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MYTHS AND CLICHÉS: THE DOCTRINAL MYOPIA OF PUBLICITY RIGHT

MIRA MOLDAWER

ORCID: 0000-0002-7989-6406

ABSTRACT

The ancients had Helene of Troy. We have Marilyn Monroe, followed by an army of her imitators. Although humanity is made of its current myths and cultural clichés, research has concluded that three-fourths of our language may infringe upon intellectual property rights. However, the persona/celebrity is granted sole and exclusive authorship in her making and consumption, especially through publicity right, whose primary function is to prevent her unauthorized commercial exploitation, and legally derives her justifications from copyright infrastructure, especially its 'evil twins:' the false narratives of artistic neutrality and originality, as seen through its most intrinsic doctrines: the idea/expression dichotomy versus the scènes à faire/merger, and fair use. Inspired by the tort of "misappropriation," publicity right morphed into the strongest intellectual property right, in constant combat with copyright law and the First Amendment freedom of speech, thanks to judges' aesthetic discrimination. In contrast, the parallel trademark law axis offers contradictory solutions due to its doctrinal metamorphosis into an expressive genericity, as part of our meta-langue, and the dilution doctrine. Hence, the ill balanced perception between the persona/celebrity authorship and the public domain in copyright law, which is amplified regarding publicity right, can be intrinsically cured through applying trademark law's genericide to the idea/expression in copyright law. Thus, we can retrieve our own lost authorship in our myths and clichés.

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I. INTRODUCTION

"Fame is a form of misunderstanding." - Madonna[1]

The ancients had Helene of Troy as the quintessence of beauty and temptation.[2] We have Marilyn Monroe.[3] They dreamt of Herculean larger-than-life valor, strength, and accomplishments.[4] We fantasize about James Bond, Rambo, or Superman. Although humanity is made of its current myths and clichés, Beebe and Fromer's research concluded that "when we use our language, about three-fourths of the time we are using a word that someone has claimed as a trademark."[5] In a broader sense, the aforementioned reference is to a culture of celebrities and brands that create "[t]he

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* © Mira Moldawer, ORCID: 0000-0002-7989-6406. Attorney at Law; Director and senior Acting Instructor, Beit Zvi, School of the Performing Arts, Israel; B.F.A in Theatre & Directing (Cum Laude); Instructors Course Drama Centre, London, U.K; LL.B. Tel – Aviv University; MA Thesis Program in Law, Technology and Business Innovation, Harry Radzyner Law School, Reichman University (Summa Cum Laude); PhD candidate, Harry Radzyner School of Law, Reichman University; This article is a part of my PhD thesis. I wish to thank Prof. Lior Zemer for his profound and inspiring supervision, and Prof. Roberta Rosenthal Kwall and Prof. Dov Greenbaum for giving me the honor of serving in my committee. I am also thankful to Harry Radzyner Law School, Reichman University's senior staff and colleagues, for their suggestions, as well as to the UIC REV. INTELL. PROP. L. team for their sharp editorial eye and constructive criticism.

[1] *Fame is a Form of Misunderstanding*, QUOTE FANCY, https://quotefancy.com/quote/1133983/Madonna-Fame-is-a-form-of-misunderstanding (last visited June 12, 2022).

[2] Quora, *What did Helen of Troy Look Like?*, QUORA, https://www.quora.com/What-did-Helen-of-Troy-look-like (last visited June 12, 2022).

[3] Michael Newton, *Marilyn Monroe in Some Like it Hot … Still Smoking*, THE GUARDIAN (July 18, 2014), https://www.theguardian.com/film/2014/jul/18/some-like-it-hot-marilyn-monroe-bfi-restored. Michael Newtown crowns her as "unique yet generic – the quintessential blonde." *See also* RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 20-53 (2d ed. 2004); *see generally* RICHARD DYER, THE DUMB BLONDE STEREOTYPE (1979); GRAHAM MCCANN, MARILYN MONROE (1996).

[4] *See generally* RICHARD BERTEMATTI, THE HERACLIAD: THE EPIC SAGA OF HERCULES (2014).

[5] *See* Barton Beebe & Jeanne C. Fromer*, Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 982 (2018); *see also* Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 N.D L. REV. 397, 397-98 (1990). Beebe and Fromer's empirical research confirms the pioneering observation of Rochelle Cooper Dreyfuss over thirty years ago.

> [I]deograms that once functioned solely as signals denoting the source, origin, and quality of goods, have become products in their own right, valued as indicators of the status, preferences, and aspirations of those who use them. Some trademarks have worked their way into the English language; others provide bases for vibrant, evocative metaphors. In a sense, trademarks are the emerging lingua franca: with a sufficient command of these terms, one can make oneself understood the world over, and in the process, enjoy the comforts of home.

Society of the Spectacle," as coined by Debord and morphed into our cultural texts.[6] The images that replace the celebrities and create celebrity culture can be defined by Turner as "the marriage of the culture of consumption with the democratic aspirations to fulfill the American Dream," which is still one of the strongest myths created in modern culture.[7] Because of this, the persona phenomenon became our "floating signifier," heavily loaded with our dreams and desires, and a crucial part of the contested terrain in which individuals make and establish their own cultural meanings.[8] Consequently, cultural imagery by fandom creates a new concept of authorship.[9]

While the celebrity is not the sole and exclusive author of the significance she has for others, especially in an era where the users play a vital part in her creation, she is getting more than her fair share in her legal authorship. This is best reflected by the right of publicity, the primary function of which is to prevent the unauthorized commercial exploitation of celebrity personae.[10] The right of publicity grew out of the tort of appropriation when it was acknowledged by the courts as a privacy tort.[11] Thus, the right of privacy is unsatisfactory for the protection of celebrities' commercial interests.[12] While right of publicity is intended to control the commercial use of one's

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[6] *See* GUY DEBORD, THE SOCIETY OF THE SPECTACLE (1967). The celebrity is

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

[7] *See* GRAEME TURNER, UNDERSTANDING CELEBRITY 15 (2d ed. 2014); *see* Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 21 (1997). Kwall advocates that the persona/celebrity phenomenon is the manifestation of the American Dream. *Id*. The full title that Kwall uses is "The American Dream – Anybody Can Be Anything/The 'I Can Do It Too' Mentality" to analyze how celebrities personify the very core of the American Dream by democratizing fame. *Id.* at 22.

[8] ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 89 (1998) (hereinafter: The Cultural Life).

> Celebrity names and images, however, are not simply marks of identity or simple commodities; they are also cultural texts - floating signifiers that are continually unvested with libidinal energies, social longings, and, I will argue, political aspirations.

[9] *See* JOHN TULLOCH & HENRY JENKINS, SCIENCE FICTION AUDIENCES: WATCHING DOCTOR WHO AND STAR TREK (1st ed. 1995); ROSEMARY J. COOMBE, THE CELEBRITY IMAGE AND CULTURAL IDENTITY: PUBLICITY RIGHTS AND THE SUBALTERN POLITICS OF GENDER 59 (1992); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER & SOC. POL'Y & L. 461, 483, 498-9 (2006); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655-58 (1997). Scholars trace organized media fandom and Fan fiction to the second season of Star Trek in 1967.

[10] *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. R. 125, 148-78 (1993) (focusing on the development of publicity right from fame to commodification).

[11] *Id*. at 167-72.

[12] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953). *See also* Tonia Hap Murphy, *The Right of Publicity: Worth a Closer Look in the Classroom*, 36 J. LEGAL STUD. EDUC. 237, 240-41 (2019); *see* Madow, *supra* note 10, at 167.

identity due to a defendant's unauthorized appropriation, the right of privacy is meant to protect hurt feelings.[13] The right of publicity, as Gordon demonstrated, is considered to be a "sisterly" doctrine to "dilution" in Trademark Law, due to its legal justification as a tort of "misappropriation" that was created in *International News Serv. v. Associated Press* ("*INS*"). [14] Hence, the question posed is: how have such "sisterly" doctrines developed into two contradictory legal axes with different vocabularies regarding celebrity authorship?

The very infrastructure of the celebrity right of publicity is based on copyright law's authorship paradigms.[15] Initially, copyright law dealt with fictional characters and not real people. However, the monolithic axis of copyright law authorship evolved from the Enlightenment Era, and its categorical imperative perception fits the anachronistic and romantic idea of the author as an agonized genius solely in charge of creativity.[16] Thus, if one creator is the sole proprietor of originality, then there is no inspiration for others–only plagiarism. [17] Copyright law's "evil twins," the false narratives of artistic neutrality and originality, are seen through its most important, intrinsic tools: the idea/expression dichotomy versus the "scènes à faire," merger doctrines, and the fair use doctrine. This has culminated in a threat to the freedoms of speech and information due to general "look and feel" adjudication.[18] As a result of judges' "aesthetic discrimination" and instinct, what should constitute an idea morphs into an expression, thus, rubbing the public domain's ever diminishing quarry. [19] Likewise, transformative use, as the quintessence of fair use, proves that the marriage of aesthetic nondiscrimination and originality begot the closure of the cultural public common, either through the parody/satire dichotomy, or through the courts' interpretation of the commercial use component, rendering the distinction between

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[13] *See* Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1356 (2009).

[14] *See* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 152-3 (1992). Gordon notes that "as property, it owes much to misappropriation doctrine" (in contrast to its origin as an outgrowth of the right of privacy). *Id.* at 152.; Int'l News Serv. v. A.P., 248 U.S. 215, 239 (1918).

[15] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977); *see generally* Mark A. Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153, 1170, n. 76 (2019). Mark Lemley appropriates this continuous error to the only publicity right case that reached the Supreme Court, in which the whole plaintiff's show was copied by the defendant, rendering the case to look "more like a common-law copyright claim than a traditional right of publicity claim." *See also* Kwall, *supra* note 7, at 35. For the incentive approach, see *id*. at 35-38. For the personhood approach, see *id*. at 38-40. *See also* David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies,* 25 CARDOZO ARTS & ENM'T 913, 928, 931, 936 (2008). For the incentive approach, see *id*. at 936; for the Lockean/labor approach, see *id*. at 930-31. Tan justifies publicity right legal infrastructure by using four different classifications: the Lockean/Labor Approach, the restitution paradigm of unjust enrichment, the Incentive Approach for enhancing creativity, and the economic Utilitarian Approach.

[16] *See generally* MARTHA WOODMANSEE & PETER JASZI, THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION OF LAW AND LITERATURE (POST-CONTEMPORARY INTERVENTIONS) (1994) (hereinafter: The Construction of Authorship) (discussing the "Authorship project").

[17] *See* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 Eighteenth-Century Studies 425, 426-7, 445-6 (1984). Woodmansee writes of the construction of the "Author." *Id.; see also* Woodmansee & Jaszi, *supra* note 16.

[18] *See* Robert Kirk Walker, *Breaking with Convention: The Conceptual Failings of Scènes À Faire* 38 CARDOZO ARTS & ENT. L.J. 435, 448, 463 (2020); *See also* Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility,* 25 LAW & LIT. 20, 25-6 (2013).

[19] Walker, *supra* note 18.

news, entertainment, and commerce almost impossible.[20] The right of publicity is a relatively new intellectual property ("IP") right, created by state courts, and without federal precedent. [21] Although utilizing copyright law creates problematic infrastructure, the right of publicity is not subject to its constraints, thus, proving to be the strongest IP right.[22] In contrast to copyright law's maladies, the right of publicity requires no misrepresentation, its scope can encompass all of a persona's personality characteristics, and its posthumous protection is longer than copyright.[23]

However, a parallel trademark law axis offers contradictory solutions due to its doctrinal metamorphosis. While this trademark law axis is a far cry from its original legal infrastructure, it can better solve the celebrity phenomenon that obstructs our culture. First, as Dreyfuss and Beebe observed, the original triad of trademark law is practically obsolete as trademarks morphed to be commodities that worked their way into our meta – langue. [24] This evolvement caused the trademarks to evolve into "expressive genericity," as distinctive from its competitive and commercial aims.[25] Second, the dilution doctrine transformed to protect goodwill as an expression, not as an idea.[26] Thus, trademark law is better at relieving freedom of speech from the parody/satire dichotomy and the commercial speech discrimination by Copyright Law's "evil twins."

This article poses the question: can we transform the trademark law genericide paradigm that unarms the previously protected persona/celebrity by signing into the category of an idea, thus unarming the persona/celebrity right of publicity from its

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[20] *See* Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 980, 983 (2004); Matthew Savare, *Image is Everything*, INTELL. PROP. MAG. 52 (Mar. 2013). The issue of the "hybrid speech" is the most complicated and disputed in copyright claims. *Id.* at 53. (This issue is especially true in regarding the hybrid media.).

[21] *Id.*; *see* Madow, *supra* note 10, at 147-78 (focusing on the history of publicity right).

[22] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, A. dissenting).

> No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of 'appropriation of identity,' claims often made by people with a wholly exaggerated sense of their own fame and significance.

[23] *See* Mira Moldawer, *"What is an Author" of a Persona? The Taming of the Shrew—Rephrasing Publicity Right*, 20 VA. SPORTS & ENT. L.J. 156, 162, 173-4 (2021). Moldawer discusses the history of publicity right and its crystallization in the United States. *Id.* at 173-76; *see also* Jonathan Faber, *Right of Publicity, Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes (last visited June 14, 2022); Jennifer E. Rothman, *Right of Publicity State-by-State*, RIGHT OF PUBLICITY, https://www.rightofpublicityroadmap.com (last visited June 14, 2022) (current state of publicity right).

[24] *See* Dreyfuss *supra* note 5, at 397-8; Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 669, 677, 679 (2004).

[25] *See id.* at 645-46. For the original triad of trademark law, i.e.: identifying goods' source and distinguishing them from others; *see also* Plasticolor Molded Prods., Inc. v. Ford Motor Co., 713 F. Supp. 1329, 1332 (C.D. Cal.1989). ([Trademarks have] begun to leap out of their role as source-identifiers and, in certain instances have effectively become goods in their own right.).

[26] Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 810, 845 (2010).

overpowering doctrinal armor? Namely, can we treat the persona as our social code, either under the scènes à faire doctrine or the merger doctrine? Section A discusses the evolvement of the modern persona's role in the cultural mechanism, as well as her playing an integral part of our language, identity, and consumption. Section B examines the right of publicity's "original sin" in its embedment in the axis of copyright law as the wrong IP right, and its implications. Section C proposes a better balance between the persona and the public domain through the axis of trademark law authorship. That is to say: how both the two prongs of trademark law fundamental evolvement blurred the distinction between trademark law and copyright law; the first prong refers to the evolvement of trademark law from its triad model that was meant to avoid consumers' confusion into the "hypermark" model perception; the second prong refers to Trademark Dilution Revision Act of 2006 (TDRA).[27] Section D suggests a different model of persona authorship by applying trademark law's genericide to the right of publicity through a different reading of the idea/expression dichotomy in the copyright law toolkit, thus, attempting to cure the maladies of copyright law authorship intrinsically.

II. DISCUSSION

A. THE PERSONA/CELEBRITY MEANING: WHY BOTHER?

Humanity is made of its current Myth as "a basic constituent of human culture."[28] As Geertz deciphers, culture is

> [b]elieving . . . that man is an animal suspended in webs of significance he himself has spun. I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative one in search of meaning. It is explication I am after, construing social expression on their surface enigmatical.[29]

Therefore, Shakespeare's famous quote "[w]e are such stuff/[a]s dreams are made on . . . "[30] can be transformed into the conclusion of Beebe and Fromer's research that about three quarters of the language and images in our use might be liable for trademark infringement.[31] As society has shifted from print typography into the medium of the image, each medium conveys knowledge appropriate to its essence.[32] As

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[27] Trademark Dilution Revision Act of 2006. Pub. L. No. 109-312, 120 Stat. 1730 (2006).

[28] *See* Richard G.A. Buxton, *Myth*, BRITANNICA https://www.britannica.com/topic/myth (last visited March 11, 2022); *see also* AHARON SHABTAI, GREEK MYTHOLOGY 251-7 (2000) [Ha-Mitologya Ha-Yevanit].

[29] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 5 (1973).

[30] William Shakespeare, *The Tempest*, act 4, sc. 1, l. 145.

[31] Beebe & Fromer, *supra* note 5, at 982.

[32] *See* NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 8-10, 12-13, 15 (1985). Postman took McLuhan's aphorism 'the medium is the message' further, claiming that "the medium is the metaphor." *Id.* Postman claims that the visual media turned the viewers into a mere passive role. *Id. See also* STUART HALL, ET AL., CULTURE, MEDIA, LANGUAGE:

the form dictates new content, the image defeats the word, and passion overcomes rational argument. Therefore, the image, best enhanced by the persona, is our text. In addition to the persona's integral part of our cultural baggage, especially in an era that is characterized as "The Culture of Narcissism," she serves as a crucial ambassador of the "Libidinal Economy," in which compulsive consumption manipulates us to purchase the illusionary images in our eternal quest for artificial satisfaction of our desires.[33]

The media and technological changes that created the culture of the image, such as the outset of print and its subsequent democratization of fame, enhanced by the art of photography and cinematography are responsible for the persona being a key figure in understanding popular culture.[34] These two aspects also impact the great representation crisis of postmodernism that culminated in morphing the persona into a "floating signifier," heavily impacted y our myths, dreams, and desires.[35]

The great catastrophes of Fascism and Totalitarianism caused the "postmodern condition" as coined by Lyotard.[36] No more could humanity console herself with the messianic dogma in scientific progress and rationalism, hand in hand with political freedom, human solidarity, or aesthetic redemption through art. Those "metanarratives" or "grand narratives," were abolished due to the fall of the great illusions that begot them. Once the great enlightenment axiom of an eternal absolute truth was challenged, the semiotic code of an illusionary heterogeneous culture was broken.

As Beebe points out, semiotics has followed two independent lines: the 'linguistic' tradition of Ferdinand de Saussure, and the 'logical' tradition of Charles Sanders

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WORKING PAPERS IN CULTURAL STUDIES 117 (1980). Hall challenges Postman's claim and challenged it utilizing the Encoding/Decoding theory of communication. *See also* STUART HALL, THE SPECTACLE OF THE 'OTHER,' REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 270 (1997). Here, Hall completed and reversed The Frankfurt School theorists who generally viewed mass-mediated popular culture as a field in which autocratic and dominant meanings are systematically reproduced and reinforced by the culture industries. The audience, according to Hall, is not a passive and a mere silent majority, but an active component in culture transformation. *See* Max Horkheimer and Theodor W. Adorno, *The Culture Industry: Enlightenment as Mass Deception, in* MAX HORKHEIMER AND THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT, PHILOSOPHICAL FRAGMENTS 94 (1947).

[33] *See* CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 38 (1979); *see* Iain Hamilton Grant, *Introduction* to JEAN FRANCOIS LYOTARD, LIBIDINAL ECONOMY, at xii-xiv (1974). *See also* GILLES DELEUZE AND FELIX GUATTARI. ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA 1-9, 26-31, 373 (1972). Lyotard was greatly influenced by Deleuze and Guattari. *Id.* Deleuze and Guattari regarded society as a mechanism of desiring-machines manufactured by Consumer Capitalism. *Id.*

[34] Madow, *supra* note 10, at 149-168; Kwall, *supra* note 7, at 5-7.

[35] *See* Turner, *supra* note 7, at 6; 8; 10. Originally, persona meant "a mask," referring to one commonly used in the theatre of ancient Greece. *Id.* In its current meaning, persona is the personality that the celebrity shows the world, while functioning socially as a public "commodity." *Id.* Focusing on the tension between the persona as a personality and her diverse aspects as a public commodity. *See* Moldawer, *supra* note 23, at 159-61 (the development of the modern persona/celebrity phenomenon).

[36] *See* Fredric Jameson, *Foreword* to JEAN FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE, at XI, XVIII, XXIV-V (1979).

Peirce.[37] Although they offer different semiotic models, they both understood culture and language to be concerned with everything that can be taken as a sign.[38]

Saussure's dyadic model of a sign consists of 'the signifier' (a linguistic form, e.g., a word; a 'sound-image') and 'the signified' (the meaning of the form).[39] Unlike Peirce's triadic model, the 'the signifier' does not correspond to the named physical object (the referent in Peirce's model), but to its psychological concept.[40] Hence, the linguistic sign gains its meaning from the psychological association between the signifier and the signified. "The linguistic sign unites, not a thing and a name, but a concept and a sound- image."[41] The sign "follows no law other than that of tradition, and because it is based on tradition, it is arbitrary."[42] Saussure's binary oppositions theory introduced the important dichotomy of langue, the abstract and invisible layer of a language, as opposed to the parole, namely, the actual speech that we use in real life. [43] Consequently, "[l]angue is structure; parole is event."[44] Peirce's triadic sign model consists of three elements which correspond with Saussure dyadic model. [45] As summarized by Beebe:

> Peirce's sign consists, then, of three elements, each of which corresponds to one of Peirce's three categories of Firstness, Secondness, and Thirdness. The first element, comparable to Saussure's signifier, is the representamen, the perceptible object, the 'vehicle conveying into the mind something from without.' The second element is the object, or 'referent' as this Article will call it, which can be a physical 'object of the world' or a mental entity 'of the nature of thought or of a sign.' The third element, comparable to the Saussurean signified, is the interpretant, which Peirce defined as '[creating]

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[37] Beebe, *supra* note 24.

[38] *See* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 16 (1916). "A science that studies the life of signs within society is conceivable; it would be a part of social psychology and consequently of general psychology; I shall call it semiology." *Id. See also* CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 252 (1934).

[39] *See* Beebe, *supra* note 24, at 633-35.

[40] *Id*. at 636-37; Charles Sanders Peirce, The Collected Papers of Charles Sanders Peirce, THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (1994), https://colorysemiotica.files.wordpress.com/2014/08/peirce-collectedpapers.pdf.

> A sign, or representamen, is something which stands to somebody for something in some respect or capacity. It addresses somebody, that is, creates in the mind of that person an equivalent sign, or perhaps a more developed sign. That sign which it creates I call the interpretant of the first sign. The sign stands for something, its object. It stands for that object, not in all respects, but in reference to a sort of idea.

[41] De Saussure, *supra* note 38, at 66.

[42] *Id*. at 74.

[43] Beebe, *supra* note 24, at 638-42.

[44] *Id*. at 638

[45] *See* CHARLES SANDERS PEIRCE, ON THOUGHTS IN SIGNS, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 339 (1934).

> something in the Mind of the Interpreter,' 'the "proper significate effect,' 'the proper effect of the sign.'[46]

An integral part of postmodernist resistance to one universal truth or center was its "rejection of the strict anchoring of particular signifiers to particular signifiers."[47] This evolved into the "floating signifier," concept originated by Claude Lévi-Strauss, namely, a signifier without a specific signified, known also as an 'empty signifier.'[48] Hence, the free-floating signifiers are "emancipated from the tyranny of the referent, both the sign and the signified" in rebellion "from the ideal, rational and to coherent ego, existing at the expense of the other which it suppresses."[49] This emancipation of the sign is what characterizes our society as simulacra, where the real is dead, as noted by Baudrillard:

> The emancipation of the sign: remove this archaic obligation to designate something and it finally becomes free, indifferent, and totally indeterminate, in the structural or combinatory play which succeeds the previous rule of determinate equivalence.... The floatation of money and signs, the floatation of needs and ends of production, the floatation of labor itself..., the real has died of the shock of value acquiring this fantastic autonomy.[50]

Baudrillard's prediction places the persona in a new role: a signifier that indicates nothing but herself, as "the signified and the referent are now abolished."[51] The

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[46] Beebe, *supra* note 24, at 636. To complete the picture, this process goes for ever. The sign is "[a]nything which determines something else (its interpretant) to refer to an object to which itself refers . . . in the same way, the interpretant becoming in turn a sign, and so on ad infinitum." *Id.* at 638. *See also* CHARLES S. HARDWICK AND JAMES COOK, SEMIOTIC & SIGNIFICS: THE CORRESPONDENCE BETWEEN CHARLES S. PEIRCE & VICTORIA LADY WELBY 80-81 (1977). As Peirce explained his theory in a letter to Lady Welby,

> I define a Sign as anything which is so determined by something else, called its Object, and so determines an effect upon a person, which effect I call its Interpretant, that the latter is thereby mediately determined by the former. My insertion of 'upon a person' is a sop to Cerberus, because I despair of making my own broader conception understood.

Id. at 80-81.

[47] *See* Jeffrey Mehlman, *The 'Floating Signifier': From Lévi-Strauss to Lacan*, 48 YALE FRENCH STUD., FRENCH FREUD: STRUCTURAL STUD. IN PSYCHOANALYSIS 10, 23 (1972).

[48] *Id.* ("This dissymmetry between the synchronic (structural) nature of the meant and the diachronic nature of the known results in the existence of "an overabundance of signifier (significant) in relation to the signifies to which it might apply." And it is this "floating signifier," this "semantic function whose role is to allow symbolic thought to operate despite the contradiction inherent in it" which Levi-Strauss sees, in this elusive essay, as the reality of mana. It is "a symbol in the pure state," thus apt to be charged with any symbolic content: "symbolic value zero.")

[49] Jeanne Willette, *Postmodernism and The Trail of the Floating Signifier,* ARTHISTORYUNSTUFFED (Feb. 21, 2014). https://arthistoryunstuffed.com/postmodernism-floating-signifier/.

[50] *See* JEAN BAUDRILLARD, SYMBOLIC EXCHANGE AND DEATH 6-7 (1993).

[51] *See* JEAN BAUDRILLARD, THE MIRROR OF PRODUCTION 127-8 (1975).

persona is both the means and the end establishing the dominant, obsessive consumption culture based on false substitutes, replacing reality altogether. Implementing Baudrillard's vocabulary, the persona is the embodiment of an image which is utterly severed from its source, thus transforming into a simulacrum that leaves only "the desert of the real."[52] Therefore, "the Beckham sign, for example, 'develops into a metalanguage and becomes a significant resource for cultural expression and critique," and morphs into "a floating signifier.[53] Beckham is significant without being much interested in the specific signals he sends out."[54]

The celebrity as a floating signifier is a far cry from Hollywood's Golden Age that cultivated a "cult of personality" for its stars through the "close up," the gossip columns, and the "fans' letters," to make up for the ever-shrinking "Aura" of the authentic art that was lost through duplication.[55] Thus, the cult of the movie star, fostered by film industry funds, preserved not only the person's unique aura, but the "picture personality," the phony enchantment of a commodity.[56] However, even then,

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> The form-sign describes an entirely different organization: the signified and the referent are now abolished to the sole profit of the play of signifiers, of a generalized formalization in which the code no longer refers back to any subjective or objective "reality," but to its own logic. . . . The sign no longer designates anything at all. It approaches its true structural limit which is to refer back only to other signs. All reality then becomes the place of a semiurgical manipulation, of a structured simulation.

[52] *See* JEAN BAUDRILLARD, SIMULACRA AND SIMULATION 1 (Sheila Faria Glaser trans.,1994) [1981]. Simulacra is a reference with no referent, a hyper-reality; *see* SLAVOJ ŽIŽEK, WELCOME TO THE DESERT OF THE REAL 12 (2002). The title is borrowed from the 1999 Matrix, which was directed by Lana Wachowski and Lilly Wachowski.

[53] *See* David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the 'Transformative Use' Doctrine Twenty-Five Years On*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311, 385 (2016); *see also* David Tan, *The Unbearable Whiteness of Beckham: Political Recoding of Celebrity Signs in First Amendment Jurisprudence*, *in* TRANSPARENCY, POWER, & CONTROL: PERSPECTIVES ON LEGAL COMMUNICATION 217 (2012).

[54] *See* Peter Conrad, *Blend it like Beckham*, THE GUARDIAN (May 23, 2003) https://www.theguardian.com/theobserver/2003/may/25/features.review7:

> He is a reflection of our media age; the man himself – a simple soul, with a talent that begins below his ankles - is a medium, and he exists to transmit whatever message you wish (or are prepared to pay for). Don't be racist, drink Pepsi, it's all much the same. Structural linguists would call him a floating signifier. He's significant without being much interested in the specific signals he sends out.

[55] *See* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction, in* ILLUMINATIONS 217 (Harry Zohn, trans., Hannah Arendt, ed. 1969). Benjamin discusses the resurrection of a new "aura" that was lost in the process of duplicating, ending with the copy being as good as its original. *See also* Neal Gabler, *Toward a New Definition of Celebrity*, USC ANNENBERG THE NORMAN LEAR CENTERTAINMENT (2015) https://learcenter.org/images/event_uploads/Gabler.pdf at 1-4; Turner, *supra* note 7, at 11-2 (discussing the transference of the stars' lost aura into mass production and commodification); *see* NEAL GABLER, WINCHELL: GOSSIP, POWER, AND THE CULTURE OF CELEBRITY 666 (2006).

[56] Turner, *supra* note 7, at 13:

> Incorporating the residue of the press agentry networks developed around live theatre and vaudeville, and seeking a means of industrialising the marketing of

diminishing the persona role to a mere commodity, passively consumed by its audience, would be an oversimplification. The question posed by Dyer: "are stars a phenomenon of production (arising from what the makers of films provide) or of consumption (arising from what the audience for films demands)?" is more complicated than it sounds.[57] As partially answered by Alberoni: "[t]he star system . . . never creates the star, but it proposes the candidate for "election"' and helps to retain the favor of the "electors." [58]

As described by Weiss, Dietrich and Garbo images were "encoded and decoded" by the lesbian metropolitan communities in America during the 30s, as part of their need to build a new identity that disrupts conventional definitions of female heterosexuality. This recreated and reauthorized the images in an ironic contrast to their mainstream image as sex symbols and mega-femme fatale. [59] Likewise, Judy Garland's ever evolving image from the girl next door into a desperate has been turned into a semiotic sign created by the gay community in their identification with her perils.[60] Therefore, the celebrity image is much more than a cultural narrative, synonymous with the dominant culture. On the contrary, she is a crucial part of what Stuart Hall believed to be the contested terrain in which individuals make and establish their own cultural meanings.[61] In the process, individuals resist and even subvert the preferred meanings (codes) that are generated and circulated by the culture industries through re-appropriating them for new meanings ("decoding"). [62] Elaborating upon the Birmingham School's "Encoding and Decoding" doctrines, scholars like John Fiske

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> their new product – the narrative feature film – the nascent American film industry experiences a number of significant shifts that result in the marketing of the 'picture personality' and, later on, 'the star'.

[57] *See* RICHARD DYER, STARS 9 (1998).

[58] *See* Francesco Alberoni, *The Powerless 'Elite': Theory and Sociological Research on the Phenomenon of the Stars* 93 (1972) *in* DENIS MCQUAIL, SOCIOLOGY OF MASS COMMUNICATIONS: SELECTED READINGS (1972).

[59] *See* ANDREA WEISS, VAMPIRES AND VIOLETS: LESBIANS IN THE CINEMA 32-39 (1992); Paul McDonald, *Reconceptualising Stardom,* STARS 192 (1998):

> Andrea Weiss describes how Dietrich and Garbo became significant stars for lesbians in America during the 30s, a period when a middle-class white lesbian subculture was first emerging in metropolitan centres (Vampires and Violets, pp. 35-6). Weiss argues that the significance of Dietrich and Garbo for lesbians came from subcultural gossip about the sexual lives of the two stars, together with readings of how the performances of both stars consistently made ironic references to the institution of marriage and played with dress codes to disrupt conventional definitions of female heterosexuality (pp. 32-9). Both stars became important for the emerging subculture because they were not only desirable but also functioned as public representations of a 'truth' which was only fully comprehended by subcultural knowledge.

[60] Dyer, *supra* note 3, at 137-91. *See also* Kwall, *supra* note 7, at 3; Rosemary J. Coombe, *Author/Izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 380 (1992); Madow, *supra* note 10, at 194-5 (scholars in opposing views regarding celebrity authorship over her image, using the Garland phenomenon, and a detailed analysis of coding/recoding Garland image).

[61] Hall, *supra* note 32 (1997), at 223, 270.

[62] Hall, *supra* note 32 (1980), at 117, 127.

have extended popular resistance beyond that of oppositional groups like subcultures.[63] Fiske coined the term "semiotic democracy" to describes the interaction between the persona and its unpredictable audiences that engage in using cultural symbols or narratives to express meanings that are different from the ones intended by their creators.[64] The re-working of cultural imagery by fandom created a new concept of authorship.[65] Fans develop a "'shadow cultural economy' that lies outside that of the cultural industries yet share features with them which more normal popular culture lacks."[66] Hence, fandom's products of the cultural industries "must be understood, therefore, in terms of productivity, not of reception."[67] Consequently, the dichotomy of the author/persona versus the public becomes blurry. As three components created the persona–its magnetism, the media, and the public–the persona is not its sole author.[68]

Hence, the persona developed to be part of our language and identity, functioning as a "signifier" of new narratives, especially by minorities who need to recreated her in order to represent them in the "Major" dominant literature, as coined by Deleuze and Guattari.[69] The Major is "the real voice of a marginalized, minority people re-appropriating the major language for their own purposes and stressing collective forces over the individual 'literary master.'"[70] In an era in which the users play a vital part in the persona's creation, they were supposed to get their fair share in her creation. Evoking Perry Barlow's famous declaration, information is meant to be free, and with

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[63] JOHN FISKE, UNDERSTANDING POPULAR CULTURE 126-27 (1989):

> Popular pleasures must be those of the oppressed, they must contain elements of the oppositional, the evasive, the scandalous, the offensive, the vulgar, the resistant. The pleasures offered by ideological conformity are muted and are hegemonic; they are not popular pleasures and work in opposition to them.

[64] *See* JOHN FISKE, TELEVISION CULTURE 236 (1987) ("[d]elegation of the production of meanings and pleasures to [television's] viewers.").

[65] *See generally* ABRAHAM DRASSINOWER, TAKING USER RIGHTS SERIOUSLY IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW (2005) (considering users as authors in their own merit, as Authorship is itself a mode of use).

[66] *See* John Fiske, *The Cultural Economy of Fandom*, THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA (1992) 30, https://paas.org.pl/wp-content/uploads/2014/07/Fiske.pdf; *see also* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE (1984). Fiske takes Bourdieu's model further. Fiske agrees with the model that cultural capital is acquired by the educational system and consists of the knowledge and critical appreciation of a particular cultural 'canon,' but argues that it should not be narrowed only to Bourdieu's "two-dimensional map in which the vertical, or north–south, axis records the amount of capital (economic and cultural) possessed, and the horizontal, or east–west, records the type of capital (economic or cultural)." *Id.* Thus, the model should be enlarged to include gender, age, and race as additional axes. *Id.* at 31.

[67] *Id.* at 37. "This melding of the team or performer and the fan into a productive community minimizes differences between artist and audience and turns the text into an event, not an art object." *Id.* at 40.

[68] *See* Lior Zemer, *The Social Bargain in Copyright*, *in* MISHPATIM 297, 302-03 (2017) [Hebrew]. *See also* DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1961). "A celebrity is a person who is known for his well-knownness. He is the 'human pseudo-event' who has been manufactured for us but who has no substantiality, something hollow that is a manifestation of our own hollowness." *Id.*

[69] *See generally* GILLES DELEUZE AND FELIX GUATTARI, KAFKA: TOWARD A MINOR LITERATURE (1975).

[70] *See* ADRIAN PARR, THE DELEUZE DICTIONARY 36 (2005).

the internet having become its core, information should regain its initial freedom.[71] Accordingly, the commercial arena will transform itself from commodities marketing to information marketing, thus establishing a new economy: the economy of information.[72] However, Perry Barlow did not foresee the irony of dialectics–those who rejoiced in the internet as decreasing the government's control are lamenting its metamorphosis into a vehicle of cultural control.[73] Therefore, the question of persona authorship, inevitably, leads to the real issue behind its publicity right: who is the legal author of our myths and our dreams?[74] As Clifford Geertz argued, our values, feelings, and ideas are cultural products.[75] Hence, "what is an author of a persona" hides the real dilemma: who is granted with authorship of our culture? This question is contradictorily answered under copyright law and trademark law as hereafter explained.

B. PUBLICITY RIGHT ORIGINAL SIN: THE AXIS OF COPYRIGHT LAW - THE WRONG IP RIGHT

Prominent scholars have claimed for decades that the doctrinal justification for publicity right is embedded in trademark law better than in copyright law, which grants the persona sole authorship in her image. [76] Lemley appropriates this continuous error to the only publicity right case that has reached the Supreme Court: *Zacchini v. Scripps-Howard Broadcasting Co*.[77] In *Zacchini*, the plaintiff's show was copied by the defendant, rendering the case to look "more like a common-law copyright claim than a traditional right of publicity claim."[78] In a 5-4 opinion delivered by Justice Byron R. White, the Court held that The First and Fourteenth Amendments do not immunize the news media when they broadcast a performer's entire act without his consent.[79]

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[71] *See* Niva Elkin-Koren, *Private Ordering and Copyrights in the Information Age*, 2 ALEI MISPHAT 319, 319, 344-5 (2002) [Hebrew].

[72] *See* John P. Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND., www.eff.org/cyberspace-independence (last visited Jan. 27, 2022); John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, 18 DUKE L. & TECH. REV. 8, 10, 12, 30-31 (2019).

[73] James Boyle, *Is the Internet Over?! (Again?),* 18 DUKE L. & TECH. REV. 32, 40, 59-60 (2019); Yochai Benkler, *A Political Economy of Utopia,* 18 DUKE L. & TECH. REV. 78, 81-2 (2019); Jessica Litman, *Imaginary Bottles*, 18 DUKE L. & TECH. REV. 127, 128-9, 131-2, 135-6 (2019); Pamela Samuelson & Kathryn Hashimoto, *The Enigma of Digital Property: A Tribute to John Perry Barlow*, 18 DUKE L. & TECH. REV. 103, 109-11 (2019). All these articles were written as a tribute to John Perry Barlow's legacy.

[74] Coombe, *supra* note 60, at 395; Rosemary J. Coombe & Andrew Herman, *Culture Wars on the Net: Intellectual, Property and Corporate Propriety in Digital Environments*, 100 THE S. ATL. Q. 919, 920-22 (2001).

[75] Geertz, *supra* note 29.

[76] Keller & Tushnet, *supra* note 20, at 1015; Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1164-65 (2006).

[77] Lemley, *supra* note 15; Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

[78] Lemley, *supra* note 15, at 1170, n. 76.

[79] *Zacchini*, 433 U. S. at 566-68.

Originally, as Bracha demonstrates, American trademark law inherited common law's duality that "loosely unified the tort and property branches." [80] Initially, trademark law was meant to defend the trademark owner, due to commercial life as handled by local and small markets, even after the markets evolved to include vast areas that bred competition and publicity.[81] This created the need to differentiate trademarks as a source and meaning signifier.[82] This duality prevailed, as "the protected interest was that of the mark owner in preventing illegitimate diversion of his trade, but it was the deceit of consumers that made the diversion illegitimate."[83]

Although, as noted by Shur-Ofri, it does not matter for the public what IP right was infringed upon by the persona's allegedly unauthorized appropriation, each legal discipline leads to a contradictory outcome. [84] There is a better chance for the public domain to gain the upper hand if trademark infringement is claimed, while the same scenario would be reversed under copyright law's umbrella. [85] As Gordon demonstrated, the tort of "misappropriation" that was created in *Int'l News Serv. v. Associated Press* ("*INS*"), inspired sister doctrines such as the "right of publicity" and "dilution" in trademark law, which are all embedded in the restitution paradigm.[86] Hence, the question posed is: why do "sisterly" doctrines develop into two contradictory legal axes, that talk with different vocabularies in regard to persona authorship?

1. Copyright Law and its Monolithic Conception of Authorship

The very infrastructure of the persona/celebrity publicity right is based on copyright law authorship's paradigms.[87] "If value/then right" is the core dilemma of IP since its inception, especially in Copyright Law. [88] As discoursed in this section Authorship as equivalent to value was a revolutionary concept begotten in the

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[80] Oren Bracha, *The Emergence and Development of United States Intellectual Property Law*, THE OXFORD HANDBOOK OF INTELL. PROP. L. 258 (2018).

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *See* MICHAL SHUR-OFRY, POPULARITY AND NETWORKS IN COPYRIGHT LAW 250 (2011) [Hebrew]. These IP rights include trademark law, copyright law or publicity right.

[85] Lemley, *supra* note 15, at 1173-6.

[86] Gordon, *supra* note 14; *Int'l News*, 248 U.S. at 215; *Id*. at 165. "[T]hese constraints, which together constitute a slimmed-down misappropriation tort that I call 'malcompetitive copying,' apply both corrective justice and economic insights drawn from the restitution pattern."

[87] *See* LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 12-13, 16 (2007) (for authorship justifications in copyright law). *See also* Madow, *supra* note 10, at 181-196, 206-25 (the same justifications are advanced in publicity right and are discussed in legal literature in connection with publicity right versus copyright law and the First Amendment, although the appliance of judicial doctrines that were meant for fiction to real people is never clarified.).

[88] *See* Rebecca Tushnet, *Intellectual Property as a Public Interest Mechanism*, *in* THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 102 (2017):

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

Enlightenment era and the legal right Authorship merits is a contestable issue ever since.[89] Hence the inherent IP rights dilemma, "if value/then right/then property right" is even more complicated regarding publicity right of the living. This right is embedded in copyright law, as an IP discipline meant for the fictional. Ironically, our reality sees no difference between the real and the fictional. The real and the fictional are both a work of fantasy, and in search of an author. This explains why the question posed regarding publicity right authorship of the real is answered by copyright law paradigms, which deal with authorship of the fictional, reflecting Jorge Luis Borges' quote: "[l]ife itself is a quotation."[90]

The insistence of copyright law on exclusive authorship goes hand in hand with its doctrinal infrastructure designed during the Enlightenment Era, especially its radical reformation of the "Author."[91] Previously, this market was regulated by a system of printing privileges, subsequently replaced by copyright laws during the 18th and 19th centuries, meant to defend the interests of publishers and booksellers, whereas authors were considered mere craftsmen.[92] Between the privilege and the intellectual property paradigms, the right-based (instead of value-based) approach emerged, which anchored its foundations in classical philosophy, as expressed by Immanuel Kant.[93]

> Book is a writing, which represents a discourse addressed by someone to the public, through visible signs of speech. […] He who speaks to the public in his own name is called the author (auctor); he who addresses the writing to the public in the name of the author is the publisher. […] The publisher, again, speaks, by the aid of the printer as his workman (operarius), yet not in his own name, for otherwise he would be himself the author, but in the name of the author; and he is only entitled to do so in virtue of a mandate (mandatum) given him to that effect by the author.

There is a primary relationship between the author and the public through the author's public speech. This relationship underlies and regulates all other speeches that give rise to a series of secondary relationships between the author, the publisher,

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[89] *See* Woodmansee & Jaszi, *supra* note 16, at 3, 8 (explaining the birth of Authorship); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 116 (1997); *see generally*, MARK ROSE, AUTHORS AND OWNERS, THE INVENTION OF COPYRIGHT (1993) (explaining the Gordian Knot between Authorship and property right since the former inception).

[90] Brainyquote, *Life Itself is a Quotation*, BRAINYQUOTE, https://www.brainyquote.com/quotes/jorge_luis_borges_183425 (last visited June 18, 2022).

[91] *See generally* Woodmansee & Jaszi, *supra* note 16, at 3,8.

[92] Woodmansee, *supra* note 17, at 426; Woodmansee & Jaszi, *supra* note 16, at 6-7; Boyle, *supra* note 89, at 116 ; Borghi Maurizio, *Copyright and the Commodification of Authorship in 18th and 19th Century Europe*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF LITERATURE 339-41 (2018); *see* Orit Fischman-Afori, *Copyright Law in Historical Perspective: Old Wine in New Bottles*, LAW & INFORMATION TECHNOLOGY 321 (Michael Birnhack & Niva Elkin Koren, eds. 2011) [Hebrew] (focusing on the privilege system pre - Copyright Law).

[93] Borghi, *supra* note 92, at 341.

and the printer and the public.[94] What happens from the privilege to the intellectual property system is a change of perspective, as a result of the principle of sales.[95] While sales had previously only concerned a non-essential facet of the author and public relationship, it is now not only central to the relationship, but composes its totality.[96]

Although the Enlightenment's philosophers preached for the supreme secular values of pure reason and rationality to release humanity, those firm dogmas are heavily knotted with their opposite target, an absolute obedience in the private sphere. [97] Kant, whose ideas still dominate copyright paradigms, frames his Enlightenment ideology as "[a]rgue as much as you please, but obey!"[98] This is his suggested compromise between the public use of one's reason, that must be free at all times, and the need to abide by the rules.[99] Kant saw no contradiction between the private use of reason, that may frequently be narrowly restricted and the progress of enlightenment.[100] Although, Kant admitted

> Thus we observe here as elsewhere in human affairs, in which almost everything is paradoxical, a surprising and unexpected course of events: a large degree of civic freedom appears to be of advantage to the intellectual freedom of the people, yet at the same time it establishes insurmountable barriers.[101]

He firmly believed in the inevitable progress regarding the sovereign of his time, Frederick the Great, as enabling his subjects to use their own reason in religious matters.[102]

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[94] *Id*. at 342. The second (author-publisher) is a contract, and specifically a contract based on a mandate. The third relationship (publisher- public) is also a speech, but in this case the words are not those of the "speaker." The publisher speaks only "in the name of the author." His or her action consists in conducting a business on behalf of the author and enjoys all the advantages that he or she legitimately can from this negotiation. The final relationship is between the publisher and the printer, and this is a contract of work done.

[95] *Id*. at 346.

[96] *Id*.

[97] Immanuel Kant, *What Is Enlightenment?*, COLUMBIA (Mary C. smith, trans. 2021) http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html.

[98] *Id*.

[99] *Id*.

> In some affairs affecting the interest of the community a certain [governmental] mechanism is necessary in which some members of the community remain passive. This creates an artificial unanimity which will serve the fulfillment of public objectives, or at least keep these objectives from being destroyed. Here arguing is not permitted: one must obey.

[100] *Id*.

[101] *Id*.

[102] Kant, *supra* note 99:

> When we ask, are we now living in an enlightened age? the answer is, No, but we live in an age of enlightenment. As matters now stand it is still far from true that men are already capable of using their own reason in religious matters confidently and correctly without external guidance. Still, we have some obvious indications that the field of working toward the goal [of religious truth] is now opened. What is

Horkheimer and Adorno saw Enlightenment as mass deception, coining the famous idiom of "The Culture Industry," while denying Kantian schematism, as a "false clarity". [103] The attempt to analyze what Enlightenment's is in a broader sense than its inception in the eighteen century, is best explained by the Enlightenment's preliminary hubris that replaced the absolute religious dogma into the dogma of rationalism and reason.[104] Thus, totalitarianism lies at the bottom of the conceptual premise of an absolute truth. Rationalism started as a tool to control the world but transformed to control and suppress humanity itself.[105] The Enlightenment notion of "instrumental" reason turned individuals to be mere species, identical to one another and mere components in the mechanism of totalitarian bureaucracy, which sees all human beings as numbers.[106]

The Enlightenment's unifying principle that sees all different components as the basis of a single principle is easily understood in its exclusive concept of authorship: one transcendental truth operates in binary language: If one is crowned to be "[t]he Author," then no one else is entitled to authorship.[107] If one genius is the sole proprietor of originality, then there is no inspiration for others, but plagiarism. Enlightenment romantic perception of a sole and exclusive author go hand in hand with the Ten Commandments vocabulary while excluding postmodern art practice, as manifested by artist Jeff Koons, or sampling, looping, mashing, and hip- hop music: "[t]hou shalt not steal."[108]

> more, the hindrances against general enlightenment or the emergence from self-imposed nonage are gradually diminishing. In this respect this is the age of the enlightenment and the century of Frederick [the Great].

[103] Horkheimer & Adorno, *supra* note 32, at XVII ("false clarity is only another name for myth.").

[104] MAX HORKHEIMER & THEODOR ADORNO, THE CONCEPT OF ENLIGHTENMENT IN DIALECTIC OF ENLIGHTENMENT 4 (1947). "For the Enlightenment, only what can be encompassed by unity has the status of an existent or an event; its ideal is the system from which everything and anything follows. Its rationalist and empiricist versions do not differ on that point."

[105] *Id*. at 9.

> Each human being has been endowed with a self of his or her own, different from all others, so that it could all the more surely be made the same. But because that self never quite fitted the mold, enlightenment throughout the liberalistic period has always sympathized with social coercion. The unity of the manipulated collective consists in the negation of each individual and in the scorn poured on the type of society which could make people into individuals.

[106] *Id*. at 4. "For the Enlightenment, anything which cannot be resolved into numbers, and ultimately into one, is illusion."

[107] *See generally* Jessica D. Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 480-82, 488 (2007).

[108] Rogers v. Koons, 751 F. Supp. 474, 481 (S.D.N.Y. 1990), *aff'd*, 960 F.2d 301 (2d Cir. 1992) (finding copyright infringement by "String of Puppies" sculpture by Koons in his successful "Banality Show", that reproduced photographic image of German Shepherd puppies in photograph taken by Rogers entitled "Puppies."); *See also* SIMON STOKES, ART & COPYRIGHT 22 (2003); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (one of the first cases to deal with digital sampling, begins with the phrase, 'Thou shalt not steal.'); Bridgeport Music v. Dimension Films, 410 F.3d 792, 801 n.12 (6th Cir. 2005); in contrast, *see* Blanch v. Koons, 467 F.3d 244, 250-59 (2nd Cir. 2006). The court reached an opposite decision for a similar appropriative practice to enthusiastic scholars' acclaim. *Compare to* Peter Jaszi, *Is There Such a Thing as Postmodern*

2. Copyright Miscellaneous Paradigms and Publicity Right

Gordon and Bone categorize the different approaches to intellectual property law as moral and instrumental.[109] According to the moral approach

> IP laws recognize the special claims of creators to exclude others from their creations, either as a means of protecting their personhood or their financial and spiritual autonomy, or in recognition of their self-ownership, and the entitlement this gives them to exclude others from the things they labor to create. According to this reasoning, recognizing and protecting IP is primarily a matter of morality.[110]

In copyright law, other scholars divide the aforementioned quote into Lockean/Labor Approach that Gordon and Bone describe as the entitlement to IP due to labor invested in its creation, and the personhood approach that protects financial and spiritual autonomy.[111]

The instrumental approach to IP law is explained by Gordon and Bone as a matter "of expediency, and of the utility or convenience of IP rights as means of securing certain socially and economically desirable ends."[112] Regarding copyright law, no wonder they refer to the Incentive Approach, as it is the dominant approach in the United States.[113]

Publicity right legal infrastructure is a blurry issue. Tan justifies publicity right legal infrastructure by using four different classifications: the Lockean/Labor Approach, the restitution paradigm of unjust enrichment Approach, the Incentive Approach for enhancing creativity, and the economic Utilitarian Approach. [114] However, Richard Posner suggests miscellaneous categories such as unjust enrichment Approach and the Incentive Approach.[115] Kwall has opined that: "[i]t has been said that the right of publicity promotes the societal interests of 'fostering creativity, safeguarding the individual's enjoyment of the fruits of her labors,

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Copyright?, 12 TULANE J. OF TECH. & INTELL. PROP. 105, 116, 118, 120 (2009) (nevertheless, there is room for a doubt whether one swallow makes a summer).

[109] Wendy J. Gordon & Robert, G. Bone, *Copyright*, THE ENCYCLOPEDIA OF LAW & ECONOMICS (1999) 189, https://reference.findlaw.com/lawandeconomics/1610-copyright.pdf.

[110] Dreyfuss & Pila, *supra* note 88, at 3.

[111] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288-96 (1985); *see generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

[112] Gordon & Bone, *supra* note 109, at 189.

[113] Tushnet, *supra* note 88, at 102:

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

[114] Tan, *supra* note 15, at 930-33, 936.

[115] *Id*. at 936 (*quoting* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 30-31 (1986)). Ultimately, "Richard Posner suggests that private property rights give rise to 'dynamic' and 'static' benefits. The former incentivizes productive investments because of the assurance that people will be able to reap what they sow, while the latter promotes efficient use of scarce resources."

preventing consumer deception, and preventing unjust enrichment.'"[116] In addition to the various approaches, the creative Incentive approach, the Lockean/Labor Approach, the personhood approach, and the unjust enrichment approach, the trademark approach, as originally meant to avoid consumer confusion, is an important component of the aforementioned amalgamation.[117]

Madow typically abides by Gordon and Bone's classification in his seminal criticism of publicity right legal infrastructure.[118] Namely, the moral arguments for publicity rights that include the Lockean/Labor approach[119]and the unjust enrichment approach[120] rather than the umbrella of the economic arguments for publicity right that include the incentives argument and the economic Utilitarian Approach.[121] In addition, he complies with Kwall's analysis and adds consumer protection arguments for publicity rights.[122] As I argue in this section, it makes sense to locate unauthorized celebrity appropriation under trademark law. Not only was it originally located under the wrong intellectual property right (i.e.: copyright law), but the legal outcome of misappropriation is contradictory under each discipline. Regardless of theoretical nuances, one regretful premise dominates them all: the celebrity is granted sole and exclusive authorship at the expense of the public that keeps creating the celebrity's image in accordance with the monolithic conception of authorship, as inherited from the Enlightenment era.

a. The Utilitarian/Incentive Approach and Publicity Right

As Samuel Johnson said: "[n]o man but a blockhead ever wrote, except for money."[123] Johnson reverberates copyright's adjudication that follows this approach.[124] In regard to the philosophy behind Article I, Section 8 Clause 8 of the United Stated Constitution, the Supreme Court has held the Incentive Approach to be embedded in its core.[125]

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[116] Kwall, *supra* note 13, at 54. Kwall can be considered one of the most enthusiastic advocates of publicity right.

[117] *See* Madow, *supra* note 10, at 229-38 (focusing on the trademark approach, in comparison to the Incentive approach, the Lockean/Labor Approach and the unjust enrichment approach, as discussed.) *See also id*. at 179-225.

[118] *See generally id*.

[119] *Id*. at 182-96.

[120] *Id*. at 196-205.

[121] Madow, *supra* note 10, at 206-25.

[122] *Id*. at 228-38.

[123] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

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

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

The gist of the Incentive approach, as summed up by Gordon and Bone, "is to provide incentives for new production at fairly low transaction costs."[126] In reference to other aforementioned grounds for "if value/then right" in copyright law, they base the economic argument for copyright "on the idea that works of authorship are quasi-public goods plagued with the usual free-rider and monopoly problems associated with non-excludability and inexhaustibility."[127] Accordingly, they interpret copyright law's toolkit as a vehicle to enhance this approach.[128] Therefore, copyright law's constraints, such as its limited duration, the fair use doctrine, and the idea/expression dichotomy, all serve "to reduce deadweight loss and other costs within a larger structure that creates incentives."[129] As the Incentive Approach is still dominant in copyright lawsuits' adjudications it would be helpful to cite her seven "commandments", that, "when present together, make the strongest economic case for copyright".[130] Therefore:

> (1) The cost of independent creation is very high.
>
> (2) A second party is able to copy the creation from its originator at a cost lower than the cost of independent creation.
>
> (3) These copies are perfect substitutes for the originator's product, being identical to the originator's product in regard to all characteristics that affect consumer preferences. Such characteristics include, inter alia: quality, reliability, number and quality of distribution networks, authenticity and associational value and support services provided in connection with the product.
>
> (4) Consumers perceive the two products to be perfect substitutes.
>
> (5) The difference between the cost of copying and the cost of independent creation is high enough that the price the copyist charges will be 200 – significantly less than the price the originator would have to charge in order to recoup his costs of independent creation.
>
> (6) In the absence of an opportunity to recoup the costs of independent creation, no one will invest in creative activity.

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[126] Gordon & Bone, *supra* note 109, at 189. In their terminology, the term "costs" refers to Copyright generates costs, that fall into four categories: (1) monopoly pricing; (2) chilling of future creativity; (3) transaction costs of licensing; (4) costs of administration and enforcement. *Id*. at 194.

[127] *Id*. at 191.

[128] *Id*. at 189.

[129] *Id*. at 189., *see generally* Neil Weinstock Netanel, *Israeli Fair Use from an American Perspective*, CREATING RIGHTS: READINGS IN COPYRIGHT LAW 377 (Michael Birnhack, Guy Pessach, eds., 2009) [Hebrew] (explaining the implications of this approach on fair use doctrine, ending in diminishing it into a narrowly interpreted defense that fails to incorporate freedom of speech).

[130] Netanel, *supra* note 129, at 394. Guy Pessach, *Justifying Copyright Law*, 31 HEBREW UNIV. L. REV. 359, 361-68 (2000) [Hebrew]. Pessach points out that a major part of the current legal system leans on new developments of the utilitarian/incentive approach, as partially derivative of the economic approach to the law. *See also* Zemer, *supra* note 68, at 314; Gordon & Bone, *supra* note 126, at 199.

> (7) The independent creator can recoup her costs only by means of selling or licensing copies and that in doing so she has no effective recourse to price discrimination.[131]

The Incentive Approach as adapted to the persona means that her image is so unique and exclusive that it will incentivize her to maximize her investment in it.[132] A related line of argument, advanced by Posner and others, justifies the right of publicity as a mechanism for promoting allocative efficiency.[133] The ample criticism of this approach focuses on the core question; why should we incentivize fame altogether?[134] Not only does our society let fame take the upper hand regardless of the manner of its creation, but it ignores the fair share due to the public in persona authorship, rendering the latter with consideration she does not deserve. Consequently, this theory collapses under its own premise: creativity was never done solely for money, and the Gordian note created between value (including dubious one) and right does not explain why it should be a strong IP right.[135]

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[131] Gordon & Bone, *supra* note 126, at 199-200 (notes in brackets omitted).

[132] *See* David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 681 (1981). "Protecting the right of publicity provides incentive for performers to make the economic investments required to produce performances appealing to the public." *See also* Lugosi v. Universal Pictures, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J., dissenting). "[P]roviding legal protection for the economic value in one's identity against unauthorized commercial exploitation creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition." *See also* Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, ABA (2018), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/may-june/split-personality/.

[133] Madow *supra* note 10, at 178; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 331-32 (1989) (Posner & Landes as the great advocators of the Incentive approach); *compare with* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515-17 (2009), claiming that "[i]magination is a renewable resource. Fan creators, realizing this, reject the economy of scarcity and excludability that animates mainstream copyright discourse." *Id*. at 529.

[134] *See generally* Lemley, *supra* note 15; JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY, PRIVACY REIMAGINED FOR A PUBLIC WORLD 101 (2018). "If the right of publicity incentivizes anything, it is not clear that it is incentivizing anything we might wish to encourage;" *Id*., at 101. *See also* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187-88 (2006) (where Rothman repeats Dogan and Lemley's argumentation).

[135] Madow, *supra* note 10, at 214 (noting that the real incentive to fame has very little to do with publicity right as there are powerful noneconomic motivations to excellence and achievement, such as fame in itself). *See* generally ERIC VON HIPPEL, FREE INNOVATION 10-11, 152 (2017) (proving that creativity has very little to do with financial incentives). Rebecca Tushnet, *supra* note 124, at 109 (arguing against the Incentive approach as the be all and end all of copyright law):

> First, by its very independence from the incentives of formal markets, noncommerciality signals the presence of expression tied to a creator's personhood, which deserves special consideration in any analysis of fair use that is sensitive to free speech concerns. Second, the market changes what it swallows: the proposition that all these forms of creativity could persist in a world in which the formal, monetized market was everywhere is empirically mistaken.

This "inner circle" criticism, namely, questioning the incentive theory from within, is best demonstrated by the controversial issue of publicity right as a posthumous right seen through the lens of *Shaw Family Archives Ltd. v. CMG Worldwide, Inc*.[136] Who controls Marilyn Monroe's post mortem image, which is still the quarry of many living celebrities?[137] In *Shaw Family Archives Ltd. v. CMG Worldwide, Inc*. Marilyn Monroe, LLC ("MMLLC"), an entity created by Monroe's estate to control the intellectual property interests conferred to the beneficiaries of the residuary clause in Monroe's will, commenced an action against Shaw Family Archives, LLC ("Shaw"), claiming Shaw had violated Indiana's Right of Publicity Act, by selling products bearing the likeness and image of Marilyn Monroe and licenses to use images and likenesses of Monroe on commercial products. Principals of Shaw claimed to own the copyright to various iconic images of Monroe.

The Publicity Act, enacted in 1994 in Indiana, created a descendible and transferable right of publicity extending 100 years after a testator's death.[138] The Publicity Act applies to acts or events occurring in Indiana, regardless of the decedent celebrity's domicile.[139] The plaintiff claimed that Monroe's posthumous publicity rights passed to her through the residuary clause of her will.[140] However, Shaw asserted that Monroe, a possible domiciliary of either California or New York, but not of Indiana, could not devise publicity rights she did not own at the time of her death since no Publicity Act had yet been enacted in Indiana or either state of possible domicile.[141] The New York Southern District Court held that because California statute post-dated Marilyn Monroe's death, she had no celebrity rights under California law to bequeath at her death.[142] The ever-growing myth of our fantasies and desires, that keep flourishing after Marilyn Monroe's death, does so without the incentive of a posthumous intellectual property right. Likewise, while still alive, Monroe amply contributed to our cultural life with no publicity right in her arsenal.[143]

Nowadays, reality is more complex. The internet mechanism enhances ever growing "user innovation[s]" in a vast number of fields.[144] Moreover, "today, commercial publishers and popular authors are increasingly understanding that fan fiction is a commercially valuable free complement to their intellectual property, and so increasingly seek to support fan fiction rather than suppress it".[145] Thus, the

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[136] Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F. Supp. 2d 309, 310 (S.D.N.Y. 2007); *see also* Savare, *supra* note 20, at 52 (illustrating many states, including California, recognize a posthumous right of publicity, ranging from 10 years to 100, whereas other states, such as New York, do not afford any posthumous rights).

[137] *See* Madonna Blows Chunks, *Madonna Regularly Ripped off Marilyn Monroe*, MADONNA BLOWS CHUNKS: AN ANTI-MADONNA SITE https://mbcantim.wordpress.com/madonna-is-unoriginal-index-page/madonna-regularly-ripped-off-marilyn-monroe/ (last visited August 27, 2021) (implying Madonna stole her style from Marilyn Monroe by comparing numerous pictures of the two).

[138] Ind. Code § 32-36-1-8 (2019).

[139] Ind. Code § 32-36-1-1 (2019).

[140] *Shaw Family Archives Ltd.*, 486 F. Supp. 2d at 313.

[141] *Id.* at 313-14.

[142] *Id.* at 314-20.

[143] *Id.* The outer criticism, common to all justification for publicity right legal infrastructure is the extra power granted to her as a vehicle of cultural obstruction.

[144] Pamela D. Morrison et al., *Determinants of User Innovation and Innovation Sharing in a Local Market,* 46 MGMT. SCI. 1513, 1514, 1516-7, 1519, 1522, 1526 (2000).

[145] Von Hippel, *supra* note 135, at 152.

dominant Incentive approach is turned upside down by the field itself. During the Game of Throne's prime, Travis M. Andrews estimated that it "was pirated more than a billion times — far more times than it was watched legally."[146] Yet, the show's director, David Petrarca, claims that "these unauthorized downloads actually do more good than harm" as they create the "cultural buzz" the show needs for survival.[147] Namely, the buzz will cause more people to subscribe to HBO.[148] It is argued that HBO's overly exclusive policy causes limited availability that breeds pirates.[149]

The recent case of Bel-Air (film) is enlightening. The four-minute film, created by Morgan Cooper, is based on the 1990's "Fresh Prince of Bel-Air" sitcom.[150] The film envisioned the sitcom from a darker and more dramatic approach.[151] It went viral when uploaded to YouTube on March 10, 2019.[152] Will Smith, the original sitcom star, decided to produce the film with Cooper as director, co-writer, and executive producer. Major streaming corporations, such as NBC's Peacock and HBO Max were bidding for the promising project, with the former winning.[153] Hardly three years have passed since "Will Smith Calls Dramatic Fan-Made 'Bel-Air' Trailer "Brilliant" till Bel-Air premieres planned to air it on February 13th, directly after the Super Bowl.[154] This fairy tale came true thanks to the 'Deus ex Machina', superstar Will Smith, but could have easily ended in a lawsuit.[155] Aristotle would not have approved as he regarded the 'Deus ex Machina' as an inferior device.[156] Surely, we cannot trade our cultural control with 'Deus ex Machina,' even if it would be considered as a superior one.

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[146] Travis M. Andrews, *'Game of Thrones' was pirated more than a billion times — far more than it was watched legally*, THE WASH. POST (Sep. 8, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/09/08/game-of-thrones-was-pirated-more-than-a-billion-times-far-more-than-it-was-watched-legally/?variant=c44b726edf25a662 (indicating piracy numbers, as reported by the anti-piracy firm MUSO are: Episode one: 187,427,575, Episode two: 123,901,209, Episode three: 116,027,851, Episode four: 121,719,868, Episode five: 151,569,560, Episode six: 184,913,279, Episode seven: 143,393,804 and All Episode Bundles — Season 7: 834,522).

[147] Ernesto Van der Sar, *Piracy Doesn't Hurt Game of Thrones, Director Says*, TORRENT FREAK (Feb. 27, 2013), https://torrentfreak.com/piracy-doesnt-hurt-game-of-thrones-director-says-130227/.

[148] *Id.*

[149] *Id.* (discussing that piracy being good for business was already argued by "Heroes" and "Lost" co-producer Jesse Alexander, half a decade ago).

[150] Caroline Framke, *Peacock's Intriguing 'Bel-Air' Flips 'Fresh Prince,' and Turns Low Expectations Upside-Down: TV Review*, VARIETY (Feb. 9, 2022), https://variety.com/2022/tv/reviews/bel-air-fresh-prince-reboot-review-1235169374/.

[151] *See generally* Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989). The dilemma was the film a transformative work or a derivative unauthorized work, thus, an infringing work, is not solved by the benevolent attitude of Will Smith, who chose the former. Ginger Rogers was not that generous as her lawsuit against Fellini movie, Ginger and Fred, proves.

[152] Andy Greene, *Hilarious 'Bel Air' Trailer Reimagines 'The Fresh Prince' as a Dramatic Movie*, ROLLING STONE (Mar. 13, 2019), https://www.rollingstone.com/tv-movies/tv-movie-news/bel-air-trailer-fresh-prince-will-smith-807707/.

[153] Lesley Goldberg, *'Fresh Prince of Bel-Air' Drama Reboot in the Works*, THE HOLLYWOOD REPORTER (Aug. 11, 2020), https://www.hollywoodreporter.com/tv/tv-news/fresh-prince-bel-air-drama-reboot-works-1306799/.

[154] Erica Gonzales & Bianca Betancourt, *The Fresh Prince of Bel-Air Is Getting a Reboot, with a Twist*, BAZAAR (Jan. 10, 2022), https://www.harpersbazaar.com/culture/film-tv/a33584285/fresh-prince-bel-air-news-cast-spoilers-date/.

[155] *Id.*; *compare to Rogers*, 875 F.2d at 994 (Ginger Rogers's attitude led to *Rogers v. Grimaldi*).

[156] Aristotle, *The Poetics of Aristotle*, GUTENBERG (2008), https://www.gutenberg.org/files/1974/1974-h/1974-h.htm#link2H_4_0017.

b. The Lockean/Labor Approach and Publicity Right

The right of publicity in Lockean terms was phrased by its critics as "John Locke goes to Hollywood," or the claims of "labor" on the fruits of fame.[157] For the labor-based moral argument for publicity rights to be plausible, a commercially marketable public image or persona must be viewed as the celebrity's own product, something that she herself makes or creates through her own individual labor.[158] As sociological research has proved, fame is a "relational" phenomenon.[159] A person can, within the limits of his natural talents, make himself strong or swift or learned. However, he cannot, in this same sense, make himself famous, any more than he can make himself loved. Fame is often conferred or withheld, just as love is, for reasons other than its own labor. The reason one person wins universal acclaim and another does not may have less to do with his or her intrinsic merits or accomplishments than with the needs, interests, and purposes of his or her audience.[160] Therefore, fame is created through a "socially constructed reality" via the press and the public working out their own anxieties and concerns, thus creating the persona and not the individual's "labor."[161] Ironically, despite the classification of the Lockean approach as the moral basis of publicity right, the courts omit Locke's restrictions to his own theory, which was never meant to grant unlimited IP rights.[162]

In terms of preventing unjust enrichment, the contest between the persona and the unauthorized appropriator of her image is used as a doctrinal vehicle to strengthen Lockean misunderstood approach, framed starkly as sower versus reaper, regardless of cultural production being a constant process of reworking, recombining, and

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> It is therefore evident that the unravelling of the plot, no less than the complication, must arise out of the plot itself, it must not be brought about by the 'Deus ex Machina'—as in the Medea, or in the Return of the Greeks in the Iliad. The 'Deus ex Machina' should be employed only for events external to the drama, —for antecedent or subsequent events, which lie beyond the range of human knowledge, and which require to be reported or foretold; for to the gods we ascribe the power of seeing all things.

[157] Madow, *supra* note 10, at 182.

[158] Tali Sperber, *The Right of Publicity: Clarifications and Notes on McDonald v. McDonald (Aloniel) Ltd.*, 33 MISHPATIM 693, 701 (2003) [Hebrew].

[159] Madow, *supra* note 10, at 188; *compare with* JOHN RODDEN, THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF "ST. GEORGE" ORWELL 51 (1989).

[160] Madow, *supra* note 10, at 188. Madow uses "merit" and "accomplishments" alike. He demonstrates how a celebrity's public image is always the product of a complex social, if not fully democratic, process in which the "labor" (time, money, effort) of the celebrity herself (and of the celebrity industry, too) is but one ingredient, and not always the main one. The meanings a star's image comes to have, and hence the "publicity values" that attach to it, are determined by what different groups and individuals, with different needs and interests, make of it and from it, as they use it to make sense of and construct themselves and the world.

[161] *See* CA 8483/02 McDonald v. McDonald (Alonial) Ltd. (No. 1) [2004] IsrSC 58(4) 314 (transplanting publicity right into Israeli law.). Justice Rivlin held that property too is a socially constructed outcome in its essence, which misled the Supreme Court to confer "the fruits of fame" on the persona solely.

[162] Zemer, *supra* note 68, at 317-18; Zemer, *supra* note 87, at 13; *see also* Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB POL'Y 891, 919 (2006) (providing all Locke's restrictions on private property in detail).

redeploying already-existing symbolic forms, sounds, narratives, and images.[163] As Madow argues, "on this view, prohibition of a free ride "is justified to prevent unjust gain even when it is not necessary to prevent unfair loss."[164] However, the blurry miscellaneous theories that form persona authorship in copyright law, which morph into publicity right, are at war with themselves. As Shipley sums up:

> Distinctions between conduct actionable under a misappropriation theory and actions giving rise to the prototypical right of publicity action are trivial. Unjust enrichment through the conversion of hard-earned and valuable intangible interests constitutes the remediable wrong in both situations. [165]

c. The Personhood Approach and Publicity Right

The "[i]f value/then right" premise faces a challenging doctrinal shift from an autonomy-based right, like the personhood approach, into a property right.[166] In addition, Kantian philosophy, which was the first to recognize the author as a principal actor in a dialogical discourse, is a rich palette of different colors. Whereas Haemmerli interprets the right of publicity as a Kantian right that "can be more expansively conceptualized as a property right grounded in human freedom,"[167] Drassinower formulates a work of authorship "not as a thing—whether intangible or otherwise—but as a communicative act," thus echoing the Kantian conception of the author who speaks to the public in his own name through her book as a visible sign of speech.[168]

Kant's "Categorical Imperative"("CI") as the quintessence of his moral philosophy is a rationality standard humankind should always follow.[169] According to this principle, moral requirements are justified as this principle is the law of our autonomous inner will.[170] As rationality begets the "Categorical Imperative" as the end all and be all of this moral philosophy, it renders the human will as subordinate to rational requirements.[171] Kant's Humanity Formula "states that we should never act in such a way that we treat humanity, whether in ourselves or in others, as a means

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[163] Coombe, *supra* note 9, at 63.

[164] Madow, *supra* note 10, at 200, (quoting JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 212 (1988)).

[165] Shipley, *supra* note 132, at 686.

[166] Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 92 (2020). Attempting to retrieve publicity right into its starting point as a tort, following Dean Prosser' legacy, under which four ideal torts can be constructed: 1.the right of the plaintiffs to control the use of their performances; 2. The right of commercial value in the plaintiff's identity; 3.the right of controlling the autonomy of their personality; 4. The right of dignity. However, they admit that "justifications for barring the unauthorized use of identity presently encompass the protection of both market based and personality-based interests." *Id*. at 93.

[167] Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 488 (1999).

[168] Abraham Drassinower, *Death in Copyright: Remarks on Duration*, 99 B.U. L. Rev. 2259, 2561 (2019).

[169] *See generally* Robert Johnson, Adam Cureton, *Kant's Moral Philosophy, Aims and Methods of Moral Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Feb. 23, 2004) https://plato.stanford.edu/entries/kant-moral/#AimMetMor.

[170] *Id*.

[171] *Id*.

only but always as an end in itself."[172] Consequently, we have a duty to make the most of our humanity and our potential talents in order to create a constantly improved humanity and mutual "respect" for the humanity in persons as bearers of worth and absolute value.[173] Kant's first formulation of the CI is the Formula of the Universal Law of Nature, namely, that "you are to "act only in accordance with that maxim through which you can at the same time will that it become a universal law".[174] Kant's second formulation of the CI is the Humanity Formula, according to which "we should never act in such a way that we treat humanity, whether in ourselves or in others, as a means only but always as an end in itself."[175] The third formulation of the Categorical Imperative is the Autonomy Formula, which frames "the Idea of the will of every rational being as a will that legislates universal law."[176] The goal of the Autonomy Formula can be achieved "by putting on display the source of our dignity and worth, our status as free rational agents who are the source of the authority behind the very moral laws that bind us."[177]

The doctrinal infrastructure of the personhood approach is amplified by Fichte, who established the ground for the conception of the author as the keystone of authorship.[178] However, Kant's moral philosophy is still the foundation of the personhood approach, as developed both by Hegel and Radin. Whereas Hegel,[179] granted the author the right to control her creation as the extension of her inner will, intellectual process and individuality, Radin[180] took his philosophy further, by creating the dichotomy between personal/commercial assets that merit different levels of protection, each, according to their connection to our personality. According to Radin's interpretation, the closer intellectual property is linked to the core of the creator's personality and inner- self, the higher protection it deserves and higher protection will follow. For Haemmerli, the Kantian system is enough to connect freedom, personhood, property, and publicity rights as "the right to control the use of one's image or other objectification of identity, hence, a property right based directly on freedom, autonomy, or personality."[181] However, those doctrines that constitute copyright law authorship need the doctrinal mechanism to implement them in practice. As I argue in the following chapter, the main mechanism used is false narratives of artistic neutrality and originality.

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[172] *Id*. at Ch. 6.

[173] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 44 (1797) (discussing the amalgamation in Kant's philosophy between property and freedom, as the outcome of the Humanity formula).

[174] Johnson & Cureton, *supra* note 169, at Ch. 5.

[175] *Id*. at Ch. 6.

[176] *Id*. at Ch. 7.

[177] *Id*.; *see also* Haemmerli, *supra* note 167, at 468. Haemmerli grounds her advocacy for personhood right "as it places primary emphasis on human worth and self-determination."

[178] Boyle, *supra* note 89, at 55.

[179] *See generally* Paul Redding, *Georg Wilhelm Friedrich Hegel*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 13, 1997), https://plato.stanford.edu/entries/hegel/; *see also* Zemer, *supra* note 68, at 320-21; Zemer, *supra* note 87, at 16 (discussing Intellectual property deriving from the intellectual process of the creator).

[180] Radin, *supra* note 111, at 959-60.

[181] Haemmerli, *supra* note 167, at 421. For a contrasting argument, that "works need not be conceived of as personal or personality-based, but rather, autonomy-based," *see generally* Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1083, 1101 (2008).

3. Copyright Law "Evil Twins" and their Implications: The False Narratives of Artistic Neutrality and Originality

The false narrative of Originality is not a new topic.[182] The monolithic thinking of one genius who creates "everything from nothing," armed with unprecedent expressions, plots, or characters, springing straight from the abyss, can easily mistake inspiration for plagiarism. However, what is classified as original depends heavily on judges' artistic discretion, negating the other, even darker copyright law false narrative: the false artistic neutrality narrative. As I argue in this chapter, this Gordian note creates copyright law's "evil twins" that, together, design its most influential tools that were meant to balance the persona authorship and the public domain, especially, the idea/expression dichotomy and the fair use doctrine.[183] Unfortunately, the "evil twins" led to the opposite outcome of deteriorating the already fragile balance between persona authorship and the public domain for the benefit of the former on the expense of the latter. This chapter endeavors to find out why the road to hell is paved with good intentions.

a. The Idea/Expression Dichotomy v. the "Scènes à Faire" and the Merger Doctrines

A crucial doctrinal tool in copyright law is the "aesthetic nondiscrimination."[184] As phrased in *Bleistein v. Donaldson Lithographing Co*., "some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke."[185] While the goal of copyright law is to encourage creativity, either through its focus on the work itself through the incentive approach, or on the artist, through the Labor approach and the Personhood approach, the main point is to avoid copying, regardless of the original's quality.[186] Hence, it should be sufficient that the protected work originated from its author.[187] The connection between Enlightenment Era (i.e., Fichte, Kant, and Hegel) monolithic vocabulary that perceived the author as the quintessence of originality, and "aesthetic nondiscrimination" is summed up by Boyle in reference to how a creator's

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[182] *See generally* Litman, *supra* note 107; *see also* Arewa, *supra* note 107; Michael D. Birnhack, *A Cultural Reading: Israel's 2007 Copyright Act and the Creative Field,* AUTHORING RIGHTS: READINGS IN COPYRIGHT LAW 83, 95-96 (Michael Birnhack & Guy Pessach, eds., 2009) [Hebrew] (for the development of originality as the central axis of the law in the Anglo- American judicial system, and the "Droit Moral" in the continental judicial system); Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247, 288-98 (2006) (illustrating hoe even giants like Shakespeare, Mozart or Picasso were not entirely original in their oeuvres and borrowed, to varying degrees, either from their predecessors or their contemporaries).

[183] *See* Gordon & Bone, *supra* note 109, at 189 (justifying the existence of Copyright Law's constraints such as the 'fair use' doctrine and the idea/expression dichotomy, as designated "to reduce deadweight loss and other costs within a larger structure that creates incentives").

[184] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[185] *Id*.

[186] *See* Bracha, *supra* note 80, at 244-46 (for the development of Copyright Law perception of "copying").

[187] *See* Michael D. Birnhack, *Originality in Copyright Law and Cultural Control*, 1 ALEY MISHPAT 347, 354 (2002) [Hebrew] (for the originality requirement by the law as implemented by a different amalgamation and prioritization of three components: origination, labor and creativity).

uniqueness is recognized.[188] Thus, "first in great spirits, then in creative spirits, and finally in advertising executives, expresses itself in originality of form, of expression."[189]

As Yen argues, the importance of the idea/expression dichotomy lies in its ability to prevent the unjustified expansion of copyright vis-à-vis the first Amendment, as only original "expressions" are copyrightable, but not ideas, that may serve as a future quarry for futuristic artists to copy. [190]

Hence, the Gordian note between the idea, expression, originality, and freedom of speech is established.[191] Not only should ideas be "free as the air to common use," but if original, they are constitutionally valueless and do not deserve copyright law protection. [192] The Originality doctrinal note combines the dominant incentive approach, the Enlightenment's monolithic perception of one agonized genius as the sole component in authorship in charge of originality and the idea/expression dichotomy.[193]

As Litman proves, the courts created three classifications of works under the umbrella of idea/expression dichotomy: the systems class, directory cases, and the most

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[188] Boyle, *supra* note 89, at 56.

[189] *Id*.

[190] Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 395 (1989); *see also* 17 U.S.C. § 102(b) (2022); *see* Sid and Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977). "Similarly, to the extent that copyright permits the borrowing of ideas, it leaves ample room to authors whose works do not merely repeat the expression of others, but rather add to the "marketplace of ideas."

[191] Yen, *supra* note 190, at 395. Yen argues, the idea/expression dichotomy

> is perhaps the most important limit on the unwarranted expansion of copyright. It operates by denying protection to the ideas which underlie copyrightable works. Consequently, only the original "expressions" contained in these works can actually receive copyright protection. This makes certain portions (the "ideas") of every work freely available for others to copy. Such permitted borrowing from copyrighted works ostensibly keeps copyright from unduly restricting speech and running afoul of the first Amendment.

[192] *See* Int'l News Serv. v. A.P., 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). "[T]he general rule of law is, that the noblest of human productions— knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." *See also* Miller v. Univ. City Studios, Inc., 650 F.2d 1365, 1368 (5th Cir. 1981); Yen, *supra* note 161, at 421. "The idea/expression dichotomy theoretically limits copyright so that it prohibits only copying that is constitutionally valueless."

[193] Boyle, *supra* note 89, at 114:

> This triad manages to make it seem that intellectual property rights are more than just a utilitarian grant by the state, to limit the ambit of something that sounds very much like a labor theory of property rights, and to divide the author's creation so that the idea goes into the world of public exchange while the expression remains the author's.

See also Woodmansee, *supra* note 17, at 427, 445 (focusing on copyright law infrastructure in all its paradigms as based on an anachronistic assumption of an agonized genius, whose creativity originated straight from the abyss and is the sole guardian of Originality); *see* Moldawer *supra* note 23, at 168-70 (focusing on direct and indirect Originality narratives in Copyright Law infrastructure).

relevant class regarding persona–the "scènes à faire" doctrine.,[194] Historically, the concept of "scènes à faire" as "the scenes that must be done" from the audience point of view, started much earlier in the nineteenth-century and is attributed to French drama critic Francisque Sarcey.[195] Justice Yankwich who developed the "scènes à faire" doctrine meant it to defend the public's expectation how a plot should be told, thus, rendering the necessary details of a scene to be "uncopyrightable per se, as they do not derive from a work's author but from the scene itself."[196] This thinking, that turned the "scènes à faire" doctrine into an uncopyrightable idea, should have strengthen both the public domain and the freedom of speech as its legal outcome. However, as Walker demonstrates, the "scènes à faire" doctrine caused the opposite results.[197] Other courts rephrased the doctrine as "sequences of events which necessarily follow from a common theme."[198] The question becomes: what, then, is considered to be "necessary" as to render a theme,[199] a character,[200] or a socioeconomic background to be "uncopyrightable per se?"[201] In all the ample variety of the relevant adjudication the same vocabulary recurs: "must," "necessary," "inevitably," and the like. However, those judgements depend on cultural nexuses, personal upbringing, and taste. Aristotle had a clear vision that what becomes a tragedy versus what becomes a comedy are separate genres.[202] That did not deter Shakespeare from including the porter hilarious soliloquy amidst Macbeth[203] or to portray a future king as a scoundrel[204] in his vision of life as the amalgamation of the sublime with the ludicrous.[205]

Justice Yankwich often quoted the *Cain* ruling can be questioned in order to demonstrate how intuition becomes a matter of law (the items in the parenthesis are not part of the integral text):

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[194] Litman, *supra* note 107, at 983-90. Cain v. Univ. Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942). Judge Yankwich developed the "scènes à faire" doctrine which morphed to be the dominant approach for the "film cases" class.

[195] Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 7-81 (1989).

[196] *Cain*, 47 F. Supp. at 1017; *see* Litman, *supra* note 107, at 985-87 (explaining ample adjudication in the "film cases" class pre – Cain ruling, that rejected infringement suits on the grounds of the plaintiff work described as "trite", "stock", "common" or "a cliché").

[197] Walker, *supra* note 18, at 461-63.

[198] Reyher v. Children's Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976).

[199] Zambito v. Paramount Pictures Corp., 613 F. Supp. 1107, 1112 (E.D.N.Y. 1985) (for the theme of the hidden treasure in a cave and its necessary requirements); *see generally* CBS Broad. Inc. v. A.B.C., Inc., 2003 U.S. Dist. LEXIS 20258 *22 (S.D. N.Y. Jan. 13, 2003) (for what a reality show about survival must include, i.e., a host and a generic setting as well).

[200] Brown v. Perdue, 2005 W.L. 1863673 *8 (S.D.N.Y, 2005); *aff'd* 79 U.S.P.Q. 2d 1958 (2d Cir. 2006); *cert. denied* 127 S.Ct. 580 (2006); Green v. Lindsey, 855 F. Supp. 469, 488 (S.D.N.Y. 1992); Rice v. Fox Broadcasting Company et al., 330 F.3d 1170, 1176 (2003).

[201] Walker v. Time Life Films, Inc., 784 F.2d 44, 49-50 (2d Cir. 1986) (for how a crime-ridden and poverty-stricken urban neighborhood should be portrayed, including the "inevitable" elements, such as: bribery, prostitution, purse-snatching, and neighborhood hostility to law enforcers). Shur-Ofry, *supra* note 84, at 77. (This creates the classification of "generic components" and "generic elements." However, a different classification does not provide us with any real criterion, as to what "must" be included in a work to render it as a cliché, i.e.: an uncopyrightable idea.)

[202] *See generally*, Aristotle, *supra* note 156.

[203] William Shakespeare, *The Tragedy of Macbeth*, act 2, sc. 3.

[204] See generally William Shakespeare, *Henry IV, Part 2*.

[205] *See* ERICH AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE 312 (1974) (for the origins of philosophy).

> The other small details, on which stress is laid, such as the playing of the piano (*why not the violin*?), the prayer, the hunger motive (*why should it be the only possible motive*?), as it called, are inherent in the situation itself (*how about the music stopping altogether*?). They are what the French call " scènes à faire ". Once (*is every second attempt turns the first into a cliché*?) having placed two persons in a church during a big storm, it was inevitable (*why*?) that incidents like these and others which are, necessarily, associated (*what makes a necessary association? The causation rhetoric is phrased as an axiom*) with such a situation should force themselves upon the writer (*is writing a matter of choice or of an enforcement?*) in developing the theme (*can an artist develop a forced formula*? *Isn't it an oxymoron*?).[206]

Ironically, Justice Yankwich's article about originality, the opposite of the scènes à faire doctrine, brings us no further because, at best, the lesson learnt is Justice Yankwich's artistic taste.[207] The "plot thickens" as not only the narrative of "aesthetic nondiscrimination" is debunked by the courts, but the very concept of what constitutes a copyrightable expression versus an uncopyrightable idea is evasive.[208] The more an uncopyrightable idea that expands to a general "look and feel," as a question of the judges' "aesthetic discrimination" and instinct, morphs into what it should have never meant to be: a copyrightable expression, a lesser defense to freedom of speech, thus, rubbing the public domain's ever diminishing quarry.[209] Ironically, Landes and Posner the great advocates of the incentive theory, which claims the idea/expression dichotomy as an important balance between authorship and the public domain, argue that the artistic genres of Abstract Expressionism do not deserve copyright protection as Appropriation Art has been described "as getting the hand out of art and putting the brain in" and namely, turning expressions into ideas. [210]

The merger doctrine, a "sisterly" doctrinal theory attempts to back the idea/expression dichotomy.[211] Although the "scènes à faire" doctrine and the merger

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[206] *Cain*, 47 F. Supp. at 1017 (the additional text in italics is not part of the integral text).

[207] Leon R. Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 466-85 (1951).

[208] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9th Cir. 1970) (the court found similarities between the plaintiff's cards and the defendant's because they shared the same "total concept and feel."); Sid & Marty Krofft Television Pro., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) (holding that McDonald is liable for infringement because her show had the "total concept and feel" of the plaintiff's); *see also* Yen, *supra* note 190, at 405, 418; Yen refers to Manes, *Who'll Think of Suing What Next?*, PC MAG., May 26, 1987, at 180-82, who suggests that the "total concept and feel" ruling supports a hypothetical suit by the estate of Marilyn Monroe against the pop star Madonna, for the latter appropriating the "total concept and feel" of the former. *Id*. at 418; Walker, *supra* note 18, at 446 (claiming that practically, scènes à faire has come to have two different meanings, both retain the same dilemma of the judges' "aesthetic discrimination", using the same vocabulary of "must" for the hereinafter first stated meaning and "stock, standard and cliché" for the second. Thus: "(i) [c]ertain scenes are uncopyrightable because they must be included in a given context, as "identical situations call for identical scenes;" and (ii) certain elements within a work are not protected because they are stock or standard to the treatment of a particular subject (i.e., they are clichéd.)).

[209] *Id*.

[210] WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 254, 260 (2003).

[211] Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT

doctrine were sometimes confused in courts, as Fiore and Rogoway clarify, "the merger doctrine is implicated when there are so few ways of expressing an idea that the expression and the corresponding idea have merged to become one and the same." [212] Although easily understood in technical matters, it is no wonder the merger doctrine gained the unpromising description as "the doctrine that is not" in William Patry's treatise.[213] The Gordian note to originality is more convincing through the merger doctrine's lenses, as only way to express an idea renders originality into an oxymoron. [214] However, no matter how we distinguish artful vis-à-vis functional components, the former requires aesthetic nondiscrimination, in contrast to copyright law narrative. The idea/expression dichotomy, even if titled as the artful, still blocks the freedom of expression by overpowering the "idea" scope at the expense of the "expression."[215] Although Samuelson describes the scènes à faire doctrine and the merger doctrines as contrasting, their outcomes are the same. [216]

b. The Fair use doctrine

Fair use, which was described by Lessig's famous quote as "the right to hire a lawyer" for its evasiveness and unpredictability, is posing a harder yoke on the false narratives of copyright law, specifically on aesthetic nondiscrimination and originality.[217] Although, transformative use, as the quintessence of fair use, was meant by the courts to establish the right balance between creativity and the First

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SOC'Y U.S.A. 417, 442 (2016).

[212] Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1082 (9th Cir. 2000); Daniel A. Fiore & Samuel E. Rogoway, *Reality Check*, LOS ANGELES LAWYER 34, 36 (July-Aug. 2005).

[213] Apple Comp., Inc. v. Franklin Comp.Corp., F. Supp. 812, 823 (E.D. Pa. 1982), *rev'd*, 714 F.2d 1240, 1253 (3d Cir. 1983); WILLIAM PATRY, PATRY ON COPYRIGHT LAW, § 4:46 (2015).

[214] *Id*. at 438-42. For Samuelson, five types of mergers: a fact/expression merger doctrine, a law/expression merger doctrine, a process/expression merger doctrine, a system/expression merger, and the most relevant and tricky classification to our discourse: the art/ functionality merger.

[215] *Id*. at 461. "Curiously missing from the rationales that courts have used to justify ruling in favor of merger defenses are the freedom of expression interests of subsequent creators."

[216] *Id.* at 448.

> The merger and scènes à faire doctrines are, however, distinct in their essential character. With merger, the core issue is whether there are, practically speaking, more than a few alternative ways to express particular ideas or functions. The core issue in scènes à faire cases, by contrast, is whether certain elements in common between two works are indispensable in works of that kind, common in the industry, or otherwise to be expected in works of that kind.

[217] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY LAW AND THE LOCK DOWN CULTURE CONTROL CREATIVITY 287 (2004); *see* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 169-70, 190-91 (2008) (for fair use as the main vehicle of copyright law to create the desirable balance between Authorship and freedom of expression intrinsically, thus, prima facie, rendering the First Amendment protection unnecessary). *See also* Eldred v. Ashcroft, 537 U.S. 186, 190, 221 (2003); Roy Export Co. Establishment v. CBS, Inc., 672 F.2d 1095, 1099 (2d Cir. 1982). "No circuit that has considered the question has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine."

Amendment, [218] the outcome merely proved that the marriage of aesthetic nondiscrimination and originality, as the false narratives of the law, begot the very phenomenon transformative use was meant to avoid: the closure of the cultural public common, especially in regard to publicity right. That evolved through the parody/satire dichotomy,[219] the courts' interpretation of the commercial use component in fair use doctrine and the hybrid media, which makes the distinction between news, entertainment, and commerce almost impossible.[220]

As John Tehranian demonstrates, the dynamic evolvement of derivative work in copyright law created a new, total idea of originality, unknown before, and changed the balance between the author and the public domain, for the benefit of the former at the expense of the latter. Once works that were previously unprotected, such as translations, evolved to be classified as derivative works, they were no more part of the public domain. [221] This constantly changing balance between authorship and the public domain tells the history of copyright law.[222] To borrow Boyle's colorful slogan: "The holes matter as much as the cheese." [223] As Bohannan & Hovenkamp demonstrate, works previously considered as independent works of authorship, such as an unauthorized translation of Uncle Tom's Cabin, evolved under the new balance as the questionable class of derivative works that lost their immunity to copyright infringement lawsuits. [224] Hence, as what once was permitted, is forbidden under current law, unless recognized as "fair use."[225] In addition, the fair-use legal status in the United States has become too many things to too many people, shifting from a defense into a privilege.[226] Whereas some scholars treat fair use as a question of substantive law rather than as a question of remedies, others regard fair use as a doctrine that tries to define the boundary between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment, or

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[218] Pierre N., Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); Netanel, *supra* note 217, at 398.

[219] *See generally* Keller & Tushnet, *supra* note 20 (for the outcome of parody/satire dichotomy in American adjudication).

[220] *See* Savare, *supra* note 20, at 53 (claiming the issue of the "hybrid speech" to be the most complicated and disputed in copyright claims in regard publicity right).

[221] John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237, 1245, 1249-50 (2012) (focusing on how the mechanism of derivative-works protection created a new cultural distinction and highbrow/lowbrow norm). *See also* Arewa, *supra* note 107, at 520 (for the originality false narrative); Stowe v. Thomas, 23 F. Cas. 201, 206-7 (C.C.E.D. Pa. 1853) (deciding case according to the Copyright Act of Feb 3, 1831) (for translation as an unprotected work pre the derivative work evolvement).

[222] Litman, *supra* note 107, at 978.

[223] JAMES BOYLE, THE PUBLIC DOMAIN, ENCLOSING THE COMMONS OF THE MIND 65-71 (2008).

[224] Christina Bohannan & Herbert J. Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 976, 977 (2010); *Stowe*, 23 F. Cas. at 206-7.

[225] Sonia Katyal et al., *Fair Use: Its Application, Limitations and Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1077-78 (2007). Hugh Hansen defines transformative use as a derivative work, for which there is a right.

[226] CCH Canadian Ltd. et al. v. Law Society of Upper Canada [2004] S.C.R. 339 (Can.) (focusing on the evasiveness of fair use as its core is best demonstrated through a so-called promising adjudication. The Canadian Supreme Court held that "the fair dealing exception, like other exceptions in the Act, is a user's right."); *see also* ROSEMARY J. COOMBE ET AL., INTRODUCING DYNAMIC FAIR DEALING: CREATING CANADIAN DIGITAL CULTURE 9-12 (2014) (noting that the access copyright that decrees payable uses out the scope of fair dealing, together with the Copyright Modernization Act Bill C-11 "digital locks" enhancement, leave users in the same legal ambivalence).

lament its failure to do so.[227] Hence, while Abraham Drassinower, profoundly influenced by Postmodernist vocabulary, advocates fair use as users' rights rather than as mere exceptions, Huge Hansen defines transformative use as a derivative work, for which there is a right.[228]

Not only is the classification of fair use as a right or a defense blurry, but it morphed into at least five different tests where commerciality combats with creativity.[229] Namely: the transformative use test, the predominant use test, the actual malice test, the relatedness/restatement test, the ad-hoc test and the *Rogers* test.[230] As I argued elsewhere, the hidden leitmotiv is the complex concept of transformative use

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[227] *Compare* Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 405 (2005) (treating fair use as a question of substantive law rather than as a question of remedies) *with* Hansen, *supra* note 225, at 1077-78. Hansen's perception of transformative use as a derivative work, for which there is a right. *Compare* Aiken, *supra* note 225, at 1020 (regarding fair use as a doctrine that tries to define the boundary between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment) *with* Jacqueline Deborah D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, 109 NW. UNIV. L REV. 383, 415-16 (2015) (demonstrating how the fair use doctrinee fails to reach such definition).

[228] ABRAHAM DRASSINOWER, TAKING USER RIGHTS SERIOUSLY IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW (2005). "The invocation of user rights as central to copyright is also an evocation of the author as user—an affirmation of the intertextuality of creation." *See also* Hansen, *supra* note 225, at 1077-78 (Hansen's view on the issue.).

[229] *See* Kwall, *supra* note 13, at 1356-64 (discussing the different classifications of far use tests); Matthew Savare & John Wintermute, *A Haystack in a Hurricane: Right of Publicity Doctrine Continues to Clash with New Media*, 32 COMPUT. & INTERNET L. 1, 7 (2015); Moldawer, *supra* note 23, at 174-76.

[230] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 404 (2001) (explaining the transformative use test, as the legal license to transformatively appropriate an original work in the service of creativity); *see* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (discussing the predominant use test, that requires the work in question to be primarily expressive, rather than primarily commercial); Hoffman v. Cap. Cities/ABC Inc., 255 F.3d 1180, 1186 (9th Cir. 2001) (holding only "reckless disregard" or a "high degree of awareness of probable falsity" as sufficient to relinquish the transformative use protection.); *see* Savare & Wintermute, *supra* note 229, at 2-3; *see* Restatement (Third) of Unfair Competition § 47 cmt. c (Am. L. Inst. 1995). The relatedness/restatement test stresses the use of the other's identity solely to attract attention to the defendant's work, with no justified nexus to it. *See also* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 937 (6th Cir. 2003); *see* Kwall *supra* note 13, at 136-62 (for the ad-hoc test problematic classification as actually containing every possible test that was not previously in use, demonstrating how in ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003), three tests were in use: the transformative test, the relatedness/restatement approach and the actual malice test); Savare & Wintermute, *supra* note 229, at 2 (offering additional ad-hoc tests); Kwall, *supra* note 13, at 1357-58. What Kwall regards as the ad hoc balancing approach, is not existent in Savare & Wintermute's, who refer to the *Rogers* test, from Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989), which, in turn, is not considered to be an independent test in its own merit, in Kwall's classification. The *Rogers* test, which evolved to an enormously influential doctrine in Trademark Law, was initiated by Ginger Rogers' lawsuit, who attempted to enjoin the distribution of the 1986 Federico Fellini film Ginger and Fred. The film is about two Italian cabaret dancers who build their career on personification of Astaire and Rogers and reunite after thirty years of retirement for a vulgar television show. Rogers claimed that the film violated her Lanham Act trademark rights, right of publicity, and was a "false light" defamation. The court held that "suppressing an artistically relevant though ambiguous[ly] title[d] film" on trademark grounds would "unduly restrict expression." *Id*. at 1001. And "that section 43(a) of the Lanham Act does not bar a minimally relevant use of a celebrity's name in the title of an artistic work where the title does not explicitly denote authorship, sponsorship, or endorsement by the celebrity or explicitly mislead as to content." *Id*. at 1005.

as a vehicle to circumvent the barrier of the commercial element in fair use.[231] This differentiates between the derivative work, exaggeratedly protected even by a fraction of a commercial suspicion, and the transformative work, which survives this fate.[232] Originality, if proven, may take the upper hand over the commercial component in fair use through the transformative use criterion. However, originality cannot do without its doctrinal twin: the aesthetic discrimination. [233] Straight from its inception, *Campbell v. Acuff-Rose Music, Inc.*,,[234] originated the transformative fair use doctrine as a dominant criterion of whether a use is fair.[235] *Campbell* created an unprecedented distinction between the parody, as a protected transformative use and the satire, which is not a protected transformative use.[236] As Keller and Tushnet demonstrate, "a parody, which makes the original work its target, is particularly favored, while a satire, which uses the same work to criticize something else, is not," and "[a]ccording to the Court, this is out of a concern that the satire may be using a preexisting work simply to "avoid the drudgery in working up something fresh."[237] However, this distinction requires aesthetic discrimination.[238] Not only is there room for doubt that judges are trained to fulfill this task, but as ample adjudication also proves, the distinction depends on the current beholder in office.[239] *SunTrust Bank v. Houghton Mifflin Co.* was recognized as a parody in the appellate court, thus, implying the transformative use defense, whereas the very cause of the appeal was the lower court's artistic perception of Alice Randall's "The Wind Done Gone"' reflection on Gone with the Wind as a satire, hence, infringing in copyright's eyes.[240] In addition, as Tehranian proves, the appellate court in this case, while granting Randall's work fair use defense, ignored commercial implications that should have annulled it.[241] However, an opposite approach was used regarding "The Catcher in the Rye" due its canonic status, and notwithstanding the lack of commercial implications to the author.[242] Without the courts directly admitting it, aesthetic considerations were the very gist of those rulings. No wonder Tushnet regards judges as bad reviewers, thus "[w]ithout recognizing that works mean different things to different people, transformativeness as a concept is at war with itself."[243]

Ironically, the aforementioned perils of judicial artistic bias are supposed to be the optimistic side of the coin, as they reflect the adjudicational shift from property- right

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[231] Moldawer, *supra* note 23, at 174.

[232] *Id*. at 174-76.

[233] Tushnet, *supra* note 18, at 20.

[234] *Acuff-Rose Music, Inc*., 510 U.S. at 8-12, 17-20.

[235] Leval, *supra* note 218, at 1124.

[236] Keller & Tushnet, *supra* note 20, at 983 (proving pre-*Campbell* ruling, the courts treated parody and satire alike).

[237] *Id*. at 981; *Acuff-Rose Music, Inc.*, 510 U.S. at 580.

[238] Keller and Tushnet, *supra* note 20, at 985-92.

[239] *Id*.

[240] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268-9 (11th Cir. 2001). *Compare with* SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1385- 6 (N.D. Ga. 2001) (holding that the "The Wind Done Gone" use of "Gone with The Wind" was well beyond what was necessary to create a parody).

[241] Tehranian, *supra* note 221, at 127-85.

[242] *Id.* at 1281-85; *see also* Salinger v. Colting (Salinger I), 641 F. Supp. 2d 250, 253 (S.D.N.Y. 2009); Salinger v. Colting (Salinger II), 607 F.3d 68, 75-6 (2d. Cir. 2010).

[243] Tushnet, *supra* note 18, at 27.

focus, which recognized only market failure as a narrow outlet for fair use, into expression, alterity focus, which enlarged fair use scope beyond the economic approach.[244] However, Lipton and Tehranian demonstrate how tricky the fair use defense is regarding the most important component that might annul it—the potential commercial use or market harm under the first or fourth factors of 17 U.S. Code § 107[245]. Almost every creative crowdsourcing can be construed as infringing because it may attract advertising revenues or a consumer following.[246] Hence, the monolithic perception of romantic originality that can be attributed only to one unprecedented author, morphs inspiration into plagiarism through the lenses of copyright law that retain this anachronistic approach. Combined with artistic discrimination, freedom of speech and creativity are both under assault.[247] Even if the current adjudication tries to reconcile copyright law with freedom of speech, not only from within, but, extrinsically, vis-à-vis the First Amendment, Tushnet concludes that

> the logical chain linking criticism, the First Amendment, and transformative fair use can make those concepts seem coterminous with one another as far as copyright defendants are concerned. The values of public access and dissemination that were also traditionally part of fair use, and part of many theories of free speech, get left behind. [248]

The monolithic axis of copyright law keeps in line with Western thinking, which holds the unity of absolute truth and proceeds in a straight line from the Socratic dialogues to the categorical imperatives. [249] Followed by the perception of exclusive originality and sole authorship, a parallel trademark law axis offers contradictory solutions, that, although a far cry from its original legal infrastructure, can better solve the celebrity/persona phenomenon as obstructing our culture.

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[244] *See generally* Netanel, *supra* note 129, at 398-9; *see generally* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (focusing on the economic, property-right focus).

[245] Lipton & Tehranian, *supra* note 227, at 415-16. Section 107 provides that, in determining whether the use was fair, the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect on the potential market for or value of the copyrighted work. *Id*.

[246] *See* Savare & Wintermute, *supra* note 229, at 4 (demonstrating how the commercial/non-commercial distinction fails to achieve a coherent criterion).

[247] *See* Moldawer, *supra* note 23, at 176-77 (describing an ample variety of artistic genres, that would have never flourished under the current law such as Dadaism, Futurism, Fauvism, Surrealism or Jazz); Lipton & Tehranian, *supra* note 227, at 428-9 (explaining the great damage to remixing, especially in crowdsourced projects, sampling and hip-hop); Grand Upright Music Ltd. v. Warner Bros. Rec., Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (declaring sampling and hip-hop as sheer theft, combining a monolithic Originality perception and musical ignorance as regards how those genres are created); *see also* Arewa, *supra* note 107, at 483, 531-36 (discussing the courts' musical ignorance, culminating in ruling improvisation as Copyright infringement).

[248] Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 552 (2004).

[249] *See* PLATO, SOPHIST (2008).

C. THE AXIS OF TRADEMARK LAW: PERSONA AUTHORSHIP REVISED

The common law's duality, which unifies tort and property law, was embedded in American trademark law to protect trademark owners when commerce was at its inception. [250] Yet, trademark law prevailed under a different market, under circumstances of competition that grew out of the initial local market.[251] This duality was meant to protect both trademark owners and consumers, as arbitrary or meaningless trademarks were considered property protected by the tort of trademark infringement.[252] However, descriptive trademarks were not considered property, and therefore, plaintiffs had to seek relief under the tort of passing off, which, even today, is the proper cause of action in Great Britain for an unauthorized misappropriation of celebrity personae.[253] However, the "propertization" of trademarks devoured them all, as the focus shifted towards protection of goodwill,[254] culminating in the enactment of Federal Trademark Dilution Act ("FTDA"). [255] In parallel, applying Postmodernist vocabulary, trademark law today is a far cry from its premise. As summed up by Beebe,

> [t]raditionally, trademark commentators have conceived of the trademark as a three-legged stool, a relational system Consisting of a "signifier" (the tangible form of the mark), a "signified" (the semantic content of the mark, its meaning), and a "referent" (the product to which the mark is affixed).[256]

As Dreyfuss observed, this triad is practically obsolete.[257] Trademarks morphed to be commodities in their own right, working their way into our meta-langue and evolving into "expressive genericity," distinctive from their competitive and commercial aims, such as identifying goods' source and distinguishing them from others.[258] As Justice Kozinski concluded, trademarks have "begun to leap out of their role as source-identifiers and, in certain instances have effectively become goods in their own right."[259] Hence, trademark law's main issue is now goodwill in both arenas: the "lost" triadic model of trademark law and the dilution doctrine.[260] Thus, as detailed in this chapter, trespassing copyright law, and, paradoxically, offering better solutions for celebrity/persona authorship is critical.

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[250] Bracha, *supra* note 80, at 257.

[251] *Id.* at 258.

[252] *Id.* at 259

[253] *Id.*

[254] *Id.* at 262.

[255] Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended in scattered sections of 15 U.S.C.)

[256] Beebe, *supra* note 24, at 625.

[257] Dreyfuss, *supra* note 5, at 397-98.

[258] *Id.*

[259] Plasticolor Molded Prods., Inc. v. Ford Motor Co., 713 F. Supp. 1329, 1332 (C.D. Cal. 1989). Judge Alex Kozinski was influenced by Dreyfuss "expressive genericity" perception of some trademarks and proposed to acknowledge them as Saussure's Langue; *see* Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 974 (1993).

[260] *See generally* Zachary Shufro, *Based on a True Story: The Ever-Expanding Progeny of Rogers v. Grimaldi*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391, 423-4 (2022).

1. The Evolvement of Trademark Law: From a Triadic Model into a Hypermark Defense

As Beebe argues, Schechter ironically meant to defend the goods' distinction, due to his understanding that avoiding consumers' confusion, while the base of trademarks' incentive infrastructure, is not sufficient.[261] Schechter noted that dilution will harm the protected goods much more.[262] The doctrinal bases transformed to resemble copyright law.[263] Namely, the core of the matter is to avoid unauthorized copies of the distinguished brand, but not to differentiate its source, or to segregate it horizontally in comparison with other brands.[264] Historically, the original dilution definition as offered by in 15 U.S.C. § 1125I, was omitted by the TDRA.[265] This change amended 15 U.S.C.A. § 1125(c), leaving this concept to be defined at the courts discretion "according to notions of equity and reasonableness whether dilution has occurred."[266] Dilution can be caused either by blurring, where plaintiffs "need to show actual blurring of an inherently distinctive mark," thus challenging a prima facie strong safeguard for free speech, which does not exist for defendants in publicity right infringement or tarnishment cases.[267] In regard to Dreyfuss' category of Statute-based factual solutions (in contrast to Constitution-based solutions), tarnishment cases, accordingly, "reflects the concern that a mark will be harmed by unsavory associations, and is arguably a problem of the know-it-when-I-see it variety, making it relatively easy to establish."[268] Hence, the doctrinal dichotomy between commerce and expression was rendered obsolete.[269]

As far as the other area of trademark law is concerned, namely, the collapse of its traditional triadic model and the metamorphosis of trademarks into our langue, nothing fits the celebrity "expressive genericity" more.[270] Coombe went even further than Dreyfuss, as the latter was willing to acknowledge the idea of the public sharing persona authorship as far as "expressive genericity" was concerned, because it "was in a large part generated by its audience, through the way in which it was recoded and recontextualized"[271]. However, the former claims that there is no halfway in celebrity authorship, as it was wholly created by her public. Thus,

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[261] Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 821-24 (1927); *see also* Beebe, *supra* note 26, at 846-48 (2010).

[262] *Id*.

[263] Beebe, *supra* note 26, at 848.

[264] *Id*.

[265] Tan, *supra* note 15, at 985, n. 306; Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, § 2, 120 Stat. 1730 (2006) (codified at Lanham Act 43 U.S.C. § 1125(c) (2006)).

[266] Tan, *supra* note 15, at 984.

[267] Rochelle Cooper Dreyfuss, *Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity*, *in* TRADEMARK AND LAW THEORY, A HANDBOOK OF CONTEMPORARY RESEARCH 261 (Graeme Dinwoodie & Mark Janis ed., 2007).

[268] *Id.* (Dreyfuss' category of Statute-based factual solutions (in contrast to Constitution-based solutions is the basis for this argument).

[269] *See generally* VIP Products LLC v. Jack Daniel's Props., Inc., 953 F.3d 1170 (9th Cir. 2020), cert. denied, 141 S. Ct. 1054 (2021).

[270] Coombe, *supra* note 8, at 89.

[271] Dreyfuss, *supra* note 267, at 262.

> [c]elebrity names and images, however, are not simply marks of identity or simple commodities; they are also cultural texts – floating signifiers that are continually unvested with libidinal energies, social longings, and, I will argue, political aspirations.[272]

Our society, coined as "the society of the spectacle" [273] and enslaved to the "simulacra" in exchange for the real, [274] found its match in trademark law transformation into what Beebe[275] concluded to be the death of its triadic inception: "the triadic structuration is being attacked . . . by the granting of protection to trademarks as products themselves."[276] Hence, trademarks end with the merger of signified and referent or as "hypermark."[277] Hypermarks are free-floating signifiers, signifying nothing, but themselves, as best demonstrated by the celebrity phenomenon. [278] The outcome of trademark law doctrinal metamorphosis in comparison with copyright law is even more striking. Originally, trademark infringement causes consumers confusion of one signifier with another in relation to the same referent, thus trespassing goodwill. [279] Therefore, trademark protection attempts to defend an exclusive idea, as embedded in the signified, whereas dilution protects distinction, to prevent the weakening of the signifier, thus protecting an expression, which was under copyright law. Although Lemley titles this transformation as a "doctrinal creep," this "doctrinal creep" can cure a lot of publicity right maladies, as I argue in the next chapter.[280]

2. The Benefits of "he "Doctrinal Creep"

The blurry doctrinal infrastructure that renders distinction between celebrity image protection by Publicity right paradigms, or celebrity sign protection by

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[272] Coombe, *supra* note 8, at 89. Interestingly, Coombe refers to Bakhtin's approach while discoursing Trademark Law and not Copyright Law. *Id*. at 82.

[273] Debord, *supra* note 6, at Ch. I.

[274] Baudrillard, *supra* note 52, at Ch. I.

[275] Beebe, *supra* note 24, at 625.

[276] *Id*. at 656-57.

[277] Mira Moldawer, *Cassandra's Curse or Cassandra's Triumph: Three Tales of Intellectual Property Revised*, 43 LOYOLA L.A. ENTM'T L. REV. (*forthcoming* 2022). "[A]n integral part of Postmodernist resistance to one universal and absolute truth was its "rejection of the strict anchoring of particular signifiers to particular signifieds," which evolved into the concept of the "floating signifier", originated by Claude Lévi-Strauss, although heavily influenced by Derrida." *See also* Jeffrey Mehlman, *The "Floating Signifier": From Lévi-Strauss to Lacan*, 48 YALE FRENCH STUD., FRENCH FREUD: STRUCTURAL STUD. IN PSYCHOANALYSIS 10, 23-4, 36-7 (1972); Jeanne S. M. Willette, *Postmodernism and The Trail of the Floating Signifier,* PHILOSOPHY ART HIST. UNSTUFFED (Feb. 21, 2014), https://arthistoryunstuffed.com/postmodernism-floating-signifier/21/2/14.

[278] Moldawer, *supra* note 277. "The David Beckham phenomenon illustrates how a talented soccer player became a floating signifier, and part of our metalanguage. He is no more considered as a mere athlete, but as the quintessence of success, sex appeal and a vessel for anyone dreams (females and males, alike)." *Id.*; Peter Conrad, *Blend It Like Beckham*, THE GUARDIAN: THE OBSERVER (May 25, 2003), http://observer.guardian.co.uk/review/story/0,6903,962904,00.html.

[279] Beebe, *supra* note 24, at 675-76.

[280] *See generally* Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1698 (1999).

trademark law, to be nonexistent, leads to contradictory legal results. As Keller and Tushnet demonstrate, even before the dilution doctrine morphed trademark into expressions contesting First Amendment Freedom of Speech, the courts applied "the concept of nominative fair use, which either supplements or supplants the traditional multifactor confusion analysis."[281] In order to deal with trademark parody,

> [f]irst, the plaintiffs product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the plaintiffs product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.[282]

However, even these tests proved to be astonishingly flexible, as at times courts were willing to skip "necessity" component, or, to almost let go "the minimal use" request.[283]

Publicity right requires unauthorized endorsements, not consumer confusion.[284] Hence, the next stage is to analyze the courts adjudication once the plaintiff sues for both trademark and publicity right infringement. *Cardtoons, L.C. v. Major League Baseball Players Ass'n* proved the benevolent approach to Freedom of Speech in trademark law in regard to celebrities' parodies vis-à-vis their symbolic social function.[285] The benevolent approach prevailed over the narrower interpretation of publicity right, despite commercial use being involved, which would amount to a contradictory result in regard to copyright law fair use.[286] Likewise, the deadly parody/satire dichotomy, that narrowed copyright fair use to the former, but refused to grant it to the latter, was replaced with transformative use in trademark infringement, thus, massively improving free speech defense in trademark law.[287]

Recently, in *Matal v. Tam*, the Supreme Court acknowledged purely commercial speech as private speech under the First Amendment, thus, proving *Cardtoons, L.C. v. Major League Baseball Players'Ass'n* to be even more of settled law.[288] The Supreme Court reflected Postmodernist thinking, perceiving the realm of trademarks as the metaphorical marketplace of ideas and transforming them into a tangible powerful

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[281] *See generally* Keller & Tushnet, *supra* note 20, at 1005.

[282] *Id*. at n. 123. From the impressive list of cases detailed by the authors in this footnote, most illuminating is New Kids on the Block v. News America Publ'g, 971 F.2d 302, 307 (9th Cir. 1992). "[H]olding that nominative fair uses are uses "to which the infringement laws simply do not apply."

[283] *Id*. at 1006-07.

[284] Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 996 (2002). "The crux of a copyright violation is unlawful copying, not false representations concerning the work's authorship." As argued in this article, the legal justifications of publicity right authorship are based on Copyright Law theoretical infrastructure.

[285] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996).

[286] Lemley, *supra* note 15, at 1175-6.

[287] Keller & Tushnet, *supra* note 20, at 1013; *see, for example*, Mattel Inc. v. MCA Rec. Inc., 296 F.3d 894 (9th Cir. 2002); Louis Vuitton Malletier SA v Haute Diggity Dog LLC, 507 F.3d 252 (4th Cir. 2007); Louis Vuitton Malletier SA v My Other Bag Inc., 674 Fed. Appx. 16, No. 16-241-cv (22 Dec 2016).

[288] Matal v. Tam, 137 S. Ct. 1744, 1760 (2017).

reality.[289] In *Lorillard Tobacco Co. v. Reilly,* Justice Thomas, could see no difference, historically or philosophically, for discriminating commercial speech.[290] In *Matal*, Justice Bryer concurred: "[w]hen the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as commercial."[291] This approach was followed in *Iancu v. Brunetti*, holding 15 U.S.C. § 1052 unconstitutional for violating the First Amendment by denying trademark registration under the Lanham Act for a mark described as the equivalent of a profane word.[292] The statute not only left room for bias that resulted in viewpoint-discriminatory application, but attempted to cover the universe of immoral or scandalous material.[293] This is a far cry from the hybrid expression that makes Publicity Right so powerful, as the commercial expression is almost banned from copyright fair use.

Another successful way for understanding Freedom of Speech as being deeply embedded in trademark law is to interpret "the second arena", namely, the dilution doctrine, as demonstrated in *Mattel Inc. v. MCA Records Inc*.[294] The Ninth Circuit refused trademarks holders to translate their goodwill into a vehicle of censorship, unlike parallel lawsuits for publicity right infringement.[295] As best explained by Justice Alex Kozinski in *Mattel Inc.*:[296]

> trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law . . . . Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment.[297] Simply put, the trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function.[298]

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[289] *Id*. at 1765.

[290] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001).

[291] *Matal*, 137 S. Ct. at 1769 (Thomas, J., concurring in part and concurring in the judgment).

[292] *See generally* Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

[293] *Id*.

[294] *MCA Rec. Inc.*, 296 F.3d at 900 (9th Cir. 2002). This case was a series of lawsuits between Mattel, and MCA Records that resulted from the 1997 hit single "Barbie Girl" by Danish group Aqua, which referred to Barbie as a "Blonde Bimbo." Over the years, Mattel manufactured their famous Barbie into a glamorous, long-legged blonde, as a symbol of American girlhood. "With Barbie, Mattel created not just a toy but a cultural icon." *Id.* at 898. Regarding the "second arena" in this article, i.e., the dilution doctrine, Mattel claimed the song violated the Barbie trademark by turning Barbie into a sex object, and that its lyrics had tarnished the reputation of their trademark. On appeal, the Ninth Circuit ruled the song was protected as a parody under the trademark doctrine of nominative use and the First Amendment.

[295] Lumley, *supra* note 15, at 1176, n. 107 (demonstrating how "on the same day by the same judges, the Ninth Circuit came to radically different results in the NFL and NCAA cases").

[296] *MCA Records Inc.*, 296 F.3d at 900.

[297] *Id*.; *see also* Yankee Publ'g, Inc. v. News Am. Publ'g, Inc., 809 F. Supp. 267, 276 (S.D.N.Y. 1992).

[298] *Id.* at 901; *see* Anti-Monopoly, Inc. v. Gen. Mills Fun Group, 611 F.2d 296, 301 (9th Cir. 1979). "It is the source-denoting function which trademark laws protect, and nothing more."

Trademark law as absorbing Postmodernist vocabulary into personae authorship allowed her audience to encode it either through parodies, satires, or criticism.[299] As the celebrity/brand is part of Saussure's la langue, it can be easily translated into trademark law toolkit as a generic sign.[300] In light of this, the *Rogers* test can be easily viewed as part of Saussure's la langue; namely "Ginger and Fred" transformed into generic signs, thus, losing trademark protection.[301] As Tang argues, genericide can cure copyright's maladies, because

> [g]enericide does everything fair use does not do. It recognizes anti-uniqueness in an age rife with appropriation art (in which images and objects are taken straight—and often wholesale—from our collective pop culture) and satire (in which the copyrighted work is used as a vehicle for general commentary on the state of society, a genre of work, and so on, rather than targeting the work itself) and the eradication of the author. It accommodates the use of marks not for purposes of commenting upon but for purposes of signification; it recognizes the right of the public, not the trademark owner, to decide a mark's fate. It is audience-friendly and First Amendment-approved.[302]

The *Rogers* test contributed enormously to retrieving the public domain, as proved recently in *Jack Daniel's Props. Inc. v. VIP Prods LLC.*[303] A dog toy that parodied plaintiff's trademark and trade dress was held by the Ninth Circuit to be an "expressive work," although sold as a commercial product.[304] Once an allegedly infringing work is classified as an "expressive work," the appellate court can implement the *Rogers* test: (1) is the use of the trademark in question is inherently related to the work, and (2) is the defendant's work explicitly misleading as to its endorsement by the plaintiff?[305] As noted by Cumbow, "[t]he "explicitly misleading" factor is hard to overcome, so most applications of the *Rogers* test end in a victory for

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[299] *See* Hormel Foods Corp. v. Jim Henson Prods., 73 F.3d 497, 503, 506-7 (2nd Cir. 1996); LL Bean Inc., v. Drake Publrs. Inc., 811 F.2d 26, 29, 32-34 (1st Cir. 1987); *see* Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002), at 900, 907; Louis Vuitton Malletier S.A. v Haute Diggity Dog LLC, 507 F.3d 252, at 257, 260-3, 266-8 (2007); Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., 156 F. Supp. 3d 425, 435–38 (S.D.N.Y. 2016); *see* Lucasfilm Ltd. v. High Frontier, 622 F. Supp. 931, 933,935 (D.D.C. 1985); Radiance Found., Inc. v. Nat'l Ass'n for Advancement of Colored People, 786 F.3d 316, 319, 321-2, 325, 327, 332 (4th Cir. 2015).

[300] See Dreyfuss, *supra* note 5, at 397-98; Beebe & Fromer, *supra* note 5, at 982.

[301] *Rogers*, 875 F.2d at 999.

[302] Xiyin Tang, *Against Fair Use: The Case for a Genericness Defense in Expressive Trademark Uses,* 101 IOWA L. REV. 1949, 2024 (2016).

[303] *VIP Prods. LLC*, 953 F.3d at 1172, 1176.

[304] *See* Shufro, *supra* note 260, at 410-5 for the detailed analysis of Jack Daniel's Props. Inc. v. VIP Prods LLC, 953 F.3d 1170 (9th Cir. 2020).

[305] *Rogers*, 875 F.2d at 999. The Court held:

> In the context of allegedly misleading titles using a celebrity's name, [the] balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.

the First Amendment.[306] In the absence of anything explicitly misleading, the Ninth Circuit concluded that VIP's use of Jack Daniel's trademarks is protected by the First Amendment.[307] The mens rea required in the *Rogers* test is absent in copyright law infringement, thus, leading to the opposite outcome.[308] Although both the appellate court's ruling and the Supreme Court certiorari's denial are grounded in Louis Vuitton v. Haute Diggity Dog, as, prima facie, a similar case, in which a chew-toy for dogs marketed as "Chewy Vuitton", used the plaintiff's famous LV logo pattern as a mockery, numerous brand owners and trademark authorities thought otherwise. Accordingly, "if virtually anything, even a commercial product, can be regarded as an 'expressive work', the protections and purposes of trademark law will be eviscerated."[309] No wonder Shufro chose to title his critical article of *Jack Daniel's Properties Inc. v. VIP Products LLC* as; "the ever-expanding progeny of Rogers".[310] Doctrinally, the gist of Shufro's criticism is that courts no longer distinguish between the two areas as previously mentioned.[311] In short, both areas now defend goodwill: the expression, not the idea. Although a far cry from trademark law premise, its current interpretation is better suited to mend copyright law's poor treatment of persona/celebrity Authorship. The cure for the poor balanced perception between authorship and the public domain in copyright law can be done through trademark law's toolkit.

D. PERSONA GENERIC USE AS A PROPOSED SOLUTION

To enhance the original targets of the intellectual property paradigm, the law, which instilled the persona with her exaggerated cultural power, should balance between authorship and the public domain. Scholars attempt to settle authorship's perils within copyright law doctrinal basis, and it is alluring to comply with this premise, as these perils are intrinsic to copyright law infrastructure.[312] However, the

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[306] Robert C. Cumbow, *Supreme Court Denies Cert in Jack Daniel's Dog Toy Case*, MILLER NASH (Jan 19, 2021), https://www.millernash.com/industry-news/supreme-court-denies-cert-in-jack-daniels-dog-toy-case.

[307] *VIP Prods. LLC*, 953 F.3d at 1175-76.

[308] *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976) (for the concept of unconscious infringement); Arewa, *supra* note 107, at 533 (for the implications of Copyright Law lack of Mens Rea on the defendant's onus of proof).

[309] *See generally VIP Products LLC*, *cert. denied*, 592 U.S. 208 (2021). Both the appellate court's ruling and the Supreme Court certiorari's denial are grounded in Louis Vuitton v. Haute Diggity Dog (507 F.3d 252, 4th Cir. 2007); *see* Cumbow, *supra* note 306 (providing a general reaction of brand owners and trademark authorities).

[310] Shufro, *supra* note 260, at 391.

[311] *Id*.

> In its opinion, the Ninth Circuit not only stretched the purpose of the Rogers test to a breaking point, but also improperly relied upon the test's basic premise as grounds to incorrectly dispose of a claim for trademark dilution, despite the different standards, purposes, and policy goals of trademark infringement and trademark dilution statutes.

[312] *See* Netanel, *supra* note 217, at 191-92; Reid Kress Weisbord, *A Copyright Right of Publicity*, 84 FORDHAM L. REV. 2803, 2831-2 (2016).

interpretation that was supposed to mend it, is leaning on external values such as free speech and information or free competition. Hence, although in practice the division between the “inner circle” of Copyright Law and “outer circle” of the constitutional rights is somewhat artificial, as they are blended, methodically, it would be easier to cure the handicaps of the inner “circle” of Copyright Law toolkit by absorbing into it the outer "circle" values, to create a better holistic infrastructure in the former.[313]

1. Is Fair Use Enough?

Both *Blanch v. Koons* and *Cariou v. Prince* led some scholars to believe that Postmodernist approaches were trickling into copyright law infrastructure, and thus changing authorship balance for the benefit of the latter.[314] *Blanch* represented for Jaszi the "rejection of the grand narrative of authorship and “authority,” that creates a better balance between "participants in the processes of cultural production and consumption."[315] Kausnic dwelled on the audience as the necessary component of creation, as "*Koons* carefully refused to infuse particular meaning to the work, but rather empowered the viewer with establishing his or her own relative meaning."[316] *Cariou* went even further, seeming to do the impossible by crossing the border of fair use altogether.[317] The question posed in *Cariou*, was "whether the artist Richard Prince, in taking plaintiff Cariou’s photographs and altering them, had any intention to comment on Cariou’s original works."[318] The question bears resemblance to most transformative use defenses. The novelty is the very death of fair use defense once Prince answered the question in the negative. However, the court held that to qualify for a fair use defense the artist's work need not comment on the original. It is legally satisfactory if the alleged infringing work presents a new expression, meaning, or message in comparison with the original, without relating to it at all. Another innovative point was the perception of different audiences for the plaintiff and defendant, as courts tend to regard the public as homogenous, a far cry from Fiske's

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[313] *See* Orit Fischman-Afori, *Cultural Rights and Human Rights: A Proposal for A Balanced Way to Develop Israeli Copyright Law,* 37 HEBREW UNIV. L. REV. 499, 571, 573 (2007) [Hebrew] (for the insertion of external constitutional rights, while attempting to interpret copyright law internally on its own ground).

[314] Blanch v. Koons, 467 F.3d 244, 250-9 (2nd Cir. 2006); *see also* Peter Jaszi*, supra* note 108, at 116, 118, 120 (2009); Cariou v. Prince, 714 F.3d 694, 698, 706 (2d Cir. 2013).

[315] Jaszi, *supra* note 108, at 116.

[316] Robert Kausnic, *The Problem of Meaning in Non-Discursive Expression*, 57 J. OF COPYRIGHT SOC’Y OF USA 399, 421 (2010).

[317] *Cariou*, 714 F.3d at 694. The court held that the district court imposed an incorrect legal standard when it concluded that, in order to qualify for a fair use defense, the artist's work had to comment on the photographer, the photographs, or on aspects of popular culture closely associated with the photographer or the photographs. The court ruled that 25 of the artworks made fair use of the copyrighted photographs because the artworks presented a new expression, meaning, or message. The artworks were transformative because they manifested an entirely different aesthetic from the photographs since the artist's composition, presentation, scale, color palette, and media were fundamentally different and new compared to the photographs, as was the expressive nature of the artist's work. The artist's audience was very different from the photographer's audience, and there was no evidence that the artist's work ever touched, much less usurped, either the primary or derivative market for the photographer's work.

[318] Tang, *supra* note 302, at 2043.

Semiotic democracy.[319] If the plaintiff's potential consumers are different from the defendant's, no harm would follow for the plaintiff's market, neither to its primary market, nor to the original work's derivative market.[320]

The same artistic practice earned *Koons* a humiliating legal defeat in *Rogers v. Koons*.[321] However, the legal enthusiasm of *Koons* was wishful thinking. *The Andy Warhol Foundation for the Visual Arts, Inc. v. Lynn Goldsmith* held that retrieving fair use begs consideration of its evasiveness and unpredictability.[322] Unfortunately, the copyright misuse doctrine, that could have solved the chameleon phenomenon of fair use, was not applied in copyright law and is usually connected with antitrust law or free competition.[323] *Carol Loeb Schloss v. Sea'n Sweeney and the Estate of James Joyce*, a lawsuit for copyright misuse against the James Joyce estate, which allegedly disguised censorship attempts, while enjoining the plaintiff access to information concerning Joyce's mentally-ill daughter, was settled out of court.[324] With the fair use doctrine not being enough, we need to dig further in order to import trademark law legal evolvement into copyright law's current unpredictability.

2. Persona Generic Use

The most important doctrinal kit in copyright law that could solve fair use ambiguity is intrinsic: the idea/expression dichotomy. The question posed is: can we transform trademark law's generic sign paradigm, that unarms the previously protected sign, into the category of an uncopyrightable idea, thus, unarming persona publicity right from its overpowering doctrinal armor?

The expression is the Blackstonian premise that morphed into the romantic perception that authorship is the vehicle through which the agonizing genius turns "pure" ideas into unprecedented expressions.[325] If the "clothed" ideas reflect the artist's feeling, they gain value, and this value is translated into property right, as seen by the seminal precedent *Pope v. Curl*.[326] *Pope* that evolved into an attempt to form an eternal property right in *Millar v. Taylor* and was finally crystallized in *Donaldson v. Becket* as a time limited property right.[327] Yet, *Pope* is a far cry from Sir John Dalrymple's

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[319] *See*, *Cario*, 714 F.3d at 709.

[320] *Id.*; *see also* Barry Werbin, *Art & Advocacy – The 'Transformation' of Fair Use After Prince v. Cariou*, HERRICK (Feb. 2014), https://www.herrick.com/publications/the-transformation-of-fair-use-after-prince-v-cariou/.

[321] Rogers v. Koons, 960 F.2d 301, 303-4 (2d Cir. 1992).

[322] Andy Warhol Found. for the Visual Arts, Inc. v. Lynn Goldsmith, et al., 11 F.4th 26 (2d Cir. 2021).

[323] Shur-Ofry, *supra* note 84, at 57.

[324] Carol Loeb Schloss v. Sea'n Sweeney & the Estate of James Joyce, 515 F. Supp.2d 1083, 1086 (N.D. Cal. 2007); *see also* Carol Loeb Schloss, *Privacy and the Misuse of Copyright: The Case of Schloss v. the Estate of James Joyce*, *in* MODERNISM & COPYRIGHT 243 (Paul K. Saint-Amour ed., 2011) (providing Plaintiff's commentary on the case).

[325] 1 Black. W. 301, 322-23, 96 Eng. Rep. 169, 172-3 (K.B. 1760), reargued and dismissed, 1 Black. W. 322, 96 Eng. Rep. 180, 180-1, 184 (K.B. 1761); Coombe, *supra* note 8, at 211.

[326] Pope v. Curll (1741) 2 Atk. 342, 26 Eng. Rep. 608 (Ch.); *see also* MARK ROSE, THE AUTHOR IN COURT: POPE V. CURLL (1741) 197 (2017); Woodmansee & Jaszi, *supra* note 16, at 211, 227.

[327] Millar v. Taylor (1769), 98 Eng. Rep. 201 at 252-53; Donaldson v. Becket (1774) Hansard, 1st ser., 17 (1774), 999-1001. *See also* Ronan Deazley, *Commentary on Donaldson v. Becket* (1774), *in*

false prediction, namely, the "term Literary Property, he in a manner laughed at."[328] However, what is considered to be an idea, free for public use, as distinguished from a protected expression, was never easy to define.[329] Therefore, as Jaszi notes, following Fish and Ginsburg, the idea/expression dichotomy is a fictional narrative. [330] Moreover, the premise clashes with another basic concept of copyright law: the conception of fixation. From that aspect, ideas cannot be fixed, hence, out of copyright law scope. As Coombe argues, persona attributes resemble ideas in their essence as "unfixable."[331] Therefore, an idea as a social construed product is best demonstrated by the persona conceptual evolvement.

Can we treat the persona as our social code, either under the scène à faire doctrine or the merger doctrine? As Shur-Ofry argues, popularity matters.[332] Her advocacy for lessening copyright law protection until total annulment over popular works lies in their perception as part of our Saussure's Langue, thus, equivalent to uncopyrightable ideas. [333] From authorship's perspective, the same public that transformed a protected trademark sign into a generic sign, rendering it unentitled for its protection, is the same public that encoded the persona into his language and sub-culture.[334] As Dreyfuss argues,

> particular usages [of a word] can require listeners to consider several denotations, their respective connotations, and the connections between them. This effort can lead to a new level of understanding, which might not have been achieved by words lacking the same associational set.[335]

Argento offers a test for applying Genericide to the Right of Publicity.[336] While embedded in trademark's lenses, it can be applied in determining whether the persona evolved into an idea: "whether the aspect of the celebrity's persona at issue has been used in the public dialogue with a clearly separate meaning over a long period of time."[337] She offers ten years, twice as much as requested in the Lanham Act in order

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PRIMARY SOURCES ON COPYRIGHT (1450-1900) (L. Bently & M. Kretschmer, eds., 2008) for the six sources in regard to *Donaldson v. Becket* (1774).

[328] JOSEPH LOEWENSTEIN, THE AUTHOR'S DUE 3 (2002) (writing on the appellant's counselor in *Donaldson v. Becket*).

[329] *See* Boyle, *supra* note 89, at 55-57.

[330] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory*, LITERARY AND LEGAL STUD. 61 (1989); Jane C. Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After Hoeling v. Universal City Studios*, 29 BULL. COPYRIGHT SOC'Y OF THE U.S.A 647, 658 (1982); Woodmansee & Jaszi, *supra* note 16, at 29.

[331] Coombe, *supra* note 8, at 99.

[332] *See generally* Shur-Ofry, *supra* note 84.

[333] *Id*. at 81-82, 155, 237, 316.

[334] *Id*. at 167-86, 172, 182, 230.

[335] Dreyfuss, *supra* note 5, at 414.

[336] Zoe Argento, *Applying Genericide to the Right of Publicity*, 10 VAND. J. OF ENTM'T & TECH. LAW 321, 348 (2008).

[337] *Id.*

> The intent of this test is to show that the primary significance to the public of a celebrity's persona has an autonomous meaning, separate from its function of identifying the individual. The test does so by requiring that the public has not only

to prove that a trademark in commercial use has acquired a secondary meaning.[338] As Argento notes, "[m]ost importantly, genericide would protect a considerable amount of free speech. Ideas that have become inexpressible without a celebrity's name or image would return to the public domain".[339]

One of the most important and difficult cultural dilemmas is what transforms myth into a cliché. Also important is the pro and contra arguments for the clichés' existence and whether a language can survive without them.[340] Although those matters are out of this article's scope, I argue that even if Helene of Troy was nicknamed the "dumb blonde," thus, transforming a myth into a cliché, both myth and cliché are part of our language and identity. Because of this, they legally need to be treated accordingly, not only under trademark law, but under copyright law as well.

III. CONCLUSION

Humanity is made of its current myths and clichés that constitute its cultural fabric.[341] Yet, our language, identity, and dreams are governed by intellectual property rights, especially publicity right and trademarks.[342] As argued in this article, while legally publicity right and trademarks own their foundation to the tort of misappropriation, they evolved into two contradictory axes in their authorship perception of the persona. Whereas the Trademark axis allowed the public to recreate her as a "signifier" of new narratives, the Copyright Law axis retained sole authorship to the persona in her image.[343]

The persona publicity right morphed to be the strongest intellectual property right under the wrong umbrella of copyright law infrastructure. This granted the persona much more than her fair share in authorship. This is due to copyright law's monolithic authorship perception as conceived in the Enlightenment era and its twin false narratives, namely, "aesthetic nondiscrimination" and originality. Ignoring the interaction between the persona and her ever-evolving audiences that always recreate her, especially in the Internet era, plays a vital part in the Persona's Authorship. The doctrinal failure of both the "aesthetic nondiscrimination" and the "originality" narratives is demonstrated by copyright's main tools that were meant to balance between the author and the public domain: the idea/expression dichotomy and fair use,

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> appropriated and invested the celebrity's persona with independent meaning, but that the particular use of the celebrity's persona has become embedded in the culture.

[338] *Id*. at 351, n. 170; 15 U.S.C. § 1052(f) (2022).

[339] *Id*. at 362.

[340] *See* Ryan Cooper, *In Defense of Clichés,* SLATE (Nov. 4, 2014), https://slate.com/human-interest/2014/04/cliches-despite-what-orwell-and-the-washington-post-say-overused-phrases-can-be-useful.html accessed 11.4.22 (claiming that clichés which Orwell regards as "corrupt writing" is not necessarily capable of corrupting thought). Compare with George Orwell, *Politics and the English Language*, *in* GEORGE ORWELL, WHY I WRITE 102, 106, 112, 114 (2004).

[341] *See generally* Geertz, *supra* note 29.

[342] HENRI LEFEBVRE, WE ARE SURROUNDED BY EMPTINESS, BUT IT IS AN EMPTINESS FILLED WITH SIGNS 165 (1985).

[343] *See generally* Beebe, *supra* note 24; Coombe, *supra* note 8, at 93-99.

culminating in a real threat to the Freedom of Speech. [344]. Initially, not only ideas would be "free as the air to common use," but, as they are not original, they are constitutionally valueless and do not deserve copyright law protection.[345] Hence, the Gordian note between the idea/expression dichotomy establishes originality and freedom of speech. However, the "plot thickens," the more an uncopyrightable idea expands to a general "look and feel."[346] Consequently, what was supposed to constitute an uncopyrightable idea morphed into an expression, due the judge's "aesthetic discrimination" and instinct, rubbing the public domain's ever diminishing freedom of speech. The transformative use, the quintessence of fair use, was meant by the courts to establish the right balance between creativity and the First Amendment, thus, mending the narrow economic approach to freedom of expression. However, the outcome merely proved that the marriage of aesthetic nondiscrimination and originality, as the false narratives of the law, begot the very phenomenon transformative use was meant to avoid: the closure of the cultural public common, especially regarding publicity right. This evolved through the parody/satire dichotomy and the courts' interpretation of the commercial use component in the fair use doctrine, which makes the distinction between news, entertainment, and commerce in the current hybrid media, almost impossible.

Western thinking, that holds the unity of absolute truth proceeds in a straight line from the Socratic dialogues to the Categorical Imperatives. The monolithic axis of Copyright Law follows by its perception of exclusive Originality and sole Authorship. In contrast, a parallel Trademark Law axis offers contradictory solutions that, although a far cry from its original legal infrastructure, can better solve the celebrity/persona phenomenon as obstructing our culture.

Our society, coined as "the society of the spectacle" by Debord and enslaved to the "simulacra" in exchange for the real, found its match in trademark law.[347] The latter evolved from its competitive and commercial aims and its traditional triadic model, that was meant to identify goods' source and distinguishing them from others, into granting protection to trademarks as products themselves. Together with the dilution doctrine, trademark law morphed into protecting goodwill, i.e.: the expression and not the idea. Thus, replacing copyright law's original aim, while forsaking its own. Trademarks became our meta–langue by evolving into "expressive genericity" and reflecting a similar semiotic process that embedded the persona/celebrity in the very same meta–langue.[348] Trademark law's current interpretation is better suited to mend copyright law's ill treatment of celebrity authorship as it is not bound by the parody

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[344] *Id*. at 259-66.

[345] *Int'l News Serv*. 248 U.S. at 250 (1918) (Brandeis, J., dissenting) "[t]he general rule of law is, that the noblest of human productions - knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."

[346] *See generally* Walker, *supra* note 18.

[347] *See* Beebe, *supra* note 24, at 624, 657-8, 683. (For the translation of the "the society of the spectacle" into the current state of Trademark Law in which the brands are becoming the goods in their own right); *see generally* Debord, *supra* note 6; Baudrillard, *supra* note 52.

[348] *See* Dreyfuss, *supra* note 5, at 397-98; Barton Beebe, *What Trademark Law Is Learning from the Right of Publicity*, 42 COLUM. J.L. & ARTS 389, 394-5 (2019) (arguing that trademark law that has become more like right of publicity law, although not for the better) *compare with* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1165-6 (2006).

and satire dichotomy and the commercial speech discrimination. The cure for the ill balanced perception between authorship and the public domain in copyright law can be done by applying trademark law's genericide to the right of publicity through a different reading of the idea and expression dichotomy. The question of persona authorship, inevitably, leads to the real issue behind its publicity right, namely, who is the legal author of our myths and our dreams. By recognizing the celebrity as part of our language, we can retrieve our own lost authorship in our myths and our clichés.