id*. at 95 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 117, at 807 (4th ed. 1971)).

[108] *Id*. at 97.

[109] *Id*. at 98: "Second, it recognizes one of the basic principles of Anglo-American jurisprudence that "one may not reap where another has sown nor gather where another has strewn."

[110] *Id*: "Tennessee's common law thus embodies an expansive view of property. Unquestionably, a celebrity's right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract. Thus, there is ample basis for this Court to conclude that it is a species of intangible personal property." *Id*. at 97–98: "If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death."

[111] *Id*. at 98.

[112] *Id*.

[113] *Id*. at 99.

[114] *Id.*

The ELVIS Act leads us to the axis of technology. The question posed in this part is: How come technologies meant to ease the access to culture for the public, ended up enhancing a contradictory trajectory? Long before the ELVIS Act, the battle between the promise of advanced technologies and what they morphed to be was demonstrated in the wake of the DMCA enactment.[115] This legal tendency is consistent since the contrast between John Perry Barlow's declaring independence from copyright law due to new technologies rendered it redundant versus the DMCA.[116]

Although the definition of fixation has not been revised by new legislation, the digital society does not require attachment to a material object, as the sine qua non for copyrightability. Hence, Barlow's perception that copyright law is obsolete due to the absence of tangibility in digital files—which allows society to sell wine (the ideas) without bottles (the expressions crystallized by fixation)—makes sense.[117] However, the DMCA was initially meant to prevent copyright infringement by creating an anti-circumvention legal regime dealing with illegal technological access to copyrightable works, combining the Technology Protection Measures and Digital Rights Management created a new property right: the right to control access.[118] As shown in the *Urban-Quilter* study, only 31 percent of notices taken down in the United States, according to the DMCA, were concerned with copyright-infringing works.[119]

Thus, the DMCA renders copyright into "para-copyright," as ownership takes

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[115] DIGITAL MILLENNIUM COPYRIGHT ACT, *supra* note 46.

[116] John Perry Barlow, *Selling Wine without Bottles: The Economy of Mind on the Global Net*, 18 DUKE L. & TECH. REV. 8 (2019) [hereinafter Barlow, *Selling Wine Without Bottles*]. For the legacy of Barlow, Barlow, *Selling Wine Without Bottles*, *see generally* Joseph A. Tomain, "*The Virus of Liberty": John Perry Barlow, Internet Law, and Grateful Dead Studies*, 5 GRATEFUL DEAD STUD. 14, 16–17 (2022/2021) (relating to the interface of both Barlow, *Selling Wine Without Bottles* and John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (Feb. 8, 1996), https://www.eff.org/cyberspaceindependence).

[117] For further discussion of Barlow's vision *see* Mira Moldawer, *Cassandra's Curse or Cassandra's Triumph: Three Tales of Intellectual Property Revised*, 43 Loy. L.A. ENT. L. REV. 111, 115–16 (2023).

[118] Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc., 641 F. Supp. 2d 913, 943 (N.D. Cal. 2009), held that the DMCA did not create a new property right, but only distorted the balance between copyright owners and public users ("The DMCA did not create a new property right, as Real points out, but it did clearly rebalance the competing interests of copyright owners against copyright users. . .In so doing, the DMCA tipped the balance towards the copyright owners."). In practice, this mechanism creates a strong IP right, although unacknowledged as such. As Rachel Aridor-Hershkovitz, *Antitrust Law – A Stranger in the Wikinomics World? Regulating Anti-Competitive Use of the DRM/DMCA Regime*, 27 J. COMPUT. & INFO. L. 1, 34 (2009), notes:

> Determining that the purpose of the DMCA is to protect copyright owners' right to control the access to their copyrighted work further confirms the allegation that the DRM/DMCA regime gives copyright owners a new and strong right: the right to control any access, even if the purpose is for fair use, to their protected work.

[119] Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621, 667 fig.8 (2006).

over even when authorship is not established, regardless of digital fixation.[120] The obsolete Barlow bottles evolved into imaginary bottles that are far stronger than the original ones. The public domain starting point is already greatly diminished by enhanced "ownership," although the crucial fixation threshold for authorship is not fulfilled vis-à-vis current technology. It follows that authorship morphed into ownership.[121]

While copyright law and publicity rights conjoined authorship are still unsolved, the ownership in this evasive concept differentiates between the two. If so far, copyright law and publicity rights authorship were conjoined due to the same legal infrastructure, due to *Zaccihini's* legacy, their different safe harbors create a different concept of ownership regarding Internet service providers ("ISPs") liability. The gist of the DMCA is to shield ISPs from copyright liability once the mechanism of Notice and Takedown is implemented.[122] This immunity is nonexistent regarding user-generated content that violates the right of publicity, as it is not copyrightable.[123] As publicity rights ownership is not subordinate to the DMCA, § 230 of the Communications Decency Act (CDA) is the relevant legislation to shield ISPs from liability.[124]

Contradictory adjudication interprets § 230's limitations regarding its scope and essence vis-à-vis publicity rights. First, it is still unclear if publicity rights under state law are excluded from § 230. Second, there is no consensus that a publicity right is an IP right. Accordingly, each court carves out a new immunity versus publicity rights for ISPs. Therefore, we are still none the wiser regarding what construes publicity rights authorship, let alone its legal scope. However, contradictory adjudication regarding the scope and essence of § 230 reignites the unsolved dilemma of authorship versus ownership.[125] Different courts focus on the different stages of publicity rights evaluation, leading to contradictory legal results. Hence, as a privacy tort, the right of publicity is not an IP right, and ISPs are exempt from liability for its infringement on their platforms, whereas the result is the opposite if the right of publicity is considered an IP right, thus exempt from § 230 heavens which do not embrace IP infringement.

B. The ELVIS Act and the New Concept of Authorship

The ELVIS Act is not alone in attempting to fight the negative use of generated

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[120] For the history of the DMCA, *see* Moldawer, *supra* note 117, at 118–23.

[121] As to the development of the "para-copyright," created by the DRM/DMCA, *see* Aridor-Hershkovitz, *supra* note 118.

[122] *See generally* DIGITAL MILLENNIUM COPYRIGHT ACT, *supra* note 46.

[123] John Delaney & Sean West, *Nice for What? AI Drake and Publicity Rights Limitations in Policing AI-Generated Content*, Technology TRENDS (June 1, 2023), https://www.ageofdisruptionblog.com/2023/06/nice-for-what-ai-drake-and-publicity-rights-limitations-in-policing-ai-generated-content.

[124] 47 U.S.C. § 230.

[125] *Compare* Hepp v. Facebook, 14 F.4th 204 (3d Cir. 2021) (recognizing publicity rights as IP rights exempt from § 230 safe havens) *with* Ratermann v. Pierre Fabre U.S., Inc., 22-CV-325 (JMF) (S.D.N.Y. Jan. 17, 2023) (ruling for the opposite approach).

AI use—such as deep fakes—both at federal and state levels.[126] However, it is considered by prominent scholars to be "the broadest prohibition yet on the unauthorized use of an individual's voice or likeness."[127] The same phenomenon that happened with the enactment of the DMCA happens here: while fighting threads for infringement—either regarding copyright law or publicity rights concerning the ELVIS Act—the means reach much further than their designed end.

While explicitly adding legal protections against unauthorized uses of a person's voice, the basis for civil liability against technology companies or individuals is widened in comparison to the 1984 Act in cases of publishing, performing, distributing, transmitting, or any other way of making an individual's voice or likeness available to the public.[128] As long as the required "knowledge that use of the voice or likeness was not authorized" is proved, the scope of liability can be spread to news reporting, documentaries, films, and books.[129]

The same mechanism is applied to an "identifiable individual's photograph, voice, or likeness."[130] The availability of unauthorized use begets liability—mitigated only by the mere knowledge requirements—thus diminishing the exemption granted by the prior version that required a higher standard of actual knowledge.[131] In

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[126] For the broader context of the ELVIS Act regarding federal and state levels, *see* LATHAM & WATKINS, *supra* note 76.

[127] Rothman, *Tennessee Legislature, supra* note 8.

[128] TENNESSEE CODE ANNOTATED, SECTION 47-25-1105(A):

> Any person who knowingly uses or infringes upon the use of an individual's name, photograph, voice, or likeness in any medium, in any manner directed to any person other than such individual, for purposes of advertising products, merchandise, goods, or services, or for purposes of fundraising, solicitation of donations, purchases of products, merchandise, goods, or services, without such individual's prior consent, or, in the case of a minor, the prior consent of such minor's parent or legal guardian, or in the case of a deceased individual, the consent of the executor or administrator, heirs, or devisees of such deceased individual, is liable to a civil action.

LATHAM & WATKINS, *supra* note 77 comments on the new broad definition of "voice" in THE ELVIS ACT:

> This broad definition raises the specter that liability under the ELVIS Act may extend not only to use of an existing sound recording of someone's voice, and not only to digitally generated recordings or audiovisual content that approximates individual voices, but also to humans who can imitate other artists (i.e., soundalike artists).

[129] Rothman, *Tennessee Legislature*, *supra* note 8.

[130] *Id.*

[131] *Id.*; TENNESSEE CODE ANNOTATED, SECTION 47-25-1105(A):

> (2) A person is liable to a civil action if the person publishes, performs, distributes, transmits, or otherwise makes available to the public an individual's voice or likeness, with knowledge that use of the voice or likeness was not authorized by the individual or, in the case of a minor, the minor's parent or legal guardian, or in the case of a deceased individual, the executor or administrator, heirs, or devisees of such deceased individual.
>
> (3) A person is liable to a civil action if the person distributes, transmits, or otherwise makes available an algorithm, software, tool, or other technology, service, or device, the primary purpose or function of such algorithm, software, tool, or other technology, service, or device is the production of a particular identifiable individual's

addition, whereas the previous 1984 Act focused on commercial use, the ELVIS Act might impose liability for a wider variety of unauthorized uses of an individual's voice or likeness once the knowledge request is met.[132]

Not only does the ELVIS Act broaden liability, but it also narrows its fair use exemptions "to the extent the First Amendment protects such use."[133] Hence, the burden of proof to invoke this defense is shifted to the allegedly infringing party.[134] Consequently, even while, prima facie, enlarging the exemptions of fair use activities, as long as they all must answer the First Amendment requirements, "their scope will likely remain unclear for a long time to come as courts try to figure out whether the First Amendment requires these exemptions."[135]

That brings us to the real hidden leitmotif of publicity rights controversy as reflected in Elvis' adjudication and legislation: ownership versus authorship. This article attempts to demonstrate that the evolution of Elvis's publicity rights reflects the quintessence of publicity rights and copyright law conjoined authorship in both axes: ideology and technology. Accordingly, the metamorphosis of Elvis's publicity rights unifies all three levels of copyright, publicity rights, and Elvis's publicity rights authorship, in particular, in terms of ownership, as discussed in the following part.

III. Authorship as Ownership

A. Analyzing Authorship Through the "If Value, Then Right" Principle

This part analyzes the interfacing levels of all three levels of copyright, publicity rights, and Elvis's publicity rights authorship through the lens of the ever-rotating interpretation of the "if value, then right" ("IVTR") principle. The IVTR is a commonly invoked principle in current scholarship, usually related to the incentive approach in copyright law, according to which, "wherever value is received, a legal

> photograph, voice, or likeness, with knowledge that distributing, transmitting, or otherwise making available the photograph, voice, or likeness was not authorized by the individual or, in the case of a minor, the minor's parent or legal guardian, or in the case of a deceased individual, the executor or administrator, heirs, or devisees of such deceased individual.

[132] LATHAM & WATKINS, *supra* note 76.

[133] Rothman*, Tennessee Legislature*, *supra* note 8.; Tennessee Code Annotated, Section 47-25-1107:

> (a)To the extent such use is protected by the First Amendment to the United States Constitution, it is deemed a fair use and not a violation of an individual's right, for purposes of this part, if the use of a name, photograph, voice, or likeness is:
> (1) In connection with any news, public affairs, or sports broadcast or account;
> (2) For purposes of comment, criticism, scholarship, satire, or parody;
> (3) A representation of the individual as the individual's self in an audiovisual work, as defined under 17 U.S.C. § 101, unless the audiovisual work containing the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated;
> (4) Fleeting or incidental; or
> (5) In an advertisement or commercial announcement for a work described in this subsection (a).

[134] LATHAM & WATKINS, *supra* note 76.

[135] Rothman*, Tennessee Legislature*, *supra* note 8.

duty to pay arises, regrettably, regardless of whether imposing that legal duty serves public welfare."[136] Some scholars relate to this principle in a broader sense, regarding not only the incentive approach in copyright law but the legal axiom of authorship, by and large, according to which value is the Siamese twin of ownership, and deserves the protection of a property right.[137] However, although much criticized, the vicious cycle of rendering the right to value to render value to the right can never be broken unless we deconstruct this principle by analyzing its ingredients.[138]

The innovative approach to what constitutes authorship is made in this article by the IVTR as a doctrinal vehicle to demonstrate how deconstructing each of its components and their interfacing relations led to different concepts of authorship in Western culture. None of the components of the IVTR principle is static. Scrutinizing each component shows that the IVTR is a dynamic principle that keeps changing, as Western culture renders each component with different and even contradictory meanings. Ironically, this principle is evoked today regarding AI authorship. Accordingly, the question posed is not who is entitled to authorship (i.e., how human

[136] Alfred C. Yen, *Brief Thoughts about If Value/Then Right*, 99 B.U. L. REV. 2479, 2480 (2019). Yen believes that this principle is not embraced by the U.S. Copyright Act. Ample scholarship argues for the opposite. *See generally* Rebecca Tushnet, *Intellectual Property as a Public Interest Mechanism*, *in* THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 95 (Rochelle Dreyfuss & Justine Pila eds., 2018) [hereinafter Tushnet, *Intellectual Property*]; ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 65 (1998) [hereinafter COOMBE, THE CULTURAL LIFE]; for the general principle of "If value, then right", *see also* Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405 (1990).

[137] *See* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND ARTIFICIAL INTELLIGENCE 151 (Ryan Abbott ed., 2022) (claiming the IVTR principle as an unfortunate fallacy); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 519 (2009); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521, 533 n.49 (2003) ("it sometimes seems as though our legal system is obsessed with the idea that anything with value must be owned by someone."); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1725 (1999) ("[t]here has been inexorable pressure to recognize as an axiom the principle that if something appears to have substantial value to someone, the law must and should protect it as property.").

[138] *See* Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 375 (2017) [hereinafter Beebe, *Aesthetic Progress*] (echoing the principle while demonstrating how in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), Judge Oliver Holmes replaced his "if personality, then progress" logic with "if personality, then property right" logic). For more criticism of the IVTR principle, *see* Gordon, *supra* note 78, at 167; Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1715 (1999); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997). Ironically, this principle is perceived as the core of the failure of the current system as reflected in the *If Value Then Copy* series of text paintings, challenging the very idea of originality, authorship, and value. *See If Value Then Copy*, SUPERFLEX (2017), https://superflex.net/works/if_value_then_copy. *See also I Copy Therefore I Am*, PERA MUSEUM (July 29, 2022), https://www.peramuseum.org/blog/i-copy-therefore-i-am-/1584, referring to the dictum, "If value then right" by coining "I Copy Therefore I Am," as a statement against the political and philosophical aspects of copyright laws. This interdisciplinary perspective demonstrates how the IVTR morphed into an axiom.

authorship is construed), it is what is entitled to authorship (i.e., AI).[139] Namely, the discussion focuses on the "if" components of the IVTR principle.[140]

In addition, while phrased in the current scholarship in terms of "if value, then right," each component is discussed separately, dwelling especially on the "value" or "right" but ignoring the nexus of each component in its relation to the whole. For example, the "if" component—which questions to whom authorship is attributed—is omitted when either "value" or "right" is discussed individually. However, crossing the threshold of attribution as a starting point for discussing authorship was the revolutionary thinking of the Enlightenment era, which still designs copyright law paradigms.[141] Until then, artists did not possess value of their own, as inspiration was attributed to eternal sources.[142]

Likewise, while a whole spectrum of legal theories attempts to justify the right of publicity as the "then" component of the IVTR principle, other components are usually left out of focus. By asking why the persona should benefit solely from her secondary authorship created by her public, the question of who is attributed as its author is not discussed. Even if regarded as an organizing principle, the IVTR principle is doing much more by showing how each of its components reflects one another, thus reorganizing what constitutes legal authorship in all its relevant facets. The interfacing components of the IVTR principle did not evolve symmetrically. In terms of authorship, this article attempts to show that the disproportion between the evolution of each component of the IVTR principle and their eternal interfacing conflicts makes publicity rights so dangerous in terms of cultural control.

"If"

The "if" component of the IVTR principle attempts to decipher to whom authorship is attributed by focusing on the evolution of the attribution concept in Western culture. As long as inspiration was attributed to external sources, the artistic products as their natural outcome belonged to the source and not to the mere human vessel who happened to be their bearer. In *Ion*, Plato answered the question of the "if" component of the IVTR principle in the negative, as inspiration belongs to God: "For not by art does the poet sing, but by power divine."[143] In *Phaedrus*, Plato

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[139] *See generally* Ryan Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence*, 75 FLA. L. REV. 1141 (2023).

[140] For a detailed discussion of the "if" component of the IVTR principle regarding generated AI authorship, *see generally* Mira Moldawer, *The Shadow of the Law Versus a Law with No Shadow: Pride and Prejudice in Exchange for Generative AI Authorship*, 14:5 SEATTLE JOURNAL OF TECHNOLOGY, ENVIRONMENTAL & INNOVATION LAW, (2024).

[141] *Id.* at 26.

[142] *See* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994) [hereinafter THE CONSTRUCTION OF AUTHORSHIP] at 232.

[143] *Ion*, *in* 1 PLATO, THE DIALOGUES OF PLATO 530, 534 (Benjamin Jowett trans., Oxford Univ. Press, 3rd rev. ed. 1892) (THE ONLINE LIBRARY OF LIBERTY: A PROJECT OF LIBERTY FUND, INC.), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/111/Plato_0131-01_EBk_v6.0.pdf ("For the poet is a light and winged and holy thing, and there is no invention in him until he has been inspired and is out of his senses, and the mind is no longer in him").

developed his concept of attribution to "divine madness."[144] Likewise, the poet as a vessel of the divine morphed into the "stewardship" theory, according to which the poet is a mere steward of gifts that are not her own.[145]

Until the Enlightenment era, authors were considered mere craftsmen.[146] In addition, even when copyright laws—at the juncture of the 18th and 19th centuries—replaced a market that was initially regulated by a system of printing privileges, they were meant to defend the interests of publishers and booksellers, as best demonstrated by the Statute of Anne, before which inception authors could be indicted for blasphemy, libel, or sedition, thus, their only attributed "asset" could be criminal conduct.[147] Consequently, while the Statute of Anne is the first copyright law followed by every common law jurisdiction, even this statute was silent about crucial issues, such as the basic distinction between the tangible property in which letters and texts are fixed, and the intangible essence of what is expressed through them.[148] This outcome is due to the Statute of Anne's focus on property rather than authorship to enhance the prioritized interests of the publishers.[149]

Only when attribution shifted from an external source to inner talent was the "if" threshold no longer a barrier to human authorship.[150] Immanuel Kant established the approach, according to which, there is a primary relationship between the author and the public through the speech addressed to the public by the author.[151] However, the innovative concept of authorship created by the Enlightenment era is not homogeneous. Kant attributed to the author the act of speech addressed to her

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[144] *Phaedrus*, *id.* at 372.

[145] ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW IN THE UNITED STATES 19 (2010).

[146] For the construction of the "Author," *see generally* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984); THE CONSTRUCTION OF AUTHORSHIP, *supra* note 142; JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 54 (1996); Maurizio Borghi, *Copyright and the Commodification of Authorship in 18th and 19th Century Europe*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF LITERATURE 341 (2018).

[147] Mark Rose, *The Author in Court: Pape v. Curll (1741)*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 142, at 211, 215; for The Statute of Anne 1710, 8 Ann., c.19 (Eng.) as the "exemplar" of copyright law followed by every common law jurisdiction, *see* Lior Zemer, *The Conceptual Game in Copyright*, 28 HASTINGS COMM. & ENT. L.J. 409, 420 (2006).

[148] Rose, *supra* note 147, at 223–24.

[149] *See generally* Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29, 63 (2012) (for the publishers focusing on property rights regarding The Statute of Anne, and the seminal precedents that designed copyrightability as property rights ever since).

[150] BOYLE, *supra* note 146, at 54.

[151] *See* KIM TREIGER-BAR-AM, POSITIVE FREEDOM AND THE LAW 171 (2019) (linking Kantian's attribution to the author's anatomy of expression) ("Kant further supports attribution of a work to its author. Upholding the truth requires that the book be attributed to the author, according to his name. For Kant, the associates of the name of an author with a work he has not chosen to publish, or a work that has been changed from the work as he created it, is violative of the author's autonomy of expression."); Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1077 (2008) ("Kantian principles thus support a right of attribution.").

audience, as a manifestation of her will.[152] The irony of history is that the Enlightenment era that created the phenomenon of the author was not meant to focus on the author as a proprietor, but as an agency whose primary relationship is with her public through the speech addressed by the former to the latter. This shift happened due to Johann Gottlieb Fichte and Georg Wilhelm Friedrich Hegel, who differentiated between speech and writing when writing was a profession.[153]

Whereas Kant's perception of the author was further developed by Fichte—who enhanced the justifications for the author as the quintessence of unique authorship crystallized in unprecedented form—Hegel tied attribution with property rights.[154] For Kant, an unauthorized reprinting is an "agency without authority."[155] For Hegel, the author's right to control her creation in terms of property rights is inseparable from her being the unprecedented inner source, thus attribution refers to both.[156]

Ironically, the contradictory scholarship that argues for expanded authorship for the celebrity would hold the same argument but reversed: the celebrity deserves more than its current share in its authorship because dignity and autonomy are attributed to it as well. It follows that the more the persona gets in terms of attribution, the stronger its authorship. Roberta Rosenthal Kwall, one of the prominent advocates of this approach, is connecting the right of publicity with the moral rights that are lacking in scope in the United States, as the right of publicity is meant to restore the right of attribution.[157] However, only after the first threshold of "if" is crossed can we proceed

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[152] Borghi, *supra* note 146, at 147: "Book is a writing, which represents a discourse addressed by someone to the public, through visible signs of speech. . . He who speaks to the public in his own name is called the author (auctor); he who addresses the writing to the public in the name of the author is the publisher. . . The publisher, again, speaks, by the aid of the printer as his workman (operarius), yet not in his own name, for otherwise he would be himself the author, but in the name of the author; and he is only entitled to do so in virtue of a mandate (mandatum) given him to that effect by the author."; TREIGER-BAR-AM, *supra* note 151, at 171: "Unauthorized publication of a writing under the name of the author is a violation of the author's will (unless the work is revised and printed under another's name, i.e., transformed, as seen below)."

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

[154] FICHTE, quoted in Woodmansee, *supra* note 146, at 444–45: "Hence, each writer must give his own thoughts a certain form, and he can give them no other form than his own because he has no other."; Kawohl, *supra* note 153 (for the different approaches of Kant, Fichte, and Hegel regarding IP in terms of property).

[155] Kawohl, *id.*

[156] *See generally* Paul Redding, *Georg Wilhelm Friedrich Hegel*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 13, 1997), https://plato.stanford.edu/entries/hegel (for claiming private property as a necessary vehicle for the cultivation of the individual, as it materializes her inner will. Hence, the creator has a given right to control her creation and exploit it solely); Stephen Houlgate, *Hegel's Aesthetics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 20, 2009), https://plato.stanford.edu/archives/win2021/entries/hegel-aesthetics (for the importance of Hegel's Aesthetics).

[157] ROSENTHAL KWALL, *supra* note 145, at 34: "On a theoretical level, both the right of publicity and moral rights contradict the view that members of the public have the unconditional right to interpret texts according to their own cultural needs. As the right of publicity safeguards individuals' abilities to control the public presentations of their personas in commercial contexts, moral rights allow

to examine what follows naturally. Even if authorship is acknowledged through different understandings of its source, what is its worth to society? In terms of the IVTR principle, what is the principal "value" embedded in authorship?

"Value"

The Enlightenment era revolutionized not only the "if" component of the IVTR principle but the "value" component as well. The doctrinal shift was done through a new reading of the undercurrent mimesis motive because, until then, poets were considered third-rate imitations of the eternal truth.[158] "Mimesis" is the Greek word for imitation or representation.[159] Whereas Plato was willing to exile the poets from his *REPUBLIC* because he regarded artistic representation as a "third degree removed from the truth, the Enlightenment concept of the agonizing genius creating out of the abyss traded mimesis for originality."[160] The artist is his source and not a copy that mimics another. Thus, the "value" of unprecedented originality is established.[161]

Hegel reconciled the dilemma of truth vis-à-vis its representations by creating a new dialectic. While adhering to the values of the Enlightenment era, headed by transcendental absolute truth and reason, as synonyms, Hegel solved Plato's fear of art as a great provocateur of feelings and desires by combining originality, springing straight from the abyss, as a primary source, with art as a vehicle of divine truth.[162]

However, what constitutes "value" gets different answers from the pillars of the Enlightenment era—namely, Kant, Hegel, and Fichte. The importance of personality and its development as the driving force of humankind have been approached in different ways by each of them. Kant expresses an approach according to which there is a primary relationship between the author and the public through the speech addressed to the public by the author.[163] Fichte and Hegel enhanced the justifications for the author as the quintessence of originality to justify the shift to property rights.[164]

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authors of artistic works a comparable measure of control regarding the substantive presentations of their works."

[158] *See generally*, PLATO, THE REPUBLIC (Benjamin Jowett trans., The Project Gutenberg eBook of the Republic, by Plato 1998), https://www.gutenberg.org/cache/epub/1497/pg1497-images.html.

[159] The Editors of Encyclopedia Britannica, *Mimesis*, ENCYCLOPEDIA BRITANNICA (Nov. 22, 2011), https://www.britannica.com/art/mimesis [hereinafter *Mimesis*].

[160] *See generally*, PLATO, THE REPUBLIC, *supra* note 158, book X: "…all poetical imitations are ruinous to the understanding of the hearers, and that the knowledge of their true nature is the only antidote to them;" *compare with*, 1 G.W.F. HEGEL, AESTHETICS: LECTURES ON FINE ART 296 (T.M. Knox trans., 1975) [hereinafter HEGEL, AESTHETICS]: ". . .evinces its genuine originality only by appearing as the one personal creation of one spirit which gathers and compiles nothing from without, but produces the whole topic from its own resources by a single cast, in one tone, with strict interconnection of its parts, just as the thing itself has united them in itself."

[161] JOHANN G. FICHTE, PROOF OF THE ILLEGALITY OF REPRINTING: A RATIONALE AND A PARABLE (1793), quoted in Woodmansee, *supra* note 146, at 444–45.

[162] HEGEL, AESTHETICS, *supra* note 160, at 47: Accordingly, art "[h]as the capacity and the vocation to mitigate the ferocity of desires" through unique inspiration, being a mere aspect of the divine and, thus, a facet of absolute reason.

[163] *See generally* Borghi, *supra* note 146.

[164] For FICHTE (retrieved from Woodmansee), *see* Woodmansee, *supra* note 146, at 444–45; for Hegel's Aesthetics, *see* Houlgate, *supra* note 156.

Thus, Hegel asserted that if the author creates a unique value through the extension of her inner will, intellectual process, and individuality, the author has a right to control her creation.[165] Hence, the Hegelian doctrinal shift unifies the new "value" of unprecedented originality with the autonomous inner will, which is our duty to develop as the quintessence of humanity. Hegel regards private property as a necessary vehicle for cultivating this amalgamated value, thus creating the theoretical link between "value" and "right" in terms of property rights.

Originality is a heterogeneous concept regarding both the direct and indirect originality narrative. Direct originality flourished in direct legal relation to the dynamic evolution of derivative work in copyright law, thus creating a new, comprehensive idea of originality and authorship.[166] In addition, the indirect originality links together the moral right and the idea/expression dichotomy. Moral rights—the most important of which are attribution and integrity—make no sense unless they defend an original author.[167] Expression is copyrightable as long it is original.[168]

The greatest problem of what is originality is still unsolved. In theory, thanks to *Bleistein v. Donaldson Lithographing Co.*'s legacy, the originality threshold would be satisfied with minimal artistic quality to gain copyrightability, regardless of the quality of the work.[169] The question posed in *Bleistein* was: Were commercial posters designed by the plaintiff to promote a traveling circus copyrightable, or are they immune from infringement once the works involved were commercial advertisements?[170] The United States Supreme Court held that advertisements were copyrightable, regardless of their artistic quality, as stated by the framer of neutrality ideology, Judge Oliver Wendell Holmes Jr.:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.[171]

The commonly accepted premise in current scholarship is that *Bleistein's* legacy created a minimal threshold for originality to qualify for copyrightability.[172] As demonstrated by Barton Beebe, this is an oversimplified view.[173] Judge Holmes did

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[165] BOYLE, *supra* note 146, at 55; s*ee generally* Redding, *supra* note 156.

[166] John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1233, 1245, 1249–50 (2012).

[167] *See generally* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 363–64 (2006).

[168] *See generally* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1019 (1990).

[169] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–51 (1903).

[170] *See generally Id.*

[171] *Id.* at 251.

[172] 1 NIMMER ON COPYRIGHT, *supra* note 38, at § 2.01[B][1]: "Any 'distinguishable variation' of a prior work constitutes sufficient originality to support copyright if that variation is the product of the author's independent efforts and is more than merely trivial. This doctrine owes its origin in large part to the words of Justice Holmes in *Bleistein v. Donaldson Lithographing Co*."

[173] *See generally* Beebe, *Aesthetic Progress*, *supra* note 138.

not focus on the artistic value of the allegedly infringing works as promoting the requested progress in the Intellectual Property Clause of the Constitution, but on "[t]he market's judgment of their worth or otherwise to the infringer's judgment of their worth."[174] Even if current scholarship adheres to minimal originality as manifesting the unique personality involved in its creation, the result is diminished value for enhanced rights, thus focusing on ownership instead of authorship. As Judge Holmes regards copyright as a vehicle to protect a personal reaction of an individual upon nature, mimesis thrown through the door of originality in the Enlightenment Era is creeping back through the window of banality.[175]

In addition, the originality conception is an ever-evolving and multi-faceted phenomenon, as in different legal systems, originality embodies different values. The greater the focus is on originality and creativity, other values associated with the author, such as autonomy and dignity, are bound to follow. On the other hand, if the source of attribution in terms of "value" is labor, as asserted by John Locke, the outcome will be different. The Lockean/labor approach—which in the United States is known as "the sweat of the brow theory,"—argues that a person has a natural right to the products of his brain and body.[176] The added value of labor that the creator contributed justifies the transition from public property to private property, as the contributor invested the inner resources that she naturally owns.[177] Thus, the entitlement to intellectual property is due to labor invested in its creation.[178]

Consequently, if "the principal difference between the theories of Locke and Hegel is that for Locke the source of entitlement is labor, whereas for Hegel it is will," the originality requirement set by each legal system will prioritize its three components differently: origination, labor, and creativity.[179] Three important caveats

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[174] *Id.* at 330, 373: "[T]he work constituted "Progress" not because someone was willing to make it and express his unique personality through it but only because someone else was willing to pay for it."

[175] For a different interpretation of *Bleistein*'*s* legacy, *see generally*, Beebe, *Aesthetic Progress*, *supra* note 138.

[176] For the Lockean/labor approach, *see* JOHN LOCKE, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS BY PETER LASLETT, ch. v (1963).

[177] For Locke's enormous influence on the evaluation of copyright law both in the United States and England, *see* Orit Fischman-Afori, *The Evolution of Copyright Law and Inductive Speculations as to its Future*, 19 J. INTELL. PROP. L. 231, 246-47 (2012).

[178] S*ee* Michelle M. Wu, *Defeating the Economic Theory of Copyright: How the Natural Right to Seek Knowledge is the Only Theory Able to Explain the Entirety of Copyright's Balance* 9 (Georgetown Univ. 2023), https://scholarship.law.georgetown.edu/facpub/2495, referring to Lock's restrictions ("The natural rights that attach from this theory is explained in two parts. The first is that natural resources cannot be used without the intervention of human labor, so each person has the right to expend their labor on making these resources useful, and their labor converts common property to private property. The second notes that conversion is legitimate only so long (1) the object of conversion was common property, (2) the person does not take so much common property that there is an insufficient amount or a lesser quality left for others, (3) the person does not convert so many resources that some will be wasted without use.").

[179] AVIV H. GAON, THE FUTURE OF COPYRIGHT IN THE AGE OF ARTIFICIAL INTELLIGENCE 73 (2021) (citing Margaret J Radin, 'Property and Personhood' (1982) 34 Stan. L. Rev. 957, 961 [Radin, Property and Personhood]; Margaret J Radin, Reinterpreting Property (University of Chicago Press 2009); Margaret J Radin, 'Market Inalienability' (1987) 100 Harv. L. Rev. 1849).

should be made. First, the concept of unprecedented inspiration contradicts what the authorship project proved, namely, that even the greatest artists collaborated or borrowed from other sources.[180]

Second, the match between absolute truth and art that constitutes "value" was not considered satisfactory in Hegel's view regarding the artists of his era, including Johann Wolfgang von Goethe and Johann Christoph Friedrich Schiller. Hegel regards Romantic art as inferior due to its incapacity to reconcile objectivity with the spirit's inward being.[181] Consequently, the great advocate of transferring originality as a value into a property right did not believe that even the greatest artists of his time possessed this value to begin with. Third, in retrospect, once an artistic judicial judgment is involved, copyrightability depends on the idiosyncratic spectrum of the judiciary—cultural nexus, thus not only debunking *Bleistein*'s legacy altogether but leaving the mystery of what constitutes originality unsolved.[182] Consequently, the question posed is: What justifies copyright law authorship if its value is so fragile? This leads us to examine the "then" component of the IVTR principle.

"***Then***"

The "then" component of the IVTR principle focuses on authorship justifications that are meant to synchronize its previous components—namely, why attributing talent to constitute authorship and originality as its utmost value merits property rights. Publicity rights as a tort of privacy that transformed into intellectual property reflect the dilemma of authorship justifications since its legal crystallization. It is still unclear whether the interest in question is personal or pecuniary. The current justifications for the conjoined persona and copyright authorship, whether deriving straight from copyright law due to *Zacchini'*s legacy or from independent justifications, is a legal hybrid. Hence, the dilemma is: When privacy and property rights are intimately linked, which gains supremacy?

This hybrid is current in the English adjudication that designed legal authorship.

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180 For the authorship projects, *see generally* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 142; for the false myth of unprecedented inspiration, *see* Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 288–98 (2006) [hereinafter Zemer, *The Copyright Moment*].

181 HEGEL, AESTHETICS, *supra* note 160, at 609: Now romantic art was from the beginning the deeper disunion of the inwardness which was finding its satisfaction in itself and which, since objectivity does not completely correspond with the spirit's inward being, remained broken or indifferent to the objective world.

182 *Bleistein*, 188 U.S. at 251‑52: "At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt;" *compare with*, Mira Moldawer, *Myths and Clichés: The Doctrinal Myopia of Publicity Right*, 22 UIC REV. INTELL. PROP. L. 50, 75-84 (2022) (illustrating how the main vehicles of copyright law that are meant to balance authorship with the public domain are dependent on the idiosyncratic spectrum of the judiciary—cultural nexus).

The first prominent precedent that demonstrates why the "then" component of the IVTR principle is its weakest link is *Pope v. Curl* (1741) ("*Pope*").[183] The plaintiff, the famous poet Alexander Pope, sued a bookseller for obtaining and publishing personal letters written or received by Pope without his authority, including correspondence with other well-known literary figures, such as Jonathan Swift.[184]

The revolutionary dichotomy created by the court differentiated between the tangible quality of a letter, i.e., the ink and paper that belong to the receiver, and its intangible quality, i.e., the composition, which is the property of the writer and cannot be published without his consent.[185] However, although there were other interests involved, such as invasion of privacy, *Pope* focused on the artist's composition as a property right, which paved the way for the design of authorship ever since.[186]

The next milestone to follow was *Millar v. Taylor*.[187] The plaintiff, Andrew Millar, was a bookseller who had purchased the publishing rights to James Thomson's poem "*The Seasons*."[188] After the term of the exclusive rights granted under the Statute of Anne expired, the defendant, Robert Taylor, began publishing the same poem.[189] *Millar v. Taylor* is considered a touchstone regarding the duration of copyrightability, deciding for perpetual property rights anchored in common law that were not extinguished by the Statute of Anne.[190]

The doctrinal argumentation reflects the hybrid infrastructure that currently accompanies the celebrity's controversial authorship in its publicity rights. Dissenting in *Millar v. Taylor*, Lord Yates regarded unauthorized publishing as violating a dignitary and personal right that, in its essence, is a common law right of personal vindictive action and, as such, is untransferable to third parties.[191] As "this action is merely vindictive: it is *in personam*; not *in rem*," it mirrors the usual classification regarding publicity rights at its inception.[192] As a tort of privacy, it protected hurt feelings but did not support the theoretical shift to property rights.[193]

While the matter in question is the right to control publication, whereas Lord

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[183] Pope v. Curl, (1741) 26 Eng. Rep. 608 (KB).
[184] *Id.*
[185] "[T]he receiver only acquires a qualified interest in [the letter]. The paper on which it is written may belong to him, but the composition does not become vested in him as property, and he cannot publish against the consent of the writer." Retrieved from Stern, *supra* note 149, at 63.
[186] *Id.* at 68:

> Pope's legal strategy anticipates the emphasis on property rights that later courts would solidify. Pope is best known as the judgment that began to articulate a distinction between the physical embodiment of the work and the words that constitute it, but the dispute is also important as an early example of an exclusively property-driven approach to copyright.

[187] Millar v. Taylor, (1769) 4 Burr. 2303, 98 ER 201 (KB).
[188] *Id.* at 203.
[189] *Id.*
[190] *See generally Millar*, 4 Burr.
[191] *Id.* at 245 (Yates, J., dissenting).
[192] *Id.*
[193] *Id.*

Yates refused to let the Statute of Anne transform a personal right into a right in rem at common law, this was the premise of Lord Mansfield, who led the Court of the King's Bench to a contradictory approach.[194] Even Lord Mansfield's zealous advocacy for the right to control publication as a property right is not based purely on pecuniary arguments.[195] His advocacy mixes labor theory, unjust enrichment, and personal will, which foresaw the personhood theory decades before it was crystallized.[196] Lord Mansfield states:

> [I]t is just, that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. It is just, that Another should not use his Name, without his Consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the Time, but the Manner of Publication; how many; what Volume, what Print. It is fit, he should choose to whose Care he will trust the Accuracy and Correctness of the Impression; in whose Honesty he will confide, not to foist in Additions.[197]

The property right is even amalgamated with argumentations that reflect the same thinking behind moral rights. Lord Mansfield refers to the author's loss of control over her name and her work, which are the counterparts of the rights of attribution and integrity—the core of moral rights.[198] Lord Mansfield states:

> The author may not only be deprived of any profit but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend; or cancel a faulty edition. . . . He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.[199]

However, Lord Mansfield assumed rather than indicated the shift from dignitary and personal rights to property rights.[200] Drawing a straight line from Lord Mansfield's assumption to current scholarship brings us no further. While it is common knowledge that authorship is justified by both "market-based and personality-based interests," i.e., the incentive approach, the Lockean/labor approach, and the personhood approach, the doctrinal shift from privacy to property is still assumed and not proved.[201] In addition, two caveats should be made regarding all the

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[194] Stern, *supra* note 149 at 76.
[195] *Id.* at 77.
[196] *Id.*
[197] *Id.* at 252–53 (retrieved from Stern, *supra* note 149, at 77).
[198] *Id.*
[199] *Id.*
[200] Stern, *supra* note 149, at 79.
[201] *See generally* Post & Rothman, *supra* note 91, at 93; *see also* Wendy J. Gordon & Robert G. Bone, *Copyright*, *in* ENCYCLOPEDIA OF LAW & ECONOMICS 189 (2000) categorize the different approaches to IP law into moral and instrumental.

aforementioned approaches.

First, the distinction between the "value" and its justifications is blurry as even prominent scholars are discussing the embedded values that justify IP, such as the value of utilitarianism or labor as values per se and not as justifications. Consequently, the focus shifts. Is authorship meant to defend creativity, utility, labor, or dignity? There is no clear answer as to whether the value or the justification gains supremacy. Second, the common justifications are at war with themselves. The utilitarian/incentive approach is easily classified as a goal-based right, aiming to improve the general welfare.[202] In contrast, the Kantian Categorical Imperative, which greatly influenced the personhood approach, is a classic duty-based right.[203] Consequently, IP rights as moral rights are at war with their perception as instrumental rights. As Bentham put it: "Right is with me the child of the law: . . . a natural right is a son that never had a father."[204]

As we are dealing with publicity rights conjoined authorship with copyright law, the same heterogeneous premise applies to both. Whereas the current Anglo-American model is "instrumental," focusing on the incentive approach, other jurisdictions focus on "moral" approaches, namely, the labor/Lockean approach and the personhood approach.[205] It follows that the challenge of justifying publicity rights regarding the incentive approach is composed of two levels due to its trait as a legal hybrid. First is the challenge of justifying the incentive approach per se. Second, is the question of whether society should incentivize fame as a starting point at all.

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[202] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 171–72 (1977).

[203] IMMANUEL KANT, GROUNDWORK TO THE METAPHYSICS OF MORALS 95–98 (H.J. Paton trans., 1961); David Lametti, *Property and (Perhaps) Justice. A Review Article of James W Harris, Property and Justice and James E. Penner, The Idea of Property in Law*, 43 MCGILL L.J. 663, 669 n.14 (1998), sums up Dworkin's classifications for political theories that can be traced to and based on an ultimate notion of right, duty or goal: "It is upon this 'reasonable supposition' that Dworkin grounds his tentative initial classification. It follows, then, that for a goal-based theory, some goal or set of goals is fundamental, like improving the general welfare; for a duty-based theory, some duty or set of duties is fundamental, like those set out in the Decalogue; and for a right-based theory, a right or set of rights is fundamental, like the right of all persons to the greatest possible liberty." "Pure" or "nearly pure" examples of each theory are given by Dworkin: utilitarianism is an example of a goal-based theory, Kant's categorical imperative is a duty-based theory, and Thomas Paine's theory of revolution is a right-based theory.

[204] *See* Bentham, *Supply Without Burthern*, *in* 1 JEREMY BENTHAM'S ECONOMIC WRITING 334 (W. Stark ed., 1954) (retrieved from Jeremy Waldron, *Introduction*, *in* THEORIES OF RIGHTS 4 (Jeremy Waldron ed., 1984); David Lyons, *Utility and Rights*, *in* THEORIES OF RIGHTS, *id.* at 110, 112, 123, frames "The Moral Rights Exclusion Thesis" as embedded in the utilitarian/incentive approach that excludes normative argumentations unless allocated and enforced within the Law.

[205] *See generally* Gordon & Bone, *supra* note 201, at 189 (for categorizing the different approaches to intellectual property law as moral and instrumental)*; see also* TREIGER-BAR-AM, *supra* note 151, at 167, demonstrating the inner contradiction between the instrumental and the moral approaches ("The Anglo-American incentive model is instrumental: authors are presumed to rely upon the incentive of copyright protection and profits for their efforts of creation. The Continental deontological models for authors' rights (droit d'auteur) are rights in property (in France) and personality (in Germany). Copyright is often considered to exist on two norms and, indeed, as caught between them. Yet both instrumental and deontological aspects of the doctrine function side by side.").

The incentive/utilitarian approach is regarded by the Supreme Court as embedded in the core of Article I, Section 8, Clause 8 of the United States Constitution.[206] The gist of the incentive approach, as summed up by Gordon and Robert Bone, "is to provide incentives for new production at fairly low transaction costs."[207] Accordingly, copyright law's constraints, such as its limited duration, the fair use doctrine, and the idea/expression dichotomy, all serve "to reduce deadweight loss and other costs within a larger structure that creates incentives," to enhance this approach.[208] The incentive approach, as adapted to the persona, means that its image is so unique and exclusive that it will incentivize the persona to maximize its investment in it.[209] Much criticism of this approach is due to the focus on the core question: Why should we incentivize fame?[210] Not only does our society let fame take the upper hand regardless of the manner of its creation, but it ignores the fair share due to the public regarding its authorship in publicity rights, thus affording the celebrities consideration that they do not deserve.

The incentive approach is considered the dominant theoretical justification not only for copyright law but for all IP rights in American law.[211] However, its justifications have evolved a long way since summed up by Samuel Johnson as "[n]o man but a blockhead ever wrote, except for money."[212] While the question of what it means "[t]o promote the Progress of Science and useful Arts" according to the Copyright Clause of the Constitution remained the same, the answers regarding the incentive approach changed considerably.[213]

The starting point of the theoretical justification of the incentive approach is to

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

[207] Gordon & Bone, *supra* note 201, at 189.

[208] *Id.*

[209] Shipley, *supra* note 32, at 681; *see also* Lugosi v. Universal Pictures, 25 Cal.3d 813, 840 (Bird, C.J., dissenting) (Cal. 1979) ("[P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition."); *see also* Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, 10(5) LANDSLIDE 37 (May/June 2018).

[210] *See generally*, Lemley, *Privacy*, *supra* note 27; JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 101 (2018)("If the right of publicity incentivizes anything, it is not clear that it is incentivizing anything we might wish to encourage."; Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187–88 (2006) (Rothman repeats Dogan & Lemley's argumentation in this article).

[211] Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1256 (2014) ("The major forms of IP—trademark, patent, copyright, and design patent—look different, but they do have at least one objective in common: they are generally concerned with the instrumental goal of providing individuals with an incentive to create something intangible that might otherwise be easily appropriated.").

[212] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).; *see generally* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (2008) (For the incentive approach as the dominant approach in American adjudication); Gordon & Bone, *supra* note 201, at 199.

[213] *See generally* 1 NIMMER ON COPYRIGHT, *supra* note 38, at § 1.03.

promote economic efficiency.[214] It follows that "[i]ts principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection."[215] Promoting utility is legally understood in terms of monetary incentives enhancing creativity by maximizing its financial gains.[216] The Benthamian approach, according to which human behavior aims to achieve pleasure and avoid pain, measures the ethics of rights by the criterion of causing "the greatest happiness of the greatest number."[217] Therefore, the common good of an action is judged by its "good consequences."[218] Scholars call the Benthamian approach "quantitative hedonism."[219] "[I]t is 'hedonistic' because what matters is happiness; and it is 'quantitative' because the amount of happiness an action produces determines how to evaluate the action against other potential actions."[220]

Even mild criticism of the "quantitative hedonism" ideology questions whether an accumulative approach advocating the production of artistic works in terms of quantity contributes to more happiness.[221] In short, the causation between the two ingredients of the whole is doubtful. The general criticism regarding the utilitarian approach does not stop there but discusses this approach theoretically, normatively, and empirically. First, the incentive approach, while anchored in economic thinking,

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[214] Patrick Russell Goold & David A. Simon, *On Copyright Utilitarianism*, 99 IND. L.J. (forthcoming 2024) ("Promoting progress is valuable, not because it secures natural rights, nor because doing so aids democracy per se, but because promoting progress in turn promotes utility.").

[215] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); *see also* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2 (2011) ("Current convention has it that IP law seeks to maximize the net social benefit of the practices it regulates. The traditional utilitarian formulation the greatest good for the greatest number— is expressed here in terms of rewards. Society offers above-market rewards to creators of certain works that would not be created, or not created as soon or as well, in the absence of reward. The gains from this scheme, in the form of new works created, are weighed against social losses, typically in the form of the consumer welfare lost when embodiments of these works are sold at prices above the marginal cost of their production. IP policy, according to this model, is a matter of weighing these things out, of striking the right balance."); *see also id.* at 2–3 (For the impossibility of this assumption).

[216] Sarah Polcz, *Loyalties v. Royalties*, 74 HASTINGS L.J. 765, 774 (2023) ("In the standard model of monetary incentives, the essential variable is the absolute amount the creator stands to receive. The more they receive, the more they will produce.").

[217] JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 393 (The Collected Works of Jeremy Bentham, J.H. Bums & H.L.A. Hart eds., 1977).

[218] Goold & Simon, *supra* note 214, at 9.

[219] *Id*.

[220] *Id.*

[221] Christopher Buccafusco & Jonathan S. Masur, *Intellectual Property Law and the Promotion of Welfare*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 98 (Ben Depoorter, Peter Menell & David Schwartz eds., 2019); Beebe, *Aesthetic Progress*, *supra* note 138, at 346 (criticizes the accumulative approach, arguing that "Thus, while a strong accumulationist model of progress is typically applied to scientific-technological progress, in which the goal is to accumulate ever-better scientific and technological achievements, a weak accumulationist model is typically applied to aesthetic progress. In the latter, the focus is not on better works but simply on more works. The weak accumulationist account of aesthetic progress retreats to the quantitative in an effort to disengage from the qualitative.").

ignores the vast scope of what motivates artists apart from financial gain.[222] Second, from an interpretive point of view, the Copyright Clause, while specifically articulating its aim of the promotion of the progress of science and useful arts, is silent about utility.[223]

This silence leads prominent scholars to question the normative flaws of the utilitarian approach. The market-driven accumulative approach, which is what the utilitarian approach morphed into, is perceived as too narrow regarding democratic values such as enabling individuals access to culture.[224] Last but not least, not only is there not enough empirical data to support the utilitarian approach, but quite the contrary.[225] In that light, the Game of Thrones director's call to enhance piratic loading, as it benefits the buzz around the show, makes sense.[226]

On the already shaky ground of the incentive approach, justifying persona authorship is even harder. The criticism of this approach focuses on this core question: Why should we incentivize fame?[227] As fame is severed from achievements or moral value, how are we supposed to read the Copyright Clause of the Constitution in terms of enhancing progress? The understanding that "not everyone can be great, but everyone can be a celebrity," leads to contradictory scholarship.[228] This change, while democratizing fame and rendering celebrityhood to look like "a fundamental right available to all," is not as democratic as it sounds.[229] Even sympathetic

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[222] *See* Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 101, 106 (2008): "The drive to assimilate every creative act to the formal market economy is a mistake both of fact and of value. Money isn't everything, and it can prove destructive to particular creative practices."

[223] Goold & Simon, *supra* note 214, at 13 (interpreting the Copyright Clause of the Constitution as meant to enhance the ability of people to live truly happy lives, adapting the utilitarian approach to John Stuart Mill's vision); *see also* Beebe, *Aesthetic Progress*, *supra* note 138, at 373 (criticizing Judge Holmes' approach in *Bleistein* case, *supra* note 169) ("[I]nstead, to find evidence that the works promoted progress, Holmes retreated to the market's judgment of their worth or otherwise to the infringer's judgment of their worth.").

[224] *See generally* MERGES, *supra* note 215215 (advocating distributive justice as the plausible ground for IP rights); WEINSTOCK NETANEL, *supra* note 212; Goold & Simon, *supra* note 214, at 17.

[225] GLYNN LUNNEY, COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY 4 (2018) (proving that from 1962 to 2015, more money for creators not only did not lead to more or better music but quite the contrary); Polcz, *supra* note 216216, at 770 ("Received doctrine holds that sharing royalties equally, with lesser contributors, disincentivizes greater contributors from collaborating or putting forth their best efforts. The results are inconsistent with that claim. Music groups whose splits align with the existing default rule have higher sales and more Grammy awards.").

[226] Ernesto Van der Sar, Piracy Doesn't Hurt Game of Thrones, Director Says, TORRENT FREAK (Feb. 27, 2013), https://torrentfreak.com/piracy-doesnt-hurt-game-of-thrones-director-says-130227 (relating to the show's director, David Petrarca, claiming "these unauthorized downloads do more good than harm," as they create the "cultural buzz" the show needs for survival).

[227] *See* Lemley, *Privacy*, *supra* note 27; Gervais & Holmes, *supra* note 86, at 185: "The domain that remains for the right of publicity to protect exclusively is revealing: the right of publicity alone protects the commercial use of nondeceptive, non-private references to an individual. The questions that emerge are: who benefits from this and why?"

[228] *Compare* Mark Bartholomew, *The Political Economy of Celebrity Rights*, 38 WHITTIER L. REV. 1 (2018) (advocating for the persona's rights from the prism of political economy), with Madow, *supra* note 11 (arguing against the unjustified control of public assets by instant, undeserving celebrities).

[229] Bartholomew, *supra* note 228, at 3.

commentators admit the massive lobbying of miscellaneous stakeholders whose interests initiated the celebrity culture.[230] Needless to say, the missing factor in celebrity authorship that was missing was the public.

Whereas the orthodox incentive argument that without incentives the world will be devoid of creativity is still unproved, instead of proving what is the celebrity value that merits her rights, "courts have come to presume such value from the defendant's unauthorized use."[231] The reason for creativity is still beyond us, whereas the incentives for it are enhanced with no better theoretical infrastructure for publicity rights authorship than its copyright counterpart.[232] The failure of the incentive theory regarding publicity rights has severe implications in terms of control. As summed up by Rebecca Tushnet:

> Incentive theory, indeed, is a notable contributor to the metastasis of the right of publicity in American law, despite the empirical dubiousness of the claims that celebrities need economic incentives in the form of control over all commercial uses of their identities. In IP, "if value, then right," is unfortunately not only a realist criticism, but also a never-ending threat.[233]

The next approach to justify authorship is the labor/Lockean approach, which in the United States is known as "the sweat of the brow theory"—wherein people have a natural right to the products of their brains and bodies.[234] The added value of labor to which the creator contributed justifies the transition from public property into private property, as the contributor invested her inner resources that she naturally owns.[235] In addition, the theory is strengthened by "unjust enrichment" arguments.[236] The property right is given because allowing someone who did not sow to reap is unjustifiable. From this point of view, copyright is based on the values of justice and fairness.[237]

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[230] *Id.* at 21 (especially regarding Elvis Presly's estate).

[231] *Id*. 21–22.

[232] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 2:6. Incentive justification (2d. ed. 2023) ("People are motivated to work hard and excel for many reasons, some of them unconscious and self-contradictory. The degree to which a right of publicity may or may not provide an additional incentive to excel and reach prominence can probably never be proven either in the abstract or in any particular case.").

[233] Tushnet, *Intellectual Property*, *supra* note 136, at 102.

[234] *See* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 142, at 36.

[235] *See* LOCKE, *supra* note 176, at chap. V, §§ 26–28, 44; Corinna Coors, *Morality, Utility, Reality? Justifying Celebrity Rights in the 21st Century,* 44 SYRACUSE J. INT'L L. & COM. 215, 216 (2017); Wu, *supra* note 178.

[236] *See* Wu, *supra* note 178 (claiming unjust enrichment to be anchored in copyright law since its inception, thus "equity, not money, formed the basis for the rights granted by copyright.").

[237] Letter from Joel Barlow to the Continental Congress (1783), PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds.), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783b; Samuel L. Clemens [Mark Twain], Statement before the Committee of Patents of the Senate and House to discuss amending the Copyright Act, in JAMES BOYLE & JENNIFER JENKINS, INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY–CASES & MATERIALS 270 (5th ed. 2021); Madow, *supra* note 11, at 196–205.

However, it is highly questionable if the commercially marketable public image or persona must be viewed as the outcome of the celebrity's labor.[238] Fame has often very little to do with labor, but a lot with the needs of the public, who consumes and recreate its celebrities, as best demonstrated by Elvis's herds of impersonators.[239] In addition, the advocacy of the labor/Lockean approach ignores the Lockean restraints to his theory. Locke never meant property to be given unconditionally.[240] The proprietor should take only the necessary resources from the public common, leaving enough for others to allow them to create their own products and private property as well.[241] In other words, the remaining resources should be sufficient and of the same quality as those taken so as not to deteriorate or be destroyed, allowing those in need to benefit from the natural right to charity.[242]

In terms of preventing unjust enrichment, the contest between the persona and the unauthorized appropriator of its image is used as a doctrinal vehicle to strengthen the Lockean approach, which is misunderstood. As Michael Madow argues:

> A celebrity like Madonna cannot say of her public image what the carpenter can say of his chair: "I made it." And because she cannot say this of her public image, she cannot lay a convincing moral claim to the exclusive ownership or control of the economic values that attach to it.[243]

In addition, critics of this theory claim that the reward justified by this theory should be given only for the added value deriving from labor, whereas the right of property is granted fully to the persona, regardless of its partial role in its public image.[244] However, the courts adhere to the unjust enrichment doctrine by ruling that the gist of the matter is that even if the celebrity does not deserve authorship in its entirety, the unauthorized appropriator had no hand in it at all.[245]

The personhood approach, whose premise is the importance of personality and its development as the driving force of humankind, derives its legacy from the three pillars of the Enlightenment Era: Immanuel Kant, G. W. F. Hegel, and J. G. Fichte.[246] However, while it is tempting to mention these giants in one breath, they differ considerably. Kant expresses the right-based (instead of value-based) approach,

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[238] Noa Dreymann, *John Doe's Right of Publicity*, 32 BERKELEY TECH. L.J. 673, 683–84 (2017).
[239] Madow, *supra* note 11, at 188; March, *supra* note 1; COOMBE, THE CULTURAL LIFE *supra* note 136, at 63.
[240] LOCKE, *supra* note 176, chap. V, §§ 27, 31–32, 36; Wu, *supra* note 178.
[241] Coors, *supra* note 235, at 217 (explaining the Lockean limitations on natural rights due to the limited earthly resources by nature).
[242] LOCKE, *supra* note 176, at chap. V, § 46; Coors, *supra* note 235, at 217 (for Locke's proviso, namely, that "enough, and as good, left in common for others."); Wu, *supra* note 178 (arguing that thus, "society maximizes the benefits from labor while avoiding waste.").
[243] Madow, *supra* note 11, at 196.
[244] *Id*. at 181–96.
[245] *See* Dreymann, *supra* note 238, at 683 n.99 (demonstrating Lockean arguments in publicity rights adjudication).
[246] LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 16 (2007).

according to which there is a primary relationship between the author and the public through the speech addressed to the public by the author.[247] In his essay "*What Is a Book*," regarding the wrongfulness of unauthorized publication of books, Kant regards the book as a writing in which "the author speaks to his reader."[248] Thus, the perception of "book as speech" renders an unlicensed book unlawful because it becomes an "agency without authority."[249] The focus of Kant is on books as actions of speech, not as commodities.[250] Therefore, scholars attribute "[t]he modern concept of the autonomy of expression" to Kant's legacy.[251] The publisher is legitimate as long as he is authorized to address the act of authorial dialogue to the public in the name of the author.[252]

Kant's perception of the author was further developed by Fichte, who enhanced the justifications for the author as the quintessence of authorship, as he believed that "each writer must give his own thoughts a certain form, and he can give them no other form than his own because he has no other."[253] However, even Fichte cannot justify the doctrinal leap to a perpetual property right, as indicated by one of the most popular quotes from his manifesto, in which it is still unclear why an author should acquire a property right.[254] Fichte writes:

> Hence, each writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property.[255]

Hegel enhanced Kant's and Fichte's innovative thinking by connecting the author's extension of her inner will, intellectual process, and individuality with the property right, i.e., the author's right to control her creation.[256] Hegel's perception, culminating in property rights as embedded in the creative will, is highly influenced by Kant's vision of an autonomous will, which we must develop as the quintessence

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[247] Borghi, *supra* note 146, at 341.
[248] IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 89 (W. Hastie trans., 1887).
[249] Kawohl, *supra* note 153.
[250] *Id.* (demonstrating the failure of the Kantian concept of reprinting as "agency without authority" in copyright discourse: "It is not the author's property that is violated by a reprint, but the author's right to decide whom he will delegate to transfer his speech to the public.").
[251] KIM TREIGER-BAR-AM, POSITIVE FREEDOM AND THE LAW 170 (2019).
[252] KANT, *supra* note 248, at 89–90.
[253] JOHANN G. FICHTE, PROOF OF THE ILLEGALITY OF REPRINTING: A RATIONALE AND A PARABLE 227–28 (M. Woodmansee trans., 1793).
[254] FICHTE, *id.*
[255] *Id.*
[256] *See generally* REDDING, *supra* note 156; HOULGATE, *supra* note 156 (for the importance of Hegel's Aesthetics).

of humanity.[257] While the Kantian act of speech may not create a distinction between writing and speaking in its gist as an authorial address to an audience, Fichte and Hegel need this dichotomy to establish property rights for writing as an emerging profession. It follows that for his contemporary colleagues, the Kantian "authorial ownership of one's thoughts" was not sufficient to justify property rights in terms of a coherent copyright system.[258]

Margaret Radin takes Hegel's philosophy further. Hegel granted the author the right to control her creation as the extension of her inner will, intellectual process, and individuality. Radin creates the dichotomy between personal and commercial assets, which merit different levels of protection, each according to their connection to our personality.[259] According to Radin's interpretation, the closer the link of intellectual property to the core of the creator's personality and inner self, the higher the protection it deserves. Thus, the personhood approach faces a challenging doctrinal shift from an autonomy-based right into a property right because it links controlling assets to the expression of our personality, required for the implementation of our autonomy and freedom.[260]

In Europe, especially in France, Germany, and Italy, the personhood approach led to the recognition of authors' personal rights—separate and apart from the economic aspect of copyright—known as moral rights (droit moral), the most important of which are the right of attribution and the right of integrity.[261] Article 6 of the Berne Convention states:

> Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said

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[257] *See generally* Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 23, 2004), https://plato.stanford.edu/archives/spr2022/entries/kant-moral.

[258] Kawohl, *supra* note 153 (referring to Kant: "He resorts to a completely different juridical concept: it is not the author's property that is violated by a reprint, but the author's right to decide whom he will delegate to transfer his speech to the public. Unauthorized reprinting is, therefore, not a property offence but, rather, an "agency without authority.").

[259] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–60 (1982).

[260] G.W.F. HEGEL, PHILOSOPHY OF RIGHT 58–61 (S.W Dyde trans., 2001) [hereinafter HEGEL, RIGHT]; *see id.*

[261] 3 NIMMER ON COPYRIGHT § 8D.01[A] (lists moral rights to include: "The right to be known as the author of his work; The right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written; The right to prevent others from being named as the author of his work; The right to publish a work anonymously or pseudonymously, as well as the right to change his mind at a later date and claim authorship under his own name; The right to prevent others from using the work or the author's name in such a way as to reflect adversely on his professional standing. In addition, there are several distinct categories that comprise the classic droit moral: The right to prevent others from making deforming changes in his work (*droit au respect de l'oeuvre*); The right to publish a work, or to withhold it from dissemination (*droit de divulgation*); and The right to withdraw a published work from distribution if it no longer represents the views of the author (*droit de retrait; also, droit de repentir*).").

work, which shall be prejudicial to his honor or reputation.[262]

The rationale of moral rights is "[to] provid[e] a climate in which authors are encouraged to create, secure in the knowledge that their personal relationship with their works cannot be violated."[263] In the United States, where the copyright system incorporates the incentive approach, the scope of moral rights is far narrower than in Europe, as the Visual Artists Rights Act of 1990 ("VARA") allows attribution claims only for works of art that are specified in the law.[264] In addition, the rationale of moral rights is criticized as wishful thinking.[265]

Adapting the personhood theory to the moral justification for the right of publicity, some scholars claim that if society recognizes identity as an asset, it evolves into a property right in its use.[266] Others argue that publicity rights are a Kantian right that "can be more expansively conceptualized as a property right grounded in human freedom."[267] Thus, the personhood approach faces a challenging doctrinal shift from an autonomy-based right into a property right because it links the control of assets to the expression of our personality. The shift into a property right is required for the implementation of our autonomy and freedom. In terms of publicity rights, "[a]s long as an individual identifies with his personal image, he will have a personality stake in that image."[268] Accordingly, while publicity rights are primarily property rights, the contradiction with the personhood theory is squared with Hegelian and Kantian approaches by linking money as a crucial factor to the persona development.

However, this approach ignores the same interests that are embedded in the users who took a major part in the celebrity authorship, granting it their autonomy and humanity derived from their inner will. Consequently, no satisfactory justification fills the "then" component of the IVTR principle, as the gap between the value at stake—originality—and the property rights that follow is not yet plausible. Therefore, attempting to decipher what constitutes authorship requires scrutiny of the "right" component of the IVTR principle.

"Right"

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[262] The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. 99-27, 1161 U.N.T.S. 30 [hereinafter THE BERNE CONVENTION].

[263] 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:2 (2024) (quoting H.R. Rep. 514, 101st Cong., 2d Sess. 5 (1990)).

[264] 3 NIMMER ON COPYRIGHT, *supra* note 261, at § 8D.03.

[265] FICHTE, quoted in Woodmansee, *supra* note 146, at 445; LANDES AND POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 276 (2004): "Proponents of moral rights laws argue that these laws create a climate of respect for art and artists that encourages artistic creation. The implication is that such laws increase the quality-adjusted quantity of art. There is no evidence for this conjecture. Artistic innovation in the past half-century has been greater in the United States than in Europe, despite Europe's having moral rights laws during this period and the United States largely not. Economics suggests that integrity rights, though not attribution rights, may do more harm than good and on balance may actually discourage artistic creation."

[266] Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 418, 420–21, 427–28 (1999).

[267] *Id.* at 488.

[268] Coors, *supra* note 235, at 228.

The "right" component of the IVTR principle illustrates how authorship is transformed into ownership. The first traits that indicate the transition of publicity rights from a tort to a property right are its assignability and duration.[269] However, both critical stages in publicity rights' evolution into a property right dealt explicitly only with its assignability. The *Haelan* court, which was the first to recognize publicity rights as property rights and differentiate them from a tort of privacy, focused on the assignability factor.[270]

The premise of Nimmer's seminal article that framed the ideology of publicity rights is the inadequacy of publicity rights as a tort in terms of control.[271] The gist of Nimmer's advocacy for publicity rights as a property right is their assignability and not their duration.[272] Accordingly, "[t]he right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee."[273] Consequently, the duration of publicity rights, especially as a posthumous right, was not discussed at all by its framers. In contrast, in terms of cultural control, it is its most important trait.

In that regard, publicity rights share one of the most important issues of copyrightability since its inception: its duration, as shown in *Millar v. Taylor,* which was overruled by *Donaldson v. Becket.*[274] The plaintiff, Alexander Donaldson, a Scottish bookseller, was sued by the defendant to enjoin him from printing *The Seasons*, which was at the core of the *Millar v. Taylor* dispute.[275] Whereas the chancery felt bound by *Millar v. Taylor* to regard copyright as a perpetual right in published works deriving from the common law, the appellant argued for the work in question to be in the public domain once the Statute of Anne, which abrogated a pre-existing common law, had expired.[276] In *Donaldson v. Becket,* the British House of Lords held that copyright in published works was subject to the statutory limits of the Statute of Anne, thus reversing *Millar v. Taylor,* which held that common-law property rights outlive the statute and rendered copyright as a perpetual right.[277]

As Simon Stern indicates, the word "property" was not used in the questions put

[269] Gervais & Holmes, *supra* note 86, at 215 (describing how various states' enactments of a postmortem right of publicity statute were their reactions to the refusal of the courts to recognize publicity rights as posthumous while arguing that "the right of publicity should end with a person's death, or soon thereafter," to morph it back into a privacy tort).

[270] *Haelan Laboratories Inc.*, 202 F.2d at 868.

[271] Nimmer, *supra* note 22, at 204: "Those persons and enterprises in the entertainment and allied industries wishing to control but not prohibit the use by others of their own or their employees' names and portraits will find, for the reasons indicated below, that the right of privacy is generally an unsatisfactory means of assuring such control."

[272] *See generally* Nimmer, *supra* note 22.

[273] *Id.* at 216.

[274] (1774) 4 Burr. 2408, 98 ER 257 (HL). The case is also reported as *Donaldson v. Beckett*, (1774) 2 Bro. PC (2d ed.) 129, 1 ER 837.

[275] *Id.* at 130.

[276] *Id.* at 130–31.

[277] *Id.* at 145.

before the judges.[278] Therefore, the duration issue marks the borderline of property rights.[279] While this is obvious in terms of prolonging the period legally allowed for authorship control before we assess its end, we should start with its beginning by examining the fixation requirement as a sine qua non for copyrightability.[280] Not only is it highly questionable if fixation is needed at all as a threshold for copyrightability, but the crystallization of a persona fixation to render its eligibility for authorship is more complicated.

Contrary to Barlow's perception of digital files, which, because they lack the element of tangibility, allow society to sell intellectual property (wine) without copyright law (bottles), copyright law still insists on fixation as the threshold for copyrightability.[281] Although framed by scholars as "imaginary bottles," "copy" in copyright law is interpreted to include temporary and ephemeral instantiations due to new technologies enabling a different reading of fixation.[282] Although celebrity authorship shares the same infrastructure as copyright law authorship, its fixation is amorphic as her personality is both the "idea" and the "expression" in a tangible form. As stated by Rothman: "Being the author of oneself is the purview of the right of publicity."[283] As a result, the starting point of the publicity rights authorship is unclear.

Yet, publicity rights ownership is enhanced, even compared to its copyright law counterpart. The dilemma should society incentivize fame—i.e., should we recognize persona authorship—is not solved but is enhanced, especially regarding its posthumous trait in certain states. Due to its lack of fixation, the preemption doctrine that could restrain the publicity right's duration and compare it to copyright law is not legally enforceable. The outcome is a far stronger celebrity ownership than its counterpart granted by copyright law in states that acknowledge a longer period in which one may claim a right to publicity posthumously.

Copyright law ownership has grown stronger thanks to the DMCA, evolving to be a new mega/para-right: the right to control users' access to digital media in copyrighted works. However, the DMCA protects online platform providers regarding only copyright infringement claims.[284] Therefore, as copyrighted works and the right of publicity do not share the same safe harbor for online platforms, their ownership differs.

The outcome of squaring publicity rights with this new mutation is twofold. On the one hand, the gist of the DMCA is to shield ISPs from copyright liability once the

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[278] Stern, *supra* note 149, at 82.
[279] *Id.* at 35: "One of the ironies of the decision in *Donaldson v. Becket* (1774) is that, although the publishers lost the dispute over perpetual protection, they won the argument over the premise for such protection - the premise that copyright was a form of property."
[280] For fixation as the "sine qua non" of copyrightability, *see* Shipley, *supra* note 32, at 704.
[281] Barlow, *Selling Wine Without Bottles*, *supra* note 116.
[282] Jessica Litman, *Imaginary Bottles*, 18 DUKE L. & TECH. REV. 127, 131–32 (2019).
[283] Rothman, *The Other Side of Garcia*, *supra* note 32.
[284] *See generally* DIGITAL MILLENNIUM COPYRIGHT ACT, *supra* note 46.

mechanism of Notice and Takedown is implemented.[285] This immunity is nonexistent regarding user-generated content that violates the right of publicity, as it is not considered copyright infringement.[286] On the other hand, once publicity rights ownership is not subordinate to the DMCA, § 230 of the CDA is the relevant legislation to shield ISPs from liability for violating the right of publicity.

Contradictory adjudication interprets § 230's limitations regarding its scope and essence vis-à-vis publicity rights. First, it is still unclear if publicity rights under state law are excluded from § 230. Second, there is no consensus that a publicity right is an IP right. Accordingly, each court carves out a new immunity versus publicity rights for ISPs. Therefore, we are still none the wiser regarding what construes publicity rights authorship, let alone its legal scope.

Contradictory scholarship attempts to answer what "right" persona authorship deserves. The unanimous conclusion that ties together otherwise contradictory scholarship concerning the "right" that fits authorship is that none of the current solutions is clear or satisfactory. Critics of authorship as a property right claim that it gives the persona too much in terms of cultural control or financial consideration for too little value.[287] This school argues that celebrity-exaggerated authorship curtails creativity, cultural pluralism, and freedom of speech.[288] The contradictory school claims that the celebrity is not getting enough regarding its moral rights, for which the right of publicity is a parallel doctrine. This school advocates for a more nuanced balance between the user's free speech and the persona's dignity and autonomy, which prohibits the "coerced use of her expression." As Rosenthal Kwall notes:

> The free speech interests of subsequent users must be balanced against those of original authors not to have their works distorted or modified in objectionable ways with implicit or explicit attribution, resulting in a coerced use of their expression.[289]

In practice, the obsolete Barlow bottles evolved into imaginary bottles far stronger than the original ones. The public domain starting point is already greatly

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[285] *Id.*

[286] *See* Brown v. Ames, 201 F.3d 654, 661 (5th Cir. 2000) (right of publicity is not preempted by federal copyright law).

[287] *See generally* Madow, *supra* note 11.

[288] Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE L.J. & HUMAN. 463, 469–70 (1998); Rosemary J. Coombe, *The Celebrity Image and Cultural Identity: Publicity Rights and the Subaltern Politics of Gender*, 14(3) DISCOURSE 59, 65–66 (1992); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461 (2006); Tehranian, *supra* note 166, at 1249–55 (explaining how the mechanism of derivative-works protection created a new cultural distinction and highbrow/lowbrow norms); *see* Zemer, *The Copyright Moment*, *supra* note 180, at 298–300 (claiming that under the current copyright law's stigma of sole authorship, it is highly unlikely that postmodern movements such as Dadaism, Futurism, Fauvism, and Surrealism, whose quintessence was to challenge one central authority, would be able to exist today without being sued for infringement); *see also White*, 989 F.2d at 1516 (Kozinski, J., dissenting) (detailing the exaggerated legal power bestowed on the persona through publicity rights, and its damage to the public domain, to name but a few); *See generally* Olufunmilayo B. Arewa, *The Freedom to Copy*: *Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007).

[289] ROSENTHAL KWALL, *supra* note 145, at 59–60.

diminished by enhanced "ownership," although the crucial fixation threshold for authorship is not fulfilled vis-à-vis current technology. It follows that authorship morphed into ownership, proving why the "right" component of the IVTR principle is so problematic. The price of unsolved authorship devoured by ownership is argued in the following part regarding the ELVIS Act, being the quintessence of copyright and publicity rights conjoined yet different authorship.

B. Who Profits from Fame?

The prima facie simple question, "Who is the heir of fame?" asked in *Memphis Development, Etc. v. Factors Etc.*, *Inc.* hides a much more important issue.[290] Namely: who controls fame in terms of cultural control, and why? Put differently: who is considered by our legal system to profit from fame? While prominent scholars mark Tennessee's right of publicity law as driven by Elvis's ghost, it seems that the ELVIS Act transforms publicity rights into the ultimate IP rights without the minimal balance between authorship, ownership, and the public domain requested by its counterpart—copyright law.[291]

The Elvis impersonation phenomenon that embraces more than 35,000 impersonators in the United States is a good example of the problematic new balance between free speech and publicity rights created by the ELVIS ACT.[292] While the borderline between free speech and publicity rights was never easy, the expansion of what counts as voice could easily "cover impersonators and artists' use of vocal interpolations, which is similar to the common industry practice of sampling."[293] The *Estate of Presley v. Russen* case (*"Presley v. Russen")*, tried even before the 1984 Act, already demonstrates the conflict between authorship and ownership regarding Elvis's publicity rights, which is bound to get worse at the expense of the public domain.[294]

The action was brought to the New Jersey District Court on a motion by the plaintiff for a preliminary injunction to enjoin *THE BIG EL SHOW*, a stage production patterned after an actual Elvis Presley stage show featuring an individual who impersonates the late Elvis Presley by dressing and wearing the same hair style and design of clothing and jewelry of the latter, and imitating Presley's singing voice,

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[290] *Memphis* Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 957 (6th Cir. 1980) ("This appeal raises the interesting question: Who is the heir of fame?").

[291] Rothman, *Tennessee Legislature*, *supra* note 8 ("Tennessee's right of publicity law has long been driven by the ghost of Elvis, and is now likely to replace its current statute with the almost inevitable passage of the appropriately titled ELVIS Act (the Ensuring Likeness, Voice, and Image Security Act of 2024) (HB 2091/SB 2096).").

[292] Hannah Cox, *ELVIS Act Needs to Be 'Returned to Sender*,' REALCLEARPOLICY, (February 29, 2024), https://www.realclearpolicy.com/2024/02/29/elvis_act_needs_to_be_returned_to_sender_1015124.html (hereinafter: *'Returned to Sender'*).

[293] Gabby Land, *Tennessee's New ELVIS Act: Free Speech & Free Market*, MICHIGAN JOURNAL OF ECONOMICS, (May 13, 2024), https://sites.lsa.umich.edu/mje/2024/05/13/tennessees-new-elvis-act-free-speech-free-market/.

[294] Est. of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981).

distinctive poses, and body movements which made him famous.[295] The defendant's request to the United States Patent and Trademark Office to register the name *THE BIG EL SHOW* and the design feature of that name was answered by the plaintiff's Notice of Opposition, claiming that the defendant's production, *THE BIG EL SHOW*, infringes on its right of publicity, inherited from the late Elvis Presley.[296] While the plaintiff was entitled to Elvis's publicity rights, the relevant contracts did not specifically authorize their correlation with any rights associated directly with the performances.[297]

In setting the distinction between publicity rights infringement and the First Amendment defense, the court was greatly influenced by Peter Felcher's & Edward Rubin's seminal article, *Privacy, Publicity, and the Portrayal of Real People by the Media*, concluding that "[t]he primary social policy that determines the legal protection afforded to media portrayals is based on the First Amendment guarantee of free speech and press."[298] Hence, the court examined the purpose of the impersonation in question: did it predominantly serve "a social function valued by the protection of free speech," which is immune from liability, or was the impersonation's primary function commercial exploitation, thus infringing publicity rights?[299]

While academically tempting to draw the line between commercial exploitation and a social function shielded by the First Amendment, the hybrid speech that amalgamates these components makes the distinction almost impossible and prey to the idiosyncratic artistic taste of the judiciary.[300] As Judge Alexander Kozinsky (dissenting) wrote: "In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and noncommercial has not merely blurred; it has disappeared."[301]

The *Presley v. Russen* court did no better. Judge Brothman found that *THE BIG EL SHOW* did not fall clearly on either side, as he could not define its exact genre as a parody, burlesque, satire, or criticism of Elvis Presley.[302] Therefore, the only conclusion left was defining the tribute to Elvis as a commercial appropriation by the imitator (Judge Brothman's use of the word "imitator" is already leading to his

[295] *Id.* at 1348.
[296] *Id.* at 1349.
[297] *Id.* at 1350.
[298] Peter L. Felcher & Edward L. Rubin, *Publicity, and the Portrayal of Real People by the Media*, 88 Yale L.J. 1577, 1596 (1979).
[299] *Presley*, 513 F. Supp. at 1356.
[300] Savare, *supra* note 30 at 52–54 (claims the issue of the "hybrid speech" to be the most complicated and disputed in publicity rights claims).
[301] White v. Samsung Elec. Am., Inc., 989 F.2d 1512, 1520 (9th Cir. 1993).
[302] *Presley*, 513 F. Supp.at 1359.

verdict).[303] While phrased as a question, the answer is already given. Thus:[304]

> However, entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment.

Not only the huge crowd of Elvis's impersonators may differ, but the issue at stake is more than purely commercialism. Research has proved the cultural importance of celebrities' impersonation as a vehicle for the free expression of minorities, the creation of undercurrent culture, as well as reshaping the main culture as well.[305] In addition, the *Presley v. Russen* court compared *THE BIG EL SHOW* with Zacchini's stolen act in its entirety, yet admitting that Presley's death rendered *Zacchini's* holding meaningless as there is no chance of harming potential profits from future Elvis performances.[306] Once the court has chosen to solely focus on the commercial trait, the reasoning falls back to the unjust enrichment argumentation, although the circumstances of *Zacchini's* holding are different, dealing with the future performances of the living, whereas Elvis died about four years before the *Presley v. Russen* proceeding started.[307]

Yet, the court declined to grant the requested preliminary injunction to enjoin *THE BIG EL SHOW,* demonstrating that it could not follow its previous reasoning. While failing to find any social value in the show, defended by the First Amendment, at the same breath, the court found "the defendant's activity when viewed simply as a skilled, good faith imitation of an Elvis Presley performance, i.e., without the elements leading to a likelihood of confusion, is, in some measure, consistent with the goals of freedom of expression."[308] This self-contradictory finding omits the fact that no likelihood of confusion is needed for publicity rights infringement. Therefore, the link between the lack of likelihood of confusion and the demand to show immediate, irreparable harm to the commercial value of the right of publicity requested for preliminary injunction is artificial. It need not be connected with

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[303] *Id.*:

> In essence, we confront the question of whether the use of the likeness of a famous deceased entertainer in a performance mainly designed to imitate that famous entertainer's own past stage performances is to be considered primarily as a commercial appropriation by the imitator or show's producer of the famous entertainer's likeness or as a valuable contribution of information or culture.

[304] *Id.*

[305] *See generally* Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders,* 10 CARDOZO ARTS & ENT. LJ 365 (1992); Coombe, *supra* note 288; DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 137-91 (2d ed. 2004) (referring to the urban gay community remaking Judy Garland's image in their Drag shows to assert their identity).

[306] *Presley*, 513 F. Supp. at 1361 ("The death of Presley diminishes the impact of certain of the court's reasons, especially the one providing for an economic incentive to produce future performances.").

[307] *Id.* ("However, through receiving royalties, the heirs of Presley are the beneficiaries of the ''right of the individual to reap the reward of his endeavors.' . . .. Under the state's right of publicity, they are entitled to protect the commercial value of the name or likeness of Elvis Presley from activities such as defendant's which may diminish this value." (citations omitted)).

[308] *Id*. at 1379.

wrongly equating publicity rights to trademark law but differentiating between *THE BIG EL SHOW* and *Zacchini's* circumstances.[309]

The harsh criticism against the ELVIS Act focuses on fame-controlling culture disguised as protection from publicity rights infringement by AI-generated use. The law is "so overly broad that instead of merely ensuring AI cannot replicate a person's voice for commercial purposes it ensures anyone making parody, documentaries, or even news-related content could find themselves in a Tennessee courtroom."[310] While Hannah Cox's criticism delineates the desired legal borderline between commercial use such as advertising, merchandise, and fundraising purposes, as the gist of publicity rights, and "newsworthy" exceptions encompassing "everything from hard news to documentaries, to satire, to celebrity gossip" for the sake of "public interest," this is hardly the practice case.[311]

Neither was it in *Zacchini,* in the Supreme Court of the United States, choosing to dwell on the similarities of publicity rights and copyright law's infringement, instead of focusing on the "newsworthy" of the alleged infringement, thus creating the legal hybrid of publicity rights and copyright law conjoined authorship.[312] Again, the same lesson drawn from the fear of technology, culminating in the enactment of the DMCA, is repeated here: the music industry associations and Hollywood unions let ownership conquer authorship.[313]

Conclusion

Elvis's contribution to Western culture is beyond dispute. Unfortunately, this is not the case concerning his publicity rights, as manifested in the ELVIS Act. The ELVIS Act demonstrates not only what publicity rights morphed to be, but reflects on the ancient conflict of authorship versus ownership in copyright law, with which publicity rights share conjoined yet different legal infrastructure.

Tracing the history and evolution of Elvis's publicity rights in adjudication and legislation, which were at war with themselves, leads to the argument that the right of publicity challenges the very concept of authorship and cultural control devoured by private ownership in three interfacing legal IP rights: copyright law, publicity rights in general, and Elvis's publicity rights in particular. Ideologically, this

[309] *Id.* ("In light of these comments, we find that the plaintiff has not made a sufficient showing that the presentation of this particular production, THE BIG EL SHOW, has resulted in any loss of commercial benefits to the plaintiff or will result in an irreparable commercial harm in the near future. The plaintiff has not adequately demonstrated that the existence of defendant's activity has led to or is likely to lead to a diminished ability of the plaintiff to profit from the use of Elvis Presley's name or likeness.").

[310] Cox, *supra* note 292.

[311] *Id.*

[312] *But cf.* Joe Dickerson & Assocs., LLC v. Dittmar, 34 P.3d 995, 997 (Colo. 2001) (reaching the opposite conclusion of *Zacchini,* regarding the desired balance between publicity rights versus the "newsworthy" of the allegedly infringing speech).

[313] Cox, *supra* note 292 ("What these entities really want is an end to Fair Use practices because they're bleeding money, and instead of making better products or creating new revenue sources, they're simply being lazy and attempting to restrict the market.").

evolution embodies the essence of publicity rights as a legal hybrid, attempting to protect a whole spectrum of interests, anchored in the restitution paradigm and evolving from a tort of privacy into a property right while embedded in copyright law due to *Zacchini*'s legacy.

The parallel technology axis, reflected by the history of both the DMCA regarding copyright law and the ELVIS Act concerning Elvis's publicity rights, offers to understand the fear of new technology as the new measure for authorship. Accordingly, technologies meant to ease the access to culture for the public, ended up enhancing a contradictory trajectory, siding with strong lobbies that advocate private ownership at the expense of public authorship in its cultural myth. Whereas the DMCA created the new mega-right, i.e. the right to access, the ELVIS Act broadens liability and narrows the fair use exemptions.

The conflict of authorship versus ownership in copyright law since its inception is discussed through the dynamic evolution of each component of the "if value, then right" ("IVTR") principle in Western culture, leading to a different concept of authorship. The first component of the IVTR principle is the "if" component, which answers the question of to whom society attributes authorship. The "value" component of the IVTR principle was answered by constituting unprecedented originality as the main value of authorship but proved not only to be a false myth but highly dependent on the idiosyncratic artistic taste of the judiciary. Hence, the "then" component that attempts to link its justifications to the "right" component of the IVTR principle fails to do so. Consequently, while we are still none the wiser why questionable values, either by answering only the minimal threshold of originality requested by copyright law or enhancing undeserved fame regarding publicity rights, are getting stronger property rights in both the ideological and technological axes. The Elvis impersonation phenomenon, as analyzed by adjudication and compared with the implications of the ELVIS Act, attempts to demonstrate how unsolved authorship is devoured by ownership, reflecting on its cultural price. While it seems that big money always wins in terms of ownership, the real loser is not authorship. It's us—the public.