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Entertainment, Arts and Sports Law Journal

A publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association



After the Artist: Counseling Estates and Museums on Posthumous Digital Creation

Fact or Fiction?: Applying the Copyright Act to Footage of Historical Events

Resolving AI-Centric Disputes Through Mediation

Paying With House Money: How NCAA Schools Can Remain Title IX Compliant Following the House Settlement

150 Years NYSBA | PUBLICATIONS

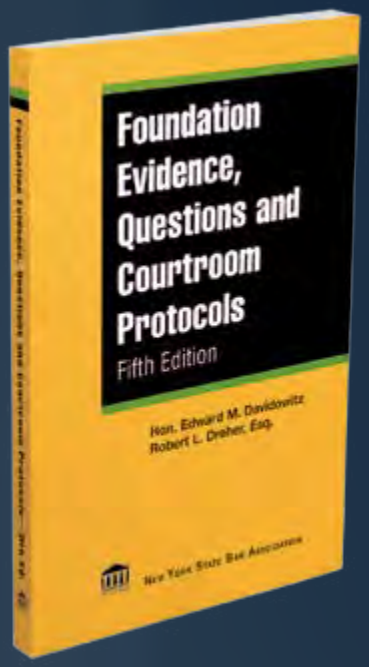
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Entertainment, Arts and Sports Law Journal

2026 | Vol. 37 | No. 3

Contents

3 Remarks From the Chair
By Judah S. Shapiro

4 Editor's Note and Pro Bono Updates
By Elissa D. Hecker

6 Student Writing Competitions

10 After the Artist: Counseling Estates and Museums on Posthumous Digital Creation
By Lorena Guzmán-Díaz

18 Fact or Fiction?: Applying the Copyright Act to Footage of Historical Events
By Neville Johnson, Douglas Johnson and Hunter Litterio

24 Resolving AI-Centric Disputes Through Mediation
By Theo Cheng

28 Surprise Me!
By Jacques E. Boubli

30 Navigating the Digital Frontier After *Cox v. Sony*: The Death of Contributory Copyright Infringement and Broader Implications for Entertainment, Media, Advertising, Telecommunications, and Technology
By Barry Skidelsky

42 2026 Phil Cowan/Judith Bresler Memorial Scholarship Award Winner: Paying With House Money: How NCAA Schools Can Remain Title IX Compliant Following the *House* Settlement
By Jonathan Stevens

50 Acquisition, Not Just Use: The Copyright Theory Anthropic Can't Shake
By James Parker

55 Channels of Commerce and Instruments of Creation: A Commerce Clause Framework for Federal Regulation of GAI in Entertainment Production
By Chabelly Pacheco Maluly

65 The Legal Blueprint for NBA Europe: Adapting the U.S. Sport Model to European Law
By Lucija Vranesevic Grbic

71 It's Not Christmas Till Somebody Sues, Part II
By David Krell

Entertainment, Arts and Sports Law Journal

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The *Journal* welcomes the submission of articles of timely interest to members of the EASL Section. Articles should be submitted with biographical information via e-mail in Microsoft Word format. Please submit articles to:

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Remarks From the Chair

Dear EASL Members,

It's a new season and as you might discern from the articles in this multifaceted edition of the EASL Journal, our section and its committees have been very active and involved in a broad range of developing laws and topics of interest concerning the entertainment, arts, and sports industries. I am pleased that EASL continues to offer great programs with the help of top legal and industry experts. A significant upcoming program in November is our two-day fall meeting. It includes our annual Music and Business Law Conference (Day 1) and our famous Theatre Conference (Day 2 – standing ovation to Jason Baruch). Truly, if you're in the Biz, you are not going to find better CLE programs anywhere else (and it's purposely not all AI-oriented).

We are also following up with various programs to increase and maintain membership and foster the collegiality that, together with our shared interests, binds us as an organization of professionals.

Among other things, EASL has initiated a mentorship program for law students and young lawyers. We have started efforts to put together a section directory, which should be particularly helpful to gauge our members' practice areas and facilitate outreach. We are always looking to help you in education, networking and professional development.

We are always listening. If you have any suggestions, please call me directly to discuss. You should also check out EASL's online community through NYSBA's website; it's easy, entertaining and eclectic. Much thanks goes to our committee chairs who keep community communications vibrant and professionally informative.

So, here's the information about our fantastic Fall meeting.

Thursday, November 5 – Friday, November 6

EASL's 2026 fall meeting is a premier two-day IN-PERSON event bringing together legal and business professionals from across the entertainment industry. The program features the Music Business & Law Conference, followed by Theatre, Current Issues in Publishing, and Survey of Unions in the Entertainment Industry. Attendees will enjoy timely CLE-accredited programming, engaging discussions with leading practitioners and industry executives, and valuable networking opportunities.

It will take place at the American Arbitration Association, located at 150 East 42nd Street, 17th Fl., New York, NY. It is packed full of important, interesting and useful topics and material.

Here's the Agenda:

DAY I – Thursday, November 5, 2026

Annual Music Business and Law Conference

Open to attorneys and accounting professionals, this full-day conference will offer CLE and CPE credits.

This year's MBLC will explore current legal and business issues impacting the music industry, including:

- The Basics: Music in Media
- Music Documentaries and Biopics
- Collective Management in the U.S.
- Management in the Music Business: A Financial Perspective
- Litigation Update on the Music Front

Light breakfast, luncheon session and evening reception included

DAY II – Friday, November 6, 2026

Theatre, Current Issues in Publishing, and Survey of Unions in the Entertainment Industry

The second day of the fall meeting turns to broader entertainment law topics, featuring sessions that examine developments in theatre, the evolving publishing landscape, and the role of labor unions across the entertainment industry.

- Annual Theatre Program
- Current Issues in Book Publishing
- Survey of Unions in the Entertainment Industry

CLE credits available

Light breakfast and rolling lunch.

Whether you are an expert in these fields, a relative newcomer or somewhere in between, you will definitely learn something, enjoy yourself, and earn CLE credits. I particularly value the litigation panel's discussion to keep me up to date on cutting-edge issues. More information can be obtained though our website. Join us!

Huge thanks are directed to the American Arbitration Association, which has been and continues to be, very generous to EASL by allowing us to use their top notch mid-Manhattan facilities for this and other programs. They are always extremely professional and accommodating.

Special thanks also goes to the programs' planning committee, especially Rosemarie Tully, Diane Krausz, Jason Ba-

continued on page 5

Editor's Note

By Elissa D. Hecker



Happy fall! The leaves are changing, pumpkin spice appears everywhere, and in this issue you have the perfect articles to read while enveloped in a warm fleece blanket.

In addition to excellent and timely articles, this issue contains the Phil Cowan/Judith Bresler Memorial Award winning paper and a Law Student Initiative winning paper, plus our regular interesting and informative columns. Please feel free to contact the authors as resources and refer clients to them, as they are truly experts in their fields.

Continue telling me about what inspires you. I am also interested in submissions about the practice of law – how you obtain your clients, how you serve your companies, and how you are growing within your positions. Are you a mentor? Do you need one? Surrounding ourselves with trusted advisors and thought partners is an excellent way to grow, both professionally and personally. It would be helpful for everyone to read about what works and what does not in building successful careers.

Please feel free to reach out regarding any ideas and/or articles that you may have for the *Journal* or Blog at eheckeresq@eheckeresq.com.

Elissa

The next deadline is December 18, 2026.

DO PRO BONO! DO PRO BONO!

Pro Bono Update

We are working on rescheduling the virtual clinic and hosting new programs with the Graphic Artists Guild. Stay tuned for more pro bono clinic opportunities.

If you are involved with a nonprofit organization that would like to host a clinic, please email Elissa at eheckeresq@eheckeresq.com. We are always looking for good partners so that we can help the many potential pro bono clients who need us.

We encourage EASL members to volunteer as pro bono attorneys, panelists, and webinar speakers for other topics that are relevant to the creative communities. Please contact any of us if you are interested in doing so.

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Stephanie Drawdy, stephanie@arthausforjustice.com









Thanks to Avita Delerne for a lovely Romeo & Juliet evening at Shakespeare in the Park.

Remarks From the Chair *continued from page 3*

ruch, Joyce Dollinger, Emily Trachtman, and Jared Leibowitz, as well as Steve Rudner, Marc Jacobson, and of course our excellent NYSBA section liaison, Sharmin Woodall.

In other news, EASL continues its academic scholarship through the Phil Cowan/Judith Bresler Memorial Scholarship. We offer scholarships to law students who submit academic articles in the entertainment, arts and sports fields. The eligible participants are from law schools in New York State plus several others in the NYC metro area. We are particularly pleased to present in this issue the very fine article written by Jonathan Stevens, our 2026 Cowan/Bresler Memorial Scholarship winner. The article is "Paying With House Money: How NCAA Schools Can Remain Title IX Compliant Following the House Settlement." All of our judges were very impressed by its insight and quality. Jonathan is a law student at the University of Buffalo Law School. I suspect that Jonathan, who had the wisdom to join EASL, will be running the show at the Bills or Sabres organizations down the road and maybe help prove the governor's $2.2 billion investment in the recently opened Highmark stadium was all worthwhile. Congrats to Jonathan.

Please note that the scholarship program is getting an earlier start this year and we will be in the thick of it when this issue comes out. The 2027 winner(s) will be announced at our Annual Conference in January. If you are connected to a law school, please spread the word for this worthwhile and enlightened program.

Further, EASL is currently in the process of constructing our CLE programs and panels for our NYSBA's Annual Conference. The Annual Conference programs are always excellent and worth attending. EASL and NYSBA will actively keep you informed as this develops and you can check the website as well.

To assist our member outreach, as mentioned, we are in the process of possibly putting together and EASL directory. We are in the early stages and I am not exactly sure what format it will take, but it should be useful to our section members. The goal is to help our interactions as well as possible referrals and networking. It should be particularly useful for small firms, solo practitioners, and lawyers who are not in New York. This is one part of an effort to expand our networking and referral structure.

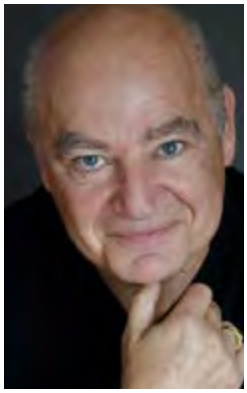
Another aspect of our outreach will be to inform members of our committee activities. We strongly encourage you to participate. Our committees stimulate interest in specialized areas of law, engage in social activity, and provide a good network for attorneys. EASL has about two dozen committees, which are listed in the back of this *Journal*.

In addition to thanking our Music Law and Theatre Committees for putting together the fall meeting, particular appreciation goes to our very fine Fine Arts Committee, which meets regularly for substantive discussions and does fun stuff like museum tours. Another special mention is to EASL's ADR Committee, which is geared up for the fall and presenting two upcoming events in its TeaTime Series. On Sept 30th, the committee will have discussed "Mediation Roadblocks and NY Court ADR." On October 21st, it will present "Lessons from NFL Arbitrations for Dispute Resolution Practitioners." Finally, kudos to our Pro Bono Committee, which continues to do good throughout the year.

Moreover, you should know from an organizational viewpoint that EASL is doing quite well. Briefly, our data shows that our section membership increased at a healthy rate of approximately 10% this year, with over 2,100 members. We are also financially sound and have reversed a trend of dipping fairly significantly into our surplus. EASL has benefited from NYSBA's new business model, which was adopted about two years ago. Apparently, NYSBA has as well.

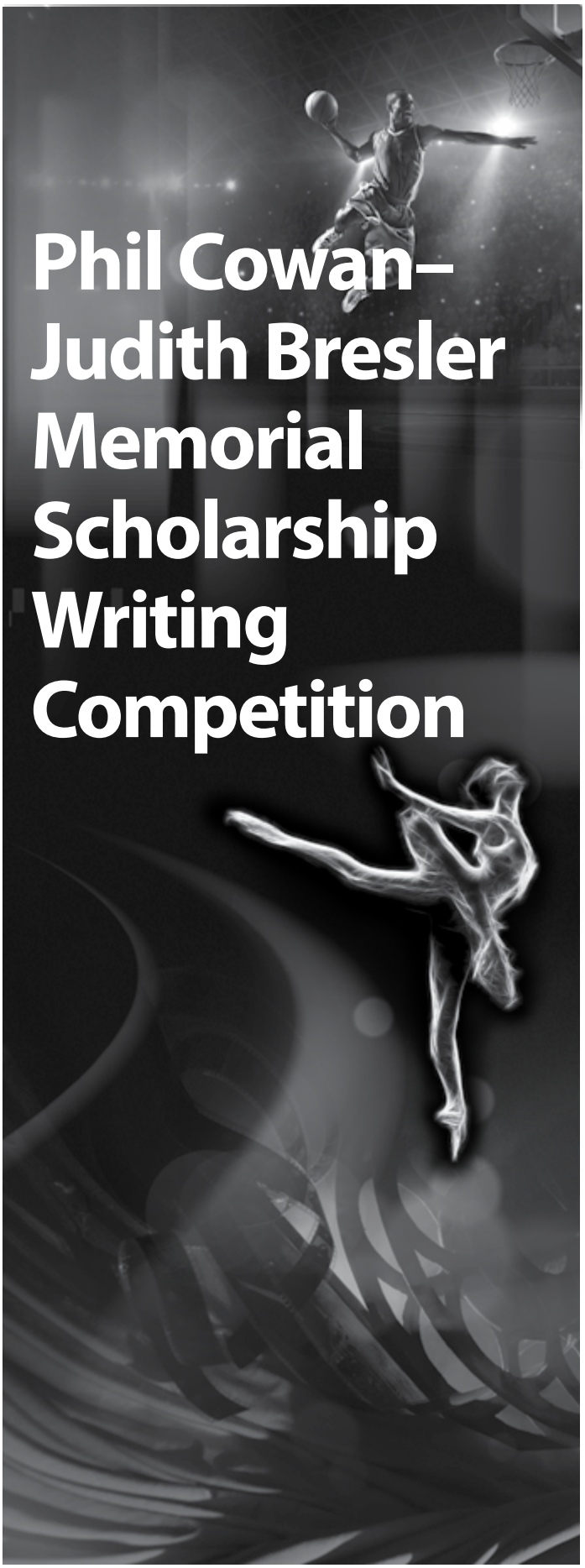
I attended NYSBA's House of Delegate's meeting in June with my colleagues and fellow delegates, Diane Krausz, Rosemarie Tully, and Barry Skidelsky (all former EASL chairs) and it was reported the NYSBA was doing well. This new model, which includes a couple of free section memberships, makes it even easier to join EASL! Encourage others to join and reap the benefits that you appreciate.

Rosemarie Tully and Diane Krausz also deserve recognition for their leadership in a major project that has been devolved upon EASL. Due to EASL's credibility and prominence in the entertainment industry, we are the Keeper of the Flame for periodically updating *the* go-to treatise in our field, "Siegel on Entertainment Law." The new edition will likely be published in 2027. We have top experts from different fields in entertainment law contributing. Of course, in addition to more traditional areas of entertainment law, such as music, theater, and motion pictures, this edition will be expanded to address developing legal issues in newer (big money) technologies, like video gaming and artificial intelligence.



At the time when this issue of the *EASL Journal* is published, we will be immersed in updating that prestigious text and actively interacting with legal experts. If you think you have something to contribute and want to participate, contact us.

Judah Shapiro



Phil Cowan–Judith Bresler Memorial Scholarship Writing Competition

Law students, take note of this publishing and scholarship opportunity: Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL)'s Phil Cowan-Judith Bresler Memorial Scholarship, named after two esteemed former EASL chairs, offers up to two awards of $2,500 each on an annual basis in Phil Cowan's and Judith Bresler's memories to law students who are committed to a practice concentrating in one or more areas of entertainment, art or sports law.

The Phil Cowan-Judith Bresler Memorial Scholarship has been in effect since 2005.

The Competition

The paper should be 12 to 15 pages in length (including *Bluebook* form endnotes), double- spaced and submitted in Microsoft Word format. PAPERS LONGER THAN 15 PAGES TOTAL WILL NOT BE CONSIDERED. The cover page (not part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and email address. The first page of the actual paper should contain only the title at the top, immediately followed by the body of text. The name of the author or any other identifying information must not appear anywhere other than on the cover page. **All papers should be submitted to designated faculty members of each respective law school.** Each designated faculty member shall forward all submissions to Sharmin Woodall, EASL's liaison to the New York State Bar Association. Sharmin, in turn, will forward all papers received to the committee co-chairs for distribution.

Eligibility

The competition is open to all students – both J.D. candidates and L.L.M. candidates – attending eligible law schools. "Eligible" law schools mean all accredited law schools within New York State, along with Rutgers University Law School and Seton Hall Law School in New Jersey, and up to 10 other accredited law schools throughout the country to be selected, at the committee's discretion, on a rotating basis.

Free Membership to EASL

All students submitting a paper for consideration, who are NYSBA members, will immediately and automatically be offered a free membership in EASL (with all the benefits of an EASL member) for a one-year period, commencing January 1st of the year following submission of the paper.

Submission Deadline

January 4, 2027: Law School faculty liaison submits all papers she/he/they receives to the EASL Scholarship Committee, via email to Sharmin Woodall at swoodall@nysba.org with subject line "EASL Writing Competition," no later than noon on January 4.



In recent years, winner(s) have been announced at either the EASL Annual Conference or the EASL spring meeting.

Prerogatives of EASL Scholarship Committee

The Scholarship Committee is composed of the current chair of EASL and, on a rotating basis, former EASL chairs who are still active in the section, section district representatives, and any other interested member of the EASL Executive Committee. *Each winning paper will be published in the* EASL Journal *and will be made available to EASL members on the EASL website.*

The Scholarship Committee is willing to waive the right of first publication so that students may simultaneously submit their papers to law journals or other school publications. *In addition, papers previously submitted and published in law journals or other school publications are also eligible for submission to the Scholarship Committee.*

The Scholarship Committee reserves the right to submit all papers it receives to the *EASL Journal* for publication and the EASL website. The Scholarship Committee also reserves the right to award only one scholarship or no scholarship if it determines, in any given year that, respectively, only one paper, or no paper is sufficiently meritorious. All rights of dissemination of the papers by EASL are non-exclusive.

Payment of Monies

Payment of scholarship funds will be made by EASL directly to the law school of the winner(s), to be credited against the winner('s) account(s).

About the New York State Bar Association

The New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA programs and activities have continuously served the public and improved the justice system for more than 140 years.

The more than 1,400 members of the Entertainment, Arts and Sports Law Section of the NYSBA represent varied interests, including headline stories, matters debated in Congress, and issues ruled upon by the courts today. The EASL Section provides substantive case law, forums for discussion, debate and information-sharing, and pro bono opportunities.

NEW YORK STATE BAR ASSOCIATION



If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor-in-Chief:

Elissa D. Hecker
Law Office of Elissa D. Hecker
eheckeresq@eheckeresq.com

Articles should be submitted in Word format (pdfs are NOT acceptable), along with biographical information and an author headshot.

REQUEST FOR ARTICLES

150 Years

THE NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

Law Student Initiative Writing Contest

Congratulations to LSI winner
Chabelly Pacheco Maluly of the Benjamin N. Cardozo School of Law
for her article, "Channels of Commerce & Instruments of Creation: A Commerce Clause Framework for Federal Regulation of GAI in Entertainment Production."

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association offers an initiative giving law students a chance to publish articles both in the *EASL Journal* as well as on the EASL website. The Initiative is designed to bridge the gap between students and the entertainment, arts and sports law communities and shed light on students' diverse perspectives in areas of practice of mutual interest to students and Section member practitioners.

Law school students who are interested in entertainment, art and/or sports law and who are members of the EASL Section are invited to submit articles. This Initiative is unique, as it grants students the opportunity to be ***published and gain exposure*** in these highly competitive areas of practice. The *EASL Journal* is among the profession's foremost law journals. Both it and the Web site have wide national distribution.

Requirements

Eligibility: Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the *EASL Journal* must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.

Form: Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in endnote form. An author's blurb must also be included.

Deadline: Submissions must be received by December 18, 2026.

Submissions: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

Topics

Each student may write on the subject matter of his/her choice, so long as it is unique to the entertainment, arts, and sports law fields.

Judging

Submissions will be judged on the basis of quality of writing, originality, and thoroughness.

Winning submissions will be published in the *EASL Journal*. All winners will receive complimentary memberships to the EASL Section for the following year. In addition, the winning entrants will be featured in the *EASL Journal* and on our website.

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Andy Warhol at the Jewish Museum by Bernard Gotfryd (1924-2016). 1980 – USA.

After the Artist: Counseling Estates and Museums on Posthumous Digital Creation

By Lorena Guzmán-Díaz

For most of the history of art law, the death of an artist marked a reasonably clean doctrinal boundary. The artist stopped working; the estate managed what existed; scholars wrote; museums preserved. The work circulated, but no new work appeared. Generative artificial intelligence (AI) has dissolved that boundary. A model trained on an artist's archive – letters, sketches, paintings, photographs, even handwriting – can now produce endless outputs that look like, sound like, and paint like an artist who is no longer here. Style itself becomes training data. Unfinished material becomes a prompt. The line between preservation and production grows unstable, and the legal frameworks the profession has inherited – copyright, moral rights, contract, fiduciary duty – were built for a world in which that instability did not exist.

Drawing on insights from a recent New York County Lawyers Association Art Law Committee panel, "After the Artist: Museums, Estates, and Posthumous Digital Creation," presented at the 17th Art Law Institute on May 14, 2026, this article examines the legal and practical questions confronting attorneys who represent artists' estates, foundations, and museums as generative technologies reshape how art is produced, preserved, and disseminated. The panel brought together Jason Andrew, founding partner of Artist Estate Studio, LLC, an estate strategist; Yayoi Shionoiri, general counsel and vice president of external affairs at Powerhouse Arts, Inc., a museum and arts-institution general counsel; and Sarah Conley Odenkirk, founder of ArtConverge, an art law practitioner and educator, to examine three interlocking problems: the scope of estate authority over archives and stylistic attributes; the legal status of "new" works generated after an artist's death; and the responsibilities of museums stewarding digital collections that can now function as generative archives. This article synthesizes that discussion into practical guidance for counsel.

I. Estate Authority Over Archives, Training Data, and Artistic Style

An artist's archive – correspondence, sketchbooks, studio notes, photographic records, inventories, and digitized images of the works themselves – has traditionally been understood as a scholarly and conservation resource. It must now also be understood as a data set. Counsel advising estates should treat the archive as a distinct asset class with its own inventory, governance, and licensing protocols.

A. The Archive as a Data Asset: Infrastructure and Governance Gaps

Most estates do not currently have the infrastructure, governance structures, or even the baseline awareness to understand how archival material might function as AI training data. There is no standard industry framework to fall back on, few published case studies, and acquisition and licensing forms that predate generative AI rarely mention it. The practical consequence is that estates are routinely granting – or failing to restrict – rights they do not realize they are conveying. Counsel should consider the following steps when onboarding an estate client or auditing an existing one.

- **Inventory and Registry.** Maintain a comprehensive inventory of the artist's works and archival holdings, including digitized files, their locations, formats, and metadata. A clear registry of permitted uses is the foundation for both enforcement and licensing. Registration with a collective rights organization such as, the Artists Rights Society, provides additional administrative and enforcement support, particularly for estates without in-house legal capacity.
- **Copyright Registration.** Confirm that copyrights in significant works have been registered and that chain-of-title documentation (wills, assignments, transfer instruments) establishes the estate's ownership. Registration remains a prerequisite to infringement litigation and to statutory damages and attorney's fees – remedies that matter enormously when the potential defendant is an AI developer.
- **Technical Protections.** Embedding metadata, time-stamping, and watermarking in digitized images creates evidentiary and tracking value, and emerging content-provenance standards may eventually allow estates to signal machine-readable reservations of rights. The goal is to regulate how images are used without, as one might put it, squeezing the life out of them. Estates generally want images to circulate, be shared, and engage new audiences. They want to control ingestion and commercial replication, not visibility.
- **Express AI Provisions.** Update form agreements – licensing agreements, gallery consignments, museum loan and acquisition documents, image permission forms – to address data sets and machine learning expressly. A provision that grants "reproduction rights" without more is dangerously ambiguous in a world where reproduction includes ingestion into a training corpus.

B. The Limits of Style Protection

Counsel must be candid with estate clients about a foundational limitation: Artistic style, however recognizable, is not protected under U.S. copyright law. Copyright does not protect abstract elements, such as style, technique, palette, or compositional habits; it protects original expression fixed in particular works.[1] The viral 2025 trend of AI-generated images "in the style of" Studio Ghibli illustrated the gap vividly – a globally recognizable visual language replicated at scale through prompt engineering, with no clear infringement claim arising from style replication alone, and the studio's founder having famously condemned AI-generated imagery as "an insult to life itself."

That said, the absence of style protection does not leave estates without recourse. Several theories remain available.

- **Infringement at the Input Stage.** Training a model on an estate's copyrighted works without authorization implicates the reproduction right, and the early litigation – including the visual artists' class action in *Andersen v. Stability AI*[2] and the high-profile publisher litigation in *The New York Times Co. v. Microsoft Corp.*[3] – provides a developing roadmap for estate-led claims premised on unauthorized ingestion of archival material. Whether training constitutes fair use remains contested; influential scholarship has defended "fair learning,"[4] while more recent work has mapped the conditions under which training and outputs create genuine infringement exposure.[5]
- **Infringement at the Output Stage.** Where an AI-generated output is substantially similar to a particular copyrighted work – rather than merely evocative of a style – conventional infringement analysis applies.
- **Market Displacement Under *Warhol*.** The Supreme Court's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* sharpened the fair-use inquiry's focus on whether a secondary use substitutes for, or competes in, the original's licensing markets.[6] For estates, the decision supplies a powerful framing: AI outputs "in the style of" a deceased artist may directly displace the estate's own licensing market for stylistically faithful derivative uses – a market many estates actively exploit.

The practical counsel point: Because style itself cannot be owned, the estate's leverage lies in controling access to the documented archive (the actual works and materials a model would need for high-fidelity training), policing outputs that cross into substantial similarity, and building a contractual perimeter around every authorized use of the archive.

C. The Moral Rights Gap and Drafting Around It

The United States offers very limited moral rights protection. The Visual Artists Rights Act of 1990 (VARA) applies narrowly to "works of visual art," protects rights of attribu-

tion and integrity, and – critically for this context – its rights endure only for the life of the author.[7] The Second Circuit's decisions in *Carter v. Helmsley-Spear* and the 5Pointz litigation, *Castillo v. G&M Realty*, define VARA's scope and demonstrate its potency where it applies,[8] but VARA offers an estate essentially nothing against posthumous AI exploitation. By contrast, the Berne Convention's Article 6bis obligates member states to recognize attribution and integrity rights for at least the duration of economic rights,[9] and civil law jurisdictions, such as France and Germany, maintain robust – in France, perpetual – moral rights that bind successors and can be asserted by heirs. The comparative literature on authorship and personality-based theories suggests these regimes will reach posthumous AI output very differently from U.S. doctrine.[10]

U.S. practitioners cannot import those protections, but they can approximate their function through private ordering.

- **Articulated Intent.** The single most valuable document an attorney can help a living artist create is a clear, written articulation of the artist's intentions regarding posthumous use of their work, style, and archive – including, specifically, whether and under what conditions the artist would authorize AI training or posthumously generated works. These directives operate as interpretive lodestars for executors and as quasi-moral-rights instruments enforceable through estate-planning documents and contracts.
- **Contractual Moral Rights.** Attribution, integrity, and non-modification obligations can be imposed on licensees, galleries, institutions, and platforms by contract, surviving the artist where the statute does not. The Copyright Office's report on VARA waivers remains instructive on how waiver and consent provisions operate in institutional contexts, and its lessons translate to modern digital archive licensing.[11]
- **Jurisdictional Strategy.** Where an estate has meaningful European interests – works in European collections, European licensing activity – counsel should coordinate with local counsel to preserve and, where appropriate, assert successor moral rights abroad, and should be aware that the EU's text-and-data-mining regime permits rightsholders to opt out of commercial text and data mining uses.[12]

D. Choosing Among the Levers: Copyright, Contract and Reputation

Estates protect legacies through three levers: copyright ownership, contractual agreements, and reputational stewardship. In practice, contracts and reputational vigilance have proven the most effective against unauthorized digital use. Copyright provides the underlying entitlement, but enforcement is slow, expensive, and doctrinally uncertain in the AI context. Contracts allow estates to define permitted uses prospectively – including express data set and training provisions, tiered licensing structures, and approval rights ("before you do anything, you have to talk to the estate") – while preserving the public access that keeps a legacy alive. Reputational stewardship – active monitoring, prompt objection to misuse, and consistent public positioning of the estate as the authoritative voice on the artist's work – does much of the day-to-day protective work that formal legal rights cannot efficiently reach. Counsel should resist drafting so restrictively that the archive becomes inaccessible; an estate that cannot be studied, shared, and engaged is an estate in decline. The objective is calibrated control: open enough to sustain scholarship and public engagement, closed enough to prevent unauthorized ingestion and commercial replication.

II. Authorship and the Legal Status of Posthumously Generated Works

When a model trained on a deceased artist's archive produces a "new" painting – one the artist never sketched, imagined, or described – the legal system's first question is authorship, and its answer is reasonably settled even as its implications remain unsettled.

A. The Human Authorship Requirement

U.S. copyright law requires human authorship. The principle long predates generative AI – the "monkey selfie" litigation established that a non-human cannot hold copyright[13] – and has now been squarely applied to AI: in *Thaler v. Perlmutter*, the D.C. Circuit affirmed that a work generated autonomously by an AI system, with no human author, is not eligible for copyright registration.[14] The Copyright Office's registration guidance and its multi-part report on copyright and AI elaborate the framework: Purely AI-generated material is unprotectable; works combining human and AI contributions are registrable only as to the human-authored elements; and prompts alone do not supply the creative control necessary for authorship.[15]

For estates, the consequences are concrete. If an estate commissions an AI system to generate works "in the style of" a deceased artist from the digitized archive, the raw outputs are very likely unprotectable by copyright. Protection may attach only where a human – an estate representative, or an artist engaged by the estate on a work-for-hire basis with proper permissions – contributes sufficiently expressive elements: creative selection, arrangement, or modification of outputs, or human-authored material perceptible in the final work.[16] Counsel should document the human creative process contemporaneously and in detail, both to support registration of the protectable elements and to define owner-

ship as among the estate, any commissioned artist, and any technology vendor.

There is also a strategic dimension that has nothing to do with registrability: An estate that releases works it cannot copyright is releasing works it may struggle to control. Before any generative project, counsel should ask the uncomfortable question – if these outputs are in the public domain at birth, what prevents third parties from freely exploiting them, and what does that do to the estate's market?

B. Authorship as Attribution: Identification and Crediting

Distinct from copyrightability is the question of how posthumously generated works should be identified. The emerging best practice is unambiguous: AI-generated works must not be attributed to the deceased artist. If an estate elects to disseminate generative outputs, the estate – not the artist – should be credited as creator; the use of AI should be disclosed as a medium, in the same way any other medium or process is disclosed, and accompanying materials should state plainly that the work is a posthumous estate production, not a work of the artist's hand. A recent instructive model is the Chris Burden Estate's creation of digital renderings of projects the artist had documented but never realized – the estate worked from the artist's own files of "unrealized projects," credited the estate as creator, and, when the Los Angeles County Museum of Art acquired the digital work, issued a joint public explanation of the art-historical basis for the project. The example illustrates the elements counsel should look for before blessing a posthumous generative project: documented artist intent, transparent estate authorship, institutional context, and a legacy rationale beyond revenue.

C. Artist Intent and Posthumous Instructions

Some artists leave explicit instructions about posthumous creation – some welcoming it, while others prohibiting it entirely. As a strictly legal matter, the enforceability of such instructions depends on the instruments in which they are embodied: Testamentary documents, trust terms, foundation charters, and contracts can bind fiduciaries; precatory statements may not. Yet counsel should advise estate fiduciaries that artist intent carries weight well beyond its formal enforceability. Fiduciaries who contravene an artist's explicit wishes – particularly an explicit prohibition – expose the estate to reputational damage, market skepticism, and potential claims of breach of fiduciary duty where the instructions have legal force. Where instructions conflict with the estate's commercial interests, the prudent course is rarely quiet contravention; if an artist's directive has become a genuine impedi-

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ment, the better strategy may be to engage with it publicly and transparently by treating the directive itself as part of the artist's legacy. For attorneys advising living artists, the corollary is to raise these questions now: An artist's recorded views on AI, posthumous completion, and archive use – even if those views evolve – leave an invaluable trail for future executors and cultural stewards.

D. Disclosure, Misattribution and Market Integrity

Auction houses, galleries, and dealers are beginning to grapple with how to disclose AI involvement in works offered for sale, and no regulatory standard yet governs. In the interim, transparency should be the touchstone, and counsel can implement it contractually.

- **Disclosure as a Deal Term.** Consignment agreements, private sale contracts, and catalog representations should affirmatively disclose any AI involvement in a work's creation, identify the work as a posthumous estate production where applicable, and allocate liability for misdescription. Sellers' warranties of authorship should be drafted – and read – with generative processes in mind.
- **Secondary Market Dilution.** If AI-generated works loosely attributed to a deceased artist circulate widely, they can distort demand for authenticated works, although the direction of the distortion is debated: One school of thought holds that the dissemination of diluted copies enhances the aura and value of authenticated originals. Counsel should not rely on that comfort. Misattributed circulation creates authentication burdens, title-clearance friction, and consumer-protection exposure, and the available legal tools – false endorsement and unfair competition theories, contractual warranties, and in some jurisdictions postmortem publicity rights – should be assessed early. The Copyright Office's digital replicas report, and the federal legislative proposals it discusses, signal likely expansion of protection against unauthorized digital simulations of identifiable individuals, including deceased ones.[17]
- **Authentication Infrastructure.** The traditional answer to misattribution – foundation and estate authentication boards – has been chilled by decades of authentication litigation, which led many foundations to disband their boards rather than bear the liability exposure. The practice that has emerged in its place is deliberately modest: Estates respond to inquiries with archival statements that a work does or does not appear in the artist's photographic records, inventories, studio notes, and diaries, without rendering a formal opinion of authenticity. Counsel should ensure that such letters are carefully drafted to avoid opinion liability while preserving evidentiary value.
- **AI-Assisted Authentication.** AI is entering the authentication process itself, analyzing brushwork, surface, and compositional habits against a verified core corpus. Authentication has traditionally rested on three interdependent pillars – provenance research, stylistic connoisseurship, and scientific analysis – and AI-driven visual analysis is now being proposed as a fourth, integrated alongside the others rather than displacing them.[18] Practitioner guidance in this area, notably the Framework for Responsible Use of AI in Art Authentication co-authored by Art Recognition and the Center for Art Law, warns against treating probabilistic AI outputs as oracular pronouncements.[19]



Photography of Frida Kahlo at work on postage stamp.

III. Museums as Stewards of Generative Archives

Museums occupy a structurally conflicted position: They are trusted custodians of cultural heritage, financially pressured institutions for whom digital archives are a potential revenue stream, and – increasingly – holders of vast, high-quality data sets ideally suited to AI training.

A. What Digitization Actually Confers

When a museum digitizes its collection, it does not thereby acquire copyright in the underlying works. Copyright remains with the artist or the artist's successors unless explic-

itly transferred. Under *Bridgeman Art Library v. Corel*, exact photographic reproductions of public domain works lack the originality required for independent copyright protection[20] – the doctrinal foundation of the museum open-access movement, and a point the EU has now codified for public domain works of visual art.[21] What a museum typically holds with respect to in-copyright works is a license: acquisition documents customarily include a copyright permission form granting the museum rights to create and reproduce images for the museum's lawful purposes – usually charitable, educational, archival, informational, and promotional uses.

The critical drafting question is whether AI training falls within those legacy licenses. In most cases, the language simply does not speak to it; many acquisition contracts in current use never mention AI at all. Counsel on both sides should treat this as an open negotiation point rather than assume coverage.

- **For Museums:** New acquisition and permission forms should expressly address whether collection images may be used for machine learning, and if so, for what systems. A museum seeking training rights should expect to specify whether the system is closed (internal, non-generative or access-controlled) or open, what outputs it will produce, and how those outputs will be used and identified.
- **For Estates and Artists:** Counsel should respond to broad "train our AI" requests with pointed diligence – what model, trained for what purpose, producing what outputs, under whose control, with what downstream licensing – and should resist unbounded grants of "total and unhindered" image use, which estates are with increasing frequency countering with their own forms.

B. Donor Expectations and Recourse

Artists frequently donate archives to museums with expectations – scholarship, conservation, public access – that long predate generative AI. When a museum later uses an archive in ways the artist never anticipated or the estate actively opposes, recourse depends almost entirely on the gift or acquisition agreement. Counsel structuring archive placements should therefore negotiate AI and data set provisions now, even though the institution's forms do not yet request them: Enumerate permitted uses; require consultation or consent for uses beyond them, including machine learning; address sublicensing to third-party technology vendors; and build in notice and dispute-resolution mechanisms. Counsel should also temper client expectations: most archives are gifts rather than sales, and a principal benefit of institutional placement is the museum's capacity to digitize and provide scholarly access – a benefit that now arrives bundled with precisely the data set questions this article addresses. As AI tools become embedded in archival processing itself, distinguishing "AI uses" from ordinary digitization will grow harder, which is all the more reason to define permitted purposes by outcome (scholarship, conservation, public access) rather than by technology.

C. Governance Models and Cross-Border Frameworks

Governance of generative archives – who decides what may be accessed, under what conditions, for what purposes – is an emerging field with few established models. Several existing frameworks supply useful scaffolding.

- **Open-Access Precedents.** The Metropolitan Museum of Art's 2017 open-access policy and the Smithsonian's 2020 release of millions of images under Creative Commons Zero (CC0) catalyzed the museum open-access movement.[22] Those pre-AI access decisions are now being reevaluated, since releasing images under CC0 places them permanently beyond institutional control, including for AI training. Counsel advising institutions on open-access policies today should present that tradeoff explicitly to boards: Open access advances mission and scholarship, and it also irrevocably forfeits the institution's seat at the AI-licensing table for the released material.
- **European Regulation.** The Directive on Copyright in the Digital Single Market's (DSM directive) text-and-data-mining provisions, including the Article 4 commercial opt-out, and the EU AI Act's training-data transparency and copyright-compliance obligations for general-purpose AI providers[23] are creating disclosure and compliance infrastructure that U.S. estates and institutions can leverage contractually, even where U.S. law imposes no equivalent duty — for example, by requiring counterparties to honor machine-readable rights reservations across jurisdictions.
- **Allocation of Decision Rights.** A workable division of labor is emerging in practice: Estates and their representatives control decisions about ingestion, data set inclusion, and authorization of generative uses, grounded in their knowledge of the artist's corpus and intent; museums control curation, public access, and scholarly context; and third-party oversight — neutral experts, mediators, or standards bodies — enters where the two disagree or where credibility requires independence. Counsel can hard wire this allocation into gift and loan agreements rather than leaving it to institutional goodwill.

D. Licensing Archives for AI Training: Revenue Versus Integrity

Museums face real financial pressure, and licensing digital archives for AI training is a revenue stream some institutions are actively exploring. The integrity question is real but should not be answered with reflexive prohibition. The practical reality is that unprotected content is likely to be scraped and used without permission or remuneration regardless; it is generally better for rightsholders and caretakers to be compensated under negotiated terms than to subsidize uncompensated extraction. The lawyer's role is to ensure the terms are actually protective:

- **Scope and Identity of the Licensee.** Who is the licensee, what model is being trained, and is it general-purpose or limited? A license to an unspecified general generative model is a fundamentally different transaction from a license for a closed, institutional, or research system.
- **Economic Structure.** As a digital archive is a largely static asset, a one-time fee may capture its full value poorly. Counsel should evaluate recurring license structures, usage-based royalties, audit rights, and term limits with renegotiation triggers as the market matures.
- **Output Controls and Attribution.** Licenses should address whether outputs may be commercialized, whether outputs may be attributed to or associated with specific artists, and what disclosure accompanies them.
- **Reserved Rights and Exit.** Termination provisions should grapple honestly with the technical reality that trained models cannot practicably "unlearn" ingested data; meaningful exit rights therefore focus on cessation of further training, data set deletion, and restrictions on successor models.

IV. Practical Protocols for Counsel

Synthesizing the foregoing, attorneys advising estates, foundations, and museums should consider the following protocols:

- **For Living Artists:** Raise legacy and AI questions during the artist's lifetime. Document the artist's intent regarding posthumous creation, AI training, and archive use in estate-planning instruments and a standing written directive; inventory and register the archive; and build AI provisions into gallery, licensing, and institutional agreements now.
- **For Estates and Foundations:** Audit existing agreements for data set and training exposure; adopt express AI clauses in all forward-looking contracts; register works and affiliate with a collective rights organization; implement metadata, watermarking, and monitoring protocols; adopt a written policy on posthumous generative projects keyed to documented artist intent, with mandatory estate attribution and AI-medium disclosure for any authorized outputs; and respond to authentication inquiries through carefully drafted archival statements rather than opinions.
- **For Museums:** Revise acquisition, gift, loan, and image-permission forms to address machine learning expressly; present open-access decisions to governing boards with their AI consequences fully briefed; adopt internal governance for any use of collection data in AI systems, distinguishing closed institutional tools from external licensing; and treat estate consultation as both a legal and relational imperative – the museum-estate relationship is a long-term repeat game, and unilateral AI use of donated archives will poison it.
- **For All Clients:** Insist on transparency as the default. Disclosure of AI involvement – as medium, process, and provenance – is the single norm most likely to harden into a legal standard, whether by regulation, consumer-protection enforcement, or market demand, and clients who adopt it early will be positioned ahead of it.

V. Ethical and Forward-Looking Considerations

Posthumous digital creation is not unprecedented in kind. The art and literary worlds have long managed posthumous publication, unfinished works, restorations, and estate-managed releases – Max Brod's publication of Kafka over the author's instruction to burn the manuscripts being only the most famous example – and in some art-historical traditions copying a master's style was itself the established path of knowledge transmission. What AI changes is scale, speed, and fidelity: The multiplicity of possible posthumous output is now effectively infinite, and the marginal cost of each "new" work approaches zero. That shift converts what were occasional, deliberate estate decisions into a standing structural condition that demands governance.

Three closing observations for the practitioner. First, regulation is coming, unevenly: The EU has moved first with training-data transparency obligations, U.S. legislative proposals on digital replicas are advancing, and some model providers are voluntarily implementing output filtering to limit infringement risk. Counsel should track these developments and draft contracts that anticipate, rather than ignore, the compliance infrastructure they will create. Second, the burden of policing this landscape should not fall – as it so often has – on artists and their estates alone; counsel have a role in

advocating for rules that place compliance obligations on the model developers who profit from training. Third, and perhaps counterintuitively, the proliferation of machine-generated imagery may ultimately increase the value of what AI cannot commoditize: authentic original works, the documented hand of the artist, verified provenance, and the human labor, craft, and intent embedded in them. The estates best positioned for the generative era will be those whose counsel helped them build value precisely there – while engaging new technologies transparently, contractually, and on the estate's own terms. Creation may no longer end with the artist's life, but stewardship, properly counseled, does not have to end with control.



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Endnotes

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7. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A; *see id.* § 106A(d)(1) (rights endure for the life of the author for works created on or after VARA's effective date).
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14. *Thaler v. Perlmutter*, 687 F. Supp. 3d 140 (D.D.C. 2023), *aff'd*, 130 F.4th 1039 (D.C. Cir. 2025).
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19. The three traditional pillars are described in Carina Popovici, Noah Charney, Irina Tarsis & Atreya Mathur, F*ramework for Responsible Use of AI in Art Authentication* 1 (Art Recognition & Center for Art Law 2025) (Historically, authentication has rested on three interdependent pillars: scientific analysis, connoisseurship, and provenance research.). Art Recognition describes its AI-driven visual analysis as extending that framework to a fourth pillar. *See Art Recognition*, https://art-recognition.com.
20. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
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Fact or Fiction? Applying the Copyright Act to Footage of Historical Events

By Neville Johnson, Douglas Johnson and Hunter Litterio

If the adage is true that "a picture is worth a thousand words," then the Zapruder film – the 26-second home movie that caught the assassination of President John F. Kennedy (JFK) – at 480 frames, is worth 480,000 words. Given the attention and writing devoted to it, this may be a woeful underestimate. The recent decision in *Forum on Open Access to Government Records, Inc. v. Dallas County Historical Foundation, et al.*, has only added to the pantheon of writings on this topic and promises more to come.

The Forum on Open Access to Government Records, Inc. brought a claim for declaratory relief, seeking the right to use the Zapruder film in its work, "SCAM," arguing that the Zapruder film in the National Archives is actually altered.[1,2] The order on the motion to dismiss covers various topics.[3] However, one section – based on the Forum's merger argument – highlights a key tension in copyright law between artistic expression and historical artifact.

It is axiomatic that the Copyright Act protects artistic expression, not facts.[4] While that may appear to be an easy line to draw, it becomes difficult to apply to photographs or videos of historical events. Photographs or videos, unlike other artistic mediums, freeze moments in time, similar to how amber fossilizes creatures from thousands of years ago. However, unlike a fossil, human decisions can change how a photograph or video captures a moment and, in turn, shape how we perceive that moment at large.

Take, for example, the famous photograph, "V-J Day in Times Square." The photograph captures a sailor kissing a nurse as they celebrate the end of World War II. Speaking about his process, Alfred Eisenstaedt recounts: "[t]hen suddenly, in a flash, I saw something white being grabbed. I turned around and clicked the moment the sailor kissed the nurse. If she had been dressed in a dark dress I would never have taken the picture. If the sailor had worn a white uniform, the same. I took exactly four pictures. It was done within a few seconds. Only one is right, on account of the balance. In the others the emphasis is wrong – the sailor on the left side is either too small or too tall."[5]

Few, if any, would argue that "V-J Day in Times Square" should be considered more a historical artifact than a work of art. The artistry in the image is apparent, and largely outweighs the historical import of a sailor and nurse celebrating – even if the background context is momentous. However, there is a point in which the line between historical artifact and artistic creation blurs. Where the artistic qualities of a work are less apparent, and the historical importance of the moment depicted is more significant, distinguishing between copyrightable artistic expression and noncopyrightable facts becomes more difficult. The Zapruder film has already faced multiple legal challenges, but footage of 9/11[6] and the Rodney King riots[7] have also given rise to copyright litigation. There are a few obvious reasons why these types of works are subject to fiercer debate in copyright circles.

First, there are serious First Amendment considerations. These works, unlike many other artistic works, are foundational to our understanding of a historical moment, both at the time it occurs and in the future. Allowing a person to monopolize and control the spread of these images and videos impairs our understanding of these moments.If footage of the Tiananmen Square protests, the fall of the Berlin Wall, or the moon landing sat in a vault for the remainder of their copyrights, the world's collective understanding of those moments would be fundamentally altered. It would thus appear necessary to guarantee, at least to some degree, the ability to use these images or videos in books, textbooks, educational films, or any other educational format.

Second, copyright law is awkwardly applied to these types of works because it is intended to protect works sparked by artistic vision. Indeed, the copyright clause gives Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right" to their work.[8] The idea, at least in theory, is to incentivize artists by allowing them to capitalize on their work. However, Zapruder did not intend to capture the moment when President Kennedy was assassinated, nor did CNN intend to capture the tragic failure of the space shuttle Challenger. These videos and images largely arise by accident and outside the creator's control. Thus, it can hardly be argued that copyright protection should be curtailed for these types of works.

Third, these works are often characterized not by their artistic qualities but by the extraordinary events they capture. People do not watch the video of Neil Armstrong's first steps on the moon because of its lighting, angle or the camera and lens used; they watch it to see the remarkable moment when humans transcended Earth. Any other video or photograph that captured that moment would likely be a sufficient stand-in, regardless of the artistic decisions that created it.

In most copyright cases, originality and the merger doctrine are hardly ever discussed, and for good reason. Most of the time, the minimal threshold for originality is easily met, and the idea embodied in a work can be expressed a near-infinite number of ways. However, in rare circumstances in which a historical moment is captured on film, these underdeveloped areas of law receive more attention, even if the analysis is brief. Though they may rarely win cases, these areas of the law are still worth exploring..

Originality

The Copyright Act protects original works of authorship, fixed in a tangible form, except that protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery"[9] Courts often balance whether a work is protectable based on the "idea-expression" dichotomy.[10] "The *sine qua non* of Copyright is originality," which requires both that the expression of a work be original to the author, rather than copied from other works, and that it "possesses at least some minimal degree of creativity."[11] The level of creativity necessary to meet this requirement is very low.[12]

While photographs and audiovisual works are an enumerated category covered by the Copyright Act, early copyright cases challenged whether photographs or videos could be protected at all. For example, the court in *Burrow-Giles Lithographic Co. v. Sarony* was asked to determine whether copyright protection extended to photographs on the theory that "an engraving, a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, … while a photograph is the mere mechanical reproduction of the physical features or outlines of some object … and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture."[13] The court recognized that such an argument "may be true in regard to the ordinary production of a photograph, and that in such case a copyright is no protection."[14] However, it rejected this argument as applied to the photograph at issue, because it demonstrated the necessary originality and novelty to make it a product of the author's "own original mental conception."[15] In particular, the author's posing of the subject of the photograph, the selection of the costumes and other visual accessories and the arrangement of the photograph, including its lighting and shading, were all factors that elevated the image to a work of art.[16]

Since *Burrow-Giles*, courts have regularly listed the elements that can give a photograph the necessary level of artistry, and most have found that almost any photograph qualifies for copyright protection.[17] Yet, these endeavors largely failed to examine the issue at any real depth. Moreover, the court in *Mannion v. Coors Brewing Co.* recognized that "the fact that a photographer made [choices about the film, camera or lens to use] does not alone make the image original. … Protection derives from the features of the work itself, not the effort that goes into it."[18]

The *Mannion* court, attempting to create a coherent structure for analyzing originality, suggested three categories that could make a photograph original: rendition, timing and the creation of the subject.[19] For originality in the rendition, the court explained that it "resides … in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques."[20] The court analogized to *SHL Imaging, Inc. v. Artisan House, Inc.*, which involved a photographer's extensive efforts to photograph mirrors, which required four days of shooting, the creation of a lighting effect that would allow him to photograph the mirrors without reflection and the selection of specific cameras, lenses and film type that would help create the effect.[21]

As to originality in timing, the *Mannion* court relies on *Pagano v. Chas. Beseler Co.*, and on the images "Catch of the Day" and "V-J Day in Times Square," to stand for the proposition that even unoriginal scenes can give rise to original works when timed properly.[22] As to the first, which concerned a photograph of the New York Public Library, the *Pagano* court reasoned that "[i]t undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects with the adjunctive features of light, shade, position, etc. … The photographer caught the men and women in not merely lifelike, but artistic, positions, and this is especially true of the traffic policeman. The background, taking in the building of the Engineers' Club and the small trees on Forty-First Street, is most pleasing, and the lights and shades are exceedingly well done."[23]

"Catch of the Day" was taken by a famous wildlife photographer and captured the moment that a salmon jumped into the mouth of a brown bear.[24] Though these are striking works, Mannion recognizes that copyright protection extends only to the picture itself, not to the overall subject matter.[25]

Attempting to apply these categories to the Zapruder film seems awkward, as seen in both the *Forum* case and in *Time Inc. v. Bernard Geis Associates.*[26] This case involved the use of multiple frames of the Zapruder film in the form of charcoal sketches in a book covering the assassination. While the book did not reproduce any one frame in its entirety, it contained substantial portions of 22 separate frames, for which the author did not attain a license prior to the use.[27] As a result, Time Inc. - the rights holder of the Zapruder film - brought suit for infringement. In opposing the suit, the defendants first argued that the film lacked sufficient protectable elements, because "'news' cannot be the subject of copyright."[28] The court rejected this argument, finding that there was at least some modicum of creativity, and that the unprotectable facts were distinct enough from the protectable expression to allow Time to hold a valid copyright in the work.[29] Nevertheless, the court found that the defendant's copying was protected under the fair use doctrine, largely because the copies were reasonably necessary for a clear understanding of the theories outlined in the book, and because the uses did not appear to compete with the Zapruder film's market.[30] As such, judgment was entered in favor of the defendants.

Both the *Time* and *Forum* cases found that the film was entitled to copyright protection, listing the artistic decisions that went into the film's creation, such as "the kind of camera (movies, not snapshots), the kind of lens (telephoto), the area in which the pictures were to be taken, the time in which they were to be taken, and (after testing several sites) the spot on which the camera would be operated."[31] However, there is little indication that Zapruder set out to capture a specific artistic vision as did the photographer in *SHL Imaging*. For example, it appears that Zapruder's choice of equipment was largely determined by the camera he had, rather than by a specific choice among multiple types, and, indeed, he initially did not even bring a camera to film the event.[32] Further, the time in which the video was to be taken was determined mostly by the motorcade itself, rather than under Zapruder's control.

While originality in timing may appear a better fit for the Zapruder film, the cases relied on in *Mannion* reflect photographers and artists who intended to capture the moment. For example, Thomas Mangelsen, the photographer of "Catch of the Day," spent seven days by a river, taking pictures anytime a fish jumped out of the water near a bear.[33] While it



may have involved some luck, Mangelsen intended to capture such a result. On the other hand, Zapruder clearly had no intention of capturing JFK's assassination. The *Times* and *Forum* courts did not seem to find Zapruder's intent to matter, but *Burrow-Giles* suggests that the photographer's intent matters to some degree.[34]

Perhaps the Zapruder film meets the minimal originality requirement, even if it were to be scrutinized more. After all, Zapruder tested multiple areas from which to shoot the video, which suggests some minimal intentionality. Zapruder intended to video the president and, incidentally, captured one of the most historically significant moments in United States history. As the court fairly reasoned in the *Time* case, copyright law would undoubtedly protect the video if it were taken before the shooting, so there is no logic in denying protection to the film he actually captured.[35]

Yet, there are equally fair responses. First, Zapruder's decisions were not of the kind that copyright generally protects. He watched the parade because he was an admirer of President Kennedy's, and the footage was likely intended as a treasured keepsake – the moment that he got to see the president despite all odds – not as a work of art.[36] Moreover, a video from earlier in the parade differs from the Zapruder film because it carries far less historical significance. While it may not seem fair to deny someone the right to their footage solely on this ground, allowing a person a monopoly over the use of that footage creates substantially more First Amendment concerns than would a video from earlier in the procession. As such, there is at least some logic in denying copyright protection to something that happens to become critically important to our shared understanding of a major historical event.

This is not to suggest that every point-and-shoot photograph, or every video that captures an unexpected situation, must be denied copyright protection. However, the Boston Marathon bombing provides an interesting thought experiment surrounding originality. Within days of the bombing, the FBI released photographs of the suspected bombers, mainly taken from CCTV security cameras from the businesses in the area.[37] These videos, as with any CCTV footage, were not set up with an artistic purpose in mind; rather, they were purely utilitarian. Those photographs and videos of the suspects were widely used, including in the film "Patriots Day."[38] Though a court has not been asked to pass on the question, one must ask: Does CCTV footage meet the originality requirement?

Merger

The foregoing discussion focuses mainly on the distinction between more "mechanical" and more "artistic" approaches to photographs and videos. However, Melville Nimmer's lecture on this topic throws this simple breakdown for a loop. Nimmer seems to posit that the more striking the expression of a newsworthy event is, the less it should be entitled to copyright law based on First Amendment considerations.[39] Based on the My Lai massacre images, Nimmer reasons that the "idea-expression" dichotomy fails to advance First Amendment considerations in protecting images like that of the My Lai massacre, because "no amount of words describing the 'idea' of the massacre could substitute for the public insight gained through the photographs. The photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in that tragic episode."[40]

Though Nimmer does not explicitly say as much, he indicates that more expressive images can heighten the "idea" behind the work. After all, "V-J Day in Times Square" tells its audience far more about the relief and excitement from the end of World War II than words describing a sailor kissing a nurse ever could.[41] On the other hand, a simple point-and-click photograph of an event may not convey much more than can be described in words. Nimmer claims that the protectable expression cannot be meaningfully distinguished from the unprotectable idea that the photograph portrays, and, for these works, Nimmer suggests that a compulsory license scheme could help protect First Amendment considerations while minimally impairing the copyright law.[42]

Both the *Time* and the *Forum* courts had to grapple with the suggestion that the Zapruder film could not be copyright-protected because it is indistinguishable from the historical facts it captured. The *Time* court rejected the argument, stating that "Life claims no copyright in the events at Dallas. They can be freely set forth in speech, in books, in pictures, in music, and in every other form of expression."[43] The *Forum* court agreed, stating that "[a]lthough the historical facts presented in the Zapruder film are not copyrightable, the Zapruder copyright is limited to a particular expression of those facts and reflects various artistic determinations made by Mr. Zapruder. Those same facts could be 'expressed in various ways,' making the merger doctrine inapplicable here."[44]

Yet, the question that must be asked is whether this is actually true, or, put differently, whether any other account could reflect the facts of the Kennedy assassination in a meaningful way. Indeed, the Zapruder film has been examined extensively, most notably by the FBI and the Warren Commission.[45] The same can hardly be said for a news report, a history textbook, or a painting. Thus, the film, at least to some degree, captures the historical facts in a way that cannot necessarily be done by any other expression of that moment.

However, at the end of the day, the merger argument as applied to the Zapruder film may be most undermined by a practical assessment. Put simply, the "idea" or "historical fact" of JFK's assassination has been widely disseminated for decades. It can hardly be said that the dissemination of information about one of the most widely discussed and heavily

scrutinized moments in American history was impaired by the copyright protection afforded to the Zapruder film.

Moreover, the merger doctrine generally applies to ideas that are more finite, or more specific than the JFK assassination. For example, *Kern River Gas Transmission Co. v. Coastal Corp*. held that a map detailing the proposed route of a pipeline was not protectable, because there was only one way to express the idea of the route on a map.[46] However, the court in *Mason v. Montgomery Data, Inc.* declined to extend this logic to another case involving a copyright over a map, because the court found that the idea of a map of Montgomery County could be expressed in a variety of different ways, based on the way it included or did not include different features.[47]

In this way, applying the merger doctrine to a historical moment, such as the JFK assassination, appears unwieldy, particularly given the number of documents available to recount and discuss that moment. However, consider the *Time* court's finding that charcoal sketches of the frames of the Zapruder film were copies of the film.[48] In this respect, a document that exists as the only expression of a historical moment or fact can certainly merge with the idea, because any knowledge one can have about that particular idea necessarily flows from its expression, and thus any further expression of that idea would technically be copied therefrom.

For example, in 2015, researchers discovered a new species of comb jelly that had never been seen by humans and was captured only on video.[49] Thus, in a literal sense, every fact about this species' existence was embodied entirely in its videographic expression. Thereafter, researchers drew sketches of the species to aid in further research. Though this was never litigated, it could have been the subject of a copyright dispute if the owner of the video footage had claimed that the sketches infringed on it. This seems to be a unique scenario perfectly tailored to the merger doctrine.





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Endnotes

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3. For commentary on each aspect of the order, *see* Aaron Moss, *Inside the Strange Copyright Fight Over America's Most Famous Home Movie*, Copyright Lately (Aug. 10, 2026), https://copyrightlately.com/zapruder-film-copyright-ruling/.
4. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 345 (1991) ("… facts are not copyrightable.").
5. Alex Kershaw, *The Kissing Sailor*, Friends of the National WWII Memorial (Aug. 14, 2025), https://www.wwiimemorialfriends.org/blog/the-kissing-sailor.
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8. U.S. Const. art. I, § 8, cl. 8.
9. 17 U.S.C. § 102.
10. *Feist, supra*, 499 U.S. at 350.
11. *Id*. at 345.
12. *Id.*
13. *Burrow-Giles Lithographic Co. v. Sarony*, 111U.S. 53, 58–59 (1884).
14. *Id.* at 59.
15. *Id.* at 60.
16. *Id.*; *see also Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074 (9th Cir. 2000) (citing the elements from *Burrow-Giles* that elevated a photograph to a work of art).
17. *See, e.g., Leibovitz v. Paramount Pictures Corp*., 137 F.3d 109, 116 (2d Cir. 1998); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992); *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914); *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F.Supp. 2d 301, 311 (S.D.N.Y.2000).
18. *Mannion v. Coors Brewing Co.*, 377 F.Supp. 2d 444, 451 (S.D.N.Y. 2005).
19. *Id.* at 452–54.
20. *Id.* at 452 (quoting Hon. Sir Hugh Laddie et al., *The Modern Law of Copyright and Designs* § 4.57 (3d ed. Butterworths 2000)).
21. *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F.Supp. 2d 301, 303–04 (S.D.N.Y. 2000).
22. *Mannion*, 377 F.Supp. 2d at 452–53.
23. *Pagano v. Chas. Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916).
24. *Mannion*, 377 F.Supp. 2d at 452–53.
25. *Id.*
26. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968).
27. *Id.* at 138-139.
28. *Id.* at 141.
29. *Id. a*t 141-144.
30. *Id.* at 146.
31. *Id.*

32. *See* Camilla Tominey, *Why the Man Who Captured Kennedy's Death Never Made Another Film*, The Telegraph (Nov. 12, 2023).
33. *See* Carly Everett, *Wildlife Photography – What Does It Take to Get the Shot*? Yellowstone Nat'l Park (Oct. 2, 2017), https://www.yellowstonepark.com/photos/take-best-wildlife-photos/.
34. *Burrow-Giles*, 111 U.S. at 58–59.
35. *Time*, 293 F. Supp. at 143–44.
36. *See* Tominey, *supra* note 26.
37. *See, e.g.,* Press Release, Fed. Bureau of Investigation, *Surveillance Video Related to Boston Bombings* (Apr. 18, 2013), https://www.fbi.gov/video-repository/newss-surveillance-video-related-to-boston-bombings/view.
38. *See, e.g.,* Lanre Bakare, *Patriots Day Review: Boston Marathon Bombing Movie Is Tense Yet Respectful,* The Guardian (Nov. 16, 2016), https://www.theguardian.com/film/2016/nov/18/patriots-day-review-boston-marathon-bombing-movie-is-tense-yet-respectful.
39. Melville B. Nimmer, *Copyright vs. The First Amendment*, 17 J. Copyright Soc'y U.S.A. 255 at 8 (1970).
40. *Id.*
41. This is a purely demonstrative example. Nimmer notes that he would cabin his ideas to "news photographs."
42. *Id.* at 9.
43. *Time*, 293 F. Supp. at 143. Interestingly, though the court states that the fact can be captured in every other form of expression, it also found that charcoal sketches of the film infringed upon the video.
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45. *See, e.g.,* Evan Andrews, *What Happened to the Zapruder Film,* History (Nov. 19, 2013), https://www.history.com/articles/what-happened-to-the-zapruder-film.
46. *Kern River Gas Transmission Co. v. Coastal Corp*., 899 F.2d 1458, 1463–64 (5th Cir. 1990).
47. *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 139–140 (5th Cir. 1992).
48. *Time*, 293 F. Supp. at 144.
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Resolving AI-Centric Disputes Through Mediation

By Theo Cheng

In one of my earlier columns a decade ago, I addressed how mediation could be used to resolve the uncertainties presented by the fair use doctrine.[1] To be sure, uncertainty over how the fair use doctrine would be applied by a judge or jury (or even an arbitrator) is a key driver in the voluntary resolution of disputes. That uncertainty can arise from the facts of a dispute, the legal framework in which the dispute arises, or both.

Fast forward a decade and we find ourselves in the midst of any number of artificial intelligence (AI)-centric litigations pending in numerous courts, both in the U.S. and abroad. While the parties raise numerous issues and claims in those litigations, at present they principally revolve around issues and claims arising under the copyright laws and, specifically, the doctrine of fair use. For example, in *Dow Jones & Company, Inc. v. Perplexity AI, Inc.*,[2] Dow Jones and the *New York Post* sued Perplexity AI – an AI-powered answer engine and conversational web search tool – for using their copyrighted news content. Perplexity contends that compiling publicly available factual information and internet content to create a searchable, retrieval-augmented database constitutes protected fair use. Similarly, in *Concord Music Group, Inc. v. Anthropic PBC*,[3] music publishers allege that Anthropic violated the Copyright Act and the Digital Millenium Copyright Act by using their copyrighted song lyrics to train Anthropic's generative AI tool Claude. Anthropic contends that using copyrighted lyrics (alongside billions of other text data) to train Claude is "transformative" and serves an educational/analytical purpose.

Some of these litigations have resulted in isolated trial and appellate level legal rulings, many of which are the first to opine on the applicability of the fair use doctrine in the context of AI-powered technologies. However, the consequence of that sparse legal landscape is that there is little to no established law as to the merits of the various arguments being raised by either the content owners or the technology companies, including with respect to the applicability of the fair use defense.

To review, the doctrine of fair use under U.S. copyright law is intended to balance the interests of, on the one hand, those who possess the exclusive rights to reproduce and make derivative works of their copyrighted materials (among other rights) and, on the other hand, those who desire to exercise their First Amendment right to engage in free expression, including limited use of works that otherwise would be deemed

an infringement under copyright law. That is, the doctrine essentially permits limited uses of copyrighted works without first having to obtain permission or consent from the copyright holder. Common examples of fair use include criticism, commentary, news reporting, research, teaching, and parody.

Historically, the doctrine was rooted in the common law until it was formally codified in the Copyright Act of 1976. Under 17 U.S.C. § 107, in determining whether a particular use of an otherwise copyrighted work is a fair use, a Court will look to the following four factors:

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

Although seemingly helpful, the application of these fair use factors to any particular circumstance, from a practical point of view, is highly subjective and fact-dependent.

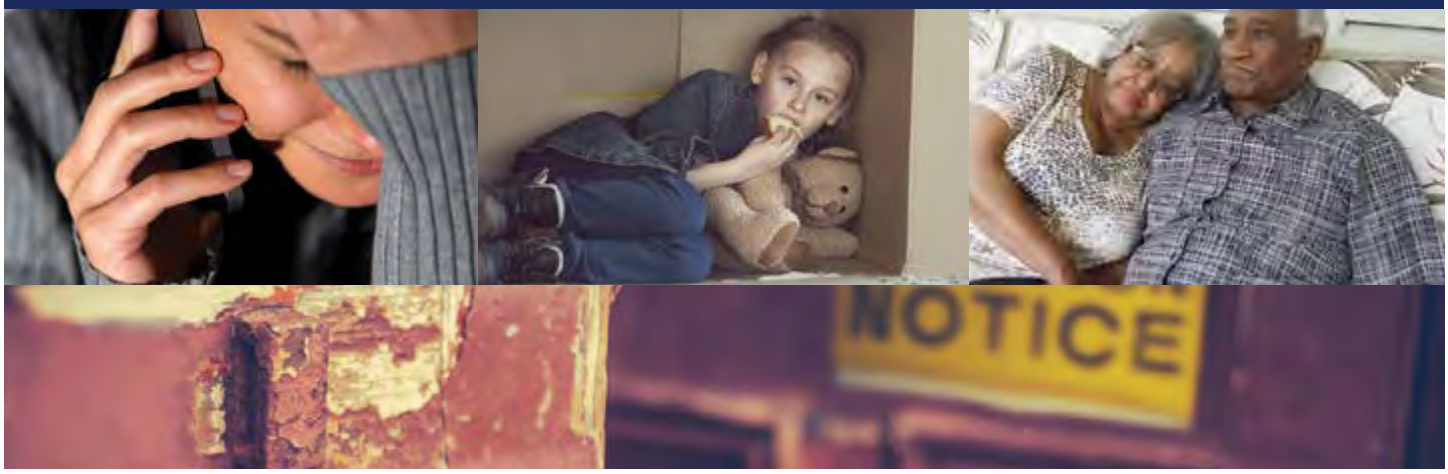
For example, in *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*,[4] the defendant used a seven-second clip from "The Ed Sullivan Show" in connection with the performance of the award-winning Broadway musical "Jersey Boys." The clip featured Ed Sullivan introducing the popular 1960s musical group The Four Seasons on his show, but not the group's actual performance, which was presented after the showing of the clip by the actors in the musical. In response to the claim of copyright infringement, the defendant moved for summary judgment based upon a fair use defense. In analyzing the factors, the Court found, among other things, that (a) the parties had agreed that the musical was an entertaining dramatization of actual events, thus weighing in favor of fair use; (b) the use of the clip was "transformative" because it was being used as a historical reference point, and not just a rebroadcast of the original, thus again weighing in favor of fair use; (c) the defendant's use was commercial in nature, and, thus, weighed against fair use, but was not accorded great weight based upon the transformative nature of the use, the fact that the clip was only seven seconds long, and the lack of any evidence that the clip was used in the marketing of *Jersey Boys*; (d) the clip was creative, but also newsworthy, thereby weighing slightly in favor of fair use; (e) the clip was not the "heart" of either the television episode or the musical,

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thus weighing in favor of fair use; and (f) the plaintiff had presented no evidence of any plans to license the clip, and the use of the clip in the musical was not a substitute for the original, thus again weighing in favor of fair use. On balance, the court concluded that the use here was fair and, thus, did not infringe upon the plaintiff's copyright.

As *SOFA Entertainment* illustrates, a fair use analysis is often difficult to conduct without the benefit of full discovery, which is both time-consuming and expensive. Moreover, with respect to the fourth factor (the effect of the use upon the potential market for or value of the copyrighted work), expert testimony will likely be required in order to present evidence of the relevant marketplace. At bottom, the application of the fair use factors is a subjective, case-by-case analysis, with no bright-line rules and little in the way of helpful guideposts.

As applied to the AI context, the courts have been all over the map on fair use rulings. For example, in *Thomson Reuters Enter. Ctr. GmbH v.v. ROSS Intelligence*, the owner of Westlaw sued an AI legal tech start-up for copyright infringement, claiming that the defendant had unlawfully used its proprietary editorial material (i.e., summaries called "headnotes" and the "Key Number System") to build a directly competing tool. On February 11, 2025, the court rejected the defendant's fair use defense on summary judgment, finding (among other things) that the use was not transformative because the defendant had used the data to build a direct commercial competitor to Westlaw.[5] On September 29, 2026, the U.S. Court of Appeals for the Third Circuit affirmed the lower court's ruling that ROSS Intelligence committed copyright infringement and rejected its fair use defense.

By contrast, in *Kadrey v. Meta Platforms, Inc.*, a group of authors sued Meta in a class action lawsuit, alleging that the company had infringed upon their copyrights by downloading their books – sometimes via BitTorrent from unauthorized "shadow libraries" – and using them as training data sets for its Llama large language models (LLMs). On June 25, 2025, the court granted summary judgment in favor of Meta, ruling that the training practice was protected under the fair use doctrine.[6] Among other things, the court found that Meta's goal was to "train its LLMs, which are innovative tools that can be used to generate diverse text and perform a wide range of functions," while the purpose of the original books is to "be read for entertainment or education." The court also declined to infer any market harm without competent empirical evidence having been submitted by the authors. The case remains pending in the trial court, with the parties continuing to litigate supplemental claims, scheduling, and ongoing discovery disputes.

With the fair use legal framework in the context of AI in flux, coupled with a highly subjective, fact-specific, and case-by-case inquiry, entrusting the application of the fair use factors to either a judge, jury, or arbitrator creates grave uncertainty and doubt as to the outcome of any fair use dispute. This is where mediation – a type of non-binding alternative dispute resolution – can be of great assistance. A voluntary resolution thrives on uncertainty. Considerations about how a trial court will rule on summary judgment or evidentiary issues at trial (or an arbitrator on a dispositive motion or at a hearing); how a trier of fact will assess the credibility of the witnesses who testify; the state of the law at the time when a decision is made, and what an appellate court will do in reviewing the trial court record all create sufficient amounts of uncertainty about the litigation process to serve as strong incentives for a resolution of a dispute of the parties' own making, as opposed to having one imposed upon them. Moreover, direct party-to-party negotiations are difficult to conduct when the factual and legal positions of the parties are subject to a high level of uncertainty, as is the case with the application of the fair use factors.

Bringing in an outside perspective to help facilitate those negotiations and help parties see the respective uncertainties that they face can often be beneficial. By providing impartial and realistic feedback on the fair use debate, from both factual and legal perspectives, a mediator can help the parties evaluate their best interests while uncovering areas of mutual gain. Undeniably, by the time parties (and their counsel) have formulated their fair use positions, they are usually entrenched and enamored by them. A mediator can work to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them towards a negotiated settlement or other resolution. More specifically, a mediator can help identify the weaknesses, uncertainties, or ambiguities in the factual record and the barriers presented by the legal framework relative to the parties' respective arguments on how to apply the various fair use factors.

In addition, a mediator with expertise in copyright, the developing decisional law relating to AI-centric disputes, and at least a passing familiarity or facility with the underlying technology would minimize the need to have the parties educate the neutral on basic, fundamental fair use principles and case law, thereby further reducing costs. Doing so can help the parties realize the value in an early resolution before enormous time and costs are spent in a protracted litigation or drawn-out negotiations, which are frequently accompanied by the great risk of impasse in the absence of a disinterested, third-party neutral who has no personal or financial stake in the outcome.

Indeed, I recently attended a multi-day training program hosted by the National Academy of Distinguished Neutrals, at which renowned mediator, author, podcaster, consultant, and past ABA Dispute Resolution Section Chair Susan Guth-

rie gave a presentation on the opportunity for mediation to address these AI-centric litigations. Specifically, she reported that in the span of just one year there has been a four-fold increase in federal AI-centric litigations from 22 cases in 2024 to 94 cases in 2025. She also noted that the parties in one of these cases – *Bartz v. Anthropic PBC* – pursued a mediated resolution, resulting in the largest copyright settlement in U.S. history of $1.5 billion.[7] (As mentioned above, a similar case brought by music publishers against Anthropic remains pending.) Her thesis was that this increase in cases, coupled with the uncertainty in any established law about the application of the fair use doctrine to the issues raised by AI, created an opening for mediation to assist those parties in finding a resolution that would be cost-effective and expeditious, as well as preserve their ability to chart their own outcome.

In the face of little to no established law and the inner workings and algorithms of AI technology being far from transparent due to confidentiality and other concerns, it is no wonder that parties having to contend with a dispute over the applicability of the fair use doctrine might be inclined to consider mediation as a concrete way to eliminate the cloud of uncertainty that comes from relying solely on a formal legal process, while reducing both time and expense and finding a mutually acceptable solution.[8]



Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and employment disputes. He is a AAA Master Mediator, a fellow of the College of Commercial Arbitrators, a member of the National Academy of Distinguished Neutrals, and a former chair of the New York State Bar Association Dispute Resolution Section. Cheng is also an adjunct professor at New York Law School where he teaches two ADR-related courses. He has nearly 25 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at theo@theocheng.com.

Endnotes

1. *See* Theodore K. Cheng, *Solving Fair Use Disputes Through Mediation and Early Neutral Evaluation*, NYSBA Entertainment, Arts and Sports L. J., Vol. 27, No. 1 (Spring 2015) at 76.
2. *Dow Jones & Company, Inc. v. Perplexity AI, Inc.*, No. 1:24-cv-07984 (S.D.N.Y.).
3. *Concord Music Group, Inc. v. Anthropic PBC*, No. 5:24-cv-03811 (N.D. Cal.).
4. 782 F. Supp. 2d 898 (C.D. Cal. 2010), *aff'd*, 709 F.3d 1273 (9th Cir. 2013).
5. *See* 765 F. Supp. 3d 382 (D. Del. 2025).
6. *See* 788 F. Supp. 3d 1026 (C.D. Cal. 2025).
7. The *Bartz* case involved a class action copyright lawsuit brought by authors against AI company Anthropic over the use of copyrighted books to train its Claude large language models. The court recently approved the settlement after conducting a fairness hearing. *See Bartz v. Anthropic PBC*, No. 3:24-cv-05417-AMO (C.D. Cal. Jul. 20, 2026). The court also appointed me to serve as the Special Master on that settlement. *See id.*, Slip Op. at 6 ("Should any disputes arise among valid claimants for a given Work, the Special Master will proceed with all reasonable diligence and will endeavor to quickly resolve all disputes based on the law, for any disputes submitted to the Special Master that cannot be resolved by mutual agreement with the assistance of the Settlement Administrator.").
8. In *Getty Images (US), Inc. v. Stability AI, Ltd.*, No. 3:25-cv-06891-TLT (N.D. Cal.), the plaintiff contends that the defendant used millions of copyrighted photos and watermarked images without permission to train its Stable Diffusion AI models. A separate high-profile lawsuit between the two companies played out in the U.K. High Court, which ruled on November 4, 2025 that Stability AI did not commit secondary copyright infringement because the AI models store mathematical weights rather than exact digital copies, though Stability faced limited liability for trademark issues over generated watermarks. The parties in the U.S. litigation have now scheduled a mediation, and the court has ordered that mediation to be completed by October 19, 2026.

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By Jacques E. Boubli

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Attorneys and financial advisors have many things in common. Many of us see the full life cycle every day, dealing with birth, death, marriage, divorce, buying and selling homes and businesses, first jobs, job changes, and retirement. We are entrusted with tremendous responsibility, and the consequences of getting things wrong can be significant. Knowing our clients well is critical, and a large part of our jobs involves managing expectations and avoiding negative surprises. Negative surprises can quickly undermine the trust we have spent years and sometimes decades, building, not to mention the direct impacts they can have on our clients' lives.

As much as we try to avoid negative surprises, sometimes clients create their own. We recently encountered two, both involving residential real estate. The first client transferred ownership of her New York City co-op to her children and is paying them rent to stay in the apartment. Removing this significant and appreciating asset from her estate was all done legally; but nobody told the co-op. As those familiar with New York City real estate know, the co-op board has to approve new owners, including immediate family members. The legal fees are mounting as negotiations with the co-op board continue. Another client put her interest in her condo in an irrevocable trust as part of Medicaid planning. However, the condo board does not know that and the mortgage is also still in the client's name. The client has significant health issues and the mortgage likely will need to be satisfied when she dies.

Our work does not end when the documents are drafted and signed. Both examples underscore the importance of finding a qualified attorney and asking the right questions. It is essential that clients reach out to qualified professionals before taking significant steps like these.

Surprises do not always have to be negative.

I had the privilege of attending a meeting with a client and his wife, his attorney, the founder of our firm, and his four stepchildren from two marriages. He has a taxable estate and, after two years of conversations with us, worked with us and his trusts and estates attorney to make $1.5 million gifts to each of the four.

The children did not know the purpose of the meeting in advance, and he shared the details of the gifts for the first time with all of us present. It was one of the most impactful client meetings I have ever attended. In subsequent one-on-one meetings, they told us they were pleasantly shocked by what had transpired. These are the good surprises in our work.

Then there are the surprises beyond anyone's control. One of our clients received a terrible diagnosis of brain cancer. She went for all sorts of treatments with varying degrees of success. When it appeared the doctors had exhausted all treatment options, she and her husband had quiet conversations together. The reflected on their lives and spoke practically and tenderly about what was likely to happen.

"Do you want to be buried or cremated?" her husband asked.

"Surprise me!"



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Navigating the Digital Frontier After *Cox v. Sony*: The Death of Contributory Copyright Infringement and Broader Implications for Entertainment, Media, Advertising, Telecommunications, and Technology

by Barry Skidelsky

Former EASL Chair Barry Skidelsky analyzes the U.S. Supreme Court's recent decision in Cox Communications v. Sony Music *and shares some insights on how that case put an end to negligence-style theories of contributory liability for copyright infringement, established an important doctrinal shift for a new enforcement paradigm, and made direct infringement more important than indirect infringement or secondary liability while drawing our focus to intent, provenance, control and contracts. As he explains, this shift was accelerated by the rapid growth of artificial intelligence (AI) and compounded by the fact that the AI ecosystem has many different actors (e.g., creator, data supplier, data set provider, model developer, infrastructure provider, application developer, platform, advertiser and end user), which will cause litigators to increasingly ask: "Which actor did what, with what knowledge, intent, control and contractual authority?"*

Part I. The End of Negligence-Based Copyright Secondary Liability, the Cox Decision, and the New AI Litigation Landscape

Introduction: A New Boundary Between Copyright Enforcement and Digital Infrastructure

The Supreme Court's decision in *Cox Communications, Inc. v. Sony Music Entertainment*[1] marks a significant turning point in the long-running conflict between copyright owners seeking greater control over digital distribution channels and technology companies seeking predictable rules for operating digital platforms and infrastructure.

For more than two decades, copyright owners have attempted to expand secondary liability doctrines beyond traditional principles of intentional wrongdoing. As digital platforms, internet service providers (ISPs), cloud services, and artificial intelligence (AI) systems became central components of the creative economy, rights holders have increasingly argued that tech companies should bear responsibility when their systems were used by customers to commit infringement.

The theory was straightforward: If a technology company knew infringement was occurring at scale and failed to take sufficiently aggressive measures to stop it, the company should share responsibility for the resulting harm. This approach effectively created a negligence-based theory of contributory copyright liability, placing expanded pressure on intermediaries to monitor, police, and remove potentially infringing activity across enormous digital networks.

In *Cox v. Sony*, the Supreme Court rejected that expansion. The Court held that providing internet access, even

with knowledge that some subscribers or other users engage in infringement, does not by itself establish contributory copyright liability. Instead, copyright owners must demonstrate more than generalized knowledge and inaction. They must establish a form of culpable conduct consistent with traditional secondary liability principles.

The decision has broad implications extending far beyond ISPs. It reshapes litigation strategies involving AI developers, online platforms, cloud providers, digital advertising systems, entertainment companies, and other businesses whose technologies can be used for both lawful and unlawful purposes.

The post-*Cox* landscape is likely to be defined by a renewed emphasis on intent, product design, user control, and direct infringement, rather than broad theories seeking to impose liability on intermediaries for failing to prevent every misuse of their systems.

The U.S. Supreme Court Decision in *Cox Communications v. Sony Music Entertainment*: Reaffirming Limits on Secondary Copyright Liability

The dispute in this case arose from allegations that Cox Communications (Cox), a major ISP, allowed subscribers to repeatedly engage in unauthorized downloading and distribution of copyrighted music.

Sony Music Entertainment (Sony) and other record company copyright holders initially sued Cox in the U.S. District Court for the Eastern District of Virginia. They argued that Cox should be held liable for copyright infringement because it had knowledge of widespread copyright infringement occurring through its network (after the ISP received voluminous takedown notices from the copyright holders), but failed to take sufficient action against repeat infringers (such as restricting or terminating users whose accounts were repeatedly associated with music piracy).

Sony argued theories of both contributory liability (failing to stop known infringement) and vicarious liability (profiting from it). After trial in the federal district court, a jury found Cox liable under both theories for willful infringement, and awarded Sony roughly $1 billion in statutory damages.[2]

Cox appealed to the U.S. Court of Appeals for the Fourth Circuit. The appellate court reversed the district court's vicarious liability verdict, ruling that Cox did not directly profit from the infringing activities. However, the Fourth Circuit upheld the finding of contributory liability, agreeing with the district court that Cox's failure to adequately act on the copyright take down notices it received constituted willful blindness.[3]

Cox filed a petition for a writ of certiorari with the U.S. Supreme Court. The Court exercised its discretion to hear the appeal (which was not an appeal as of right), and in a 9-0 unanimous decision reversing the Fourth Circuit, ruled that an ISP such as Cox cannot be held contributorily liable for a subscriber's copyright infringement simply because it possesses "mere knowledge" of the infringement and fails to terminate those users' accounts.[4]

The Supreme Court clarified that to establish secondary liability, plaintiffs must prove that the ISP actively induced the infringement or provided a service specifically tailored for illegal use. The Court's reasoning reinforces a fundamental distinction in copyright law – that a company that provides a neutral technology platform is not equivalent to a company that actively participates in, encourages, or designs its products or services to foster copyright infringement.

This distinction has long been reflected in copyright jurisprudence. For example, in the publicly well-known litigation that took place in the 1980s following Sony's manufacture and sales of its BetaMax Home Video Tape Recorder (VTR), Universal Studios and Walt Disney (as owners of copyrighted television programs) sued Sony claiming that Sony was liable for contributory infringement because consumers used the BetaMax VTR they purchased to record copyrighted works without authorization.

In *BetaMax* (where ironically Sony was initially the defendant, rather than the plaintiff as it was in the *Cox* case), the two key legal questions were: (i) does the sale of a device capable of copying copyrighted works constitute contributory infringement and (ii) is noncommercial home recording of television programs for later viewing, known as time-shifting, considered fair use under the Copyright Act?

In *BetaMax*, the district court ruled in favor of Sony, holding that home recording for personal use was fair use and Sony could not be held liable for contributory infringement. However, the Court of Appeals reversed, finding Sony liable for contributory infringement. The Supreme Court granted certiorari and ultimately reversed the Court of Appeals in a 5-4 decision.[5]

The Supreme Court in *BetaMax* held that a technology product with substantial lawful uses should not expose its manufacturer to copyright liability merely because consumers may misuse it. Later cases involving peer-to-peer (P2P) platforms clarified that liability may arise where a company intentionally encourages infringement or structures its service to promote unlawful activity.

The significance of *Cox* is that it rejects an attempt to transform those principles into a general duty of technological supervision. In *Cox*, the Supreme Court effectively concluded that copyright law does not impose strict policing obligations on neutral intermediaries simply because infringement occurs through their systems.

The New Secondary Liability Framework: Intent Over Negligence

Following *Cox*, the strongest secondary copyright claims against technology providers will likely focus on intent and require evidence falling into one of two categories: active inducement and purpose-built infringing technology.

1. Active Inducement

A plaintiff may succeed where a company actively encourages infringement through advertising, product design, business strategy, or communications promoting unlawful uses.

Evidence may include:

- marketing a service primarily as a tool for infringement;
- encouraging users to violate copyright restrictions;
- intentionally targeting users seeking unauthorized content; and
- designing features specifically to facilitate piracy.

This approach is consistent with post-*BetaMax* cases, including the P2P file sharing case involving the popular tech platform known as *Grokster* (which also made its way up to the Supreme Court), where liability was based not merely on knowledge of infringement, but rather on affirmative efforts to promote unlawful conduct.[6]

2. Purpose-Built Infringing Technology

A second pathway involves products or services intentionally designed and engineered for infringement and lacking meaningful lawful applications.

This distinction is particularly important in emerging technologies. Many modern digital platforms, including cloud-computing services, AI systems, search engines, content-management tools, and digital marketplaces, have both legitimate and potentially infringing uses.

After *Cox*, copyright plaintiffs face having to make a more difficult argument when attempting to impose liability on a company that provides a general-purpose technology used by millions of lawful customers. That helps explain why various record labels quickly reacted to the *Cox* ruling by dropping similar cases against ISPs, such as Verizon and Altice. Separately, a group of film studios agreed to drop a five-year-old case against cable company RCN.

While the *Cox* ruling's most immediate effect is on other ISPs also being sued by record labels, the decision applies broadly to other tech platforms as well. The practical effect is a shift away from questions such as "Did the company know infringement occurred?" and toward "Did the company intentionally facilitate infringement?" That difference will influence litigation strategy across multiple industry sectors beyond music.

The Generative AI Battleground: From Secondary Liability to Direct Infringement

The immediate impact of the *Cox* framework is particularly significant in the AI sector.

Generative AI developers have faced a wave of copyright litigation alleging that large language models (LLMs), image generators, music systems, and other AI tools were trained on copyrighted works without authorization. Plaintiffs have asserted several theories, including direct infringement, secondary infringement, unfair competition, and misappropriation.

The *Cox* decision weakens one potential avenue for copyright plaintiffs, i.e., the argument that AI companies are automatically responsible, as their systems may produce infringing outputs or because users may misuse their tools.

AI companies are expected to rely on *Cox* and argue (and in some pending cases have already argued) for dismissal of contributory copyright infringement claims they face, while asserting that their AI systems resemble other general-purpose technologies (e.g., search engines, computers, cloud platforms, and internet infrastructure) that have substantial lawful applications – including research, software development, education, translation, accessibility tools, and creative assistance.[7]

As a result, the center of AI-related copyright litigation is increasingly shifting toward another two key legal questions: (i) was the training process itself unlawful and (ii) did the AI system produce infringing outputs that create direct liability?

AI giants like OpenAI, Anthropic, and Meta argue that ingestion of data for training purposes is a highly transformative use, making it a fair use of copyrighted works rather than a tool to simply copy and distribute the original works.

In a highly watched case, the Third Circuit Court of Appeals case *Thomson Reuters v. ROSS Intelligence*, the court on September 29, 2026 rejected the AI company's fair use defense – ruling that ROSS's copying of Westlaw's headnotes to train a competing legal research system was not only commercial but also "minimally transformative" – two factors weighing against a finding of fair use.

That first post-*Cox* major appellate signal sent shockwaves through the tech industry by showing that courts will closely scrutinize how data is ingested during AI training, and that a critical legal fault line is emerging based on how the data was obtained. In pending cases like the *New York Times v. OpenAI* and *Concord Music Group v. Anthropic*, courts are focused on differentiating between tools trained on legally purchased/licensed content versus tools trained on scraped or pirated databases.



Training Data and Fair Use: The Input Side of AI Litigation

This first major issue on the input side of AI litigation concerns the ingestion of copyrighted materials used to train AI systems. AI developers argue that training involves analyzing patterns, language structures, statistical relationships, and information organization rather than storing and redistributing expressive works in their original form. Under this theory, AI training resembles other forms of technological analysis and may qualify as transformative fair use under Section 107 of the Copyright Act.

On September 1, 2026, the U.S. Department of Justice filed a "Statement of Interest of the United States" in the OpenAI copyright case pending in the U.S. District Court for the Southern District of New York (S.D.N.Y.) in support of OpenAI, arguing that training AI models on copyrighted works is generally fair use and highly transformative.

As noted, several AI copyright cases have also addressed these issues (background and cites omitted), including:

- *The New York Times Co. v. Microsoft/OpenAI*;
- *Authors Guild v. OpenAI;*
- *Kadrey v. Meta Platforms;*
- *Bartz v. Anthropic*; and
- *Reuters v. Ross Intelligence.*

Courts have reached varying conclusions depending on the venue, stage of litigation, and circumstances or facts involved – particularly focusing on whether copyrighted materials were legally obtained and used for transformative analysis or whether companies acquired and maintained unauthorized copies of works that could substitute for legitimate markets.

The emerging distinction is increasingly described as input versus output. The input question asks whether using copyrighted works to train a model is permissible. The output question asks whether the resulting AI-generated material reproduces protected expression and competes directly with the original creator or copyright holder.

Output Liability and the Volitional Conduct Question

The second major AI litigation battlefield involves AI-generated output. Traditional copyright doctrine generally requires some element of volitional conduct before imposing direct infringement liability. AI developers argue that users – not developers – provide the prompts (or "press the buttons") and initiate content generation. Under this view, an AI platform is a neutral tool, and the user is the actor responsible for requesting and using AI-generated content.

Copyright owners counter that advanced AI systems are not passive copying machines. They argue that AI models are not simple or neutral tools, but rather autonomously make complex computational decisions, generate unpredictable outputs, and may reproduce existing copyrighted expression even when users do not request copying.

Courts will likely resolve disputes by examining questions such as:

- How much control does the developer exercise over outputs?
- Does the system reproduce protected expression or merely generate similar ideas?
- Does the company market the system as a replacement for human creators?
- Are safeguards against infringement meaningful or superficial?

The *Cox* decision does not eliminate these disputes, but it changes the battlefield. Plaintiffs up against digital tech platforms will likely focus less on indirect contributory copyright infringement and focus more on direct copyright infringement, system architecture, training practices, and market substitution.

Part II. Broader Implications for the Entertainment, Media, Advertising, Telecommunications, and Technology Sectors; Contract and Insurance Developments; Proposed and Recently Enacted Legislation; Practical Guidance for Attorneys

Entertainment: Copyright, Creativity, and the Emerging Battle over Digital Identity

The entertainment industry is likely to experience some of the most significant effects from the post-*Cox* copyright environment. Historically, record labels, film studios, television producers, streaming platforms, and talent representatives have relied on copyright law as the primary mechanism for controlling the exploitation of creative works.

The Supreme Court's narrowing of secondary copyright liability changes the strategic balance. Rather than relying primarily on claims that technology companies should police downstream infringement, entertainment companies increasingly will need to focus on direct licensing, contractual controls, technological authentication, and emerging digital identity or personality rights laws to protect and advance their interests.

The music industry illustrates this shift particularly clearly. For decades, record companies fought unauthorized digital distribution through litigation against peer-to-peer networks, internet intermediaries, and other technology providers. The *Cox* decision reinforces that general purpose infrastructure providers are not necessarily copyright police or enforcement agents for the creative industries.

Instead, rights holders may increasingly pursue:

- direct infringement claims against users and commercial entities;
- licensing agreements with technology companies;
- collective rights management solutions;
- contractual restrictions governing the use of recordings in AI systems; and
- new statutory protections for likeness and voice as aspects of digital identity or persona.

The rise of generative AI has accelerated these concerns, especially as AI systems can now create digital replicas of living and deceased artists. Traditional copyright law, however, does not always provide a complete solution, because copyright only protects particular expressive works, and not necessarily a person's image, vocal characteristics, digital identity, or persona.

This distinction has driven legislative proposals aimed at creating or expanding rights of publicity, privacy, and consumer protections in part to address unauthorized digital replicas and synthetic performances. However, the pace of federal law changes in response to these technological changes is much slower than state law changes made in New York and elsewhere, as elaborated below.

Media: The Shift From Copyright Enforcement to Licensing and Data Governance

News organizations and publishers face a similarly complex transition. For decades, publishers relied on copyright law to prevent unauthorized copying of articles, photographs, audio-visual, and other expressive content. Digital platforms, aggregators, and search engines created recurring disputes regarding whether indexing, summarizing, linking, and displaying content constituted infringement.

The emergence of generative AI technology has intensified these concerns. Publishers argue that AI systems trained on journalistic and other written works may reduce website or app traffic, replace sales and subscriptions, and compete directly with original sources. AI companies, by contrast, argue that training models involves transformative analysis rather than publication of copied works.

The post-*Cox* framework makes broad intermediary liability arguments more difficult. A publisher seeking compensation from an AI company cannot simply argue that the company should have prevented users from generating infringing material. Instead, disputes will likely focus on:

- whether training materials were lawfully acquired;
- whether copies were retained after ingestion;
- whether AI outputs reproduce protected expression; and

- whether generated summaries compete with original publishers.

Recent litigations involving publishers and AI companies demonstrate this transition. The central questions are moving away from generalized platform responsibility and toward traditional copyright analysis involving copying, substantial similarity, fair use, market harm, and licensing expectations.

As a result, the media industry will likely increasingly turn to structuring licensing markets for AI training data, similar to existing markets for music, photographs, and stock content.[8] Those licenses or partnerships present a viable means to prevent or settle class actions and other lawsuits, such as those mentioned above and brought in recent years by major groups of fiction and nonfiction authors against OpenAI. In the case against OpenAI, the plaintiffs claimed that the tech company violated copyright laws by using their books to train LLMs underlying OpenAI's platform without permission from or payment to the authors.

Advertising and Marketing: Synthetic Media Creates New Compliance Obligations

The advertising and marketing industry faces perhaps the most immediate operational consequences, as it sits squarely at the intersection of brand reputation, creativity, technology, and consumer protection. Generative AI tools are already being used by brands, design studios, and ad agencies to create advertising images, synthetic actors, automated voiceovers, personalized marketing content, virtual influencers, and AI-generated video campaigns.

Where a brand or agency knowingly uses synthetic performers or AI-generated identities, compliance questions now include:

- Was disclosure required?
- Was consent obtained?
- Did the performer agreement authorize AI use?
- Was the digital replica created from licensed data?
- Can the company prove the provenance of the asset?

Advertising agencies will increasingly need to revise their master services agreements to include AI-specific provisions requiring disclosure of AI tools used in production, warranties regarding training data and source materials, representations regarding synthetic performers, indemnification for regulatory penalties, and documentation of creative workflows.

Insurance markets are also adapting. For example, advertising and/or media errors-and-omissions insurers are evaluating



whether AI-related claims should be covered and what compliance requirements should apply before coverage is available.

The legal risk is no longer limited to copyright infringement. Brands, advertisers, and marketers must also now consider digital identity rights, consumer deception, contractual obligations, and disclosure requirements created in proposed and recently enacted legislation, as elaborated below.

Telecommunications: Infrastructure Providers Regain a More Predictable Legal Position

For telecommunications companies, *Cox* provides important clarification. ISPs, broadband companies, and network operators have long argued that they should not function as copyright police or enforcement agencies for activity occurring across their networks.

The *Cox* decision strengthens the distinction between infrastructure and content. A telecommunications provider generally does not select, create, or distribute the content transmitted through its network, and imposing broad liability on telecom or infrastructure providers based solely on user misconduct would effectively require constant monitoring of billions of communications.

Following *Cox*, telecommunications companies will likely emphasize a neutral service provision, absence of intentional encouragement of infringement, reasonable compliance procedures, and distinction between infrastructure and content platforms.

This does not eliminate a provider's copyright law obligations. For example, providers must still comply with applicable statutory requirements, including the notice-and-takedown framework contained in the Digital Millennium Copyright Act (DMCA); but, copyright holders post-*Cox* may no longer easily rely on sending ISPs voluminous DMCA takedown notices to support knowledge based claims of contributory infringement.

The Supreme Court in *Cox* made clear that the DMCA safe harbor provision is a shield that creates conditional defenses and that it does not serve as a sword to establish affirmative obligations or expand underlying copyright liability. The decision also establishes that common-law defenses exist independently of the DMCA and that failing to qualify for a DMCA safe harbor cannot bear adversely upon a provider's regular defenses.

Even if an ISP completely loses its DMCA safe harbor protection – as *Cox* did in the lower courts for failing to "reasonably implement" a repeat-infringer policy -- the plaintiff must still prove common-law copyright infringement. As *Cox* raised the bar for contributory infringement, losing the safe harbor is no longer a death sentence for tech platforms, as Congress intended the DMCA to provide a baseline "floor" of protection.

If an ISP complies with the safe harbor rules, it is immune. If it falls outside of them, its liability is determined strictly by common law, which now requires proof of explicit intent or inducement, rather than mere passive knowledge of user piracy. *Cox* also reduces pressure on ISPs to terminate users solely because allegations of user infringement on their passive conduits exist, particularly where evidence of intentional facilitation by the ISP is absent.

Technology: Data Provenance Becomes the New Corporate Imperative

As shown, although *Cox* provides greater protection for general-purpose technologies, it does not eliminate all copyright infringement exposure. Nor does it eliminate the need for responsible and legally compliant design of technological products and services.

Thus, the post-*Cox* environment presents both opportunities and challenges for technology companies developing AI models, cloud services, search engines, and digital platforms, each of which must now increasingly focus on and be able to demonstrate data provenance, licensing compliance, internal governance, documentation of training processes, and effective safeguards against misuse.

The likely result is a transition from litigation-driven compliance to data-governance-driven compliance; and, tech companies will likely increasingly rely on licensed training datasets, negotiated content partnerships, royalty-sharing models, retrieval-augmented generation systems, and contractual restrictions on downstream use.

However, some significant issues remain unresolved concerning open-source AI systems. As open-source developers argue that transparency and public availability should not result in higher infringement liability exposure for them compared with the lower exposure risks that face closed commercial systems, copyright owners argue that publicly distributed or open-source AI models create both greater opportunities for unauthorized reproduction and enforcement difficulties.

Legislative proposals reflect this broader policy debate, particularly in connection with the currently hot topics of AI training and digital identities. Copyright holders also argue that creators need transparency regarding whether their works were used in AI training, while technology companies raise concerns regarding trade secrets, proprietary data sets, and compliance burdens. Ultimate legal frameworks require balancing innovation and transparency.

Proposed Federal Legislation

The TRAIN Act

A bill[9] has been introduced in Congress to help musicians, artists, writers, and other creative talents determine if their

copyrighted works were used to train generative AI models without their authority. Known as The Transparency and Responsibility for Artificial Intelligence Networks (TRAIN) Act, this bipartisan federal legislation proposes to give copyright holders access to training records used for AI models.

Generative AI is already well known for disrupting the music sector, yet music creators have no actionable way of knowing which AI models are built (or outputs are generated) based on their intellectual property. Currently, few AI companies are transparent about how their models are trained and nothing in the law currently requires them to share such information.

The TRAIN Act is endorsed by all major creative talent unions and guilds. As Duncan Crabtree-Ireland, SAG-AFTRA's national executive director and chief negotiator said: "Transparency is not a barrier to progress. It's a bridge that ensures AI advances alongside the artists and workers whose creativity powers our culture. This legislation is a vital step toward protecting intellectual property, human authorship and the future of creative work in the AI era."

That AI should be embraced as a powerful engine of creativity and innovation seems beyond dispute. Clearly, AI drives progress and expands opportunity, but we must advance it responsibly with guardrails in place that reward copyright authors' creativity and collaboration, providing them with proper attribution and fair compensation.

The TRAIN Act would fill a void in the regulatory landscape and serve as a pathway for creative and performing talent, among other copyright holders, to protect and enforce their rights.

The NO FAKES Act

The proposed NO FAKES Act reflects another congressional effort to place guardrails around generative AI. This bipartisan legislation would create a federal framework addressing the creation and use of unauthorized digital replicas of an individual's voice and likeness, while attempting to balance personality rights with First Amendment protections.

The bill proposing this act[10] was introduced in Congress in May 2026, advanced out of the Senate Judiciary Committee with an amendment in June 2026, and currently awaits further action on the Senate floor. The bill proposes to establish a new federal intellectual property right to protect individuals from unauthorized AI generated digital replicas of their voice or visual likeness.

The NO FAKES Act would make unauthorized creation and distribution of digital replicas a civil offense. It includes certain post-mortem protections ensuring that the rights can be transferred to executors and heirs after an individual's death, while providing carve-outs to preserve certain First

Member FEEDBACK

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Lauren Sharkey

Past Chair, Young Lawyers Section



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"The Young Lawyers Section was asked to examine the application to the bar. On it, it had some questions about prior mental health history. Our job was to ask, 'Why is that? Why was that question there? What purpose does it serve? Is it important for the applicants to disclose it, should that affect their admission to the bar?'

"Ultimately, the working group recommended that it not be included – that the question be eliminated. Just because someone has some mental health history should not be a distinctive factor of them being admitted to the bar."

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Amendment rights for uses such as news reporting, sports broadcasts, and satire. It also excludes or exempts from compliance non-profit libraries and educational institutions.

While the NO FAKES Act is also backed by major unions, guilds, and other players in the entertainment industry, it faces opposition from First Amendment advocacy groups who argue that the legislation's notice-and-takedown mechanics are overly broad and could chill free speech.

The push to enact the NO FAKES Act could force fundamental changes to be made in a variety of entertainment contracts. For example, talent agreements may increasingly provide for or distinguish among:

- ownership of recorded performances;
- licensing of digital replicas;
- consent for AI training;
- permitted uses of synthetic performances; and
- compensation structures for AI-generated exploitation.

For lawyers, the key issue here will be separating ownership of the traditional bundle of rights in copyright from ownership of digital identity rights. For example, a record label may own a sound recording but ownership of that recording (whether obtained as a work made for hire or by assignment) does not necessarily equate to ownership of the performer's digital identity nor a grant of rights to create synthetic performers. Further, the growing use of AI in political advertisements should concern political candidates, campaigns, and the voting public.

AI in Political Advertisements

It is worth noting that, while the Federal Communications Commission (FCC) has proposed adopting new regulations that would require radio, television, and cable operators to inquire if political ads contain AI-generated content, disclose its use in on-air announcements, and document it in their online political files,[11] some states have already passed their own laws regarding AI in political advertising (e.g., requiring disclaimers or barring deceptive synthetic media outright).

For example, New York requires the explicit disclosure of AI used in political advertisements. Under a recent amendment to New York State Election Law,[12] any candidate, campaign, committee, or organization that distributes political ads or communications must include a prominent disclaimer if the media has been generated or manipulated using AI. Moreover, a political candidate whose voice or likeness appears in materially deceptive media in violation of this statute may obtain injunctive relief prohibiting its distribution, publication or broadcasting, as well as attorneys' fees and costs, if done without consent of the person depicted.

Key components of this New York statute include:

- **Mandatory Disclosure:** If a political ad or communication uses AI to alter an image, video, or audio file, it must clearly disclose that the communication "has been manipulated.";
- **The Authenticity Standard:** Disclosures are required if a reasonable person would mistake the AI-altered content for an authentic, real-life event or statement; and
- **Application Scope:** The law applies to any person or entity distributing political communications to New York audiences in any media, including print, digital, social media, and broadcast ads.

Other AI-Related Legislation in New York State

Just as several states (most notably New York and California) have more quickly enacted their own legislation regarding privacy while the federal government has struggled for years to enact a comprehensive national framework as to that aspect of intellectual property law, so is the case regarding related uses of AI – including those involving an AI-generated digital replica or synthetic performer.

New York State is leading the charge on related consumer-facing AI regulation, as creatives and advertisers now must comply with new state laws concerning AI-generated "synthetic performers" and "digital replicas" promulgated respectively by two recent bills that create or modify related rights under New York state law.

New York's recently enacted disclosure requirements represent an example of emerging regulatory approaches. The Empire State's approach is particularly important for brands, design studios, and advertising agencies, as it shifts responsibility toward the party creating or distributing the advertisement rather than simply the technology provider.

NYS S8420A

The first NYS bill, S8420A, which was signed into law and made effective on June 9, 2026, amends New York's General Business Law to require advertisers to "conspicuously disclose" when a "synthetic performer" appears in an advertisement.[13] A "synthetic performer" is defined as a digital asset created or modified using generative AI or a software algorithm that is intended to create the impression that the synthetic performer is engaged in the audiovisual and/or visual performance of a human performer who nonetheless is not recognizable as any identifiable natural (or human) performer.

This new law applies to entities producing or creating advertisements featuring synthetic performers across all media. Violators who produce or create an advertisement without



the required disclosure will face escalating civil penalties from $1,000 to $5,000. Notably, the statute does not provide for a private cause of action, but rather leaves its enforcement up to the state.

Further, several of the new law's exceptions are also notable. For example, the law does not apply to audio advertisements or where the uses of AI solely involve the language translation of a human performer (e.g., dubbing). It also does not apply to advertisements or promotional materials for expressive works, like motion pictures, television programs, and documentaries – so long as the use of a synthetic performer in the advertisement or promotional material is "consistent" with its use in the expressive work.

However, what qualifies as a "consistent" use is neither specified nor clear. For example, what happens if a film incorporates a synthetic performer that would give the film's audience the impression the performer is AI-generated, but the synthetic nature of the performer is not clear from the excerpts of the performance included in the film's trailer? Or, what if a television show wants to use a promotional campaign featuring an AI-generated character that appears in the show, but in content that is not part of the show itself? The statute's ambiguities may take years to address through legal challenges involving statutory interpretation.

For those advertisements that do not fall under any exceptions, the law does not provide how the "conspicuous" disclosure requirement would be satisfied. In the absence of additional guidance from lawmakers, courts and regulators may have to look elsewhere – such as disclosure standards governing paid influencer content – to assess whether a specific synthetic performer disclosure is sufficient.

On September 16, 2026, California's Governor Gavin Newsom signed SB1050, making the Golden State the second state after New York to require advertisers to tell consumers when an ad includes a synthetic performer. That law will take effect on January 1, 2027. California covers much of the same ground as New York, but there are meaningful differences.

Two of those differences warrant particular attention: California reaches audio-only advertising (New York does not), and it only applies when a synthetic performer is used prominently – a term California uniquely defines as a "digital figure, voice or representation created in whole or part using generative AI that creates the realistic impression of the audio, audiovisual, or visual performance of a human performer who is not recognizable as any identifiable natural person."

As in New York, California targets wholly fictional digital humans and not digital replicas of real people. California already regulates those separately under AB1836, protecting individuals against unauthorized digital replicas of their voice or likeness, and AB 2602, which limits when performers can be contractually bound to the use of their digital replicas. Further, California tells you how and what to disclose, while New York only requires a non-defined "conspicuous" disclosure.

NYS S8391

S8391 amends the definitions of "deceased performer" and "digital replica" in relation to the right of publicity, and it relates to the use of aspects of a deceased performer's digital identity without authorization by the applicable rights holder.[14]

Modifying New York's existing post-mortem right of publicity law (Civil Rights Law § 50 *et seq.*), this new law requires consent from heirs and executors if a person or company

wants to use the name, image, voice, or likeness of a deceased individual for commercial purposes, and it broadens existing prohibitions governing the use of digital replicas of deceased performers in three ways.

First, the law changes the definition of a digital replica. Previously, New York law limited a digital replica to a "newly created, original, computer-generated electronic performance that a reasonable observer would think is a real performance." Under the new law, the Legislature deleted the reasonable observer standard while opting to re-define digital replicas as "newly created, computer-generated, highly realistic electronic representations that are readily identifiable as individuals who did not appear in the work at issue."

Second, while New York's prior right of publicity law prohibited the use of a deceased performer's digital replica in certain scripted audiovisual works as a fictional character, there was a significant carve-out as long as the work included a conspicuous disclaimer in the credits stating that the digital replica was not authorized by the person depicted. New York's amended law now deletes this disclaimer carve-out and further expands liability by deleting prior language providing that a use of a digital replica was only actionable where it was "likely to deceive the public into thinking it was authorized."

The new law offers a narrower set of exceptions for audiovisual works, sound recordings, or live performances of musical works. These exceptions are for works (1) of parody, satire, commentary, or criticism; (2) of political or newsworthy value, or similar works such as documentaries, docudramas, or historical or biographical works; (3) with a representation of the deceased performer as themselves, except in live performances of musical works; (4) *de minimis* or incidental uses, and (5) in advertisements or commercial announcements for any of the foregoing. These exceptions allow for some degree of fictionalization.

The statute and its exceptions are similar (but not identical) to California's post-mortem right of publicity law, which the California state legislature amended in 2024 to address the use of digital replicas there. For example, New York's statutory right of publicity lasts for 40 years post-mortem, while the California statute (AB 1836 / Civil Code § 3344.1) extends protection for 70 years after the individual's death (which timeline mirrors federal copyright law that protects works for the author's life plus 70 years).

In addition to the time limits, there is a major difference in how these timelines apply to people who passed away before the laws were written. California's law is retroactive, as it applies to personalities who died before the statute was enacted, provided they have been dead for fewer than 70 years (i.e., it covers individuals who passed away as early as January 1, 1915). New York's law is not retroactive, as the Empire State's post-mortem right of publicity only applies to individuals who passed away on or after the law's original effective date (which was established when the state first introduced post-mortem protections in April 2021). It does not retroactively protect the estates of historical New York icons who died prior to that timeline.

The net effect of this new law as amended in New York is that, while a producer may create a documentary or docudrama using a digital replica to depict a deceased celebrity as the celebrity without obtaining consent, a producer no longer may create a digital replica to depict a deceased celebrity playing a fictional role – i.e., a role that the celebrity would have been compensated for performing prior to the celebrity's death – without obtaining consent.

Finally, New York's digital replica amendment restricted the law's safe harbor for distributors who display, offer for sale or license, or sell a work that contains an unlawful digital replica. Lawmakers eliminated the safe harbor for distributors who are put on notice that the replica is not authorized and do not remove the work as soon as "technically and practically feasible."

As shown, the Supreme Court's decision in *Cox* has broad implications for the entertainment, media, advertising, telecommunications, and technology sectors, and it suggests the following practical guidance.

Practical Guidance for Attorneys Advising Clients in the Post-*Cox* Era

The practical lesson of *Cox* is not that contributory copyright infringement has disappeared. Rather, the decision leads us to envision where copyright or other liability is most likely to arise in its wake and to recommend that consideration be given to the following.

For entertainment companies:

- separate copyright rights from identity rights;
- address AI uses explicitly in talent agreements; and
- negotiate licensing structures before disputes arise.

For media organizations:

- evaluate AI licensing strategies;
- protect proprietary archives; and
- monitor market substitution risks.

For advertising agencies:

- require AI disclosure from vendors and freelancers;
- maintain provenance records; and
- update indemnification provisions.

For telecommunications companies:

- preserve neutral-platform arguments;
- maintain compliance procedures; and
- avoid conduct that could be characterized as intentional facilitation.

For technology companies:

- document lawful purposes and substantial non-infringing uses;
- maintain records regarding data sources;
- implement governance procedures; and
- avoid marketing that encourages infringement.

Part III. Conclusion: The Digital Frontier After *Cox*

In conclusion, the implications of the Supreme Court's decision in *Cox Communications v. Sony Music Entertainment* extend beyond ISPs and music piracy. The decision represents a broader judicial reaffirmation that copyright liability should follow intentional participation in infringement, and not merely the existence of infringement on a technology platform. That principle will shape the next generation of disputes involving not only copyright, but also AI, digital replicas, and synthetic performers.

The emerging legal framework will be increasingly defined by three key concepts:

- **Intent** – whether a company encouraged or facilitated infringement;
- **Transparency** – whether companies can demonstrate data and content provenance (among other aspects of responsible data and content practices); and
- **Contractual allocation** – whether parties clearly define rights, obligations, and risks before disputes arise.

For lawyers advising clients on these and other emerging issues in entertainment, media, advertising, telecommunications, and technology, the post-*Cox* era requires development of a broader understanding of technical, creative, business, and legal topics beyond just copyright.

Copyright law remains central, but attorney competency in the evolving digital landscape compels a multi-disciplinary approach encompassing corporate, commercial, contract, and consumer protection laws, AI regulation, and rights of privacy, publicity, and persona.

Creators, companies, and those who counsel them best positioned for this new digital frontier (at least for the next decade) will be those who treat copyright compliance not in isolation as a reactive litigation defense, but rather as a foundational element of a proactive holistic approach including technology design, creative contracting, and corporate governance.



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Endnotes

1. 146 S. Ct. 959 (2026).
2. 426 F. Supp. 3d 217 (Dist. Court, ED Virginia, 2019).
3. 93 F.4th 222 (4th Cir., 2024).
4. 146 S. Ct. 959 (2026).
5. 464 U.S. 417 (1984).
6. 545 U.S. 913 (2005).
7. *See, e.g., Ziff Davis v. OpenAI*, S.D.N.Y. (25-cv-4315), Memorandum Order dated 8/6/26, which notes: "Based on *Cox,* OpenAI moved pursuant to Rule 12(c) to dismiss Ziff Davis's contributory infringement claim." That motion was denied as moot when Ziff Davis withdrew its contributory infringement claim. Also post-*Cox:* (i) OpenAI leveraged *Cox* to pressure SDNY plaintiffs in *Authors Guild v. OpenAI* to amend their complaint and pivot from contributory liability to higher standard of "affirmative inducement;" (ii) Charter Communications successfully moved to dismiss contributory infringement claims made in *UMG v. Charter* (8th Cir.); and, (iii) the U.S. Supreme Court vacated the 5th Circuit's prior secondary liability ruling against the ISP in *Sony v. Grande Communications*.
8. Although the latest version of Suno's generative AI music system (V6) was trained on music licensed from Warner Music Group, record labels Sony and Universal are still pursuing legal claims against Suno (meaning that this tech company's shift to licensed training data doesn't make the wider legal controversy disappear).
9. S. 9586.
10. S. 4591.
11. FCC Notice of Proposed Rulemaking (NPRM), FCC 24-74.
12. NYS Election Law section 14-106.
13. NYS General Business Law section 396-b.
14. NYS Civil Rights Law section 50-f.

2026 Phil Cowan/Judith Bresler Memorial Scholarship Award Winner



Paying With House Money: How NCAA Schools Can Remain Title IX Compliant Following the *House* Settlement

By Jonathan Stevens

Introduction

The University of Connecticut (UConn) women's basketball team is the most decorated program in collegiate basketball.[1] Its 12 national championships are the most of any men's or women's basketball team, most notably including four consecutive titles from 2013–2016 and another in 2025.[2] With the women's team reporting $3.25 million in ticket sales for the 2024 fiscal year, many female athletes would expect a fair split of revenue-sharing dollars under the *House v. NCAA* settlement.[3] That $3.25 million led all of the women's basketball programs and exceeded the ticket sales of more than 75 public men's teams, including top programs like Alabama ($2.8 million), Louisiana State University (LSU) ($2.4 million), and Oregon ($2.3 million).[4] Importantly, the women's basketball team outsold the UConn football team by over $1 million.[5]

Amid its success, UConn has decided *not* to disclose the total amount of revenue-sharing dollars going to specific sports and athletes.[6] While there may be a legitimate privacy concern, it raises the question: Are female athletes receiving revenue-sharing payments that both comply with Title IX and are proportional to their success?[7] In the first year of the *House* settlement, UConn intends to share $18 million of the $20.5 million revenue-sharing cap with its student-athletes.[8] Nonetheless, men's football and basketball programs in the Power-4 Conferences are estimated to receive 90% of the revenue-sharing allocation.[9] While these programs have historically generated the most revenue for their respective schools, there must be a framework in place to account for underrepresented teams and athletes under Title IX, especially those that are consistently among the highest revenue-producing teams. This article examines the emerging collision between school-funded revenue sharing and Title IX's athletic framework in light of the *House* settlement.

In June 2025, U.S. District Court Judge Claudia Wilken approved the settlement in *House v. NCAA*,[10] allowing NCAA Division I schools to pay their athletes directly.[11] This decision fundamentally altered the landscape of collegiate athletics, as schools that opt into the settlement may spend up to $20.5 million on their athletes' name, image, and like-

ness (NIL) for the 2025–26 season through a process called revenue sharing.[12] Beyond prospective revenue-sharing, the NCAA has agreed to pay nearly $2.8 billion in back-pay damages from 2025 to 2035 to athletes who competed in collegiate sports any time from 2016 to present day.[13]

While this appears to be a step forward for "amateur" athletes within an association that recorded $1.4 billion in revenue for its 2024 fiscal year, it is not yet clear how the settlement money will be dispersed among each university's teams and athletes.[14] This uncertainty is especially significant under Title IX, a U.S. federal civil rights law that prohibits discrimination based on sex, because any compensation framework will have to be structured to avoid creating gender-based disparities.[15] Since 1972, Title IX has been the central driver of gender equity in college athletics, requiring federally funded schools to provide equal athletic benefits and opportunities.[16] At the same time, the *House* settlement has created conflicting guidance on whether Title IX policies will apply to revenue-sharing NIL, back-pay damages, and third-party NIL.[17]

The two presidential administrations that have addressed this issue have reached opposite conclusions. Under the Biden administration, the Department of Education's Office for Civil Rights (OCR) considered revenue-sharing NIL to be athletic financial assistance, meaning it should be divided proportionally between male and female athletes and comply with Title IX.[18] Meanwhile, the Department of Education's OCR under the Trump administration almost immediately rescinded that prior guidance, stating that Title IX "says nothing about how revenue-generating athletic programs should allocate compensation among student-athletes."[19] Division I schools that opt into the *House* settlement now face looming compliance uncertainties as they must design revenue-sharing and back-pay distribution models without clear, stable federal direction on how Title IX constrains those payments.[20]

This article argues that when a school directly compensates athletes for the use of their NIL, those payments should be treated as athletic financial assistance subject to Title IX, whereas third-party NIL compensation should be evaluated under Title IX's equivalent-benefits framework rather than strict proportionality principles.[21] It then proposes a framework for distributing revenue-sharing NIL in a way that preserves Title IX compliance without undermining a school's competitive position.[22]

Under this approach, compensation provided directly by a school would first be distributed proportionally based on the number of male and female varsity athletes. Then, it would be allocated according to the revenue generated by each men's and women's sport.[23] The 1979 Title IX Policy Interpretation makes it clear that athletic financial assistance extends beyond scholarships and grants and is therefore subject to Title IX.[24] However, Title IX only applies to educational programs or activities that receive federal financial assistance, and private companies, collectives, or donors do not fall within that category.[25] This proposal rests on the premise that third-party NIL should not be subject to proportionality, but only the equivalent-benefits provision of the 1979 Title IX interpretation.[26] As neither the Biden nor the Trump administration considered compensation paid by third parties to athletes for the use of their NIL to be athletic financial assistance, this approach represents a middle ground where schools can begin to make progress on Title IX compliance.[27]

The Solution for Schools To Remain Title IX Compliant

The central question becomes, what should constitute "athletic financial assistance" in a world of revenue-sharing and third-party NIL? In line with the since rescinded OCR fact sheet, as well as the financial assistance section of the 1979 Title IX interpretation, any compensation flowing from a school's own athletic budget is fundamentally analogous to athletic scholarship aid.[28] It is institution-controlled spending presented in the form of NIL licensing consideration, paid to students because of their participation in sports. Thus, it should be allocated proportionally in order to comply with Title IX.[29] On the other hand, treating third-party NIL as if they were university scholarships would be a drastic expansion of Title IX. Third-party sources, such as private companies, collectives, or donors, do not receive federal funding, and regulators wisely recognized the difference between these two sources of compensation.[30]

The fundamental rationale is that Title IX governs educational institutions' treatment of students.[31] It ensures that schools themselves do not discriminate on the basis of sex, while purely private transactions between students and third parties fall outside the scope of what Title IX directly regulates.[32] These third-party NIL deals are negotiated directly with student-athletes and compensation is distributed based on market forces rather than university involvement, meaning they are not subject to proportionality.[33] Here lies the potential middle ground, as neither the Trump nor Biden administration viewed third-party NIL compensation to be athletic financial assistance awarded by the school.[34] Instead, it should fall under the equivalent benefits and opportunities of the 1979 Title IX interpretation, allowing for potential differences in the benefits received between men and women while considering the nature of particular sports through the Javits Amendment.[35]

As the *House* settlement does not dictate how an institution must divide its revenue-sharing pool among teams or athletes, schools are left to design distribution rules that both preserve the revenue engine of major college sports and

manage the Title IX risk created by school-funded direct pay. My proposal gives them just that; it allows for universities to remain Title IX compliant in light of potential lawsuits stemming from revenue-sharing NIL, while also keeping them competitive by allowing third-party NIL to suit the needs of particular athletic programs. In using it, a participating school would allocate its $20.5 million cap through a two-step formula: (1) sex-proportionate allocation across the entire athletic program, and then (2) revenue-weighted distribution within each sex's pool.

Step One: Sex-Proportionate Allocation

This is accomplished by first calculating the male-female ratio of all varsity athletes, in line with the first provision of the 1979 Title IX policy interpretation.[36] My proposal would then apply this ratio to the revenue-sharing cap of $20.5 million, or the total amount of revenue-sharing dollars utilized at a given school.

Look at the University of Arkansas, for example, which has 15 total varsity athletic teams, of which six are men's sports and nine are women's.[37] Among the total number of those varsity teams, 53.61% of all athletes are male, and 46.39% are female. As Arkansas' Equity in Athletics Disclosure Act (EADA) indicates that men's teams account for roughly 98% of the athletic revenue that is allocated to specific varsity teams, and a pure pay-by-revenue approach would concentrate nearly the entire pool in football and men's basketball.[38]

The aforementioned discussion of athletic financial assistance shows how schools will face looming Title IX litigation if they continue to allocate school-controlled revenue-sharing dollars through this type of framework. If Arkansas follows, women in all nine team sports would receive a de minimis share of revenue-sharing, and it would be inconsistent with Title IX's requirement that institution-awarded athletic aid should be made in proportion to participation.[39]

Under my proposal, the $20.5 million cap would first be split based on a sex-proportionate allocation across the entire athletic program. Since 53.61% of Arkansas' athletes are male, and 46.39% are female, 53.61% of the revenue-sharing dollars would be split across all six men's teams (approximately $11 million), and 46.39% of the revenue-sharing dollars would be split across all nine women's teams (approximately $9.5 million). This initial split is what makes the model Title IX compliant. It treats revenue-sharing NIL as athletic financial assistance and ensures that the aggregate dollars made available to each sex are substantially proportionate to participation, mirroring the way Title IX had previously evaluated athletic scholarships and other institution-provided athletic aid.[40]

Step Two: Revenue-Weighted Distribution

Having already established that men's sports at Arkansas will receive about $11 million of revenue-sharing dollars through a sex-proportionate allocation across the entire athletic program, we will now disperse that money based on each sport's respective revenue. Arkansas football generates roughly $91 million within men's sports (73.79%), so it will receive 73.79% of the men's $11 million share (approximately $8 million).

The same is true for women's sports. As female athletes at Arkansas will now receive about $9 million of revenue-sharing dollars, with each sport receiving a percentage of its $9 million share that is proportional to its total revenue.[41]

By doing this, one recognizes the market reality that revenue sharing exists because certain sports generate a disproportionate share of media and revenue.[42] The key is that revenue weighting occurs within the men's pool and within the women's pool. This way, the highest earning men's and women's sport would receive the largest slice of their respective allocation, without allowing men's revenue sports to consume the funds that the first step set aside for women as a class.

Given that Arkansas football would be estimated to receive almost $15 million in revenue sharing during the 2025-26 year under a pure pay-by-revenue approach, the point of the two-step formula becomes clear.[43] Revenue weighting cannot be allowed to operate on the entire institutional pool, because it would predictably concentrate school-controlled payments in men's football and men's basketball, while leaving women's sports with a residual share untethered to participation. That is precisely the mismatch Title IX's athletic framework is designed to prevent when the benefit at issue is institution-provided athletic support.[44]

Under this proposal, Arkansas football still receives the largest slice of the men's pool, but only after women's athletics, as a class, receive a share of the institutional pool that corresponds to their participation. In other words, the model keeps football as the "engine" within men's sports while preventing it from consuming dollars that Title IX's proportionality principle would allocate to women.[45]

The Role of Third-Party NIL

Now, in terms of third-party NIL funds, my proposal views them through an equivalent benefits and opportunities lens.[46] These payments are not paid directly by the school and therefore do not fit comfortably within Title IX's athletic financial assistance bucket.[47] Instead, these third parties should be able to pay whichever athlete they choose, while the institution ensures that both male and female athletes have equivalent exposure to third-party funds.[48] The Biden administration's OCR memo made this clear by stating that



third-party NIL is not athletic financial assistance awarded by the school.[49] However, it also warned that privately sourced money can still create complications with Title IX.[50]

Overall, this framing accommodates the Trump administration's core objection that there is no automatic proportionality mandate for compensation, while preserving Biden's compliance insight that schools remain accountable for inputs that materially drive payments through third-party NIL.[51]

This means that third-party NIL under my proposal will look a lot like professional sponsorships, where the dollars follow the athlete's commercial value, and that value will differ dramatically by sport, position, performance, and personal brand. For example, Caitlin Clark's third-party NIL value was widely estimated in the $3.1 million range as she approached the Women's National Basketball Association (WNBA) draft, with major sponsors such as Nike, Gatorade, and State Farm.[52] This figure exceeds the average WNBA salary from 2025 by almost 30 times, but in sponsorship markets, that kind of dispersion is not an anomaly.[53]

The most recognizable athletes can command endorsement compensation that is out of reach for less visible athletes. As a result, Title IX compliance should not attempt to proportionalize private dollars, but instead ensure that the school provides NIL opportunities on an equivalent basis across men's and women's programs.

Moreover, third-party NIL has the ability to offset some of the funding losses certain teams may face due to revenue-sharing NIL proportionality. Industry reporting shows that the third-party NIL market as a whole has risen from $918 million to $3.6 billion, and it is estimated to reach $4.5 billion by 2026-27, with no signs of it slowing down.[54] Specifically, Power-4 teams averaged about $13.9 million in third-party NIL payments during 2024-25, and in this year's NCAA college football playoff, the average roster cost was $25.8 million per team, including both revenue-sharing dollars and third-party NIL for the sport of football alone.[55]

Taken together, these figures show that even if a program's revenue-sharing NIL is constrained by proportional allocation, third-party NIL has the ability to supplement that loss in funds.[56] For example, if the quarterback of the men's football team has more monetary value for his NIL compared to the left-fielder on the women's softball team, that discrepancy in value should not be constrained by Title IX proportionality. Instead, the value of that specific third-party NIL, as well as any others, would augment dollars that the football team "lost" when undertaking this two-step approach as opposed to a pure pay-by-revenue approach.

As a result, the third-party NIL space will undergo little change from how it already operates. Third-party deals remain driven by market demand and what private sponsors are willing to pay for access to an athlete's NIL.[57] Going back to our Arkansas example, starting quarterback Taylen Green reportedly had an NIL valuation of about $2.1 million during the 2025 season.[58] Green entered into a third-party NIL deal with Fletcher Auto Group, facilitated in part through the school's NIL Collective, rather than from the university as a revenue-sharing payment.[59] There was no proportionality aspect required from the University of Arkansas because it did not facilitate the deal; the private third-party Fletcher Auto Group would receive the monetary value from retaining Green's NIL.[60] In practice, deals like this can help offset, in whole or in part, the roughly $6 million the football team would "lose" when undertaking this two-step approach, as opposed to a pure pay-by-revenue model.[61]

Potential Concerns

However, because schools will not proportionalize third-party NIL dollars under this proposal, they must provide equivalent institutional conditions that shape third-party NIL opportunity.[62] This is especially important where the school is providing publicity, support services, or any facilitation that materially affects an athletes' ability to attract deals.[63] One potential way of achieving this is to treat third-party NIL support as an athletics-wide service. Having a third-party NIL office that offers the same categories of assistance to men's and women's programs, including brand education, financial literacy, access to content creation, and resources, among other things, would be an ideal step forward.[64] Furthermore, schools can make publicity a measurable statistic. An athletics department can track the coverage of their men's and women's sports through social media and promotional efforts to ensure it is providing equivalent opportunities to both.

Another possible concern is if NIL Collectives become the primary compensation channel. Then, Title IX risk will depend less on proportional allocation of the school's revenue-sharing money and more on whether the school's NIL ecosystem systematically advantages one sex in attracting private dollars. Moreover, if an NIL Collective becomes so intertwined with a university that it is functionally an attachment of that university, student-athletes may argue that this "private" label is misplaced, and that the school must treat this type of compensation proportionally.[65] Time will tell if the NIL Go clearinghouse will be a sufficient method to monitor compliance in third-party NIL compensation, and whether collectives at specific universities will surpass the revenue-sharing cap on a year-by-year basis.

Conclusion

The revenue-sharing regime created by the *House* settlement is widely expected to direct the bulk of school-controlled compensation toward football and men's basketball.[66] Title IX's framework is built to prevent just this, an institution allocating its athletic department funds in a way that systematically disadvantages one sex relative to participation.[67] As the cap escalates from $20.5 million toward the low $30 millions over the next decade, so do the incentives to concentrate revenue sharing NIL payments into the sports that generate the most revenue.[68] In light of this, Title IX based challenges surrounding the *House* settlement and institutions' distribution choices are certainly expected in the near future.

This proposal offers a coherent compliance architecture: (1) a sex-proportionate, participation-based allocation of the school's revenue-sharing NIL pool followed by (2) revenue-weighted allocation within each sex's pool. The Arkansas illustration shows why this matters, as a pure pay-by-revenue approach would deliver the football team nearly $15 million in revenue-sharing, while the two-step model reduces this

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payment to about $8 million. Women's sports and smaller teams will benefit from this due to the participation-based step, guaranteeing that women as a class will receive their proportional share of school-controlled pay.[69] Within that protected women's pool, revenue weighting can still reward women's sports that produce the most revenue, while also providing a meaningful new compensation dimension for female athletes that do not, or cannot, rely on private third-party sources.[70]

At the same time, this framework preserves space for third-party NIL to function like sponsorship markets. As these are private transactions, an acceptable compliance posture is not to force the proportionality of private dollars, but to guarantee equivalent benefits and opportunities. Schools should ensure that the availability, quality, opportunities, and treatment afforded to third-party NIL are equivalent to members of both sexes. By doing this, schools can abide by Title IX's requirements while still maintaining a competitive roster, even if the total amount of compensation is greater in one sex than another. Institutions of higher education that follow this combined approach of proportional school-funded pay and documented equivalence-of-opportunity within third-party NIL are better positioned to avoid being the test cases in the next wave of Title IX litigation, while also having the capacity to fund top revenue-producing programs.



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7. *Id.*
8. David Benedict, *House Settlement Approved: A New Era for College Athletics*, Univ. of Conn. Athletics (June 9, 2025), https://uconnhuskies.com/news/2025/6/9/general-house-settlement-update.
9. Patrick O'Rourke, *Estimated NIL & NCAA Revenue Sharing 2025–26*, NIL-NCAA https://nil-ncaa.com. (Although UConn competes in the Big East Conference, the point remains directly relevant because the Big East does not sponsor football, and UConn is the league's only member that fields varsity football at the NCAA Division I FBS level. The football team competes as an FBS independent, meaning that UConn still faces many of the same roster-size, recruiting, and budget pressures that drive how revenue-sharing dollars are typically allocated at major programs.).
10. *House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021).
11. Dan Murphy, *Judge OK's $2.8B Settlement, Paving Way for Colleges to Pay Athletes*, ESPN (June 6, 2025), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement.
12. *See id.* ("The annual cap is expected to start at roughly $20.5 million per school in 2025-26 and increase every year during the decade-long deal. These new payments are in addition to scholarships and other benefits the athletes already receive.").
13. *See id.* (Explaining that the back-pay damages are meant to compensate student-athletes for years in which NCAA rules restricted NIL earnings).
14. Steve Berkowitz, *NCAA shows revenue increase to $1.4 billion and $166 million surplus in 2024 fiscal year*, USA Today (Feb. 27, 2025), https://www.usatoday.com/story/sports/college/2025/02/27/ncaa-financial-report-revenue-surplus/80733616007/.
15. *Title IX and Sex Discrimination,* U.S. Dep't of Educ. (June 23, 1972) https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination.
16. *See id.*
17. Revenue-sharing NIL refers to payments made directly by an institution of higher education to a student-athlete, whereas third-party NIL refers to payments made by outside entities rather than the school itself.
18. *Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities*, U.S. Dep't of Educ., (Jan. 2025), https://calmatters.org/wp-content/uploads/2025/02/ocr-factsheet-benefits-student-athletes.pdf ("Compensation provided by a school for the use of a

student-athlete's NIL constitutes athletic financial assistance under Title IX because athletic financial assistance includes any financial assistance and other aid provided by the school to a student-athlete that is connected to a student's athletic participation; it is not limited to scholarships or grants.").

19. *U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation*, U.S. Dep't of Educ. (Feb. 12, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-rescinds-biden-11th-hour-guidance-nil-compensation.
20. *See supra* notes 17–18.
21. *See infra* Part VI.
22. *Id.*
23. *Id.*
24. *Policy Interpretation: Title IX and Intercollegiate Athletics*, U.S. Dep't of Educ. (Dec. 11, 1979), https://www.ed.gov/laws-and-policy/civil-rights-laws/federal-register-notices-and-regulations/policy-interpretation-title-ix-and-intercollegiate-athletics ("When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent-benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.").
25. *Id.*
26. *See generally id.*
27. *See supra* notes 17–18.
28. *Supra* note 17 ("Compensation provided by a school for the use of a student-athlete's NIL constitutes athletic financial assistance under Title IX because athletic financial assistance includes any financial assistance and other aid provided by the school to a student-athlete that is connected to a student's athletic participation; it is not limited to scholarships or grants. Thus, the various forms of financial assistance that could be provided by a school to student-athletes include, but are not limited to, scholarships, cost-of-attendance awards, other types of compensation and financial assistance permitted to be provided by schools following a federal court injunction, and compensation from schools for use of a student-athlete's NIL.").
29. *Id.*
30. *Id.* (". . . [C]ompensation provided by a school for the use of a student-athlete's NIL constitutes athletic financial assistance under Title IX. By contrast, OCR does not view compensation provided by a third party (rather than a school) to a student-athlete for use of their NIL as constituting athletic financial assistance awarded by the school that must comply with 34 C.F.R. § 106.37(c).").
31. *Supra* note 14.
32. *Id.*
33. Randall Hallett, *Why Revenue Sharing Dollars/NIL Is Likely to Fall Under Title IX Rules in College Sports (Eventually)*, Hallett Philanthropy (Mar. 31, 2025), https://www.hallettphilanthropy.com/blog/why-revenue-sharing-dollarsnil-is-likely-to-fall-under-title-ix-rules-in-college-sports-eventually.
34. *Supra* notes 17-18.
35. *Supra* note 23. (Publicity is specifically listed under the equivalent benefits and opportunities section of the 1979 Title IX interpretation, and because third-party NIL is a way of monetizing exposure, it fits here practically.).
36. *Id.*
37. *NCAA Membership Financial Reporting System* (Reporting Year (FY): 2024) (AUP Report Issuance Date: Jan. 3, 2025), https://arkansasrazorbacks.com/pdf/athletics/ncaa-membership/2023-24.pdf (Arkansas University has planned to allocate the full amount of the revenue-sharing cap of $20.5 million.).
38. *EADA Gender Equity*, Univ. of Ark. Off. of Strategic Analytics & Insights https://osai.uark.edu/surveys/eada/ (Arkansas's 2024–25 EADA report attributes $123,033,976 in total revenues to men's teams and $1,639,561 to women's teams; within those team-attributed totals, football accounts for $90,791,403 and men's basketball accounts for $25,392,395.).
39. Under this framework, women's sports would receive a mere $269,592 of revenue-sharing to be split across their nine varsity teams.
40. *Supra* note 23.
41. In this case, softball generates the highest percentage of women's revenue at 34.74%. Therefore, softball will receive 34.74% of the women's $9 million share (approximately $3 million).
42. For example, men's football and basketball consistently generate the most amount of revenue for men's sports, while women's basketball generates the most amount of revenue for women's sports.
43. Football generates 72.82% of all athletic revenue that is allocated to specific varsity teams, therefore under a pure pay-by-revenue approach, they would be set to receive $14.93 million of revenue-sharing dollars alone (compared to the $8 million of revenue-sharing dollars under my proposal).
44. *See supra* note 23.
45. *Id.*
46. *See id.*
47. *Id.*
48. *Supra* note 23. (Exposure, in this sense, would be weighed by the availability, quality, and treatment afforded to both sexes. "Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect.").
49. *Supra* note 17.
50. *Id.* ("It is possible that NIL agreements between student-athletes and third parties will create similar disparities and therefore trigger a school's Title IX obligations. Because these NIL agreements vary widely and continue to evolve and because the application of Title IX's equal athletic opportunity requirements is a fact-specific inquiry, this Fact Sheet does not offer specific guidance on Title IX's application in the context of compensation provided for the use of a student-athlete's NIL by a third party, including an NIL collective.").
51. *Supra* notes 17–18.
52. Dan Treacy, *Caitlin Clark's NIL Deals, Explained: How Much Money Iowa Star Makes from Nike, Other Sponsors in 2024*, Sporting News (Mar. 30, 2024), https://www.sportingnews.com/us/ncaa-basketball/news/caitlin-clark-nil-deals-money-iowa-nike-sponsors-2024/e58534cadc3b2960663a36cb.
53. Annie Costabile, *Inside the WNBA's Proposed New Economic System: Bigger Share for Stars, Less for Middle Class, Front Off.* Sports (Feb. 25, 2026), https://frontofficesports.com/wnba-cba-max-salaries-share/ ("The supermax salary in 2025 was $249,244, and the standard max was $214,466. The veteran minimum was $78,831, and the minimum for players with less than three years of experience was $66,079. The average salary was roughly $125,000.").

54. OPENDORSE, THE OPENDORSE ANNUAL NIL REPORT 4 (June 2026), https://biz.opendorse.com/annual-nil-report-2026/.

55. *Supra* note 9. (This $25.8 million figure is significant because it pertains to football alone. While schools are subject to a $20.5 million cap on revenue-sharing NIL funds across all university athletics, third-party NIL funds remain uncapped.).

56. *Id.* ("Our estimated average is just under $26 million per team, of which approximately $15 million is directly paid by schools via revenue sharing and $ 11 million is paid via third-party NIL".).

57. *Id.*

58. *Top 25 College Athletes with Highest NIL Valuations*, Fox Sports, https://www.foxsports.com/stories/college-football/top-25-college-athletes-highest-nil-valuations.

59. Pete Nakos, *Arkansas QB Taylen Green Lands New Truck Through NIL Deal*, ON3 (July 7, 2024), https://www.on3.com/nil/news/arkansas-qb-taylen-green-lands-new-truck-through-nil-deal/.

60. *Id.*

61. Kim Souza, *Tyson Foods Inks Deal to Support Razorback Athletics*, Talk Business and Politics (Mar. 4, 2026), https://talkbusiness.net/2026/03/tyson-foods-inks-deal-to-support-razorback-athletics/ (It is important to note that the University of Arkansas recently added a "Tyson Foods" jersey patch which will help provide money to third-party NIL efforts. "Tyson said 90% of the revenue generated from the efforts will go to athletes through their name, image, and likeness (NIL) opportunities. UA Athletic Director Hunter Yurachek said the sponsorship is transformative for Razorback athletics.").

62. *Supra* note 17. ("However, OCR has long recognized that a school has Title IX obligations when funding from private sources, including private donations and funds raised by booster clubs, creates disparities based on sex in a school's athletic program or a program component. The fact that funds are provided by a private source does not relieve a school of its responsibility to treat all of its student-athletes in a nondiscriminatory manner.").

63. *Id.*

64. *See generally id.*

65. This could occur if NIL Collectives and University Athletic Departments are sharing personnel, operating under the school's direction, or serving as a de facto distribution arm.

66. *Supra* note 9.

67. *Supra* note 14.

68. *Supra note* 9.

69. *Id.*

70. *Id.*

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Acquisition, Not Just Use: The Copyright Theory Anthropic Can't Shake

By James Parker

Introduction

Anthropic PBC (Anthropic) is currently defending four related copyright actions arising from the same underlying conduct: large-scale acquisition of copyrighted works of books, song lyrics, and musical compositions, to train its Claude line of Large Language Models (LLMs). In *Bartz v. Anthropic*, a class of authors won a $1.5 billion settlement after Judge Alsup drew a sharp line between lawfully acquired training data, which was held to be fair use, and pirated library copies, held not to be, regardless of whether those copies were ever used for training. That distinction now anchors three parallel suits brought by music publishers and BMG Rights Management GmbH (BMG), which import the *Bartz* piracy theory directly into the music context and add personal liability claims against Anthropic's leadership. Together, these four cases offer a real-time view of how a single doctrinal line, drawn first in the book publishing context, is being tested and potentially extended in music.

Bartz v. Anthropic

On August 19, 2024, a class action was filed against artificial intelligence (AI) company Anthropic.[1] Authors Andrea Bartz, Charles Graeber, and Kirk Wallace were the lead plaintiffs. The authors alleged that Anthropic infringed upon their copyrighted works by assembling a massive central library of books, sourced from both pirate websites and purchased print copies, and then used those books to train its LLMs, all without authorization from rights holders.[2] In December 2024, the authors amended their complaint to add their loan-out companies as plaintiffs.[3]

The factual crux of the case is Anthropic's deliberate effort to amass what is described by its own employees as a library of all the books in the world to be retained forever. Anthropic downloaded millions of copyrighted books in digital form from pirate sites on the internet at no cost. It also purchased physical copies of books and uploaded them as digitized files. From this library, Anthropic selected various sets and subsets of books to include in "data mixes" used to train LLMs.[4]

Rather than moving to dismiss, Anthropic sought and was granted permission to file an early motion for summary judgment on the affirmative defense of fair use under 17 U.S.C. § 107.[5] Judge William Alsup split the analysis into three distinct categories of copying under the four-factor fair use framework and reached three different answers.

The court held that Anthropic's copying of works to train its LLMs to generate new text was transformative and constituted fair use.[6] The *Bartz* court named the technology as among the most transformative many will see in their lifetimes, reasoning that Anthropic's LLMs trained upon works not to replicate or supplant them, but to transmute them and create something entirely different.[7] Critically, the plaintiffs did not allege that any LLM output actually reaching users infringed upon their works. The record instead demonstrated that users interacted only with the LLM, which placed additional software between the user and the underlying LLM to ensure that no infringing output ever reached users.[8] The court found that every fair use factor but the first one, the nature of the copyrighted works (which are expressive), favored Anthropic on the training use issue.[9]

The court also held that Anthropic's digitization of printed copies of books it had purchased was fair use, but for a different reason than the training use.[10] The format change itself added no new copies, eased storage and enabled searchability, and did not trench upon the copyright owners' rightful interests.[11] As the purchased print copy was destroyed and its digital replacement was not redistributed, the court found this use to be transformative on balance.[12]

However, the court held that Anthropic's downloading of pirated digital copies of copyrighted works for retention in its central library was not a fair use,[13] finding against the company in every factor. Anthropic's own employees stated that copies, including pirated ones, would be retained forever for general purpose, even after Anthropic determined that it would never use certain copies to train LLMs.[14] The court reasoned that building a permanent library of works to be available for any number of further uses was itself the use for which Anthropic acquired these copies, and that pirating copies to build a research library without paying for them was its own use, and not a transformative one.[15] The court denied summary judgment as to whether pirated library copies must be treated as training copies, leaving that question for trial.[16]

The court granted Anthropic's motion for summary judgment in part and denied it in part, and ordered a trial on the pirated copies use to create Anthropic's central library and the resulting damages, actual or statutory, including for willfulness. The court noted that buying a book after pirating it does not erase the theft, although it may soften the analysis of statutory damages.[17]

Before reaching final approval of settlement, these two rulings were poised to define where this case stood: the June 23, 2025 fair use ruling and the July 17, 2025 class certification order. Together, they set the stage for a class trial on Anthropic's liability for downloading pirated books and the resulting damages.[18] The case was positioned for trial on the pirated library copies, with the court having already resolved the training fair use question in Anthropic's favor. The conditional class certification required that plaintiffs file a comprehensive per-work list by September 2025, a prerequisite to the class proceeding.

The *Bartz* rulings have already influenced parallel AI copyright litigation. In *Kadrey v. Meta Platforms, Inc.*, Judge Chhabria found that Meta's reproduction of books for LLM training was fair use when viewed in light of the overall transformative purpose, and held that Meta's downloading from shadow libraries must be considered in light of that transformative purpose rather than as a wholly separate use.[19] However, the court did not rule on whether the downloading and distribution itself constituted fair use, leaving that issue for future resolution. The *Kadrey* court's analysis of how downloading should be considered in the context of a transformative use differs in approach from Judge Alsup's treatment in *Bartz*, where the pirated library copies were analyzed separately and found not to be fair use. This divergence in analytical framework seems to signal an emerging question about how courts should evaluate AI companies' use of pirated sources in the training pipeline. The case never reached that trial. On July 20, 2026, Judge Martinez-Olguin granted final approval of a $1.5 billion settlement, the largest copyright class action recovery in history, resolving Anthropic's liability for the pirated library copies before the jury could decide. The settlement covered roughly 482,000 works on a court-approved list, with eligible authors recovering an average of approximately $3,000 per work, and required Anthropic to destroy the pirated files underlying the claims. Notably, the release reached conduct only through August 25, 2025; it did not cover claims arising from AI-generated outputs, future conduct, or any works outside the certified class, including the song lyrics and compositions at issue in the cases below.[20]

Concord Music Group v. Anthropic PBC (*Concord I*)

Anthropic's first fight over lyrics began in Nashville. Music publishers, including Universal Music Group N.V. (UMG), Concord Music Group, and ABKCO Music, among others, sued Anthropic on October 18, 2023, originally in the Middle District of Tennessee, later consolidated in Northern District of California.[21] Collectively, the publishers own the exclusive rights to millions of musical compositions and identified nearly 500 exemplars in their complaint, from the Beach Boys to Beyonce.

The core factual allegation was twofold: first, that Anthropic made unauthorized copies of the lyrics as input to train Claude and second, that when prompted by users, Claude reproduced output containing verbatim or near-verbatim copies of those lyrics.[22] On that basis, the publishers asserted four causes of action under the Copyright Act, 17 U.S.C § 101: (1) direct copyright infringement; (2) contributory copyright infringement; (3) vicarious copyright infringement; and (4) removal or alteration of copyright management information (CMI) in violation of 17 U.S.C. § 1702.[23] Anthropic's defense from the outset was fair use under 17 U.S.C. § 107.[24]

Shortly after filing, the publishers moved for a preliminary injunction in the Middle District of Tennessee. Anthropic responded by moving to dismiss for lack of personal jurisdiction and improper venue, or alternatively to transfer venue.[25] On June 24, 2024, Judge Waverly Crenshaw Jr. granted the motion in part and ordered the case transferred to the Northern District of California.[26]

After the transfer, on August 1, 2024, the publishers filed a new motion for preliminary injunction, with the argument heard on November 25, 2024.[27] Before the ruling, the par-

ties struck a partial deal: A January 2, 2025 stipulation in which Anthropic agreed to maintain already implemented guardrails on its current AI models and products to prevent verbatim lyric reproduction, and to apply similar guardrails to new LLMs and products going forward,[28] thus resolving output-based infringement for purposes of the motion. The remaining dispute focused solely on input-based infringement, or whether Anthropic should be enjoined from using the publishers' lyrics to train future AI models.

On March 25, 2025, Judge Eumi K. Lee denied the preliminary injunction and upon applying the four-factor Winter test, the court found that the publishers had failed to demonstrate a likelihood of irreparable harm, which is a prerequisite for injunctive relief in copyright cases per Ninth Circuit precedent.[29] The court found two independent grounds for denial.

First, the court reasoned that the request for relief was unmanageable and overbroad, as the publishers could not define how many songs would be covered. With numbers climbing into the hundreds of thousands, including future works publishers might acquire, combined with Anthropic's argument that excluding an undefined and ever-shifting universe of works from its training corpus would be virtually impossible, the court could find no manageable process through which it could enjoin the use of the works for training purposes without unduly burdening Anthropic.[30]

Second, the court found that the publishers failed to demonstrate irreparable harm on either of their two theories.[31] In relation to reputational harm, the publishers' complaints were largely duplicative, stating damage only in general and conclusory terms, without identifying any specific harm from the use of lyrics as training input.[32] Here, the court noted that accepting a showing on such grounds would imply automatic entitlement to injunctive relief in all copyright cases, a premise the Ninth Circuit had already rejected.[33] On market-related harm, the publishers submitted no evidence that Anthropic's use of lyrics to train Claude reduced fees with existing licensees or aggregators.[34] The court denied the motion without prejudice and reserved the merits questions, including whether the publishers could plausibly state direct or secondary infringement claims, for subsequent proceedings.[35]

Anthropic's Rule 12(b)(6) motion to dismiss was argued on December 19, 2024 and taken under submission.[36] Following rulings on the publishers' motion to dismiss and subsequent amended pleadings, the case proceeded with all claims surviving: direct copyright infringement, contributory infringement, vicarious infringement, and the CMI claim under 17 U.S.C. § 1702. Anthropic filed its Answer to the First Amended Complaint on October 22, 2025.

Anthropic has maintained that its use of copyrighted song lyrics to train Claude constitutes fair use. A fair use defense requires courts to weigh four statutory factors: (1) the purpose and character of the use, including whether it is transformative; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use on the potential market for or value of the copyrighted work.[37] The crux of Anthropic's argument is that training an LLM is a highly transformative use because the purpose of ingesting lyrics is to enable the model to learn patterns of language and not to reproduce or substitute the original works. This argument has found traction in parallel litigation *Bartz v. Anthropic PBC*.[38] That case, however, presents a potentially distinct fact pattern. Song lyrics are short, highly expressive works, the type of creative expression copyright law protects most zealously, and the publishers have alleged that Claude reproduced them verbatim in its outputs, which distinguishes this case from *Bartz*. The January 2025 stipulation addressed the output-based reproduction issue going forward, but the input-based training question and the historical output-based infringement remain live. The U.S. Copyright Office's May 2025 report on AI and copyright concluded that fair use for AI training is a fact-specific determination that depends heavily on the nature of the works, how they are used in training, and the purpose and functional-



ity of the AI system.[39] Given these fact specific considerations and the distinctive nature of the song lyrics as highly expressive works, the outcome in this case remains uncertain.

The most significant development in this matter is the publishers' filing of a Motion for Partial Summary Judgment on March 23, 2026, moving the case squarely into the merits phase following the completion of at least some discovery. Anthropic filed its answer to the first amended complaint on October 22, 2025. The case is now in active litigation before Judge Lee, with the direct copyright infringement claim (both input-based and historical output-based), contributory infringement, and vicarious infringement, and CMI claims all pending on the merits.

Concord Music Group v. Anthropic PBC (*Concord II*)

In January 2026, the same music publishers filed a second, separate action, against Anthropic and, most notably, two individual defendants: Anthropic's CEO Dario Amodei and its co-founder Benjamin Mann. The new complaint was assigned to the same judges (Lee and Susan van Keulen), but raised significantly expanded allegations that went beyond the original case's focus on lyric theft.[40]

The January complaint alleges four categories of wrongdoing. First, the publishers allege that Anthropic engaged in large-scale, unauthorized torrenting of their musical compositions from pirating websites in order to build its own permanent library. This mirrors allegations that have been central to the *Bartz* litigation, where the court found that Anthropic's downloading of pirated copies of books, even if not ultimately used for training, was not protected by fair use and ordered a trial on resulting damages Second, the complaint further alleges that when using BitTorrent to download the works, Anthropic simultaneously uploaded unauthorized copies of the publishers' work to the public, thereby violating the publishers' exclusive distribution rights and encouraging further infringement by other BitTorrent users. Third, the publishers allege that even after the original lawsuit was filed in October 2023, Anthropic continued to knowingly copy their works to train new versions of Claude, and that Claude continues to generate infringing output containing the publisher's lyrics. Finally, the complaint alleges that by taking the publishers' works without first obtaining licenses, Anthropic undercuts the market for those works and lowers their overall value.[41]

On those allegations, the January 2026 complaint asserts the following: (1) direct copyright infringement via torrenting (against all defendants); (2) direct copyright infringement via training and output (against Anthropic); (3) contributory copyright infringement (against Anthropic); (4) vicarious copyright infringement (against Anthropic) and; (5) removal or alteration of CMI (against Anthropic), and the inclusion of Amodei and Mann as individual defendants.[42] No published judicial opinions have been issued in the January 2026 action as of the date of this article.

The filing of the action itself is the headline here, which dramatically expands the scope of the publishers' claims against Anthropic by adding torrenting-based distribution infringement and naming individual executives as defendants. Meanwhile, the original action advances toward summary judgment, with the publishers' motion for partial summary judgment filed on March 23, 2026, pending before Judge Lee.

BMG Rights Management v. Anthropic

On March 17, 2026, BMG sued Anthropic in the Northern District of California. BMG holds the rights to millions of compositions and lists nearly 500 that have been allegedly infringed upon, including songs like "What a Wonderful World," "Uptown Funk," "You Can't Always Get What You Want," and "Kryptonite." The complaint alleges that Anthropic scraped lyrics from the open web and downloaded pirated songbooks and sheet music to train its LLM. Additionally, it alleges that Claude has generated full or substantial portions of specific songs on request.[43]

Specifically, BMG lodges five claims: (1) direct infringement through training and outputs, (2) direct infringement via torrenting, (3) contributory infringement, (4) vicarious infringement, and (5) removal of CMI.[44] The arguments are clearly a coordinated effort against Anthropic, leveraging arguments that proved effective against the company in previous litigation: combining the "scraping" theory from *Concord I* with the "piracy" theory from *Concord II*/*Bartz* in a single filing, as well as adding the direct output infringement theory, which is distinct from, and likely easier to prove than, the training output theory.[45]

While the case is still young, it is situated in an evolving web of related AI actions. BMG's legal strategy directly weaponizes a finding that already cost Anthropic dearly: as in *Bartz*, torrenting copyrighted works can carry massive liability on its own, independent of whether the material was ever used for training. With the *Bartz* settlement's historic $1.5 billion price tag, music publishers have clear incentive to fold piracy and torrenting claims straight into their own complaints rather than litigate scraping and training theories alone.

While the response to BMG is still in the works, the AI company's defense strategy might be illuminated by previous lawsuits it has defended. Unlike other competitors who have started entering licensing deals with music publishers, Anthropic maintains that using copyrighted data to train AI models is a transformative process protected by the fair use doctrine.

Conclusion

Together, these four cases trace a single question stretching from books to music: does the method of acquiring training data matter independently of how transformatively it is later used? In *Bartz*, Judge Alsup answered yes, treating pirated library copies as unprotected regardless of whether they were ever used for training. That distinction now anchors *Concord II* and *BMG*, both of which import the *Bartz* piracy theory directly and pair it with personal-liability claims against Anthropic's leadership, claims made possible by discovery from the Bartz record itself.

Concord I is positioned to answer the harder question first: whether short, highly expressive lyrics warrant a different fair use outcome than the book-length works in *Bartz*. That ruling will likely shape how much leverage the piracy and personal-liability theories carry in the later cases.

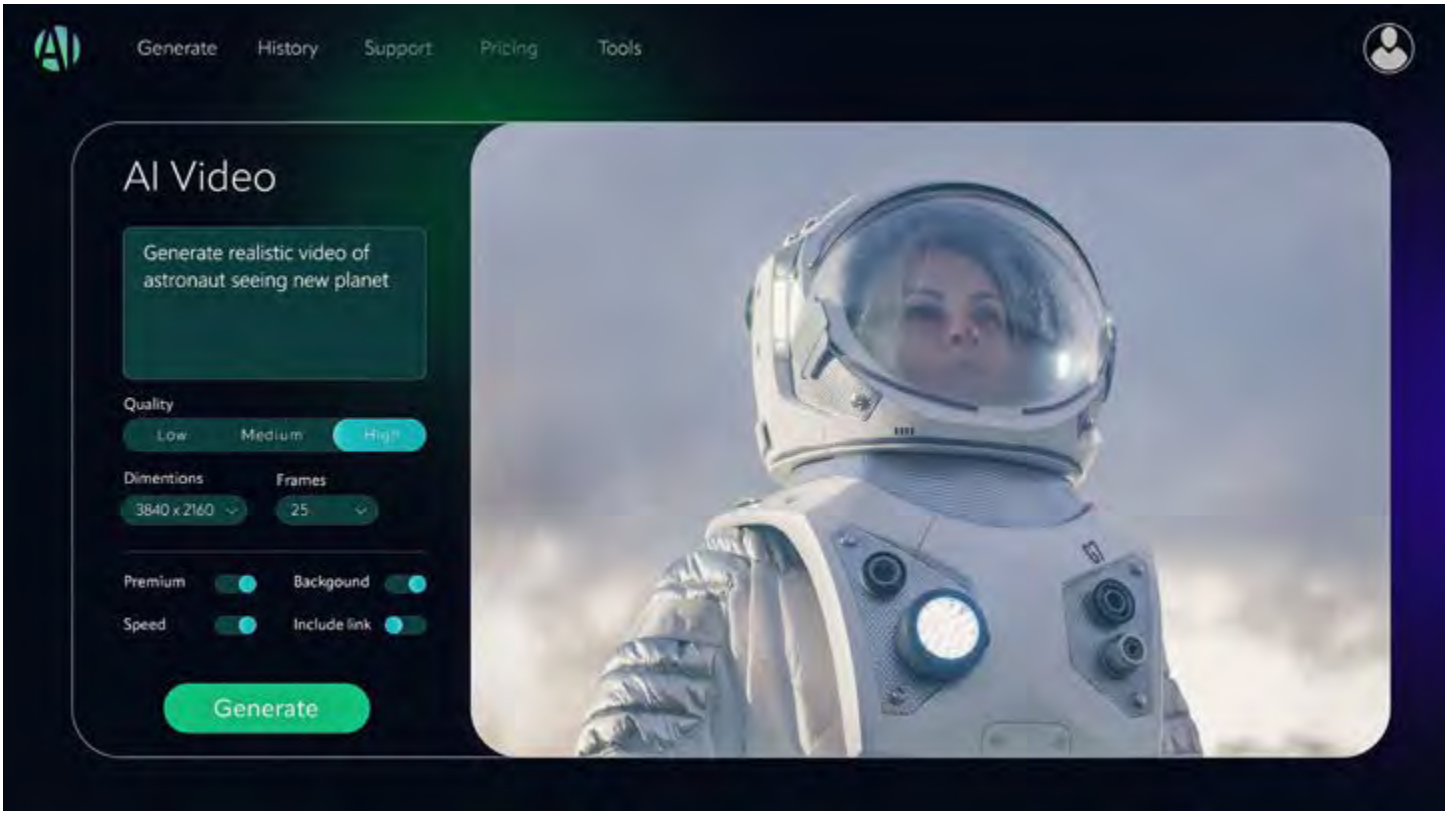
For practitioners in the entertainment space, the emerging lesson is less about the ultimate fair use answer, still unsettled even for books, and more about acquisition risk: Companies that can point to licensed sources are meaningfully better positioned than those relying on pirated ones, and the *Bartz* settlement's price tag has clearly emboldened rightsholders in other content categories to litigate that theory rather than license first.



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Endnotes

1. *Bartz v. Anthropic PBC*, 787 F.Supp. 3d 1007 (N.D. Cal. 2025).
2. *Id.*
3. *Bartz v. Anthropic PBC*, 791 F. Supp. 3d 1038 (N.D. Cal. 2025).
4. *Id.*
5. *Bartz v. Anthropic PBC.*
6. *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025); *Bartz v. Anthropic PBC*, 791 F. Supp. 3d 1038 (N.D. Cal. 2025).
19. *Kadrey v. Meta Platforms, Inc.*, 788 F. Supp. 3d 10266 (N.D. Cal. 2025).
20. *Bartz v. Anthropic PBC*, No. 3:24-cv-05417-AMO (N.D. Cal. July 20,2026 (order granting final approval of class action settlement).
21. *Concord Music Grp., Inc. v. Anthropic PBC*, 738 F. Supp. 3d 973 (M.D. Tenn. 2024).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Concord Music Grp., Inc. v. Anthropic PBC*, 772 F. Supp. 3d 1131 (N.D. Cal. 2025).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. 17 U.S.C.A. section 107.
38. 787 F. Supp. 3d 1007 (N.D. Cal. 2025)
39. Generative AI and Copyright, Practical Law Practice Note w-0430-4877.
40. *Concord Music Grp., Inc. v. Anthropic PBC*, No. 5:26-cv-00880 (N.D. Cal. Jan. 28, 2026).
41. *Id.*
42. *Id.*
43. *BMG Rights Management LLC., v. Anthropic PBC*, No. 5:26-cv-02334 (N.D. Cal. Mar. 17, 2026).
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Channels of Commerce and Instruments of Creation: A Commerce Clause Framework for Federal Regulation of GAI in Entertainment Production

By Chabelly Pacheco Maluly

I. Introduction

The use of generative artificial intelligence (GAI) in the entertainment industry is a legitimate concern because its imminent use in the creative, production, and distribution processes raises cataclysmic questions of ownership and authorship, the displacement of human labor, and the overall economic impact the application of such a new technology poses to traditionally made and commercially successful entertainment output.

More than a century ago, in *Burrow-Giles Lithographic Co. v. Sarony*, these same issues arose upon the creation of the photograph via the camera. In this case, the Supreme Court grappled with the issue of whether the photograph, which was considered a possible threat to the foundation of creative authorship, would warrant copyrightable protection because it was a product of a machine or technology, and not a product entirely by a human being. The Court held that the photograph in question was an original work of art, therefore qualifying for copyright protection because it was the human mind's intellectual effort that arranged the photograph's components, and then decided to encapsulate the moment in a photo.

Today, the entertainment industry is facing a similar and defining moment, because GAI is a new technology that is capable of assisting in the writing of scripts, the generating of visual effects, the replicating of human performers, and the delivering of content across the world. However, unlike with camera technology, the legal system has yet to provide a response to the threats that GAI poses to entire ecosystems sustained by entertainment production.

In 2023, the D.C. Circuit Court in *Thaler v. Perlmutter* affirmed that AI-generated work continues to require human authorship in order to qualify for copyright protection.[1] However, the circuit court declined to rule on *how* current intellectual property frameworks should adapt to the inevitable use and rise of GAI tools across film, television, and video

game creation, production, and distribution. Ultimately, this silence should be interpreted in a manner that addresses this legal and regulatory vacuum.

This article argues that the Commerce Clause of the United States Constitution poses as the strongest authority for federal regulation of GAI in the entertainment industries. I will provide analysis through this framework by applying the three-prong test from *United States v. Lopez*, further establishing that GAI tools travel through the channels of interstate commerce, function as instrumentalities of interstate commerce, and substantially affect interstate commerce in the aggregate. Furthermore, all three *Lopez* prongs should be concurrently satisfied because entertainment creation, production, and distribution are inherently economic activities that constitute interstate commerce.[2]

II. Overview of Entertainment Production in Film, TV, and Video Games

A. Defining Entertainment Production Through the Creative, Production and Distribution Pipeline

The pipeline that defines entertainment production, starting from the ideation and creative process, to the production stage involving editing, visual effects, and the eventual distribution of the finished product via theatrical releases and streaming platforms, functions as a single commercial organism composed of interdependent parts and processes. This pipeline structure has remained consistent throughout decades of practice by the film and television industries. The video game industry holds a similar structure led by game studios, composed of an initial design stage, followed by subsequent testing and development, and then delivery and distribution.

B. The Interstate Nature of Entertainment Production

These pipelines not only sustain individual and collaborative creation, but also entire economies through inherently interstate and commercial activities. For example, the global film industry market was estimated to be worth $112.9 billion in 2025, with an estimated growth of 9.7% from 2026 to 2033, to reach the projected amount of $231.4 billion.[3] The U.S. television industry, which includes broadcasting and cable TV, is valued at an estimated $129.91 billion,[4] and the video game industry is projected to bring $353 billion in revenue by 2030.[5] These increasing figures cannot be made possible without the interdependent and interconnected economic activities that drive the entertainment industries. For example, a film, television show, or video game could be structured and financed in New York, the visuals could be shot in Atlanta or designed in Florida, and then the final product would most likely be delivered and distributed through streaming and video game platforms across all of the United States. These activities demonstrate the interstate nature of entertainment production because business activity is required for the entertainment output to enter the stream of commerce.[6] This provides a foundation for the following commerce clause analysis.

C. The Legal Foundations of Entertainment Production

There are three legal pillars that constitute the fabric that drives and sustains entertainment production: intellectual property (specifically copyright law), contracting (mainly indemnification), and methods of risk allocation (insurance).

Intellectual property is a highly valuable source of commercial and economic prosperity within all realms of the entertainment industries. In film, television, and video games, a script, the design of an animated character, or any recorded performance are all copyrightable assets warranting legal protection. Furthermore, the representations and warranties clause in entertainment production agreements provides a safeguard against infringement claims and ensures that these protected assets are original creative works, particularly for their eventual distribution and licensing. Under 17 U.S.C. § 102, the scope of copyright protection[7] includes almost all the creative works derived for film, television and video games. At times, copyright infringement claims depend on a determination of whether the output in question posed an issue of substantial similarity. In *Nichols v. Universal Pictures Corp.*,[8] Judge Learned Hand articulated the "abstractions test," which distinguishes between what is a general idea and what is a protectable expression. This standard represents a vital distinction to my argument, because GAI primarily operates in the realm of general ideas, such as patterns, tropes, and conventions, which fall beneath the threshold of copyrightable expression and protectable, specific works. Nonetheless, because this standard was not created with GAI in consideration, a gap remains that fails to address AI-generated reproductions below that of the protection threshold.

Entertainment production agreements, such as an option agreement for a screenplay or a production services agreement, allocate liability and risk through indemnification clauses that require one party to bear the financial responsibility from legal disputes as a result of the other party's contributions. For example, in an agreement between a producer and a writer where the producer is purchasing a screenplay from the writer for a substantial amount of consideration, the indemnification clause from this agreement should protect the producer if there is an infringement claim against the writer's work, which the writer probably also represented and warranted was original. If it were to be revealed that the writer utilized GAI to effectuate the work, and the AI output



contained already copyrightable material, the indemnification framework of the agreement would be disrupted because it would not be clear who would bear liability.[9]

Major entertainment productions hold various types of insurance to protect against legal claims, such as general liability insurance, workers' compensation for employees, cast insurance to protect a production in the event that a cast member falls ill or becomes injured,[10] and weather insurance. Insurers formulate their policies based on the risks each unique production poses,[11] and with the rise in GAI, insurers must adapt because of the concurrent rise in potential liabilities as a result of AI use, such as copyright infringement and regulatory violations. Insurers may encounter entertainment productions that may not have reliable ways of confirming whether the creative's output is free of infringement, which could render the production's opinion letter to the insurer as untrustworthy. Due to this, commercial uncertainty abounds because without adequate insurance, entertainment production companies face barriers in the creative, financing, and distribution phases of the production pipeline.

III. The Legal and Economic Impacts of GAI Use in Film, TV, and Video Game Creation, Production and Distribution

A. AI-Assisted Creation: Content Generation, Ideation and Development

The creation stage of entertainment production is where GAI's impact is perceived as the most pronounced, and therefore the most legally contentious. Large language models (LLMs), a subset of what is known as GAI,[12] are currently being used to draft entire stories and screenplays with dialogue unique to individual characters, in addition to being used for visual and artistic designs, which then shortens the amount of time a creative team would need to formulate a final product. Further, the use of AI tools in video games is reducing the time-intensive processes of procedural world generation, NPC behavior scripting, and 3D asset creation.[13] Despite these increases in economic efficiency, the use of GAI in the formulation of creative and artistic works should not replace the creative labor that is ultimately required to obtain legal protections. Rather, this powerful technology should condense the process in which copyrightable works originate and not replace human creativity, which is the impetus to impressive and impactful entertainment output.

B. AI-Assisted Production: Editing and Visual Effects

In the development and production stage, the use of GAI has accelerated the processes that have historically required the highest allocation of costs and labor. Netflix's most recent acquisition of InterPositive, Ben Affleck's AI company, for up to $600 million demonstrates just how elusive and valuable adapting to GAI could be to a production company. InterPositive's own AI model uses an existing production's dailies,[14] "[which] then lets a filmmaker introduce that model into the postproduction process to provide the ability to … mix and color, relight shots, and add visual effects."[15] In combination with McKinsey's January 2026 report on the impact of AI use in film and television production, this concept of AI having a high impact towards production workflows is reinforced when approximately $10 billion worth of forecasted content by 2030 could be addressed by some form of AI.[16] Furthermore, Bain & Company concluded that the ability to shoot complex shots digitally streamlines the production process, which underscores the need for the preservation of human creativity in entertainment output. While the gains of economic efficiency will be prioritized by the corporations that govern entertainment production, they do come at the expense of traditional human labor and creative talent. This tension arises from the inevitable commercialization of AI in entertainment production because entertainment studios and

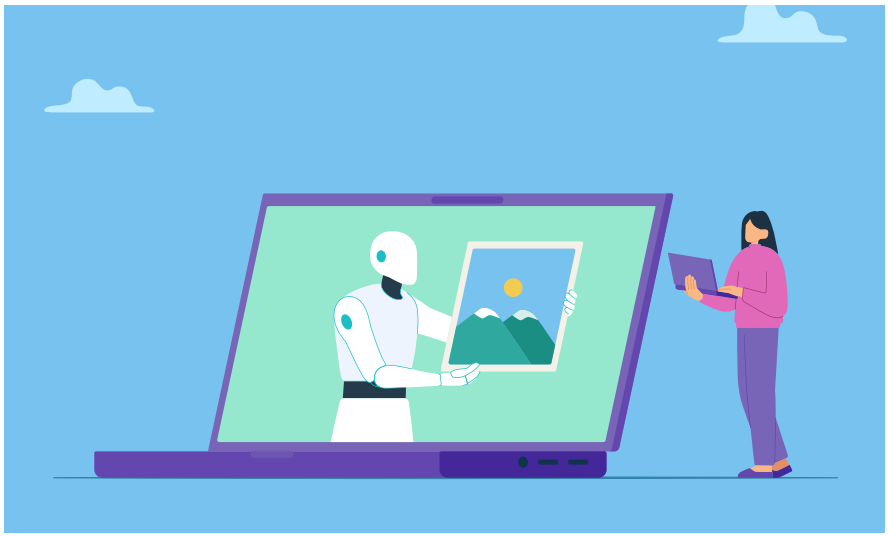
production companies prioritize financial gain, which results in the loss of creativity and jobs, in addition to the total disruption of the status quo. As a result, the legal system should intervene and partially act as a balancing check to these corporate responsibilities.

C. AI-Assisted Distribution: Delivery to International Markets, Voiceovers and Dubbing

In the distribution stage, entertainment companies are adapting to the use of GAI to further reach international markets and audiences. For example, AI-generated dubbing and voiceover tools are allowing production studios to bring localized content at scale at a fraction of the cost.[17] AI dubbing could cut costs by up to 90% and reduce the distribution processing times from months to days.[18] At the same time, recommendation algorithms from film/TV and gaming streaming platforms, such as Netflix, Disney/Hulu, and Steam, manipulate the content that reaches specific global audiences and individuals, thus proving to be drivers of a production's commercial success. Nonetheless, AI use in the distribution phase is becoming more prevalent despite receiving less legal scrutiny, as demonstrated by the scale of international productions that are extended through national and international streams of commerce.

D. The Displacement of Labor

The use of GAI throughout all phases of entertainment production provides economic efficiency and ensures further commercial success. However, these efforts and outcomes exist in tension with the human labor they are threatening to displace. For example, the 2023 Writer's Guild of America (WGA) and SAG-AFTRA strikes centered around this issue. The WGA won precedential protections for their members, affirming no replacement of human writers by AI and giving complete control to the writer on how they could use GAI while receiving all the possible credit and compensation.[19]



The SAG-AFTRA union successfully negotiated heightened protections for actors in film, television, and video games, requiring studios to obtain informed consent and compensation when an actor's likelihood is used to create a replica, and requiring studios to notify and bargain with SAG-AFTRA upon the studio's potential use of "synthetic performers."[20] Despite these efforts by long-established unions to protect their talent, independent studios and non-union productions could still decide to operate outside of these contracts by hiring non-union creatives and talent, thereby facing no consequences of a possible breach. Collective bargaining remains a powerful tool and framework to bind participating studios and union members, but there is an increasing share of entertainment output that is left completely unregulated. Therefore, a federal standard should be implemented to address this widespread transformation within the entertainment industry.

E. Ambiguous Authorship in Copyright

The integration of GAI in the creation phase of entertainment production continues to raise existential questions about copyright protection because the legal system and current copyright doctrine do not provide clear rules on works derived from human involvement *and* GAI. In *Thaler*, the court held that human authorship, in the context of a creative work made entirely by a GAI tool, is required in order to qualify for copyright protection. However, this case did not address the implications of a human creative using GAI, in conjunction with their own judgment and discretion, to generate entertainment output. The use of GAI as a tool or assistant in the creation of entertainment should be regulated because its applicability is imminent and extremely common. Nonetheless, the Copyright Office has not made a clear determination about how much human involvement is sufficient to establish authorship. Due to this ambiguity, creatives and entertainment production companies face uncertainty over the copyrightability of certain works or products created with the assistance of GAI, thereby impacting copyright registration, the licensing process, and the commercial viability of a deliverable created with the support of GAI.

F. The Loss of Creative Authenticity

In relation to the authorship issue and its impact on the creative and commercial processes of entertainment production, there lies the concern of creative authenticity driven by audiences and consumers. Today, there is hesitation among film, television, and video game audiences to openly accept GAI content because there is value in humanly crafted visuals, performances, and art. If the use of GAI becomes even more prevalent and remains

undisclosed to the consumer, the risk of collective audience disengagement and subsequent decrease in brand value and revenue driven by consumer mistrust increases substantially. Therefore, creative authenticity is not just an aesthetic preference, but it is also a commercial asset, which threatened existence poses economic consequences to entertainment production across interstate markets.

IV. The Commerce Clause Doctrine as an Authority for Federal Regulation of GAI Use in the Entertainment Industry

Despite the increase in economic efficiency, and in spite of the disruptions to labor, authorship ambiguity, and authenticity concerns, there is no existing federal framework governing these issues (and more) as the use and prevalence of GAI inevitably pervades through entertainment production. Nonetheless, the absence of a response to these developments does not represent a deliberate policy choice; instead, it reflects a deficiency that the Commerce Clause is constitutionally equipped to address.

Under Article I, Section 8, Clause 3 of the United States Constitution, Congress holds the power to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This enumerated power has been applied by Congress and then interpreted and defined by the U.S. Supreme Court, leading to the modern Commerce Clause framework established in *United States v. Lopez*.[21] Under *Lopez*, the Court concluded that there are three categories of activity that Congress may regulate under the Commerce Clause. First, the channels of interstate commerce; second, instrumentalities of interstate commerce or people and things in interstate commerce, and third, activities that have a substantial effect on interstate commerce. This three-prong framework applies to any federal regulation addressing GAI in entertainment production because GAI travels through already established channels of commerce, GAI tools serve as instrumentalities of commerce, and the aggregate effect of GAI in entertainment production has a substantial impact on interstate commerce.

V. GAI Use in Entertainment Production Should Be Regulated Under All Three *Lopez* Prongs

A. GAI Tools Travel Through the Channels of Commerce

The first *Lopez* prong gives Congress the authority to regulate the channels through which interstate commerce moves. Relevant to the entertainment production output analysis is *Reno v. ACLU*, where the Courts recognized the internet as a channel of commerce for the first time.[22] Furthermore, in *Gibbons v. Ogden*, the Court held that commerce via navigable interstate waterways, specifically the Hudson River and the waters that connected New York and New Jersey, were inherently interstate because the navigation at issue involved commerce between different states, and this was enough to warrant federal regulation. Lastly, in *United States v. Sullivan*,[23] the Court held that Congress was within its power to regulate a misbranded pharmaceutical product under the Federal Food, Drug and Cosmetic Act because the product had completed an interstate shipment for the purposes of being sold locally to consumers in that particular state, and its mislabeling posed commercial and economic risks that warranted consumer protection efforts.

All GAI tools used in entertainment production travel through the internet, which the legal system has branded a channel of commerce. GAI tools used in the creation, production, and distribution of film, television, and video games are hosted by cloud platforms that depend on internet access for full functionality. Furthermore, the final deliverable of an entertainment production gets distributed through streaming platforms such as Netflix, Hulu, or Steam, which operate as distribution services and digital storefronts across every state in the U.S. and internationally. Ultimately, these AI tools, in addition to platforms that are dependent on the internet, cannot lead to revenue generation and audience impact for the entertainment industry without the internet's facilitation as a channel of commerce.

Other functional considerations that should support federal regulation of GAI in entertainment production are the threats of labor replacement and authorship ambiguities, which have the power to drastically impact entertainment industry creatives, insiders, and employees; in addition, the threat to creative authenticity in GAI output and how creative authenticity is a driver for consumer engagement. The potential impact these issues pose requires federal regulation because the commercial and economic risks involved with the integration of GAI in film, TV, and video games, for example, are far too consequential in application and heavily interstate in scope to be addressed solely via private bargaining or state action. Unregulated integration of GAI threatens to displace labor, destabilize consumer engagement, and create unbalanced competition between studios that adapt to GAI and those that do not, thereby undermining the functionality of interstate commerce (via the channels of commerce).

B. AI Tools Are Instrumentalities of Commerce

According to the second prong of *Lopez*, Congress has the authority to regulate the instrumentalities of interstate commerce, or the tools and mechanisms through which commerce is conducted. Instrumentalities of commerce are the means of interstate commerce, which include both tangible and intangible elements that facilitate commerce, such as vehicles, airplanes, trucks, and communication networks that include telephone lines and fiber-optic cables. Both the trans-

portation and information elements are instrumentalities because they enable the flow of commerce, intrastate and interstate.[24] Additionally, an instrumentality is not required to function across state lines because it serves as a link connecting to the broader processes of interstate commerce.[25] GAI in entertainment production functions as a tool, and therefore an instrumentality warranting federal regulation, because it travels through the streams of interstate commerce via cloud platforms and the internet in order to be used intrastate by local creatives, studios, and production companies. Furthermore, consumers engage with the distributed deliverable via internet-dependent technology, or streaming platforms.

History further provides that new technologies, such as the camera, are allowed to assist in the production of copyrightable works because a human supplied the required originality.[26] GAI is the camera technology of our times. It is a new tool that assists in the effectuation of human-controlled creative output and, similar to the camera, has the potential to change the entire commercial landscape of entertainment because of its novel application in creative production and business.

An additional technology that served as a disruptive tool to copyright law was the VCR. In *Sony Corp. v. Universal City Studios*,[27] the Court held that home recording VCRs were neutral instruments of entertainment output and that the use of VCRs by individual consumers did not constitute copyright infringement because recording for personal use was fair use. The holding additionally protected Sony, the manufacturer of the recording equipment, by concluding that the sale of said equipment did not constitute infringement since the product was widely used for legitimate purposes and was capable of substantial non-infringing uses. This case provides a directive the entertainment industry should benefit from as it continues to integrate GAI as technological innovation in its creative, production and distribution processes. By establishing the parameters required to avoid infringement liability, the Court created a safe harbor for neutral technology that can coexist with copyright protection. Nonetheless, the Court drew a line in the spectrum of technologically derived infringement liability in *MGM Studios v. Grokster*,[28] holding that companies that distribute software with the intent to promote copyright infringement as a business model should be liable for the resulting infringing acts. GAI in entertainment production falls somewhere on this spectrum, as it is a tool that interacts with copyrightable works by processing them and generating output derived from them, but whose neutrality has yet to be legally determined. That leaves the issue open to responsive federal regulation authorized under the instrumentalities prong of current Commerce Clause doctrine.

C. GAI Use in the Entertainment Industry Substantially Affects Interstate Commerce

The third and final *Lopez* prong authorizes Congress to regulate activities that may be intrastate but substantially affect interstate commerce in the aggregate. In *Wickard v. Filburn*,[29] the Court held that a farmer growing wheat for personal consumption and not pure economic output could still be subject to regulation, because when considering other farmers in a similar position in the aggregate, this activ-



ity substantially affected interstate commerce sustaining the wheat market. Further, in *NLRB v. Jones & Laughlin Steel Corp*., the Court justified the regulation of union terms after the potential secession of manufacturing activity as a result of conflicts between management and labor, holding that "[w]hile the manufacturing process or relationships between labor and management may not have a direct impact on the flow of goods, they have an aggregate impact on commerce."[30]

Unregulated GAI use within the creative, production, and distribution processes of film, television, and video games has a cumulative effect on interstate commerce because the execution of said AI by one individual does not exist in isolation; when all studios, production companies, and independent creators integrate GAI into their workflows concurrently, the aggregate effect could substantially impact creative output, production costs, and the labor market. Additionally, it was the potential for disruption of the steel manufacturing industry that justified federal regulation of labor relations in *NLRB*. The current, imminent disruption caused by GAI in entertainment production warrants federal involvement, as there is no clear guidance for creatives who utilize GAI as an aid in their creative process and seek protection. In addition, studios can undercut human labor costs by relying on digital editing tools and performers, which when considered in the aggregate, has a ripple effect across the interstate channels of commerce that facilitate the creation and delivery of the content. Therefore, the disruption of GAI in the film, television, and video games industries is measurable, inherently economic, and interstate.

VI. Limits and Counterarguments

A. Limited Federal Power

Critically, *United States v. Morrison* imposed a limiting principle to the Commerce Clause doctrine in that regulated activity at issue must be economic in its nature, and however harmful the activity may be, a meaningful economic nexus is required for regulation.[31] However, unlike in *Morrison*, there is no attenuation issue in this application of the Commerce Clause doctrine because the creative, production, and distribution processes of film, TV, and video games are inherently and indisputably economically and commercially driven, as demonstrated by Parts II and III above.

B. Anti-Commandeering Principles

One possible counterargument to federal regulation of GAI in entertainment production is the federal government would be forcing private actors to participate in a commercial scheme not of their choice. This was the issue at hand in *NFIB v. Sibelius*, where the Court held that Congress could not use the Commerce Clause to compel individuals to purchase health insurance via the Affordable Care Act.[32] However, the proposed regulatory scheme of this article does not purport to compel any studios, creatives, production, and/or technology companies, as the individuals and entities involved are already participating in and driving interstate commercial activity. They utilize GAI tools in the creative and ideation process and the distribution process across interstate and international channels, which in turn generates revenue and consumer engagement. Nonetheless, the purpose of the regulation would be to impose standards and bright line rules surrounding the conduct they are voluntarily engaged with in order to provide adequate structure with terms that would control the elective participation.

C. The First Amendment and Freedom of Expression

Federal regulation of AI tools in entertainment production must also survive First Amendment scrutiny after *Reno v. ACLU*, where the Court struck down provisions of the 1996 Communications Decency Act, holding that it violated the First Amendment because the provisions were targeting and limiting the content of creative expression. This is a legitimate but distinguishable concern, because the proposed federal response to the issue here is targeting the instrumentality used to produce entertainment content, and not the actual content. Federal regulation should require studios to disclose to consumers when AI is used in a production, ensure minimum human involvement in creative output, and obtain consent from performers whose likeliness become digitally replicated. None of these responses, or others, shall regulate the final product's protected First Amendment speech. This distinction is further supported by broadcast regulation through the Federal Communications Commission (FCC). The FCC regulates interstate communications through various channels of information, including broadcast and cable television, the internet, and satellites, without dictating what the substance generated from these channels should be. Ultimately, the federal regulation should focus on the GAI tool itself and the processes that apply the tool, rather than the idea, narrative, or creative expression.

D. Federalism and Existing State Action

States have already begun to implement their own regulations in response to the rise of GAI in entertainment production. For example, the California Legislature recently passed Assembly Bill 2602, which prevents the unauthorized use of digital replicas of individuals' voices or likeness in contracts for professional or personal work, further requiring consent and competent representation during negotiations.[33] The California Assembly additionally prohibited the creation and distribution of digital replicas of deceased performers and individuals without permission from their estate through Assembly Bill 1836, thereby extending the posthumous rights of publicity to protect deceased performers from unauthorized AI replication.[34] While these statutes encom-



pass vital steps that address certain problems GAI poses in the entertainment industry, they also present problems that federal intervention could solve. After all, other states are not obliged to follow these regulations, because they only apply to businesses in California. Other states conducive to entertainment production, such as New York or Georgia, are under no obligation to comply, yet they could implement their own protective statutes and regulations. The result would be a patchwork of state laws where the protections granted to creatives, performers, and industry insiders would be based on a certain location or jurisdiction, burdening interstate commerce. For example, a type of "forum shopping" could develop as a result, leading to the exploitation of AI tools in the creative, production, and distribution processes that function through the channels of interstate commerce, and then profiting from the national market, all without complying with any persuasive standard. This economic balkanization is exactly what the Dormant Commerce Clause[35] is designed to prevent, because it is supposed to promote federal uniformity across all channels and sources of interstate commerce. This should then ensure that viable protections are available to all entertainment industry employees and that regulatory obligations imposed on studios and production companies do not vary based on jurisdiction.

VII. Proposed Regulatory Structure

A. Labels and Disclosures

Labels and disclosures on films, television shows, and video games that incorporated GAI in the creation, production, and/or distribution of the final product are critical to protect consumers, enable transparency, and ensure regulatory compliance. These motives are supported by the Commerce Clause framework, because GAI travels through the channels of interstate commerce, functions as an instrumentality of entertainment production, and its application is already having an impact on interstate commerce in the aggregate. These disclosures should function similarly to existing content labeling administrations, for example, pharmaceutical labels that indicate to consumers what medication they are ingesting (*United States v. Sullivan*) and the Motion Picture Association's rating system,[36] which appears on marketing materials and films in theatres. The purpose of these labels and disclosures would be to inform audiences on how the content they are consuming was created. Functionally, the labeling and disclosing should not be burdensome, because any minor label in a film or television show's credits or a marker for any qualifying product in an online video game store should be sufficient. Disclosures identifying GAI use are also helpful in the identification of protectable intellectual property.

B. Consent and Compensation

Consent by a performer should be required at any time when there is unauthorized digital replication of their voice, image, or likeness via GAI. This is because consent requirements give performers creative and economic control over themselves, and how they are used in film, television, and video games across state lines, which in turn protects their branding, reputation, and general professional identity. Applied federally, the consent requirements should additionally consider the time and scope that would follow a successful consent negotiation between a film studio and an actor. For example, an actor who consents to AI-assisted manipulation of their likeliness in one film should not be tied to an eternal license of their digital replication across future options or derivative works. Ultimately, digital replication of performers will generate intrastate and interstate revenue via the established channels of commerce, proving that the Commerce Clause is authorized to address such uses.

As a result of these substantial impacts derived from the drive for more intrastate and interstate profit generation, there is the risk of GAI displacing human performers and

contributors, upending existing labor standards. Therefore, there should also be a compensation mechanism consisting of residual structures that recognize the commercial value of performers and contributors impacted by GAI use over time. The purpose behind this regulation is to enforce the underlying principles of economic fairness and justice. Human labor made GAI possible; it was trained on the worth of human intelligence, and if its application will displace human labor, then a proper compensation structure would be sufficient in distributing the economic wealth acquired by entertainment studios and productions that used GAI in their output.

C. The Creation of a Federal Commission Modeled After the FCC

The aforementioned regulatory measures of disclosure, consent, and compensation will require a federal body to implement, monitor, and then enforce them. Consequently, there should be an independent federal commission modeled after the FCC to carry out the directives proposed herein. The FCC was created by Congress in 1934 in order to consolidate regulatory authority previously split among multiple bodies (such as the Interstate Commerce Commission) and to better regulate broadcasting communication as it developed both in its wired and wireless forms. GAI in entertainment production warrants federal regulation under a similarly situated institution because continued state action imposing rules on this technology could result in fragmented legal standards ripe for exploitation, and the commissioner structure of a federal commission requires independence from bipartisan influence as the technology evolves. The Commerce Clause provides the constitutional framework for GAI to be regulated by satisfying all three *Lopez* prongs of channels, instrumentalities, and substantial effects in the aggregate. A federal commission under this authority would be a carefully considered institution descended from the expression of existing constitutional power.

VIII. Conclusion

The purpose of copyright is to promote creative progress. AI poses a threat to the commercial fabric of the entertainment industry because it is a transformative tool with seemingly unlimited potential to impact said creativity. The question remains about how the government should control or react to this matter. History speaks about the camera and the Copyright's Office response to it, the FCC's response to broadcasting, and Congress' and the courts' response to the internet in *Reno* and *Grokster*. Now, we are posed with the question of whether or not GAI should be regulated, by which entity, and how. The *Thaler* court spoke in its silence, and subsequently left the door open for creative regulatory recommendations. This is where the Commerce Clause and the *Lopez* standard provide the strongest Constitutional authority to facilitate AI regulation in the entertainment industries whose economic infrastructure will depend on the fundamental disruption that AI poses to the commercial transformation and creative output.



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Endnotes

1. *Thaler v. Perlmutter*, No. 23-5233 (D.C. Cir. 2025).
2. According to Black Law's Dictionary, interstate commerce is: "Trade and other business activities between people and entities located in different states; esp., the movement of goods and people between states. …" *Interstate Commerce*, Black's Law Dictionary (12th ed. 2024).
3. Homecare & Decor Rsch. Team, Grand View Rsch., *Movies and Entertainment Market (2026–2033*), at 1 (June 2026), https://www.grandviewresearch.com/industry-analysis/movies-entertainment-market [https://perma.cc/XHE2-FP4M].
4. Kenneth Rsch., United States (U.S.) *Broadcasting and Cable TV Market Size & Share, by Technology, Channel – Macroeconomic Analysis, Growth Trends, Top Companies, Forecast Report 2026-2035*, at 1 (May 27, 2026), https://www.kennethresearch.com/industry-analysis/united-states-broadcasting-and-cable-tv-market/1003 [https://perma.cc/T8EB-HJEQ].
5. Ernesto Pagano et al., *How Platforms Are Colliding and Why This Will Spark the Next Era of Growth: Video Gaming Report 2026*, at 4 (Dec. 9, 2025), https://web-assets.bcg.com/b3/fa/fd7443244a48a24fae8299ce0f34/video-gaming-report-2026-nov-2025-edit-02.pdf [https://perma.cc/CXR3-VJ93].
6. According to Black's Law Dictionary, the "Stream-of-Commerce Theory" is:

   > 1. [Derived from the civil procedure principle of personal jurisdiction] … [when a] defendant places a product in the general marketplace and the product causes injury or damage in the forum state, as long as the defendant also takes other acts to establish some connection with the forum state, … *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 107 S.Ct. 1026 (1987). [Or] 2. The principle that a person who participates in placing a defective product in the general marketplace is strictly liable for harm caused by the product.

Restatement (Second) of Torts § 402A (1979)." *Stream-Of-Commerce Theory*, Black's Law Dictionary (12th ed. 2024).

7. "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a *machine* or *device*." 17 U.S.C. § 102(a) (emphasis added).
8. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).
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The Legal Blueprint for NBA Europe: Adapting the U.S. Sport Model to European Law

By Lucija Vranesevic Grbic

The NBA-FIBA Plan

In March 2025, the National Basketball Association (NBA) and the International Basketball Federation (FIBA) announced that they were jointly exploring the creation of a new professional men's basketball league in Europe, with a target launch date of October 2027.[1]

The proposed initiative has already sparked tensions within the European basketball market. In January 2026, the EuroLeague reportedly informed the NBA that it was considering legal action should the NBA enter into discussions regarding a new competition with clubs that had already committed to participating in the EuroLeague under long-term agreements.[2]

While many aspects of the project remain under development, several key features have already been disclosed. The proposed competition would consist of 16 clubs, including 12 permanent members and four clubs qualifying through a merit-based mechanism. The league is expected to include both existing European clubs and newly established franchises. According to publicly reported plans, the league would mirror certain aspects of the North American sport model, such as a salary-cap system and a shared ownership structure. Reports indicate that equity in the league would be divided equally between the NBA and the owners of the permanent franchises, representing a significant departure from the traditional ownership arrangements found in European club basketball.[3]

At the time of writing, work on the project appears to be progressing without significant obstacles. However, it has already raised several legal questions. Although the NBA and FIBA have stated that the proposed league is intended to be integrated into the existing European basketball framework, doubts remain regarding its compatibility with European sports governance, EU competition law, and the principle of sporting merit.

This article adopts a European perspective. Its objective is to provide U.S. practitioners with an understanding of the

European sport model and assess how NBA Europe could be integrated into that framework from a legal perspective.

A Brief Introduction: The European Basketball Landscape and the European Sport Model

FIBA serves as the sport's international governing body. The institutional structure of basketball governance follows a hierarchical model, with FIBA at the apex, followed by five continental confederations and, beneath them, the respective national basketball federations.

At the same time, elite club basketball is not governed exclusively through that structure. Alongside FIBA competitions such as the Basketball Champions League and the FIBA Europe Cup, Europe's leading club competitions, the EuroLeague and EuroCup, are organized by Euroleague Basketball, a private commercial entity operating outside the traditional federative system. As a result, European basketball is marked by the coexistence of regulatory governance and private competition organizers, with commercial and sporting interests often intersecting.

A good starting point for understanding this landscape is the European sport model. Traditionally, the model is built on three core principles: a pyramidal governance structure, sporting merit, and open competitions. Clubs move up to higher levels of competition based on their results, usually through systems of qualification, promotion, and relegation.[4] These principles have received support from both EU institutions and the Court of Justice of the EU (CJEU). In 2021, the Council of the EU adopted its resolution on the key features of the European sport model, emphasizing the abovementioned principles.[5]

A notable distinction between the European and North American sports systems concerns the principles of promotion and relegation. Professional leagues in North America generally operate as closed competitions, with participation determined through franchise membership rather than sporting performance. By contrast, the European sport model is traditionally based on sporting merit, whereby clubs qualify for higher levels of competition through their results on the field of play.[6]

The principle of open competitions is reflected in Article 165 of the Treaty on the Functioning of the European Union (TFEU),[7] and the importance of sporting merit came to the forefront during the attempted launch of the European Super League[8] in 2021, a project criticized for departing from the traditional open-competition model. The legal implications of that initiative will be discussed later in this article.

European basketball, however, already occupies something of a middle ground. While FIBA competitions generally rely on sporting qualification, the EuroLeague has long operated through licensing arrangements that resemble certain features of a closed or semi-closed league. This demonstrates that the legal debate surrounding NBA Europe is not whether closed-league concepts can exist in Europe, because to some extent they already do. Rather, the more difficult question is how far such concepts can be taken while remaining consistent with European sports governance principles and EU law.

The First Bump in the Road: EU Competition Law

In 2017, IOC President Thomas Bach remarked that sport should not be regulated in the same manner as manufacturers of cars or producers of low-fat milk.[9] Nearly a decade later, that statement remains central to debates surrounding European sports regulation. The proposed NBA Europe league lies at the crossroads of sport and commerce, making EU competition law a natural starting point for legal analysis.

The European Commission has already commented on the project in response to a parliamentary inquiry. While recognizing that the organization of competitions falls within the autonomy of sports bodies, subject to compliance with EU law, the commission observed that NBA Europe would not be the first closed or semi-closed competition in European basketball and that the adverse effects of such structures on sporting merit, domestic competitions, solidarity mechanisms, and talent development are well documented.[10]

The relationship between sport and EU law has been shaped by decades of CJEU case law. Beginning with *Walrave and Koch,*[11] the CJEU made clear that sport does not enjoy a blanket exemption from EU law where economic activity is involved. That principle was later reinforced in *Bosman*[12] and refined in *Meca Medina,*[13] where the CJEU noted that sports regulations must be assessed in light of their context and objectives rather than in the abstract for the purposes of Article 101(1) TFEU.[14] The result is a form of conditional sporting autonomy, under which governing bodies may pursue legitimate sporting objectives while remaining subject to EU competition law.[15]

While this approach proved successful in *Meca Medina*, a different concern emerged in *MOTOE.*[16] There, a sports federation possessing regulatory authority also organized competing events and used its approval powers in a manner that disadvantaged rival organizers. The CJEU held that such an arrangement infringed EU competition law.[17]

While it is too early to assess NBA Europe's compatibility with EU competition law, CJEU case law suggests that particular attention is required when sports bodies perform both regulatory and commercial roles. In this context, the concerns about conflicts of interest raised in *MOTOE* could become relevant if NBA Europe's governance structure gives decision-making power to actors who can influence access to rival competitions.

On December 21, 2023, the CJEU's Grand Chamber delivered three judgments addressing the application of EU competition and internal market law to the organization of sport. These cases were the *International Skating Union v. Commission,*[18] *European Superleague Company v. FIFA and UEFA,*[19] and *Royal Antwerp.*[20]

International Skating Union concerned the International Skating Union's prior-authorization and eligibility rules, which allowed it to refuse approval of third-party events without predetermined criteria and to sanction athletes who competed in them. The CJEU confirmed that those rules restricted competition by object, holding that a body that both regulates a sport and has a commercial interest in it must exercise any power of prior approval under criteria that are transparent, objective, non-discriminatory and proportionate, and subject to effective review. That standard bears directly on FIBA's dual role. The judgment's separate treatment of compulsory arbitration lies outside the scope of this article.

In *European Superleague Company* (*ESLC*), concerning a proposal for a breakaway league organized by 12 European soccer clubs, the CJEU set out the conditions under which clubs may establish competitions independently of their sports' governing bodies. It acknowledged that prior-authorization systems may pursue legitimate objectives, including preserving sporting merit, ensuring equal competitive opportunities, and maintaining an orderly competition calendar. At the same time, the CJEU made it clear that governing bodies cannot enjoy unlimited discretion when deciding whether to approve or reject competing tournaments. Where an organization combines regulatory authority with commercial interests, its decision-making framework must contain adequate safeguards against arbitrary conduct.[21]

The relevance of *ESLC* to NBA Europe is not straightforward. Unlike the proposed European Super League, NBA Europe is not conceived as a breakaway competition operating outside the existing governance framework. Rather, it is being developed collaboratively by the NBA and FIBA. Consequently, the project does not currently raise the same concerns regarding exclusion through prior-authorization rules. Nevertheless, competition law questions could arise if FIBA's regulatory role were exercised in a manner that affected access to competing events or gave NBA Europe an unfair advantage.[22] In that scenario, the analysis would shift from the legality of a breakaway league to the legality of preferential treatment granted by a governing body.

The comparison is not entirely new in basketball. The EuroLeague itself emerged following a governance dispute with FIBA in 2000, when leading European clubs established Euroleague Basketball as an alternative organizer of elite club competition.[23] Against this background, the NBA Europe project appears distinctive insofar as it is being developed in cooperation with FIBA rather than in opposition to it.

The significance of the CJEU 's recent sports law trilogy lies less in its direct application to NBA Europe than in the framework it establishes for evaluating future sports regulations. The principle of conditional sporting autonomy remains intact. What changed is its approach to the distinction between restrictions of competition by object and restrictions by effect, and the legal consequences that follow from that distinction.

Article 101 TFEU distinguishes between restrictions of competition by object and by effect. This distinction is important because conduct classified as a restriction by object is considered sufficiently harmful to competition that its actual market effects need not be demonstrated.[24]



While in *Meca Medina,* the CJEU accepted that sport inevitably requires coordination and regulation and that sporting rules should be assessed in light of their objectives and overall context,[25] the 2023 sports trilogy clarified an important limitation to that principle.

As Stephen Weatherill observes, the initial question is now whether the conduct constitutes a restriction of competition by object or, in the context of Article 102 TFEU, is inherently abusive. Only where that threshold is not met may a governing body rely on *Meca Medina* to show that the measure is necessary and proportionate to the pursuit of legitimate sporting objectives.[26] According to Monti, the trilogy introduced a remarkable number of doctrinal innovations and opened significant new areas for debate.[27]

The relevance of this trilogy to the NBA Europe project is easy to overlook. Unlike the *ESLC*, NBA Europe would not be a breakaway competition. However, the project would depend on a dense network of rules. The characterization under EU competition law may determine the extent to which the NBA and FIBA can rely on legitimate sporting objectives to defend them.

The Second Bump in the Road: Sporting Merit

According to existing literature and scholarly opinion, the NBA-FIBA project could face challenges in ensuring compliance with certain principles of EU sports law. The EU's competence in the field of sport is laid down in Article 165 TFEU.[28] The CJEU has repeatedly confirmed that Article 165 does not exempt sport from the application of EU law, as reaffirmed in *ESLC*[29] and *Royal Antwerp.*[30] Article 165 performs a dual function: It recognizes the specific nature of sport, while also allowing those specific characteristics to be considered when the treaties are interpreted and applied. A key element of Article 165 is the promotion of fairness and openness in sporting competitions. Recent case law and academic commentary have increasingly associated these objectives with the concept of sporting merit, which has become a central feature of the European sport model. Although sporting merit is not expressly mentioned in Article 165, commentators increasingly view it as one of the principles underpinning the organization of European sport. Hence, this may present challenges for projects modeled on North American closed-league structures.[31]

Sporting merit is often discussed in two ways. The first is a static concept, which focuses on rewarding the most immediate manifestation of sporting success, such as victory in the most recent competition. Under this approach, fairness is achieved by ensuring that all participating teams have an equal opportunity to compete and succeed within the rules of the competition. By contrast, the dynamic concept of sporting merit adopts a long-term perspective. While it also seeks to ensure that sporting success is earned on the field of play, it recognizes that genuine competition may require measures aimed at preserving competitive balance over time. In team sports, a purely static approach may generate increasing sporting and financial inequalities, as successful clubs benefit from additional revenues that can be reinvested to strengthen their competitive position. Over time, this may result in the sustained dominance of a limited number of teams. The dynamic approach seeks to address this problem through mechanisms that redistribute resources or otherwise promote competitive balance, thereby preserving meaningful competition in the long term. This may require certain departures from a strict reward-based conception of sporting merit. The tension between rewarding success and preserving long-term competitive balance remains a recurring theme in European sports governance.[32]

The distinction between the static and dynamic concepts of sporting merit extends beyond academic debate and may have significant practical consequences for the regulation and organization of sport. In a pyramidal structure, clubs are linked through promotion and relegation, with sporting results determining movement between divisions and access to corresponding sporting and economic opportunities.

Reflecting this commitment to sporting merit, the European and North American models differ both in their underlying priorities and in the mechanisms through which those priorities are pursued. The European model prioritizes open competition and sporting merit, while North American leagues typically promote competitive balance through closed league structures and redistributive measures.[33]

These differences were acknowledged by Advocate General Rantos in his Opinion in *ESLC*, where he drew attention to the structural distinctions between the European and North American models. In his view, the inclusion of sport in the treaties through Article 165 TFEU reflected the EU legislature's intention to recognize and preserve the key features of the European Sport Model.

He suggested that the provision was adopted, at least in part, to distinguish the European approach from alternative organizational models and to provide a constitutional basis for taking the specific features of European sport into account when applying EU law.[34] Commentators have noted that proposals such as the European Super League drew inspiration from the organizational structure of North American professional sports leagues, particularly through the creation of a semi-closed competition system designed to provide participating clubs with greater financial stability and commercial predictability.[35]

The debate is not entirely one-sided. While some mechanisms commonly used in North American professional sports may raise concerns under EU competition law, this does not

mean that every feature of the North American model is incompatible with the European legal framework. Certain features, particularly those inspired by draft systems, may contribute to the promotion of competitive balance and uncertainty of outcome.[36] In *ESLC*, the CJEU reaffirmed that rules adopted solely on non-economic grounds and relating exclusively to sport as such may, in certain circumstances, fall outside the scope of EU law.[37] Although such mechanisms have traditionally played a limited role within the European sport model, some scholars argue that they could help advance objectives already recognized by Article 165 TFEU, including fairness, openness, and meaningful competition. From this perspective, aspects of the North American model may offer valuable insights for the future development of European sport.

Can It Work Out?

The proposed NBA Europe project occupies a unique position within the landscape of European sports governance. Unlike the competition considered in ESLC, it is not being developed in opposition to an established regulator. Nor does it resemble the origins of the EuroLeague, which emerged from a break with FIBA. Instead, NBA Europe appears to be a commercially ambitious venture being developed in cooperation with basketball's international governing body, giving rise to a distinct set of governance, regulatory, and competition law questions.

There is nothing inherently incompatible with EU law about an NBA-backed European competition. Whether those issues become genuine legal obstacles remain to be seen. What is already clear, however, is that EU law is unlikely to prevent NBA Europe from entering the market. The real challenge will be ensuring that its commercial ambitions are compatible with the regulatory expectations and sporting traditions that continue to shape European sport. Whether NBA Europe becomes a lasting success may ultimately depend on its ability to strike that balance.



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> The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion

> of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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It's Not Christmas Till Somebody Sues, Part II

By David Krell

TV viewers are inundated with Christmas-themed episodes during December. Below are some examples that trigger legal issues.

The Odd Couple/Alimony

Set in Manhattan, *The Odd Couple* premiered on Broadway in 1965, starring Art Carney as Felix Unger and Walter Matthau as Oscar Madison. Paramount produced a movie version starring Jack Lemmon as Felix and Matthau reprising his role in 1968, then sought to leverage the premise for television. Tony Randall and Jack Klugman starred as Felix and Oscar in the TV version, which aired from 1970-1975 on ABC.

In the first-season episode, "Scrooge Gets an Oscar," the Manhattan-based scribe does not get any leeway on his alimony obligations to his ex-wife Blanche, despite the holiday season. No wonder. Given Oscar's penchant for gambling and losing, Blanche wants to get her money before it goes to the bookies. She uses the Christmas season as a theme for her latest ploy – a singing telegram with holiday-inspired lyrics.[1]

Alimony is defined as "the financial assistance and monetary support provided by one spouse to another after a marriage ends in divorce. Oftentimes, the receiving spouse must be unable to support themselves without the help of their ex-spouse."[2]

*M*A*S*H*/Assault

The *M*A*S*H* episode "Dear Sis" takes place during the holiday season and depicts a crisis for the chaplain of Mobile Army Surgical Hospital #4077.[3]

When a wounded solider shoves head nurse Margaret Houlihan away because he wants a doctor to examine him, Father Francis Mulcahy tries to hold him down, but the solider punches him. Mulcahy responds in kind, then tries to apologize in the post-operative ward, only to receive a barb from the soldier about being ordained at Stillman's Gym, a famous training ground for boxers in New York City.

Mulcahy's physical encounter with the solider could place both of them before a military tribunal. Article 128 of the Uniform Code of Military Justice, part of the United States Code, states in part, "Any person subject to this chapter who, unlawfully and with force or violence attempts to do bodily harm to another person; offers to do bodily harm to another person; or does bodily harm to another person; is guilty of assault and shall be punished as a court-martial may direct."[4]

That Girl/In loco parentis

In a Christmas episode of *That Girl* told in a flashback, the main character Ann Marie, played by Marlo Thomas, notes that she once worked at a boarding school and sacrificed her holiday so she could supervise a young boy named Tommy, whose parents were actors working on a movie out of town.[5]

Due to liability concerns, Ann cannot take Tommy home; the school's insurance only covers a 10-mile radius. If she did not stay, then the caretaker would be in charge of Tommy. This option may have resulted in a very lonely holiday. Ann has the gentility required to assuage Tommy's feeling of solitude.

They spend Christmas Eve together, decorating the tree and making jelly sandwiches. However, Ann does not have to keep Tommy amused by herself; he has a friend named Roger

who wants to come to the school on Christmas Day. Ann calls Roger's parents, who give the green light. Their family is Jewish, but they invite Tommy to come over for the holiday and celebrate it just for him.

This is a clear case of in loco parentis, a legal concept meaning that the school has custody of its students when they are on school grounds. The phrase translation is "in place of a parent."

In a 2017 missive on the New York State School Boards Association website, senior staff counsel Kimberly A. Fanniff wrote, "School officials should be familiar with the Latin term *in loco parentis* (acting as guardian to a child) because school personnel serve in that capacity while children are in school or otherwise under their supervision."[6]

Ann's actions, though benevolent, have substantive legal impact. All the activities that she and the boys engage in require her to supervise and ensure that they are safe. If Tommy or Roger had sustained an injury or become sick on her watch, then the school would have been legally responsible.

NCIS/Presumption of Death

In *NCIS*, Leroy Jethro Gibbs leads a team of agents at the Naval Criminal Investigative Service responsible for solving crimes involving sailors and marines. Their investigation of a burglary and double homicide during the Christmas season in the episode "Silent Night" reveals the suspect to be a former petty officer in the Navy. One problem – he has been presumed dead for 17 years.[7]

Code of Federal Regulations Section 404.721 states in part that evidence is needed to presume death if the person cannot be proved dead:

(a) A certified copy of, or extract from, an official report or finding by an agency or department of the United States that a missing person is *presumed to be* dead as set out in Federal law (5 U.S.C. 5565). Unless we have other evidence showing an actual date of death, we will use the date he or she was reported missing as the date of death.

(b) Signed statements by those in a position to know and other records which show that the person has been absent from his or her residence and has not been heard from for at least 7 years.[8]

Taxi/Employment

Part of the lore of Andy Kaufman is the persona of Tony Clifton – a loudmouth lounge singer with more abrasiveness than 100 square feet of sandpaper. Kaufman did not admit to portraying Clifton with heavy makeup and prosthetics, then continued the hoax of Clifton being a real person by persuading the producers of *Taxi* to "hire" Clifton for the episode "A Full House for Christmas."[9]

They cast Clifton as Nick De Palma, a poker player in Las Vegas and the brother of Louie De Palma, the Sunshine Cab Company's verbally abusive dispatcher tired of caring for his mother with no fraternal support from his brother. When Nick comes to visit for the holidays, he has a falling out with Louie. The two reconcile with a poker game between Alex Rieger, the patriarch of sorts for the cabbies, and Nick. If Alex wins, Nick must share in Louie's responsibilities, including bringing their mother to Las Vegas for a few weeks.

It descended into chaos. According to several interviews with *Taxi* cast members, Clifton came onto the *Taxi* set with two prostitutes and small gifts. His boisterous, defiant tone irritated the cast and crew, leading to Clifton being escorted off the Paramount lot. Yet the whole thing was a ruse – Kaufman wanted to get Clifton fired so he could create a scene.

To continue the ruse, Kaufman pretended that if Clifton was fired because of his performance, he would never work again. The producers, respectful of Kaufman's comedy and protective of his involvement in the show, agreed. However, there was really no valid contract because Clifton was a persona and not an actual person.

The Detectorists/Nighthawking

Metal detecting is a hobby that anyone can undertake with the proper equipment.

In *The Detectorists*, a charming BBC show set in a fictional town in Essex, England, Lance and Andy patrol grounds looking for treasure. Their mission is born out of curiosity, not hopes of wealth.

In England, a season of television shows consists of six episodes. *The Detectorists* lasted two seasons. There was also a Christmas special depicting Lance suffering a curse – after finding an outstanding item, he made no discoveries. The curse is lifted when he puts money in the ground on the theory that if he took something from the earth, he must give something back.[10]

Though good-natured fellows who enjoy a pint at the pub after their travails, Lance, Andy, and other members of their treasure seeking group need permission from the landowners on whose property they search. Otherwise, they could be guilty of nighthawking. The website Historic England explains:

> 'Nighthawking' is a term used in the United Kingdom to describe unlawful metal detecting which can take place at any time of the day on farmland, archaeological sites and other areas of archaeological interest, in or-

> der to search for coins and other artefacts [sic] for their historic and financial value.
>
> Nighthawks will enter land without permission from the landowner with a range of equipment including metal detecting devices and digging implements. Items found during the course of the activity will be classed as stolen property and tend to be kept as part of a private collection or sold for personal profit. As a result, the finders are unlikely to report their finds to the Portable Antiquities Scheme and valuable historical data is lost for good.[11]

Chicago Med/CDC

In the *Chicago Med* episode "Naughty or Nice," a cheating husband is playing "chicken" with a potential life-and-death situation. He has been with another woman in Aruba. Dr. Will Halstead wants to test the wife after the husband's test is inconclusive for the Zika virus, but a lawsuit is threatened if the hospital goes through with the testing, because that will lead to the wife asking questions, which will unravel the husband's ruse.

Zika is considered a public health emergency, which puts it under the jurisdiction of the Centers for Disease Control and Prevention (CDC). Federal law allows the CDC to get involved, thereby trumping the patient's confidentiality issues. Halstead contacts the CDC, which sends an epidemic intelligence officer to the hospital for further investigation.

The CDC website states:

> The HIPAA Privacy Rule provides national standards for protecting the privacy of health information and regulate how certain "covered entities" (health plans, healthcare clearinghouses, and healthcare providers who engage in certain electronic transactions) use and disclose protected health information.
>
> Pursuant to the HIPAA Privacy Rule, these covered entities must provide certain assurances to patients and safeguards for securing patient records. However, appreciating the critical need for public health to use PHI to identify, address, and monitor the public's health, the HIPAA Privacy Rule expressly permits PHI to be shared for specified public health purposes. For example, covered entities may disclose PHI, without individual authorization, to a public health authority legally authorized to collect or receive the information for the purpose of preventing or controlling disease, injury, or disability.
>
> Further, the HIPAA Privacy Rule permits covered entities to make disclosures that are required by other laws, including laws that require disclosures for public health purposes.[12]

Halstead's contacting the CDC might seem to be a violation of the cheating husband's rights. However, concerns about a potential citywide viral outbreak offsets the marital impact of adulterous activities.

Conclusion

The holiday season is a rich foundation for storytellers. Lawyers may view TV episodes with Christmas themes as opportunities to ponder the implications of characters' actions and envision representing them in a fictional courtroom, tackling complex issues ranging from alimony to Zika.

David Krell is the author of *Have Yourself a Merry Legal Christmas: Laws and Justice in Holiday Movies and Television Shows*.

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