Express Yourself: A Personal Use Privilege for the Subjects of Copyrighted Works

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Abstract

In the past couple years, there has been a bevy of copyright lawsuits filed due to photographs posted on social media without the photographer's consent. More generally, this conflict exists in any situation in which a copyrighted work represents the individual and the copyright owner withholds consent for the represented individual to post the work online. This Note poses and evaluates the following dilemma: do individuals have a right to use media in which they are represented? Additionally, if such a right exists, to what extent does it exist?

This Note argues that the subject of a copyrighted work has an urgent personal interest in the use of such work, justifying a privilege to use the work that outweighs the author's copyright. Part I of this Note evaluates the normative foundation of copyright for the author of a work. Part II of this Note assesses potential theoretical bases for an individual usage right of copyrighted works in which the individual is represented. Part III of this Note considers the limitations and implications of such a usage right. Part IV details the existing legal framework surrounding this issue and proposes a legislative reform to create a personal use privilege for the subjects of copyrighted works. Part V concludes.

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I. Introduction

In the past couple of years, there has been a bevy of copyright lawsuits filed due to photographs posted on social media without the photographer's consent.[1] The scenario looks something like this: a photographer takes a picture of a celebrity in public. The celebrity sees the picture online and decides to post it to a social media account, either temporarily as a "story,"[2] permanently as a post,[3] or as an embedded post (such as a "re-tweet").[4] The photographer, who owns copyright in the picture, sues the celebrity for copyright infringement (and damages). The photographer and celebrity spend money in pre-trial proceedings before (usually) settling out of court.[5] Since April 2017, there have been at least thirty-six cases filed that follow this pattern; none have yet gone to trial.[6] Moreover, this list only captures the most prominent examples. On December 15th alone, three cases regarding photographers suing celebrities for unauthorized social media posts were filed in the Central District of California.[7] As more photographers become aware of the opportunity for lucrative settlements, they are filing lawsuits at an increasingly rapid pace. Ten out of the thirty-seven cases filed in 2019 were filed in October.[8] Such cases contribute to a growing trend of "copyright trolling"—mass litigation of copyright cases with minimal actual damages.[9]

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1 *From Gigi Hadid and Nicki Minaj to Versace and Marc Jacobs: A Running List of Paparazzi Copyright Suits*, THE FASHION LAW (Oct. 14, 2019), https://www.thefashionlaw.com/from-bella-and-gigi-hadid-and-goop-to-virgil-abloh-and-marc-jacobs-a-running-list-of-paparazzi-copyright-suits/ [https://web.archive.org/web/20210408001342/https://www.thefashionlaw.com/from-bella-and-gigi-hadid-and-goop-to-virgil-abloh-and-marc-jacobs-a-running-list-of-paparazzi-copyright-suits].

2 *See* complaint at *3, Splash News and Picture Agency, LLC v. Hemsworth, No. 2:19-cv-10584 (C.D. Cal. Dec. 15, 2019) (suing Liam Hemsworth for copyrighted content posted to his Instagram story).

3 Xclusive-Lee, Inc. v. Hadid, 2019 WL 343545 (E.D.N.Y. Jan. 28, 2019).

4 *See* Jessica Gutierrez Alm, *"Sharing" Copyrights: The Copyright Implications of User Content in Social Media*, 35 HAMLINE J. PUB. L. & POLICY 105, 117–23 (2013) (discussing copyright liability for acts of re-posting on social media).

5 *See* THE FASHION LAW, *supra* note 1 (providing a list of cases following this pattern).

6 *Id.*

7 Splash News and Picture Agency, LLC v. Hemsworth, No. 2:19-cv-10584 (C.D. Cal. Dec. 15, 2019); Xposure Photo Agency, Inc. v. Hadid, No. 2:19-cv-10587 (C.D. Cal. Dec. 15, 2019); Xposure Photo Agency, Inc. v. Wilson, No. 2:19-cv-10585 (C.D. Cal. Dec. 15, 2019).

8 THE FASHION LAW, *supra* note 1.

9 Ashley Cullins, *Has This Man Sued You? A "Copyright Troll" Takes on Hollywood*, HOLLYWOOD REPORTER (Apr. 6, 2018), https://www.hollywoodreporter.com/thr-esq/has-man-sued-you-a-copyright-troll-takes-hollywood-1099156. Although there are many varieties of low-value copyright cases being filed, this Note does not affect or address of most of these cases. This Note only deals

Although current litigation of this variety revolves around celebrities, no one is legally exempt, as copyright law covers all "original works of authorship," not just those containing celebrities.[10] Thus, the same legal conflict could hypothetically arise from someone wanting to post a photograph or footage of themselves taken from a news or sports broadcast. More generally, the conflict exists in any situation in which a copyrighted work represents the individual and the copyright owner withholds consent for the represented individual to post the work online. Because this issue usually occurs as a result of photographs posted on social media, this Note will sometimes use the circumstance-specific language of "photographer" and "image [or] photo" in lieu of the more general terms of creator, author, and work. Further, this Note will sometimes discuss the topic in language specific to social media posts. Generally, this Note poses and evaluates the following dilemma: do individuals have a right to use media in which they are represented? Additionally, if such a right exists, to what extent does it exist?

In answering these questions, it is important to remember that although end-users are the "ultimate beneficiaries" of copyrighted media, copyright benefits end-users by promoting authorship.[11] Copyright promotes authorship "by ensuring authors a financial return from and reasonable control over the exploitation of their works."[12]

This Note argues that the subject of a copyrighted work has an urgent personal interest in the use of such work, justifying a privilege to use the work that outweighs the author's copyright. Part I of this Note evaluates the normative foundation of copyright for the author of a work. Part II of this Note assesses potential theoretical bases for an individual usage right of copyrighted works in which the individual is represented. Part III of this Note considers the limitations and implications of such a usage right. Part IV details the existing legal framework surrounding this issue, proposes a policy reform that addresses the findings of Part III, and analyzes the implications of this policy reform. Part V concludes.

II. The Creator's Interest

First, the theoretical source of the photographer's right must be established. One theory, broadly referred to as democratic theory, justifies copyright on the basis that it enhances civil society.[13] Neil Netanel, a scholar of this theory, defines civil society as "the sphere of voluntary, nongovernmental association in which individuals determine their shared purposes and norms. It may include unions, churches, political and social movements, civic and neighborhood associations, schools of thought, educational institutions, and certain forms of economic organization. . . . [C]ivil society

with one aspect of copyright trolling: lawsuits against individuals who post representations of themselves online.

10 17 U.S.C. § 102(a).

11 Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 20 (1997).

12 *Id.*

13 Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

also comprises the realm of public communication and discourse."[14] Although Netanel was writing in the twentieth century, he recognized that public discourse was increasingly digital, both through mass media and the internet.[15] Given the explosion of social media and other digital platforms, this is even more true today.[16]

Netanel argues that copyright law supports civil society in part through a production function.[17] Through the production function, copyright "encourages creative expression . . . . The activity of creating and communicating such expression and the expression itself constitute vital components of a democratic civil society."[18] Public discourse relies on the exchange of information and ideas.[19] Copyrighted works are the "lifeblood" of the digital information exchange; thus, it is crucial that copyright law functions in such a way that promotes the creation and distribution of such works.[20] The financial and control benefits of a copyright serve as "a vital incentive" for creators to develop and disseminate works.[21]

Without copyright protection, or sufficiently strong copyright protection, "there is no reason to assume that the creators of 'sustained works of authorship'—books, articles, films, songs, and paintings . . .—will generally make their work available over the Internet, or will create new cyberspace variations of such works, without some reasonable possibility of remuneration."[22] Essentially, copyright needs to be sufficiently strong so as to incentivize the creation and distribution of works in both physical and digital realms. The reason for this lies in the non-excludability of copyrighted works: copying is much cheaper than creating; thus, in the absence of copyright, it is more difficult for the creator to recoup the value of their creation.[23] When evaluating a copyright policy under this framework, the incentive to create and distribute a work must be balanced with the public's consumptive interest of the work.[24] If copyright protection is too weak, creators may have insufficient incentive to create and distribute; if copyright protection is too strong, creators may (1) be unable to develop new works without infringing on prior copyrights, (2) censor uses of their works they deem undesirable, or (3) extract excessive access fees, thus impairing both discourse and cultural development.[25]

The standard approach to copyright efficiency analysis relies on a marketplace

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14 *Id.* at 342.
15 *Id.*
16 Antonio García Martínez, *Used Wisely, the Internet Can Actually Help Public Discourse*, WIRED (Dec. 17, 2018), https://www.wired.com/story/used-wisely-internet-can-actually-help-public-discourse/.
17 Netanel, *supra* note 13, at 347.
18 *Id.*
19 *Id.* at 348.
20 *Id.*
21 *Id.* at 349.
22 *Id.* at 340.
23 Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 293–94 (1970).
24 Netanel, *supra* note 13, at 285.
25 *Id.*

which allows copyright owners to achieve maximum profit for their works, thus distributing creative works to those who value them most.[26] In the standard efficiency model, allocative efficiency is achieved by allowing anyone with a willingness to pay market price the right to purchase and use the work.[27]

Ordinary efficiency analysis of this Note's dilemma under the efficiency framework suggests that the subject may indeed be justified in personal use of a work in which they are represented. Remember that the photographer's interest in an image is ultimately based on incentivizing production and dissemination of the work.[28] Under the efficiency approach to copyright, creativity is incentivized best through a level of copyright protection that maximizes the amount of works in the marketplace that can be purchased by individuals with a willingness to pay.[29]

Under this framework, the subject of a photograph would have a right to use it solely if they were willing to pay the market price. While this may be financially feasible for wealthy celebrities, it is less so for everyday individuals. Additionally, there are practical transaction costs of copyright at play that impact the consumptive value of the work. For example, if a license must be purchased before using a photo, there is an additional delay between when the photo is taken and when it can be permissibly used. In a rapidly moving digital culture, this temporal delay may reduce the relevance of the work when it is finally displayed, thus diminishing its societal value. Finally, considering allocative efficiency only at the aggregate level may overlook individual instances in which allocative efficiency favors the consumer rather than the copyright owner.[30]

While broad copyright protection may be generally ideal, it may be undesirable in specific instances where the protection does not incentivize additional creative activity.[31] Professor Sterk argues that "when an author creates a work with one market in mind, the incentive justification fails as a reason to give the author monopoly power in another market; the author would have created the work even without the prospect of monopoly."[32] In the case of paparazzi photographs (the legal nexus of this Note's dilemma), the creators are targeting their work toward entertainment media outlets.[33] The primary media market is likely more than adequate for incentivizing the creation of the media and recouping the cost of creating it. Losing access to the single-user market of the subject seems unlikely to disincentivize creation relative to the target

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26 *Id.* at 309.
27 *Id.* at 319.
28 *See* discussion of the production function, *supra*.
29 *See* discussion of the neoclassical approach to copyright, *supra*.
30 *See* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law,* 94 MICH. L. REV. 1197, 1213 (1996) ("Although the deadweight losses a copyright monopoly creates might be greater in some areas than in others, all monopoly power creates some inefficiencies.").
31 *Id.* (arguing that copyright protection does not incentivize additional creation of personal photographs).
32 *Id.* at 1215.
33 KIM MCNAMARA, PAPARAZZI: MEDIA PRACTICES AND CELEBRITY CULTURE 3–4 (2016).

market of the media industry, whereas the subject's inability to utilize the photo may have an outsize impact on consumptive value. Thus, it is arguable that granting copyright protection to the single-person market of the image's subject may produce allocative inefficiency. Even under standard economic analysis, there are reasons for allowing personal uses of one's own image. However, the next Part of this Note will provide an even stronger justification for such personal use outside of the allocative efficiency framework: a high-intensity personal interest of the person depicted in the photo.

III. The Subject's Interest

The subject of a photograph may consider several possible bases to claim a privilege to use the photograph: personality interests, privacy interests, publicity interests, self-expression, and personal usage. Although only one of the bases—personal usage—stands up to scrutiny, it is helpful to evaluate each possible basis, as each theory will help color the discussion of personal usage.

A. Personality Interests

The theory of personality interests asserts that in order to self-develop, an individual must be able to exert some level of control over their external environment.[34] Most individuals possess objects that they consider to be "almost part of themselves."[35] These items, if parted with, would impart the pain of loss.[36] Thus, there is some intuitive appeal for a concept of property for personhood—ownership of items that define an individual's person in some way.[37] Professor Radin illustrates as follows: "Our reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society. Where other kinds of object relations attain qualitatively similar individual and social importance, they should be treated similarly."[38] Following from this principle, Radin advocates that property should be denied to an individual if their possession of it would deny another individual self-actualization.[39] In other words, when a personal interest in property conflicts with a traditional interest in property, the personal interest prevails.

Although Professor Radin conceptualized personality interests in the context of physical objects, the concept can extend to intellectual property as well.[40] As Professor Hughes explains, "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self."[41] The personality justification for intellectual property is best applied to arts.[42]

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34 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).
35 *Id.* at 959.
36 *Id.*
37 *Id.* at 961.
38 *Id.* at 1013.
39 *Id.* at 989–91.
40 Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 330 (1988).
41 *Id.*
42 *Id.*

Personality theory is a good fit for artistic works such as poems, stories, music, sculpture, paintings, and prints,[43] as these are "the personal reaction of an individual upon nature."[44] To the extent such a work promotes the self-actualization of the creator, the creator may wish to exert control over them.[45] The creator's control over a work is most strongly in relief when control is asserted against another's use.[46] For example, Samuel Beckett challenged Harvard's controversial production of his play *Endgame* on the basis that the production undermined the integrity of his art.[47] As discussed in Part III below, personality theory may afford an artist the basis to control how others use their work, which has the potential to conflict with the subject's use of such work.[48]

Another possible use for personality interests is that of persona: an "individual's public image, including his physical features, mannerisms, and history."[49] Unlike most other forms of intellectual property, one's persona is not generally considered to be the result of one's labor.[50] Thus, persona is "the ideal property for personality justification,"[51] as no intermediary step of "expression" is necessary.[52] Rather, "as long as an individual identifies with his personal image, [t]he[y] will have a personality stake in that image."[53]

Under this formulation, the subject of a photograph may assert a personality interest in the image. However, in order for this personality interest to be present, the image must be put to some use developing or realizing one's identity. It is not merely about a strong personal connection. Given that the work is a byproduct of the artist's interaction with the world, the artist may have a stronger personal interest than the subject, unless the subject acts on the image in some way.[54] It is difficult to predict what kind of interaction with the work is sufficient to create a personality interest, but it seems to go beyond mere display or viewing.

The dilemma described above exposes a limitation of the personality theory: it

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43 *Id.* at 340.

44 *Id.* (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903)).

45 *Id.* at 330.

46 *Id.* at 294.

47 *Id.* at 294–95 (citing Justin Hughes, *Between Art and Law*, HARV. CRIMSON, Jan. 21, 1985, at 3, col. 1).

48 *See* discussion in Part III, *infra*.

49 *Id.* at 340.

50 *Id.* Although many public figures work on their public image, other famous individuals do not. *Id.* at 340 n.218. Regardless, American jurisprudence protects persona in order to motivate creativity. *Id.*; Memphis Dev. Found. v. Factors, 616 F.2d 956, 959 (6th Cir. 1980).

51 *Id.* at 340.

52 *Id.*

53 *Id.* at 340–41.

54 *Cf. id.* at 341 n.220 (comparing whether an author's writing or persona is the better medium for expressing personality). Although the footnote is discussing whether the *same* individual's expressive work or persona is better at expressing personality, the concept is analogous to two *different* individual's expressive work and persona competing as personal claims.

can give rise to conflicting claims of interest.[55] Multiple individuals may assert a claim to property on the basis of personhood.[56] In the absence of a theory of group rights, these conflicting claims of interest are difficult to resolve.[57] To elucidate, Professor Radin provides the example of *Village of Belle Terre v. Boraas*.[58] The case involved a conflict between town zoning that restricted living quarters to nuclear families and six students residing in a house in violation of the zoning.[59] Radin abstracts two conflicting property claims from this scenario: the students' claim that the residence is personal, and the townspeople asserting that the zoning restriction is personal.[60]

While such a conflict of personal claims is seemingly unresolvable with physical property, intellectual property, which is non-rivalrous,[61] provides an intriguing new context for conflicting personal claims. In the digital realm, each individual with a personal claim may simply create their own copy of that item.[62] Relevant to this Note, both a photographer asserting a personal claim over a photograph and the subject asserting a similar claim may possess a digital copy of the photograph. In the case of mere possession, no apparent conflict exists.

However, the photographer may desire more control than mere possession, such as commercialization or exclusive control. In the former situation, the subject's desire to possess the photograph (without compensation) conflicts with the photographer's desire to commercialize; in the latter, the subject's desire to possess the picture (without permission) conflicts with the photographer's desire for exclusive control. One may attempt to resolve these conflicts by placing a limit on the personal claim. For example, excluding commercialization from a personal claim, or exclusive control from a personal claim. These exclusions are difficult to reconcile with personality theory if the photographer (validly) asserts that commercialization or exclusive control are essential to their self-actualization. For example, a career photographer may self-actualize by profiting off of their work, or by maintaining careful control of when and how their photographs are viewed. The inability of personality theory to adequately address competing claims implies that personality theory on its own is an insufficient basis to answer the dilemma posed by this Note. Thus, other bases should be evaluated.

B. Privacy and Likeness

Control over one's image originates in privacy interests The early leading case

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55 Radin, *supra* note 34, at 1011.
56 *Id.*
57 *Id.*
58 *Id.* at 1010–11 (citing Vill. Of Belle Terre v. Borras, 416 U.S. 1, 2 (1974)).
59 *Id.* (citing *Borras*, 416 U.S. at 2).
60 *Id.* (citing *Borras*, 416 U.S. at 2).
61 LUKE TREDINNICK, DIGITAL INFORMATION CONTEXTS: THEORETICAL APPROACHES TO UNDERSTANDING DIGITAL INFORMATION 110 (2006).
62 Netanel, *supra* note 13, at 299.

in privacy jurisprudence was *Pavesich v. New England Life Insurance Co.*,[63] which recognized a distinct interest in privacy related to one's name and image.[64] In *Pavesich*, the Georgia Supreme Court explained: "the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right . . ."[65] Half a century later, Prosser refined privacy interests to into four broad categories of invasion: "1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."[66]

Prosser further distinguishes appropriation of likeness from other torts that invade the right to privacy by explaining that appropriation of a likeness is only wrongful when it is done for the benefit or advantage of the defendant.[67] In contrast, the other three torts derived from the right to privacy are wrongful even when the defendant does not benefit from the act.[68] Prosser provided the theoretical underpinnings for this distinction by explaining that "appropriation is quite a different matter from [the other three privacy torts]. The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity."[69] Regardless of whether such interest is a property right or otherwise, one's likeness is proprietary.[70] Prosser argued that the proprietary nature of such right entitles an individual from enjoining the use of their name or likeness by a third party.[71] Modern caselaw still recognizes this privacy interest.[72]

Relevant to the dilemma posed by this Note, privacy interests are augmented for celebrities.[73] As Professor Madow explains, "[c]laims of such emotional injury [from privacy violations] were not nearly as convincing when they came from celebrities . . . ."[74] Most famously, the Fifth Circuit held in 1941 that a famous college football player who had repeatedly posed for publicity photographs had partially surrendered his privacy interests.[75] Consequently, the court rejected O'Brien's privacy

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63 50 S.E. 68, 80–81 (Ga. 1905).
64 William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386 (1960).
65 *Pavesich*, 50 S.E. at 80–81.
66 Prosser, *supra* note 64, at 389.
67 *Id.* at 405–06.
68 *Id.* at 406.
69 *Id.*
70 Prosser, *supra* note 64, at 406.
71 *Id.* at 406–07.
72 *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 487 (1975) ("[h]owever it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity").
73 Michael Madow, *Private Ownership of Public Image*, 81 CAL. L. REV. 125, 168–69 (1993).
74 *Id.* at 168.
75 O'Brien v. Pabst Sales Co., 124 F.2d 167, 169 (5th Cir. 1941), *cert. denied*, 315 U.S. 823 (1942).

claim against Pabst for using a photograph of him on a calendar.[76] In rejecting the claim, the court reasoned that the publicity O'Brien received "was only that which he had been constantly seeking and receiving . . . ."[77] Other examples of courts denying privacy protection for celebrities involve posters of movie stars.[78] Since then, the right of privacy for celebrities has been further diminished.[79] As Professor Madow explains, "[c]elebrities must endure media intrusion into their privacy and the familiarities, entreaties, and fickleness of fans. As 'public figures,' they are all but defenseless against defamation."[80]

The use of a likeness represented in a copyrighted work can be broken down into four broad categories: (1) commercial use by the likeness owner; (2) commercial use by the copyright owner; (3) non-commercial use by the likeness owner; and (4) non-commercial use by the copyright owner.[81] Under the current regime, only the fourth category, non-commercial use by the copyright owner, is permissible without consent of the other owner. A likeness owner must get permission from the copyright owner for both commercial and non-commercial use (categories 1 and 3), and a copyright owner must get permission from the likeness owner for commercial use (category 2).[82] Copyright owners can use a likeness for non-commercial purposes without permission or payment; however, likeness owners are unable to utilize a copyrighted work for non-commercial purposes without permission or payment.

The current likeness regime gives an individual the right to *exclude* others from using their likeness (provided certain conditions are met) but are not themselves permitted to *use* their likeness when the likeness is represented in a copyrighted form. Given that control over one's likeness is an interest derived from one's identity,[83] it seems incongruous that the interest only permits exclusion and not use. However, because likeness interests are based in privacy, rather than full control, extending likeness rights to allow for positive uses seems like a baseless claim. Thus, other

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76 *Id.*

77 *Id.* at 170.

78 *See, e.g.* Paramount Pictures, Inc. v. Leader Press, Inc., 24 F. Supp. 1004 (W.D. Okla. 1938 (denying privacy protection for celebrities on movie posters); Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338 (C.P. Ct. 1938) (refusing privacy protection for actress on theatre poster).

79 Madow, *supra* note 73, at 207.

80 *Id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 (1974) (holding that a public figure cannot recover libel damages unless the statement was published with "actual malice")).

81 Regardless of whether one's likeness is an ownable property right (as a copyright is), the law gives individuals distinct rights to control their likeness as a proprietary interest. *See* Prosser, *supra* note 64, at 406–07 (describing likeness as a proprietary interest). Thus, this section of the Note will discuss the conflict of rights between the copyright owner and the "likeness owner."

82 Here, commercial use involves things like advertising, not the sale of the image itself. This is the result of the concept that celebrities "waive" their right to privacy due to their status of a celebrity. *See* Melville B. Nimmer, *The Right of Publicity*, 19 LAW AND CONTEMPORARY PROBLEMS 203, 204 (1954) (describing the concept of waiver by celebrities). There is some pushback against this precedent. Consider, for example, Odell Beckham Jr.'s suit against a photographer that took a photo of Beckham on Beckham's driveway—the case eventually settled. Beckham v. Splash News and Picture Agency, LLC, No. 2:18-cv-01001 (E.D. La. 2018).

83 Prosser, *supra* note 64, at 406.

alternatives must be considered.

C. Publicity Interests

Publicity interests assign the "commercial" value of an individual's name, likeness, and other identifying characteristics as that individual's private property.[84] Publicity interests are usually only an issue for celebrities,[85] as non-famous individuals do not necessarily need to exclude others from exploiting their image. However, publicity interests technically protect all individuals, not just celebrities.[86] Although the underpinnings of publicity interests have been broadly challenged,[87] American courts now widely accept their existence.[88]

Publicity rights are not unlimited—others may utilize a person's identity so long as the purpose is "informative or cultural."[89] Because this exception is based in the First Amendment, it is quite powerful; a defendant demonstrating an informative or cultural use of one's identity "will almost invariably prevail."[90] This exception contextualizes publicity rights as a commercial protection with a non-commercial carve-out.

For the right of publicity to protect a subject's use of an image, the use would thus have to be commercial.[91] Thus, the right of publicity is an inadequate theoretical basis for the subject of an image to use it non-commercially. Moreover, in the commercial context, the subject's use of a copyrighted image would conflict with the image creator's right to benefit commercially from the image.[92] Because the right of publicity is a right, rather than a privilege, it gives the owner power to exclude others. Even if a person could successfully assert publicity rights, they would only be able to exclude the photographer from using the work, but would be unable to use the work themselves. Such a situation is analogous to "blocking rights" in improvement

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84 Madow, *supra* note 73, at 130.

85 *See generally id.* at 128–30 (discussing the justification for publicity rights in the context of celebrities).

86 *See, e.g.*, Douglass v. Hustler Mag., Inc., 769 F.2d 1128, 1138 (7th Cir. 1985) (Posner, J.) (explaining that the publicity right is "the right to prevent others from using one's name or picture for commercial purposes without consent"), *cert denied*, 471 U.S. 1094 (1986); J. THOMAS MCCARTHY & ROGER E. SCHECHTER, 1 THE RIGHTS OF PUBLICITY AND PRIVACY ix (2019) (defining the right of publicity as "the inherent right of every human being to control the commercial use of [their] identity"); Nimmer, *supra* note 82, at 216 (defining the right of publicity as "the right of each person to control and profit from the publicity values which [they have] created or purchased").

87 Madow, *supra* note 73, at 132–33, 132 n.22

88 *Id.* at 134.

89 Midler v. Ford, 849 F.2d 460, 462 (9th Cir. 1988) (quoting Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L. J. 1577, 1596 (1979) (internal quotation marks omitted)).

90 Felcher & Rubin, *supra* note 89, at 1590.

91 *See supra* note 86 (listing various definitions of the right of publicity, each one mentioning commercial use).

92 *See* Netanel, *supra* note 13, at 340 (discussing the need for copyright owners to benefit commercially from their work in the context of democratic theory).

patents[93]—such a blocking of rights is inadequate to resolve the conflict of interests between the photographer and subject.

D. Personal Usage

The personal use of copyright work is a growing field of copyright scholarship.[94] Although the concept of personal use is defined in various ways, the general concept involves "copyrighted works that involve at least a modicum of expressive interaction but are not necessarily highly transformative of the original."[95] While personal uses may have an element of income-generation (such as ad revenue from a personal blog), their primary purpose is non-commercial; that is, "they do not primarily revolve around creating and selling an expressive commercial product designed to extract a market price from consumers."[96]

Whereas many personal uses, such as a video of a toddler dancing to a copyrighted song posted online, can be collapsed into efficiency analysis of subjective preferences,[97] a certain subcategory of personal use requires a unique status.[98] Strong identity-based uses cannot be lumped into mere subjective preference analysis.[99] To illustrate, Jennifer Rothman provides the example of a woman who blogs about her assault, including the copyrighted song played during her assault along with the post.[100] This use of a copyrighted song is not merely for the purpose of preference satisfaction.[101] Rather, the use relates to an "urgent" interest—an interest connected with publicly asserting self-identity.[102]

Additionally, Rothman provides the example of a Myspace post by Samantha Ronson, an English DJ, of her and her girlfriend kissing at a party.[103] By posting this

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93 *Cf.* Charles W. Adams, *Blocking Patents and the Scope of Claims*, STANFORD LAW SCHOOL 4, https://web.stanford.edu/dept/law/ipsc/pdf/adams-charles.pdf (explaining that improvement patents block the original inventor from practicing the improvement, whereas the improvement inventor is blocked from practicing the original invention).

94 *See* Oren Bracha & Talha Syed, *Beyond Efficiency*, 29 BERKELEY TECH. L.J. 229, 281 n.169 (2014) (providing recent examples of personal use literature).

95 *Id.* at 281.

96 *Id.*

97 *Id.* at 284.

98 *Id.*

99 *Id.*

100 Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 516 (2010). This example differs from the dilemma of this Note, as the individual claiming the interest is not directly represented in the copyrighted work. This example provided by Rothman is of someone claiming non-representative materials are essential for their self-expression. For another example, suppose an individual claims that their life narrative is inextricably entangled with the story line of F. Scott Fitzgerald's *The Great Gatsby*, and that their self-expression online depends on utilizing content from the book and film. The theory of personal use may justify use of non-representative material if the interest is sufficiently urgent, or, as Rothman phrases it: "when the individual impact is significant." *Id.* at 529. However, personal use of non-representative works is beyond the scope of this Note.

101 Bracha & Syed, *supra* note 94, at 284.

102 *Id.*

103 Rothman, *supra* note 100, at 521–22.

photo without the photographer's permission, Ronson violated the photographer's copyright.[104] Rothman argues that Ronson has a personal interest in posting the photo, as it documents her life and enables her to "accurately describe her experiences."[105] Professor Rothman also argues that Ronson's personal interest in the photograph is enhanced because sharing the photograph is intimacy-promoting—by sharing the photograph on social media, Ronson signified to her fans, friends, and family how much she valued her relationship.[106] Consequently, Rothman asserts that "[c]opyright holders cannot own reality and should not be able to prevent individuals from documenting, contextualizing, or reframing their own experiences, nor charge them for doing so."[107]

Consequently, uses that represent urgent interests are a unique normatively privileged category beyond a mere consumptive use.[108] Bracha and Syed characterize the hierarchy of interests within self-determination as follows:

> [W]e can distinguish between three levels of interests and corresponding uses of copyrighted works: (1) those uses going to ordinary preference satisfaction, which are to be analyzed as part and parcel of standard efficiency analysis (subject to any distributive considerations . . .); (2) those uses implicating the user's higher-order interests in reflectively forming her preferences, which are to be given lexical priority over the satisfaction of existing preferences of others or even of the user herself; and (3) those uses that pertain to a user's urgent interests (typically by strongly going to self-expression or self-identification), which merit some priority against the aggregation of others users' interests in preference satisfaction.[109]

In other words, when an individual uses a copyrighted work in order to self-express or self-identify, the underlying interest falls under category three and is sufficiently important that it should be prioritized above general preference satisfaction—the uses must be evaluated on their own scale.[110] It is incongruous to use the same scale to compare high-intensity uses, which relate to the ability of an individual to "publicly realize aspects of one's personal identity," to mere consumptive uses.[111] Capacity for self-identity and consumption are not usually commensurable, regardless of domain.[112] As Bracha & Syed quip, "[w]e do not make marginal adjustment of two units of self-identity to gain five units of entertainment."[113] To prevent this kind of abstract tradeoff analysis, Bracha and Syed suggest permitting the use of "strong-intensity, identity-based uses of copyrighted works" irrespective of how such uses may impact others' consumptive abilities—essentially an exemption from copyright liability.[114]

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104 *Id.*
105 *Id.* at 522.
106 *Id.*
107 *Id.* at 529.
108 Bracha & Syed, *supra* note 94, at 284.
109 *Id.* at 284 n.183.
110 *Id.* at 284–85.
111 *Id.* at 285.
112 *Id.*
113 *Id.*
114 *Id.*

The theory of personal use provides a strong justification for the ability of individuals to post copyrighted representations of themselves on social media. The interest in the representation is urgent and intense—the representation is not merely a cultural work that the individual relates to or derives meaning from, but rather a direct depiction of the individual. One's appearance is directly connected to one's identity and self-expression;[115] a rendering of one's likeness in a photograph or video seems no different.

The theory of self-determination supports such identity-based uses regardless of the impact on consumptive interest.[116] Self-determination refers to "the ability of individuals reflectively to form and revise their own conception of the good, and effective to pursue a life plan for realizing it."[117] A similar formulation describes the idea as "self-authorship:" the ability to choose one's own ends and work towards achieving them.[118] The ability to express oneself is instrumental in fulfilling self-determination.[119]

Generally, personal uses may not fall under self-determination, as a connection to an urgent interest must be established;[120] however, when the user is depicted in the work, an intense interest in the material is present. One indicator of the intensity of the interest is that it is unique to the user. Whereas many individuals may claim an urgent interest in self-expressing through use of a popular song, self-expressing through a picture of oneself is unique to the subject(s) of the photo. The intensity of the subject's personal interest in a photograph as well as the higher hierarchical preference for personal interests makes this theory a good basis for comparison against the photographer's interest in the photograph, as discussed in Part III.[121]

IV. Implications and Limitations of Personal Use

A. Comparing The Interests of The Subject and Creator

Assuming that an individual claims an urgent interest in a photo of themselves, the question remains as to whether that interest can outweigh the copyright interest that the photographer possesses in the work. Remember from Part I that the photographer's interest is derived from incentivizing creation and distribution of the work.[122] In contrast, the subject's interest in the work is not a mere consumptive interest, but rather a more urgent interest originating in self-determination. Unlike the comparisons made in Part I, in which there was no clear lexical ordering of interests,[123] or the inadequacy of the interests discussed in Parts II(A)–(C), the comparison between the

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115 *Cf.* Hughes, *supra* note 40, at 340–41 (discussing the connection between personal image and self-actualization).
116 Bracha & Syed, *supra* note 94, at 285.
117 *Id.* at 251.
118 *Id.*
119 *Id.* at 252.
120 *Id.* at 285–86.
121 *See* part III, *infra*.
122 *See* discussion of the production function of copyright in Part I, *supra*.
123 *See* Parts II(A)–(D), *supra*.

photographer's incentive-based interest and the subject's personal interest is resolvable through a clear lexical ordering of the interests. The high-intensity nature of personal interests makes them incomparable on the same scale as consumptive uses (within the efficiency framework).[124] However, the incomparability of these interests on the *same* scale does not preclude them from being evaluated within a *hierarchy*. Compared hierarchically, personal interests, which promote self-determination, are valued higher than incentive-based interests, which merely promote economic efficiency.[125] So long as (1) one values self-determination above economic efficiency in the individual case, and (2) the privilege to use would not undermine the urgent interest by preventing works from being developed, the urgent personal interest of the individual should trump the incentive-based interest of the photographer.

Once the preference for the personal interest of the subject is accepted, it must be determined whether the connection between the subject matter and the urgent interest with respect to a work is assumable, or if it is case specific. In other words, does an individual possess an urgent interest in *every* photo in which they are represented, or does the individual's urgent interest only attach to *some* photos. Professor Rothman evaluates this question by explaining that, "although there may be a general liberty interest in doing what one pleases with copyrighted works, such interests will only outweigh competing interests of copyright holders, creators, and the public more broadly when the individual impact is significant."[126] Applying this framework to the dilemma at hand, is there a significant individual impact for every photograph in which an individual is represented? For example, it is arguable that an individual may not have urgent interest in photo in which they are blurred out, but it is impossible to rule out such an interest. An individual may still have an interest in their blurred form.[127] While some may wish to verify the presence of such urgent interest through case-by-case analysis, so long as most uses will reflect an intense personal interest, a blanket rule is more workable and avoids the burden of case-by-case analysis. The assumption that most uses will reflect an urgent interest seems reasonable—why would an individual use the work if their interest is not in fact urgent? If an individual does not use the photo, it is irrelevant whether there is an urgent interest. Conversely, an individual's use of the photo can be deemed sufficient demonstration that they have an urgent interest in it, so long as the use is non-commercial. The reason for this non-commercial exception is elaborated in the next subpart.

B. Impermissibility of Personal Commercial Use

Proponents of a copyright exception for personal use do not advocate for carte

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[124] Bracha & Syed, *supra* note 94, at 285.

[125] *Id.*

[126] Rothman, *supra* note 100, at 529.

[127] Consider, for example, the cover of Earl Sweatshirt's album *Some Rap Songs*, which features the artist blurred nearly beyond recognition. Devin Stuzin, *Our Take: Earl Sweatshirt Bends Time and Space on* Some Rap Songs, ATWOOD MAGAZINE (Jan. 9, 2019), https://atwoodmagazine.com/srs-earl-sweatshirt-some-rap-songs-album-review/. In this case, Earl arguably had an urgent enough interest in a blurry, nearly unrecognizable photo to use it as an album cover.

blanche use of those works without permission and payment, but rather recognize that some limits must exist.[128] An issue with a copyright exception for identity-based use is whether it is sufficiently broad so as to permit *commercial* use of copyrighted works in which one is depicted. This seems facially unlikely, as personal uses are not primarily commercial.[129] Although personal uses may contain an element of income-generation,[130] when the use of one's representation is *primarily* commercial, it is no longer a personal use, but a commercial one.[131] A personal use is geared mainly toward serving a highly personal need, whereas a commercial use is aimed at generating market income.

When an individual is using their image for a commercial purpose, the urgent personal interest is displaced by a commercial interest in making a profit. Moreover, once in the commercial realm, the interests of the subject and author can once again be compared on the same efficiency-based scale.[132] In the market, the efficiency view dominates—creators should have rights sufficient to incentivize creation and the subject of a work can pay the market price for commercial use of the work as a cost of doing business. Permitting an individual to engage in commercial use of copyrighted works in which they are depicted would shift the income from such a work from the author to the subject, at least for their individual commercial use. Just as individuals must be compensated for commercial use of their likeness,[133] so too should individuals compensate creators for the commercial use of their work.

C. The Urgency of Celebrity Interests

Given the vast quantity of material representing celebrities, there is a question of whether celebrities still possess an urgent interest in particular photos. The quantity of information regarding celebrities alters other rights normally afforded to individuals, such as privacy rights.[134] If celebrity status alters one's right *not* to be seen, should it also alter one's right *to* be seen—to express oneself?

The answer to this question is no, for three reasons. First, all classes of people have an interest in self-expression and self-determination.[135] Second, depictions and discussions of one's life by others should not preclude one from depicting and discussing their own life. Unlike the privacy realm, where there is an inverse relationship between the celebrity's right not to be seen and the public's right to discuss the celebrity, the expressive realm is additive. That is, any expression by the celebrity is in addition to the expressions of others about the celebrity. Affording the celebrity the

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[128] Rothman, *supra* note 100, at 529.
[129] Bracha & Syed, *supra* note 94, at 281.
[130] *Id.*
[131] *Id.*
[132] *Cf.* Bracha & Syed, *supra* note 94, at 285 (explaining that personal interests are not commensurable with consumptive interests).
[133] *See* discussion of publicity rights in Part II(C), *supra*.
[134] *See* discussion in Part II(B), *supra*.
[135] *See, e.g.*, Rothman *supra* note 100, at 465, 521 (providing examples of a non-celebrity with a personal interest in a song and a celebrity with a personal interest in an image).

right to self-express neither precludes others from discussing the celebrity nor distributing depictions of the celebrity. Finally, allowing the celebrity to assert a personal interest in copyrighted works in which they are represented enhances civil society by encouraging dissemination and distribution of that work. Celebrities have millions of followers on social media.[136] Allowing celebrities to claim a personal use will thus allow them to self-express to millions of other individuals and allow other individuals to view and interact with the content.[137]

D. Extent of Creative Control

Given that creators have a personality interest in controlling their work,[138] is the personal interest of the portrayed sufficiently urgent so as to outweigh the creator's interest in control? Relevant to this discussion, it is important to remember that the creator's interest in controlling their work is not unlimited.[139] There is an issue as to how far this right to control extends. In this case, perhaps the author has no right to control the work aside from attribution (which maintains the connection between the author and the work). Arguably, the intensity of the subject's interest outweighs the creator's interest in controlling the work. For the creator, the work is a reflection of the individual's ideas.[140] For the subject, the work is a direct representation of one's personal image, which is strongly connected to one's self-actualization.[141] Thus, as long as the work is attributed, it seems justified to permit the subject to use such work how they please, unless the creator and the subject explicitly agree otherwise.[142]

V. Legal Landscape and Reform

A. Legal Landscape

Currently, the photographer, as originator of the image, possesses the copyright for the image, whereas the subject of the photograph does not receive any rights to the image.[143] Existing copyright law is inadequate to address the dilemma posed by this Note. Federal law grants copyright protection to "original works of authorship fixed in any tangible medium of expression,"[144] which includes "pictorial, graphic, and sculptural works."[145] Immediately upon the creation of a work, the author gains

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136 Josh Boyd, *The Top 20 Most Followed Instagram Accounts*, BRANDWATCH (Feb. 21, 2020), https://www.brandwatch.com/blog/top-most-instagram-followers/.

137 As seen in Part IV(B) below, some are suspicious of celebrity's self-expression, given that celebrities use their social image in part to monetize their fame.

138 *See* discussion of personality rights in Part II(A), *supra*.

139 Hughes, *supra* note 40, at 294–95.

140 *Id.* at 294.

141 *Cf.* Hughes, *supra* note 40, at 340–41 (discussing the connection between personal image and self-actualization).

142 Here, the subject would be voluntarily giving up their right to use the work in certain ways. This would protect the ability of contractually hired photographers to limit how their work is utilized.

143 *What is the (Copyright) Law When it Comes to Street Style Photography?*, THE FASHION LAW (Sept. 10, 2019), http://www.thefashionlaw.com/home/the-laws-at-play-for-street-style-photography.

144 17 U.S.C. § 102(a).

145 17 U.S.C. § 102(a)(5).

"exclusive rights" to reproduction, distribution, and display of the work.[146] Although the author of a work retains exclusive rights to the work, "fair use of a copyrighted work, including such use by reproduction . . . is not an infringement of copyright."[147] Courts must consider four statutory factors determining whether use of a copyrighted work constitutes fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[148]

The Supreme Court stated in *Harper & Row Publishers, Inc. v. Nation Enterprises*[149] that "[f]air use is a mixed question of law and fact."[150] Moreover, the statutory factors are not applied through the use of "bright-line rules," but rather through "case-by-case analysis."[151]

Courts have utilized several principles in applying the "purpose and character of use" factor, such as "transformation" and "commercial use."[152] The principle of transformation evaluates whether the new use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[153] The principle of transformation is unlikely to qualify the social media posts in question as "fair use," as the extent of transformation is usually removal of a watermark[154] or potentially addition of a photo filter.[155] Furthermore, the caption on a post will likely be insufficient to constitute transformation.[156] Celebrity blogger Perez Hilton has consistently used transformation as a defense in copyright cases.[157] However, precedent on the transformation defense has yet to be created because Hilton settles copyright cases.[158] Other celebrities involved in these cases have also settled

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146 17 U.S.C. § 106; Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 887 (2019); *see also* Eldred v. Ashcroft, 537 U.S. 186, 195 (2003) ("[F]ederal copyright protection . . . run[s] from the work's creation.").

147 17 U.S.C. § 107.

148 *Id.*

149 471 U.S. 539 (1985).

150 *Id.* at 560.

151 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (citations omitted).

152 Peterman v. Republican Nat'l Comm., 369 F. Supp. 3d 1053, 1060 (D. Mont. 2019); *see also* Monge v. Maya Mag., Inc. 688 F.3d 1164, 1173 ("The first factor includes three principles . . . news reporting; transformation; and commercial use").

153 *Campbell*, 510 U.S. at 579.

154 Complaint at *4, Opinaldo v. Spring London Ltd., No. 1:19-cv-08788 (S.D.N.Y. Sept. 22, 2019).

155 Cases haven't yet discussed use of photo filters as a transformation, but given the popularity of filters on Instagram, this seems like a potential area for litigation.

156 *See* Graham v. Prince, 265 F. Supp. 3d 366, 382 (S.D.N.Y. 2017) (finding that comments added below an image in a are insufficiently transformative to constitute fair use).

157 Allen Murabayashi, *The Economics of Copyright Infringement in Robert Caplin vs Perez Hilton*, PHOTOSHELTER BLOG (July 8, 2013), http://blog.photoshelter.com/2013/07/the-economics-copyright-infringement-in-robert-caplin-vs-perez-hilton.

158 *See, e.g.*, Mediation Report, Caplin v. Lavandeira, No. 13-04638 (C.D. Cal. July 10, 2014) (noting

their cases before litigation has concluded.[159]

In terms of reposting content on social media, there is an open question of what constitutes a "transformation."[160] Social media posts by celebrities and influencers that involve reposting photos of themselves on social media, occasionally altering or removing the watermarks, pushes the boundaries of what constitutes a transformation under the fair use defense.[161] Whereas the content posted to social media is the same (minimal transformation of content), the purpose of the use (self-expression), is distinct from the traditional purpose of the image (entertainment). Regardless, the presence of commerciality can outweigh transformative use.[162]

The principle of commercial use evaluates whether the new use "is of a commercial nature or is for nonprofit educational purposes."[163] The Supreme Court has held that "although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter."[164] Moreover, the copyright holder must show that the noncommercial use of a copyrighted work is either harmful or, "that if it should become widespread, it would adversely affect the potential market for the copyrighted work" in order to enforce the copyright.[165]

B. Existing Proposals

Although the argument was not directly made, the defendant's filing in *Xclusive-Lee v. Hadid* "begins to lay the ground for an argument of co-authorship of copyright in the photograph."[166] Essentially, the argument suggests that by posing, the subject of a photograph contributes an element sufficient to be a joint author.[167] This argument is unlikely to be successful given the high standards required for a court to find

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that the parties settled).

159 *See, e.g.*, Cepeda v. Hadid, 2017 WL 3916881 (E.D. Va. Sept. 5, 2017) (settled case).

160 Caroline E. Kim, Comment, *Insta-fringement: What is a Fair Use on Social Media?*, 18 J. MARSHALL REV. INTELL. PROP. L. 102, 115 (2018).

161 Kim, *supra* note 160, at 118.

162 *See Campbell*, 510 U.S. at 580 ("[O]ther factors, like the extent of [the work's] commerciality, loom large.").

163 17 U.S.C. § 107(1).

164 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

165 *Id.*

166 Meaghan Kent, Katherine Dearing & Danae Tinelli, *Keeping Up with Copyright Infringement: Copyright, Celebrities, Paparazzi, and Social Media*, IPWATCHDOG (Oct. 30, 2019), https://www.ipwatchdog.com/2019/10/30/keeping-copyright-infringement-copyright-celebrities-paparazzi-social-media/id=115456/.

167 *Id.*; *see* Xclusive-Lee v. Hadid, 2019 WL 343545, at *10 (E.D.N.Y. Jan. 28, 2019) (memorandum of law in support of defendant's motion to dismiss) ("Ms. Hadid posed for the camera and thus herself contributed many of the elements that the copyright law seeks to protect."). In making this argument, Ms. Hadid's lawyers cited Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992), which found that elements of originality in a photograph included the "posing [of] the subjects", and also cited Gillespie v. AST Sportswear, Inc., 2001 WL 180147, at *5 (S.D.N.Y. Feb. 22, 2001), which suggested that the defendant could be the joint author of photographs where the defendant contributed to "clothing" and "poses" of models.

that a work is a joint work.[168] Furthermore, such an argument, if accepted would entitle the subject of an image to royalties from such image, which would diminish the rights of the photographer beyond what is necessary or reasonable.

Others have proposed a legislative comment to Section 107 of the Copyright Act to clarify that:

> effect of the use on the potential market for or value of the work is appropriate for fair use depending on and not limited to whether the copyrighted work could have been purchased or licensed; whether the copyrighted work could have been reasonably available for purchasing or licensing depends on the market; special attention should be given to the copyrights in relation to social media and the Digital Millennium Copyright Act ("DMCA").[169]

Although the addition of this comment may provide courts with additional guidance for factors to consider in copyright suits relating to social media, it would not solve the conflict between photographers and subjects of posts that is discussed in this Note—photographs of celebrities are easily purchasable or licensable.

Another proposal suggests that courts should both "recognize online social dialogue as a presumptive transformative purpose in their analysis of the first factor in a fair use inquiry" and "consider attribution when analyzing the market harm from a particular secondary use under the fourth fair use factor."[170] There are arguably two ways in which fair use could protect self-expressive social media posts. Under the first factor, the self-expressive purpose of the post is arguably transformative of the purpose in such a way to constitute fair use.[171] Whereas the original image was intended for sale to entertainment media agencies, the post is being used for self-expression. However, opponents of this position may assert that a social media post is not sufficiently transformative of purpose, as the social media post functions as entertainment as well.

Under the fourth fair use factor, the subject of an image could argue that their secondary use is sufficiently transformative such that market substitution is not present.[172] However, as described above, the photographer could counter this position by asserting that the social media post serves the same entertainment purpose as in the original market. Although use of the image may serve a self-expressive purpose for

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[168] *See* 17 U.S.C. § 101 (explaining that a joint work is one "prepared by two or more authors with the *intention that their contributions be merged* into inseparable or interdependent parts of a unitary work" (emphasis added)); Childress v. Taylor, 945 F.2d 500, 504 (2d Cir. 1991) (requiring that the contribution of both authors to a joint work be "independently copyrightable"). An argument of joint authorship based on a pose is likely to fail because poses are very difficult to copyright. *See* Rentmeester v. Nike, Inc., 883 F.3d 1111, 1119 (9th Cir. 2018) (denying copyright protection for Michael Jordan's iconic jump pose).

[169] Kim, *supra* note 160, at 121 (2018).

[170] Lauren Levinson, Comment, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038, 1079 (2017).

[171] *Cf.* Authors Guild v. Google, Inc., 804 F.3d 202, 216–17 (2d. Cir. 2015) (finding that Google's copying of plaintiff's books for sake of making them searchable constituted a highly transformative purpose); Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 981–82 (permitting Google to display thumbnail images of copyrighted content).

[172] *See Campbell*, 510 U.S. at 591.

the *poster*, it serves an entertainment purpose for the *audience*.

Guidance to courts on how to apply the fair use test to subject's social media posts of copyrighted works may resolve these dilemmas, but reliance on the fair use standard would require case-by-case analysis, which maintains uncertainty for individuals wishing to self-express. Rather, a categorical rule is preferable, as discussed in the next subpart.

C. Legislative Proposal

As described above, a categorical rule is the preferable method for translating the theoretical discussions from Parts I and II into law.[173] This subsection proposes legislation to resolve the dilemma proposed by this Note in line with the theoretical findings of the previous Parts. This Note proposes the following draft legislation:

i. SECTION 101. SOCIAL MEDIA POST DEFINED.

Section 101 of title 17, United States Code, is amended by inserting after the paragraph defining "registration" the following:

"A 'social media post' is the temporary or permanent display of a pictorial or audiovisual work on a website or application which enables a user to create and share content, or to find, connect, and interact with other users of common interests. For the purposes of Section 107A, the framing or in-line linking of a pictorial or audiovisual work shall be considered a post."

ii. SECTION 102. SUBJECT DEFINED.

Section 101 of title 17, United States Code, is amended by inserting after the paragraph defining "state" the following:

"A 'subject' is an individual whose likeness is represented in a copyrighted work."

iii. SECTION 103. RIGHTS REGARDING SOCIAL MEDIA POSTS.

Chapter 1 of title 17, United States Code, is amended by inserting after section 107 the following new section:

"§ 107A. Privilege regarding the use of a copyrighted work by a subject

(a) Notwithstanding the provisions of sections 106 and 106A, the use of copyrighted work by the subject of such work, including a social media post by the subject, is not an infringement of copyright, provided that:

(1) the use is made by a subject of the work;

(2) the use is not made for tangible financial gain;

(3) the use attributes the work to the author; and

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[173] *See* the theoretical discussion in Parts I and II, *supra*.

(4) the subject and the author have not expressly agreed in a written instrument signed by them to restrictions on use or display of the work."

iv. SECTION 104. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsection (b), this title and the amendments made by this title take effect 6 months after the date of the enactment of this Act.

(b) APPLICABILITY.—The rights created by section 107A of title 17, United States Code, shall apply to works created on or after such effective date.

D. ANALYSIS OF THE LEGISLATIVE PROPOSAL

i.—Sections 101 & 103. Extent of Protection

The statute applies protection to individuals represented in any form of copyrighted work. This includes photographic, audiovisual, graphic, and sculptural works. Although the dilemma of this Note is unlikely to arise with regards to graphic and sculptural works, it is important to understand how the right may apply to those works. First, the legislation grants a privilege to use or display the copyrighted work, not to physically possess it or exclude others from possessing it. This privilege of use may permit the subject of a graphic or sculptural work to post or display an otherwise copyrighted image of the work but does not entitle them to possess the work itself.

The legislation extends to audiovisual works for two reasons: first, posting short video clips on social networks is increasing in popularity (such as Boomerangs on Instagram, or all content posted to TikTok). Second, if audiovisual works were not covered by the statute, photographers may react to the language of the legislation by taking short videos and claiming copyright protection on either the video or potentially any pictures that were clipped from such a video. There is at least one example of this occurring. In September 2019, Kendall Jenner posted a copyrighted video of herself on social media without obtaining the author's consent.[174]

Given that the dilemma of this Note is most often manifested in social media posts, the legislation explicitly defines social media posts and includes social media posts as a protected use. The definition of social media in the statute is based on the definition from the Oxford English Dictionary, modified to incorporate the OED's definition of social networking into the statutory definition as well. To illustrate, OED defines social media as "websites and applications which enables users to create and share content or to participate in social networking."[175] OED defines social networking as "the use of websites which enable users to interact with one another, find and contact people with common interests, etc."[176] In the statute, the term "social networking" in the definition of "social media" was replaced with the relevant portions

[174] Angela Ma v. Kendall Jenner, Inc. 2:20-cv-03011 (C.D. Cal. Mar. 31, 2020); *Kendall Jenner is Being Sued for Copyrighted Infringement Over a Video She Posted on Her Instagram*, THE FASHION LAW (Apr. 1, 2020), https://www.thefashionlaw.com/kendall-jenner-is-being-sued-for-copyright-infringement-over-a-video-she-posted-on-her-instagram/.

[175] *Social Media*, Oxford English Dictionary (3rd ed. 2009).

[176] *Social Networking*, Oxford English Dictionary (3rd ed. 2009).

of the social networking definition in order to avoid having to refer to additional definitions to understand the scope of "social media" as protected by the statute. These OED definitions were interpreted together by a California court of appeals in *People v. Lopez*,[177] which stated that "although not mathematically precise, [social media] has a reasonably certain definition[.]"[178] While a lack of exact precision in this definition may lead to future litigation contesting whether content was posted to "social media," the term as defined is sufficiently clear to cover major social media sites, such as Facebook, Instagram, and Twitter. Additionally, it is likely impossible to define with exactitude what constitutes "social media," especially as individuals develop new forms of connecting with each other and sharing content. However, the definition included in the legislation is sufficiently broad so as to give courts some degree of discretion in determining when to apply the law. The definition is broad enough for a judge to apply the law to a new form of social media, and defendants can also rely on the broader "use" protection as well.

It is not facially clear whether this protection would apply if a subject re-posted a photo of themselves that was originally posted by someone who did not have rights to the photo.[179] It seems that such a scenario would protect the subject, provided that the re-post complies with the other statutory requirements but would not protect the original poster. Thus, the author of the image could require the original poster to remove the image or sue the original poster for damages, but the re-poster (the subject of the image) would be protected from such actions. The statute addresses this scenario through its definition of social media post. The definition of "social media post" includes "framing or in-line linking of a pictorial or audiovisual work" in order to protect the right of individuals to share or re-post images of themselves in the same manner as their right to post the image themselves.

The concepts of framing and in-line linking are already well defined in case law, and thus do not require statutory definitions. The Ninth Circuit described in-line linking as follows: "[i]n-line linking allows one to import a graphic from a source website and incorporate it in one's own website, creating the appearance that the in-lined graphic is a seamless part of the second web page."[180] Similarly, the Ninth Circuit defined framing as "the process by which information from one computer appears to frame and annotate the in-line linked content from another computer."[181] The allowance of in-line linking to and framing of copyrighted content is part of the "server

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[177] People v. Lopez, 2016 WL 297942, at *4 (Cal. Ct. App. Jan. 25, 2016).

[178] *Id.*

[179] A related issue not addressed by this Note or the proposed legislation is a circumstance in which the creator never released the work, but it otherwise "leaked" into the world. Given that the author has the right to control release of their work into the world, it is questionable whether the subject of such a leaked work should have the right to use or display the work.

[180] Kelly v. Arriba Soft Corp., 336 F.3d 811, 816 (9th Cir. 2003). In the remainder of the paragraph, the court describes the technical process that constitutes an in-line link. *See id.* (discussing in-line link behavior).

[181] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1156 (9th Cir. 2007).

rule" that facilitates large amounts of online behavior today.[182] Several other courts have adopted the server rule that protect in-line linking and framing,[183] although two recent district court decisions have declined to follow it.[184] The technical elements of in-line linking and framing would make such terms unwieldly to define in a statute, but the Ninth Circuit's jurisprudence and other courts' adoption of the server rule demonstrate that courts are already familiar with and capable of interpreting and applying such concepts without formal statutory definitions.

ii.—Section 102. Definition of Subject

The definition of "subject" is intended to protect an individual's likeness. While likeness hasn't been formally defined in copyright statutes or jurisprudence, the extent of the definition can be inferred from case law. The Digital Media Law Project has thus summarized likeness as "a visual image of the [person], whether in a photograph, drawing, caricature, or other visual representation. The visual image need not precisely reproduce the [person]'s appearance, or even show [their] face, so long as it is enough to evoke the [person]'s identity in the eyes of the public."[185]

Three examples illustrate this definition. First, suppose a photograph contains a clearly identifiable face; the person in the photograph is considered a "subject" because they are easily identifiable. Second, consider a full-body photograph of a person with their face obscured.[186] The person in the photograph is considered a "subject" so long as the image evokes the person's identity. This may be a litigable issue, but existing likeness jurisprudence and a reasonable judge should help resolve ambiguous cases. Third, suppose a photograph depicts a crowd of people on a city street, none of whom are clearly identifiable. The people in this photo would not be considered "subjects" because the image does not evoke the individual's identities.

This formulation is difficult to reconcile with the reasoning laid out in Part III(A), which suggests that individuals may still have an urgent interest in almost unrecognizable representations.[187] To resolve this issue while still having a legally cognizable definition of subject, perhaps individuals can still claim the personal use exception if they demonstrate that they are indeed the subject of the work.

iii.—Section 103. Personal Use Rights

This is the substantive section of the legislation. Essentially, the subject of a copyrighted picture or video may reproduce and display the work (or perhaps perform

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[182] Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 421 (2019).

[183] *Id.* at 420.

[184] *See* Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018) (expressly declining to follow *Perfect 10*); Leader's Institute, LLC v. Jackson, Civ. No. 3:14-CV-3572-B, 2017 WL 5629514, *10 (N.D. Tex. Nov. 22, 2017) (same).

[185] Digital Media Law Project, *Using the Name or Likeness of Another*, BERKMAN CTR. FOR INTERNET AND SOC., http://www.dmlp.org/legal-guide/using-name-or-likeness-another.

[186] *See* O'Neil v. Ratajkowski, No. 1:19-cv-09769 (S.D.N.Y. 2019) (for example, Emily Ratajkowski's Instagram story in which a bouquet of flowers obscures her face).

[187] *See* Part III(A), *supra*.

the work in the case of an audiovisual work), for example, by posting the picture on social media without the author's permission and without being subject to damages for copyright infringement.[188] This provision is grounded in the theory of personal use,[189] but legally manifests as the inverse of likeness protection. Likeness protection gives an individual limited control of how others use their likeness; this legislation gives individuals the limited right to use their own likeness without the permission of others.[190]

The structure of this section is parallel to the fair use exception in section 107[191] and the archival exception in section 108.[192] Although this proposal is similar to a fair use exception, it is preferable to codify it as a new section to avoid confusion and limit the import of fair use case law into its enforcement.[193] This provision provides an exception to the copyright protections laid out in sections 106 and 106A for personal uses of pictorial or audiovisual works. Subsection (b) of this legislation clarifies that the statute does not cover graphic or sculptural works; this explicit clarification is provided because pictorial works are included in the same definition as graphic and sculptural works in the existing statute. Additionally, by limiting the applicability of this statute to personal uses, photographers can still obtain royalties from photos used in print media, posted on news sites, displayed publicly, or used in any other way aside from non-commercial personal use by the subject of a work. In order for personal use to be protected by this statute, it must meet certain conditions, as discussed below.

iv.—Section 103(1). Subject Condition

In order to be insulated from copyright infringement, the personal use must be made by the subject of a work. If the subject of the work is not clearly identifiable, but the subject still has an urgent personal interest in the photo, courts should deem this condition to be satisfied so long as the subject can provide evidence that they are the subject. Moreover, this statute will not protect non-subjects who post the work. For example, if a celebrity posts a photo of themselves and a fan re-posts the photo, the celebrity's post would be protected, but the fan's post would not be protected because the fan is not a subject of the photo.

v.—Section 103(2). No Financial Gain Condition

In order for a personal use to be protected from copyright claims under this statute, the use must not be made for "financial gain." Financial gain is broadly defined in Section 101 of the Copyright Act as "receipt, or expectation of receipt, of anything

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188 It is less certain whether the protection should extend to permission for derivative works or distributing copies. Derivative works and distributing copies seem more likely to fall into commercial use.

189 *See* Parts II(E) and III(A), *supra*.

190 *See* discussion of likeness in Section I *supra*.

191 17 U.S.C. § 107.

192 17 U.S.C. § 108.

193 *See* fair use discussion in Part IV(D)(v), *infra* (providing that one area where fair use case law may be helpful to import into this provision is in determining commerciality).

of value, including the receipt of other copyrighted works."[194] The goal of this provision is to ensure that the subjects of a work cannot benefit financially from the use of copyrighted content without paying royalties to the author of the work. As the dilemma of this Note is primarily apparent on social media, subsequent analysis of this condition will be specific to social media.

There are two general ways people are compensated for social network posts: payment or product. Payment for a post is obviously financial gain. There is an issue of whether product compensation should be considered financial gain. For example, suppose Nike gives a pair of sneakers to a basketball player, provided that the basketball player makes a post endorsing the sneakers (or the brand in general). Receiving the sneakers would likely be considered receipt of value, and thus constitute financial gain.

Suppose now that someone posts a copyrighted photo of themselves to promote a product or brand. If the poster receives payment for making the post, the post would not qualify for protection under the statute because the post was made for financial gain. The same result occurs if the poster receives product for the post. Copyright owners would still have full protection if their works are being used to produce financial benefit for the poster.

Additionally, consider a social media post by an actress to promote a show or movie. For example, one suit is against Rebel Wilson for using copyrighted photographs to promote *The Hustle* on Instagram—a movie she is acting in.[195] Notably, it is possible for an actress to have both a direct financial interest in a movie, through royalties, and an indirect financial interest, through reputation and image—playing a role in a popular film increases one's appeal. While "financial gain" would certainly encompass direct financial benefit, it is less clear whether it would encompass indirect financial benefit as a result of reputational improvement or personal brand awareness.

Next, consider an ongoing financial relationship. For example, suppose Nike sponsors an athlete. Is every post by that athlete for financial gain? The value of such sponsorship depends on part on how active the athlete is on social media,[196] thus each post could be considered to indirectly benefit both the athlete and the sponsor. More narrowly, is every post by the athlete that includes a Nike product considered to be for financial gain (regardless of whether the post is an endorsement of the product)? If the statute is interpreted where the *post* must be made for financial gain, these examples would likely not constitute financial gain. However, if the statute is

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194 17 U.S.C. § 101.

195 Complaint at *4, Xposure Photo Agency, Inc. v. Wilson, No. 2:19-cv-10585 (C.D. Cal. Dec. 15, 2019). The photos in question were taken by a third-party photographer on the set of the film. *Id.* If the photos were taken by the film crew, perhaps the copyright issue could be resolved via a contract provision explicitly permitting or prohibiting personal use of the content.

196 Paul Jackiewicz, *How Social Media Can Drive Athlete Sponsorship Opportunities*, CREATITIVE (Aug. 31, 2019), https://creatitive.com/how-social-media-can-drive-athlete-sponsorship-opportunities/

interpreted where any financial gain *results* from the post, these examples likely would constitute financial gain.

Finally, consider the argument that some plaintiffs proffer in these copyright cases that every post by a celebrity increases the brand value of that person, or as one plaintiff put it: every social media post by a celebrity is "fundamentally promoting something to [their] millions of followers."[197] Assuming that increasing brand value is considered "financial gain," every post by a celebrity would thus be for financial gain and celebrities would not be able to benefit from the statute. Such an argument, if accepted, would prevent the primary group of beneficiaries of this legislation from receiving such benefit.

One possible solution to these ambiguities would be to define "financial gain" for the purposes of 107A in terms of the FTC endorsement disclosure regulations.[198] There are three issues with this idea: first, there may be forms of financial gain that should disqualify a post from this exemption that don't require the disclosure of an endorsement. Second, tying the definition of financial gain to the FTC endorsement disclosure requirements may make people less likely to make endorsement disclosures for a social media post—in other words, if a post is considered for financial gain (and thus subject to copyright suit) when the endorsement is disclosed, individuals have an incentive to avoid disclosure to avoid copyright suit. Finally, it imports concepts of deceptive trade practices law into copyright law, which creates problematic potential to cross-apply these areas of law in the future. Consequently, defining financial gain based on FTC endorsement disclosure regulations is an inadequate solution to this issue.

Another option, present in existing jurisprudence, but inadequate in its application to the issue at hand, is the legal distinction between direct profits, earned by selling an infringing product, and indirect profits, enhancement in value due to infringement.[199] However, reliance on this line of distinction would be unworkable because courts have narrowed the analysis down to whether the user can profit from the exploitation of the copyrighted material "without paying the customary price."[200] In this case, celebrities are using copyrighted material without paying the customary

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[197] Complaint at *5, Xposure Photo Agency, Inc. v. Wilson, No. 2:19-cv-10585 (C.D. Cal. Dec. 15, 2019).

[198] *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N (Nov. 5, 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf; *The FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Sept. 7, 2017), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[199] TD Bank, N.A. v. Hill, 2015 WL 4523570, at *23 (D.N.J. July 27, 2015); *see also* American Geophysical Union v. Texaco Inc., 60 F.3d 913, 921–22 (2d Cir. 1994) (discussing the direct and indirect profit distinction in terms of commercial exploitation).

[200] Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

licensing price. Furthermore, this is the same standard used in fair use analysis and would thus create the risk of importing fair use jurisprudence into the new statutory exception.

Another, more workable, solution, would be for courts to differentiate between tangible and intangible financial gain. The proposed statutory exception relies on the lack of "tangible financial gain." While tangibility is nearly impossible to define with precision, and thus unworkable for inclusion as a definition within the statute, it could be used by courts to provide protection consistent with the intent of the statute. However, guidance could suggest that tangible financial gain may be present if the subject was paid for a social media post, the post endorsed a product or brand, the post promoted a TV show or movie, or other circumstances surrounding the post would make it unfair to apply the statute. In those circumstances, the court could find the presence of tangible financial gain. If a social media post produces only intangible financial gain, such as through general reputation improvement, or incidental promotion of a product, then the court could find that the post was not for financial gain.

vi.—Section 103(3). Attribution Condition

This provision requires the personal use to include attribution of the copyrighted work to the author, preserving the author's right to attribution in Section 106A.[201] Currently, posting copyrighted photos without attribution is fairly common.[202] Moreover, when a social media post lacks attribution, news agencies and other sources will credit the image to the poster, rather than the author.[203] Inclusion of the attribution requirement serves as a signal to social media users that attribution is a crucial aspect of posting content, and has the potential to increase the amount of work attributed on social media. This behavioral change, if adopted (which seems likely), serves two purposes: first, it increases the visibility of the author and maintains their ties to their work.[204] Second, it makes it easier for other individuals (who are ineligible to claim the personal use exception) who want to use the photo to find the author and obtain permission for use.[205] The attribution requirement will thus preserve, and potentially improve, the future market for the original photographs.[206]

Many cases currently being litigated involve watermarks that are cropped out of

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201 17 U.S.C. § 106A (defining the right to attribution).

202 *See* trial pleading at *4, Xclusive-Lee, Inc. v. Hadid, 2019 WL 343545 (E.D.N.Y. Jan. 28, 2019) ("As of the date of this filing, Hadid's Instagram account includes at least fifty (50) examples of uncredited photographs of Hadid . . .").

203 Trial pleading at *5, Cepeda v. Hadid, 2017 WL 3916881 (E.D. Va. Sept. 5, 2017).

204 Levinson, *supra* note 170, at 1075.

205 *Id.*

206 *But see* complaint at *5, Xposure Photo Agency, Inc. v. Hadid, No. 2:19-cv-10587 (C.D. Cal. Dec. 15, 2019) (arguing that the post by the celebrity destroys the future market because individuals viewing the post on social media would "otherwise be interested in viewing licensed versions of the [p]hotographs in the magazines and newspapers that are plaintiff's customers"). One possible response to this argument is that the future market for magazines and newspapers is maintained due to the additional commentary and context they provide. Magazines and newspapers currently write articles about photos that celebrities have posted on social media and must pay for a license if they include the photo in the article. That will not change with this legislation.

a photo or digitally removed. The removal of a watermark and failure to attribute a work to an author can lead to increased infringement due to misattribution—news agencies crediting the celebrity with the photo instead of the original photographer.[207] A provision requiring inclusion of a watermark may be a good idea to protect the rights of the photographer but raises an issue for posts on Instagram (i.e., watermark on bottom of a vertically rectangular photo. Instagram requires square aspect ratio; posting the top portion of a photo removes the watermark but keeps the subject's head, whereas posting the bottom portion of the photo keeps the watermark but digitally de-capitates the subject of the photo). Thus, this legislation simply requires some form of attribution credit. For example, even if a watermark is removed, the subject must give credit to author in the text of post or by "tagging" the author (assuming the social network provides such a feature).

vii.—Section 103(4). Contract Exception

The goal of this provision is to allow photographers in formal photo and video shoots (where the photographer and subject have agreed *ex ante* to the terms and conditions of photography and distribution) to maintain control of their work. Whereas the target market for paparazzi photos is the entertainment media industry, the target market for professional portraiture is the subject itself. In this context, copyright protection seems justified to incentivize and protect such creative works, and a statutory avenue should exist to preserve such protection. This statute permits a written contract signed by both the subject and photographer to prevent the exception from applying and thus maintain full copyright protection for the author.

The reason for including contract formalities within the statute is to prevent implied contracts, which create uncertainty and have an evidentiary problem. Although contract law generally recognizes implied agreements, special circumstances require formalities. When there is a particularly important, urgent interest at stake, such as in will drafting, formalities are justified, as they make it harder for the urgent interest to be modified or given up without knowing one is doing so. Here, formalities are required to prevent the privilege of self-expression from being given up unless the subject is certain and aware that such a change is occurring.

viii.—Section 104. Effective Date

Subsection (a) provides that the provisions of the bill take effect six months after the legislation is passed to give individuals time to become aware of the new law and adjust their behavior accordingly. Subsection (b) provides that the bill only applies to photographs taken on or after the legislation becomes effective; it does not apply retroactively.

ix.—Applicability of 106A(a)(3)

As written, this legislation overrides the protections of 106A, including 106A(a)(3) which gives an author the right "to prevent any intentional distortion,

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[207] Kent et. al, *supra* note 166.

mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."[208] Absent this provision, authors may claim that edits (such as cropping, removing watermarks, or adding filters or stickers) to a photograph made by a subject violate such right.[209]

x.—Applicability to Non-Subject Reposting

As discussed in Part IV(D)(i), this statute explicitly protects the right of a subject to use an embedded or linked representation of themselves.[210] In contrast, this statute would not protect a reposter in the opposite scenario, in which the subject of the image posts a work, and someone else reposts the work without the original author's permission. Consequently, fans of celebrities who repost content may still have their posts removed by the photographer under this statute. This may seem like an undesirable outcome, but the alternative would upset the balance of interests this legislation tries to strike. By allowing the repost of content after the subject of such work has posted it, entities that benefit from the publication of such work would be able to use the works without compensating the photographer merely because the subject of the work posted it. Moreover, use of a work by a non-subject lacks the theoretical justification of an urgent personal interest that supports the right of a subject to use a work in which they are represented.

However, there may be some legal basis for noncommercial reposts in the future if they become sufficiently widespread.[211] Although the no financial gain requirement that applies to the subject's post could extend to reposting in the future, the uncertainty surrounding the no financial gain requirement[212] creates too great a risk for the rights of photographers if the statute covers reposts of a subject's picture at the outset. Rather, it would be preferable to only protect the subject's posts and potentially extend protection to reposts of the subject's post once the no financial gain requirement has some case law surrounding it. The statute as written will still subject fan reposts to takedown notices,[213] as occasionally seen in the status quo,[214] but that issue is

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208 17 U.S.C. § 106A(a)(3).

209 Although this exception would protect the ability of the subject to modify the work in the ways described, there is an issue of just how much distortion or mutilation is permissible or desirable. While it is difficult to define a brightline, courts should be wary of permitting subjects to use copyrighted works in a way that excessively distorts the original work.

210 *See* Part IV(D)(i), *supra*.

211 *See, e.g.*, Ginsburg, *supra* note 11, at 18 (arguing that the Supreme Court's decision in Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) not to hold the use of home videotape recorders to record copyrighted content as a violation of copyright may have been a result of how widespread the practice was; "[i]n other words, if everybody's doing it, it must be fair use.")

212 *See* discussion in Part IV(D)(v), *supra*.

213 Takedown notices are likely the worst consequence of an ordinary user posting copyrighted content, and even these are unlikely to be regularly utilized due to impracticality. *See* Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 442 (2002) ("Chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem . . .").

214 Ellie Woodward, *The Kardashians Are at War with The Paparazzi Over Deleted Fan Accounts*, BUZZFEED (Aug. 23, 2018), https://www.buzzfeed.com/elliewoodward/kardashians-war-with-paparazzi-deleted-fan-accounts.

tangential to the dilemma posed by this Note and thus outside this Note's scope.

VI. Conclusion

Although there is some argument that subjects of copyrighted works should have a right to use such works under the standard efficiency analysis of copyrighted, a much stronger justification for such use rests in the theory of personal use. The urgent personal interest of an individual in self-expressing is lexically preferred to standard utility claims, forming the normative foundation for a personal use copyright exception.

This Note advocates for the subjects of copyrighted works to have a privilege to engage in non-commercial use of such works, so long as certain conditions are met that balance the interests of the creator and subject. Future discourse and analysis should refine the conditions of such a personal use privilege, especially the circumstances that constitute a commercial use of the work.