

BREAKING THE FOURTH WALL: AN ANALYSIS OF THE
EMERGENCE OF AI IN THE ENTERTAINMENT
INDUSTRY

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INTRODUCTION

From the blast of a phaser to the crack of a whip, George Lucas and Harrison Ford have made an indelible impact on the world of entertainment. George Lucas created *Star Wars* and *Indiana Jones*, two movie series starring Harrison Ford with zealous fanbases. What if it were possible for Lucas and Ford to produce new installments in each franchise starring Harrison Ford in perpetuity? New *Star Wars* and *Indiana Jones* movies featuring the same artful writing of Lucas with an ageless Harrison Ford acting. This prospect would certainly excite their ardent fanbases. Sellers of artificial intelligence (AI) promise to make the impossible possible.

Current AI technology can probe the internet, find relevant, copyrighted works, extract information from these works, and create new works without plagiarizing the original.¹ While one might think this technology is far from being utilized in entertainment, Lucasfilm Production Company resurrected deceased actor Peter Cushing to reprise

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1. See Marshall Terrill, *Duplicating Talent: The threat of AI in Hollywood*, ASU NEWS (July 21, 2023), <https://news.asu.edu/20230721-creativity-duplicating-talent-threat-ai-hollywood> [<https://perma.cc/AS9F-BNDC>] (explaining how AI produces new works).

his role in *Rogue One: A Star Wars Story* in 2016.² Prominent actors like Robert De Niro, Samuel L. Jackson, and Harrison Ford have been digitally “de-aged” for films—the result of AI’s miraculous technology.³ While there is much excitement about AI, Baz Luhrmann—director of the new movie *Elvis*—shared his sense of urgency that existing laws are not equipped to govern AI and that its regulation is “way behind.”⁴ Generative AI threatens to escape all existing legal frameworks.⁵

As can be imagined, the excitement and fear surrounding AI have brought uncertainty to the film industry. Members of the Screen Actors Guild and American Federation of Television and Radio Artists (SAG-AFTRA), and the Writers Guild of America (WGA) joined together on strike in 2023 for the first time since 1960. SAG-AFTRA and WGA fear that AI “might keep them from gainful employment and could collapse the entire entertainment industry.”⁶ Proponents of the technology believe it will soon be used to produce written and visual entertainment, empowered by analysis of existing works. The onset of AI raises questions about creativity and expression. As our society advances, ever approaching a world in which human tasks are completed through automation, many fear meaningful human employment will become obsolete.⁷

Innovation is certainly not a new phenomenon. Throughout history, innovation has transformed and improved industries. Buggy-whip manufacturing, a once thriving industry, crashed virtually overnight with the invention of the automobile. As much as innovation brings societal advancement and prosperity, it also creates obsolescence, raising questions about negative consequences. While the buggy-whip example may seem trivial, it was not to those whose livelihood depended on the industry. Some might conclude that this is the price that must be paid for society to move forward; societal advancements cannot be held back by a few relying on a dying industry; and people can learn a

2. Kelly Lawler, *SAG-AFTRA Is Worried about AI, But Can It Really Replace Actors? It Already Has.*, USA TODAY (August 1, 2023), <https://www.usatoday.com/story/entertainment/tv/2023/08/01/ai-and-hollywood-strikes-what-the-real-threat-is-to-actors-writers/70436618007/> [<https://perma.cc/D8QP-9UG2>].

3. *Id.*

4. See Niamh Lynch, *Baz Luhrmann: Film Industry ‘Way Behind’ on Governing AI*, SKY NEWS (November 25, 2023), <https://news.sky.com/story/baz-luhrmann-film-industry-way-behind-on-governing-ai-13016154> [<https://perma.cc/6WRH-DRMD>].

5. Katherine Lee, A. Feder Cooper, & James Grimmelman, *Talkin’ ‘Bout AI Generation: Copyright and the Generative-AI Supply Chain*, J. OF THE COPYRIGHT SOC’Y OF THE U.S.A., *3 (forthcoming in 2024).

6. Terrill, *supra* note 1.

7. See Ashley Stahl, *The Rise of Artificial Intelligence: Will Robots Actually Replace People?*, FORBES (May 3, 2022), <https://www.forbes.com/sites/ashleystahl/2022/05/03/the-rise-of-artificial-intelligence-will-robots-actually-replace-people/?sh=5f236b7f3299> [<https://perma.cc/56P6-R5SL>] (discussing the inevitability of AI taking over some jobs in the workplace, including its recent proliferation in customer service departments).

new trade or skill to make a living.⁸ Instead of ending an industry and replacing it with one providing new jobs, the emergence of AI threatens to replace humans entirely.

Luckily for actors, the Lanham Act and right of publicity law stand between them and AI.⁹ Actors enjoy strong rights in their likeness which are grounded in their personhood.¹⁰ The same cannot be said for screenwriters.¹¹ Copyright law—used to protect written works—does not protect screenwriters from the threat of AI.¹² This Note seeks to determine how courts will apply existing law to AI and whether, where disparate treatment arises, change should occur. It argues that copyright should mirror right of publicity law—strictly in the AI context—grounding rights in the author’s personhood rather than in his creative work.¹³

This Note proceeds in four parts. First, it briefly describes the generative AI process to give readers background on the technology. Next, it evaluates the relationship between actors and AI under current law. Then, it evaluates the relationship between screenwriters and AI. Finally, it concludes that a judicial change in the application of the first and fourth fair use factors is necessary to give screenwriters protection that mirrors actors’ protections.

I. HOW GENERATIVE AI WORKS

Before addressing how AI will affect the film industry, the reader needs a cursory understanding of AI. AI refers to “deep-learning models” that scan large quantities of raw data and “learn” to generate statistically probable outputs when prompted.¹⁴ It uses the “training data” to produce entirely new works using the information it acquired from the training data.¹⁵ Put simply, this process allows AI to imitate human intelligence or a really well-informed auto-complete function.¹⁶ Although AI was initially used to analyze numerical data, recent advances have allowed the generation of images and text. AI can be used

8. See Jessica G. Martz, *Artificial Intelligence Is Here, Get Ready!*, 28 CATH. U. J. L. & TECH. 33, 37 (2019).

9. See discussion *infra* Section III.A.2.

10. See Caitlyn Slater, *The Duet on the Internet: Balancing Sharing Information and Protecting the Right of Publicity on Social Media*, 46 AIPLA Q. J. 457, 473 (2018) (describing a personhood justification for right of publicity).

11. See discussion *infra* Section IV.B.

12. *Id.*

13. See discussion *infra* IV.D.

14. Kim Martineau, *What Is Generative AI?*, IBM (April 20, 2023), <https://research.ibm.com/blog/what-is-generative-ai> [<https://perma.cc/3Y9J-5NUR>].

15. *Id.*

16. See Sara Brown, *Machine Learning, Explained*, MIT SLOAN SCHOOL: IDEAS MADE TO MATTER (April 21, 2021), <https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained> [<https://perma.cc/CS6J-QS4Z>].

to generate a new work, but that is only one step along the “generative-AI supply chain.”¹⁷

As Katherine Lee, A. Feder Cooper, and James Grimmelmann noted in a recent article, the process begins with creative works that “AI seeks to learn from and emulate.”¹⁸ However, before AI can learn from creative works, the information must be converted into usable data.¹⁹ AI learns through a process of encoding—compressing large sets of raw data; and decoding—reconstructing the compressed data—to form a new output with variations from the original.²⁰ A further advancement—a “transformer”—allows an encoder and decoder to convert text and learn “how words and sentences relate to each other.”²¹ Each portion of usable data is then “compiled into training datasets: vast and carefully structured collections of related data.”²² The training model can then be adapted or “fine-tuned” by the user to refine the training process.²³ After a user is satisfied with the training process, the model can be “deployed.”²⁴ Once deployed, the generative-AI model requires a user input to set parameters and make requests to generate an output.²⁵ Through these processes, AI can generate new images, new books, or any other type of artistic and expressive work.²⁶

II. ACTORS

This section discusses how the utilization of AI in movies and television implicates the rights of actors. Actors’ legal protections are grounded in the right of publicity and misappropriation of identity. California courts apply two different tests to determine if one has a valid claim regarding their likeness: the Transformative Use test under the California statutory and common law right of publicity claims, and the *Rogers* test under the Lanham Act.²⁷ This section analyzes whether generative AI uses of actors’ likenesses violate the Lanham Act under a False Endorsement claim or the common law right of publicity. It proceeds by arguing that generative AI uses of actors’

17. Lee, *supra* note 5 at *5 (defining the generative-AI supply chain as “an interconnected set of stages that transform training data (millions of pictures of cats) into generations (a new and hopefully never-seen-before picture of a cat that may or may not ever have existed)”).

18. *Id.*

19. *Id.*

20. Martineau, *supra* note 14.

21. *Id.*

22. Lee, *supra* note 5 at *5.

23. *Id.*

24. *Id.*

25. *Id.*

26. See Martineau, *supra* note 14 (describing AI’s capability to create generative content-based data).

27. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

likenesses are likely to violate the Lanham Act.²⁸ It then argues that the common law right of publicity will likely bar generative AI from using actors' likenesses without their consent.²⁹

A. *False Endorsement Under the Lanham Act*

While the Lanham Act is a federal law intended to protect trademarks, courts also recognize claims under the provision "relating to the use of a public figure's persona, likeness, or other uniquely distinguishing characteristic" if it causes consumer confusion.³⁰ An actor would bring a false endorsement claim under the Lanham Act when his AI-generated likeness was used in movies without his consent. While *Brown v. Elec. Arts, Inc.* and *K and K Promotions, Inc. v. Walt Disney Studios Mot. Pictures* are examples of Lanham Act claims that failed, they are useful analogs for illustrating how courts have applied the *Rogers* test to scenarios where an individual's likeness is used without his consent.³¹

1. *The False Endorsement Claim and the Rogers Test*

The Ninth Circuit Court of Appeals applied the *Rogers* test in *Brown*, finding that NFL legend Jim Brown failed to establish a valid false endorsement claim under the Lanham Act.³² Jim Brown (the plaintiff), a former professional football player, claimed that Electronic Arts (EA—the defendant) violated the Lanham Act by using his likeness in its *Madden NFL* series of football video games.³³ Under the Lanham Act, in analyzing a right of publicity claim, courts must balance the First Amendment free expression (artistic or creative) of a defendant against the interest of a plaintiff's freedom from misappropriation of their likeness without consent or participation.³⁴ A plaintiff must satisfy the *Rogers* test to justify a court's regulation of a defendant's free expression.³⁵ To satisfy the *Rogers* test, a plaintiff must show that the use of his likeness is not artistically relevant to the underlying work, or alternatively, if it is artistically relevant to the underlying

28. See discussion *infra* Section III.A.2 (in cases where the actor's likeness would surely be used in the movie's promotional material).

29. See discussion *infra* Section III.B.1.

30. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013).

31. *Id.*; *K and K Promotions, Inc. v. Walt Disney Studios Mot. Pictures*, No. 21-16740, 2022 WL 3585589 *2 (9th Cir. Aug. 22, 2022).

32. *Brown*, 724 F.3d at 1248.

33. *Id.* at 1238-39.

34. See *id.* at 1239 (explaining the limits the First Amendment places on the Lanham Act's protections).

35. *Id.*

work, it explicitly misleads consumers as to the work's source or content.³⁶

Applying the *Rogers* test, the court found that the use of the plaintiff's likeness had artistic relevance to *Madden NFL* and was not explicitly misleading to consumers.³⁷ In determining the artistic relevance of the plaintiff's likeness to the game, the court referenced *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, in which the court reasoned that the artistic relevance of the use of a likeness "merely must be above zero" to be artistically relevant to the work.³⁸ The plaintiff argued that the defendant's commitment to realism in *Madden NFL* cut against artistic relevance.³⁹ However, the court held that because a focus on realism was the central goal of the expression, the inclusion of Brown's likeness showed some artistic relevance.⁴⁰ The court added that the inclusion of all-time great NFL players—like Jim Brown—is related to the simulation of NFL football.⁴¹ The court further stressed caution in restricting the First Amendment.⁴² The court concluded that the plaintiff failed to satisfy the first prong of the *Rogers* test.⁴³

Next, the court addressed the second prong of the *Rogers* test, which asks if the creator used the likeness to explicitly mislead consumers as to the work's source or content.⁴⁴ Even if the first prong fails, a plaintiff can bring a successful claim under the Lanham Act by satisfying the second prong. The court emphasized that the use must be explicitly misleading to consumers.⁴⁵ The plaintiff presented a consumer survey which showed that consumers believed the defendant needed permission from the plaintiff.⁴⁶ The plaintiff argued the defendant's statements about his involvement in the game were explicitly misleading

36. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013) (quoting *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989)).

37. *Brown*, 724 F.3d at 1243, 1245.

38. *Id.* at 1242-43 (quoting *E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008)) (discussing the likeness of a Los Angeles strip club in the video game *Grand Theft Auto: San Andreas*).

39. *Id.* at 1243.

40. *Id.*

41. *See Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243-44 (9th Cir. 2013) (The court distinguished this case from *Parks v. Laface Records* in which the court determined that Ms. Parks' name was not related to the content of the song).

42. *See id.* at 1244-45 (opining that "[t]he *Rogers* test is applicable when First Amendment rights are at their height—when expressive works are involved—so it is no surprise that the test puts such emphasis on even the slightest artistic relevance.").

43. *Id.* at 1245.

44. *Id.* at 1245 (quoting *Rogers*, 875 F.2d at 999).

45. *See Brown*, 724 F.3d at 1245 (quoting *Rogers*, 875 F.2d at 999-1000) (clarifying that the second prong "points directly at the purpose of trademark law, namely to avoid confusion in the marketplace by allowing a trademark owner to prevent others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner.").

46. *Id.*

and cited contradictory statements made by the defendant to bolster his claim.⁴⁷ The court rejected each argument and was not persuaded that the defendant sought to mislead consumers.⁴⁸ The court stated that even if the plaintiff offered data showing that consumers believed that the plaintiff endorsed the game, it would not be dispositive to the second prong of the *Rogers* test.⁴⁹ Moreover, the court clarified that if the defendant made a statement claiming it had received permission to use the players' likenesses on the back cover of *Madden NFL*, it might raise questions as to whether it was explicitly misleading consumers.⁵⁰ Finally, because the plaintiff's claim failed both prongs of the *Rogers* test, the video game was not in violation of the Lanham Act.⁵¹

The Ninth Circuit also applied the *Rogers* test in *K and K Promotions*, finding that Disney's (the defendant) character Duke Caboom in the movie *Toy Story 4* was a protected expressive work and did not violate the Lanham Act.⁵² The plaintiff owned the intellectual property and publicity rights of the famous stuntman Evel Knievel.⁵³ The court held that "Duke Caboom clearly has artistic relevance."⁵⁴ Further, the court explained that "[the plaintiff] did not allege sufficient facts that would show the character was explicitly misleading as to its source."⁵⁵

In its analysis of the "explicitly misleading" prong of the *Rogers* test, the court evaluated "(1) the degree to which the [plaintiff] uses the mark in the same way as the [defendant] and (2) the extent to which the [plaintiff] has added his or her own expressive content to the work beyond the mark itself."⁵⁶ The court differentiated the underlying work from Evel Knievel by pointing out that "[u]nlike Evel Knievel, Duke Caboom is a fictional character in an animated film about toys that come to life."⁵⁷ Furthermore, the court noted that the defendant's Duke Caboom had a different name, appearance, and origin than Evel Knievel.⁵⁸ Moreover, Evel Knievel is never explicitly mentioned in the film, and therefore, would not mislead consumers to believe that he

47. *Id.* at 1245-47.

48. *Id.* at 1245-46

49. *Id.* at 1246.

50. *Id.* at 1247.

51. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013).

52. *K and K Promotions, Inc. v. Walt Disney Studios Mot. Pictures*, No. 21-16740, 2022 WL 3585589, at *2 (9th Cir. 2022).

53. *Id.* at *1.

54. *Id.*

55. *Id.*

56. *Id.* at *1 (quoting *Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 270 (9th Cir. 2018)).

57. *Id.*

58. *K and K Promotions, Inc. v. Walt Disney Studios Mot. Pictures*, No. 21-16740, 2022 WL 3585589, at *1 (9th Cir. 2022).

endorsed the film.⁵⁹ The court concluded that the plaintiff failed to state a claim under the *Rogers* test.⁶⁰

2. Application

Under the *Rogers* test, trademark law is unlikely to provide a remedy to actors for AI-generated use of likeness. Courts are apt to find the use to be artistically relevant. Artistic relevance need only be above zero; therefore, the *Rogers* test imposes an easily surpassable bar.⁶¹ In the recent film, *Indiana Jones and the Dial of Destiny*, Harrison Ford, the lead actor, was “de-aged” using AI to show the audience an adventure earlier in the character’s life.⁶² A court would arguably find this use artistically relevant to the film. The movie executives could have cast a younger actor with similar features to Harrison Ford as the young Indiana Jones. However, because the *Indiana Jones* franchise has featured Harrison Ford as Indiana Jones for decades, using another actor to portray the character would be less viable and meaningful to the audience. As Electronic Art’s commitment to realism in its video game showed “some artistic relevance,” the production company’s commitment to recreating a young Indiana Jones, via an AI de-aged version of Harrison Ford, maintained the continuity of the franchise, thus serving as artistic relevance to the movie.⁶³ As noted in an article in *The Atlantic*, “[i]magine the outcry, even now, if a studio announced . . . a new *Indiana Jones* movie without Harrison Ford cracking the whip.”⁶⁴

While the recent example of Harrison Ford’s de-aging clearly has artistic relevance to the film, it is not completely analogous to the type of AI-generative use that actors fear. Rather, the fear is that “actors’ images could be used to create characters without any humans involved.”⁶⁵ If, instead of Ford being de-aged, a production company made a prequel *Indiana Jones* movie using AI to generate images of a young Harrison Ford without the actor’s consent or involvement, would a court find the use to be artistically relevant under the *Rogers* test? In other words, a court must decide whether such use is

59. *Id.*

60. *Id.* at *2.

61. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1243 (9th Cir. 2013).

62. Priya Singh, *Hollywood Going the AI Way: How the New Indiana Jones Movie De-Aged Actor Harrison Ford*, BUSINESS TODAY (July 19, 2023), <https://www.businesstoday.in/technology/news/story/hollywood-going-the-ai-way-how-the-new-indiana-jones-movie-de-aged-actor-harrison-ford-390481-2023-07-19> [<https://perma.cc/5JK4-LLGJ>].

63. *Brown*, 724 F.3d at 1243.

64. Scott Meslow, *Do Audiences Care When Sequels Switch Up Their Stars?*, THE ATLANTIC (February 10, 2012), <https://www.theatlantic.com/entertainment/archive/2012/02/do-audiences-care-when-sequels-switch-up-their-stars/252900/> [<https://perma.cc/R6KB-EARY>].

65. Lawler, *supra* note 2.

analogous to the use of Jim Brown's likeness in *Madden NFL*.⁶⁶ Following the court in *Brown*, a court could find that the use of Harrison Ford's likeness, as described above, is clearly related to the content of the *Indiana Jones* franchise. As fans of the NFL might regard great players like Jim Brown as synonymous with the league, fans of *Indiana Jones* might regard Harrison Ford as synonymous with the movie franchise.

In this hypothetical, Harrison Ford's representation could argue that his case is distinguishable from *Brown*, and more like *Parks v. LaFace Records*.⁶⁷ In *Parks*, the court held that the defendant impermissibly used civil rights icon Rosa Parks' name in a song title.⁶⁸ While the court noted that the use of her name could have some metaphorical significance, it questioned its actual significance to the song.⁶⁹ Similarly, Harrison Ford could claim that the use of his likeness sought only to increase the marketing power of the film and served no artistic purpose. However, unlike in *Parks*, Harrison Ford's likeness is an integral part of the content of the *Indiana Jones* franchise. In *Parks*, the court struggled to find any nexus between Rosa Parks's name and the content of the song.⁷⁰ Since Harrison Ford has always played the character Indiana Jones, it could be concluded that his likeness is inextricably tied to the content of the franchise. Thus, Harrison Ford's claim would likely fail under the first prong of the *Rogers* test.

The nature of the relationship between Harrison Ford and Indiana Jones could aid the actor's claim in the second prong of the *Rogers* test.⁷¹ Harrison Ford could argue that the purpose of his likeness, while it may have some artistic relevance, mainly serves as a marketing tool used to mislead consumers. This argument appears rather strong. It is common practice in the movie industry to show promotional previews and posters of movies to inform consumers of their

66. See *Brown*, 724 F.3d at 1243-44 (recognizing that "the content of the *Madden NFL* games—the simulation of NFL football—[wa]s clearly related to Jim Brown, one of the NFL's all-time greatest players.").

67. See generally *Parks v. Laface Rec.*, 329 F.3d 437, 454 (6th Cir. 2003) (where the court found that the defendant's use of Rosa Parks' name had no artistic relevance to the work).

68. See *id.* (concluding that "reasonable people could find that [Rosa Parks's] name was appropriated solely because of the vastly increased marketing power of a product bearing the name of a national heroine of the civil rights movement.").

69. See *id.* (explaining that claiming the use of someone's likeness to be symbolic does not "confer authority to use a celebrity's name when [no symbolism], in fact, may exist.")

70. See *id.* at 453 (stating that Outkast's lyrics "contain absolutely nothing that could conceivably, by any stretch of the imagination, be considered, explicitly or implicitly, to . . . any other quality with which Rosa Parks is identified.").

71. See *Brown*, 724 F.3d at 1245 (quoting *Rogers*, 875 F.2d at 999) (stating that "[e]ven if the use of a trademark or other identifying material is artistically relevant to the expressive work, the creator of the expressive work can be subject to a Lanham Act claim if the creator uses the mark or material to 'explicitly mislead [consumers] as to the source or the content of the work.'").

premiers. A movie using an AI-generated Harrison Ford as Indiana Jones would almost certainly employ the AI-generated Harrison Ford in promoting the film. Using Ford's likeness would likely explicitly mislead consumers, satisfying the second prong of the *Rogers* test.

Unlike *Brown*, where it was unclear whether EA used his likeness to explicitly mislead consumers about his involvement or endorsement of *Madden NFL*, the use of Harrison Ford's likeness to promote a new *Indiana Jones* movie would be more apparent and more clearly misleading.⁷² The second prong of the *Rogers* test is designed to avoid consumer confusion that might cause them to support a movie they believe includes and is endorsed by Harrison Ford.⁷³ If promotional tools introduced the movie and claimed Harrison Ford starred as Indiana Jones, that would likely qualify as an "explicit indication," "overt claim," or "explicit misstatement," causing consumer confusion.⁷⁴ The court in *Brown* posited that if statements or depictions of Brown's name, image, or likeness had appeared in promotional materials for the game, it could have been satisfied or created an issue of fact.⁷⁵ Similarly, if the name, image, or likeness of Harrison Ford appeared in promotional material for a new *Indiana Jones* movie, it would explicitly mislead consumers into believing he was involved in the film. As distinguished from *Brown*, Harrison Ford would unquestionably be the main attraction of the movie for consumers. Brown's likeness used in *Madden NFL* may have piqued the interest of consumers, but other popular players would attract them as well. Harrison Ford has been the main character of the *Indiana Jones* franchise throughout its existence. A claim by Ford under the second prong of the *Rogers* test should be successful.

B. Right of Publicity and The Transformative Use Test

While an actor's claim under the Lanham Act is not certain to fail, a right of publicity claim is more applicable and has a greater probability of success.⁷⁶ The Ninth Circuit Court of Appeals addressed a case similar to *Brown* in *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, applying the Transformative Use test in a right-of-publicity claim.⁷⁷ The court had to weigh the right of publicity of a former college football player against the First Amendment right of EA.⁷⁸ The

72. *Brown*, 724 F.3d at 1247.

73. *Id.* at 1245.

74. *Rogers*, 875 F.2d at 1001.

75. *Brown*, 724 F.3d at 1247.

76. See *Rogers*, 875 F.2d at 1003-04 (citing *Bi-Rite Enter., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983)).

77. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1279 (9th Cir. 2013).

78. *Id.* at 1271.

California Supreme Court defined the Transformative Use test as “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”⁷⁹ To analyze a case under the Transformative Use test, the court considers five factors to determine if a work is protected by the First Amendment.⁸⁰

The first factor considers whether the likeness is used as “raw materials” to produce an original work, or if the likeness is “the very sum and substance of the work.”⁸¹ The second factor requires the court to balance the originator’s own expression against the use of the likeness in question.⁸² The third factor requires the court to inquire “whether . . . the imitative or the creative elements predominate in the work.”⁸³ The fourth factor requires the court to inquire whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.”⁸⁴ The fifth factor requires the court to evaluate whether the “artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame.”⁸⁵

The court found that EA (the defendant) failed the first factor by portraying the sum and substance of the plaintiff’s likeness in its *NCAA Football* video game, which simulated college football.⁸⁶ Additionally, the court noted the realistic context of the avatars—they were depicted in real football stadiums.⁸⁷ The defendant argued that the focus should be on whether the game, as a whole, provided transformative elements, rather than the likeness of the plaintiff.⁸⁸ However, the court reasoned that just because the videogame contained creative elements, it did not necessarily transform the players’ likenesses beyond the fame the player already acquired.⁸⁹ The court agreed with the

79. *Id.* at 1273 (quoting *Comedy III*, 21 P.3d 797 at 799).

80. *In re NCAA*, 724 F.3d at 1274.

81. *Id.*

82. *See id.* (citing § 8:72. Artistic and expressive uses and the “Transformative Test”, 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 8:72 (2d ed. 2024)) (specifically, the court must determine “whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity or to buy the expressive work of that artist.”).

83. *In re NCAA*, 724 F.3d at 1274 (quoting *Comedy III*, 21 P.3d 797 at 809).

84. *Id.* (quoting *Comedy III*, 21 P.3d 797 at 810).

85. *Id.* (quoting *Comedy III*, 21 P.3d 797 at 810).

86. *See In re NCAA*, 724 F.3d at 1276 (elaborating that in the game “users manipulate the characters in the performance of the same activity for which they are known in real life—playing football . . .”).

87. *Id.*

88. *Id.*

89. *Id.* (quoting *No Doubt v. Activision Publ., Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. App. 2d Dist. 2011)).

defendant that alterations of the character were relevant but concluded that the main appeal of the game was the user's ability to play with their favorite team or players.⁹⁰ The court ultimately concluded that the defendant's use of the plaintiff's likeness was not sufficiently transformative to garner First Amendment protection under the Transformative Use test.⁹¹

The Second District Court of Appeal of California applied the Transformative Use test in *Kirby v. Sega of Am., Inc.*, finding that the defendant's use of the plaintiff's likeness was protected free expression under the First Amendment of the United States Constitution.⁹² Kirby (the plaintiff) sued Sega (the defendant) alleging that it misappropriated her likeness in its game *Space Channel 5*.⁹³ Kirby specifically took issue with Sega's character Ulala.⁹⁴ Ulala was depicted wearing a similar outfit to the plaintiff's signature costume, including pink pigtails, platform shoes, a skirt, a crop-top shirt, and an exposed numeral written on her chest.⁹⁵

Applying the Transformative Use test, the court explained that while the plaintiff and Ulala shared similar features, they differed as well.⁹⁶ The game—depicting a 25th-century reporter from space—was quite different from any public depictions of the plaintiff.⁹⁷ The court also agreed with a finding of the trial court that Ulala's dance moves were unlike the plaintiff's dance moves in her music videos.⁹⁸ After considering the similarities and differences between the plaintiff and the defendant's character in *Space Channel 5*, the court concluded that the depiction was transformative and that the defendants “added creative elements to create a new expression.”⁹⁹ Conceding the added expression, the plaintiff contended that the character was merely a “look-alike, an imitation or emulation or rip-off of [her] entire persona” that sought to exploit her fame.¹⁰⁰ The court rejected the plaintiff's contention, explaining that while it could not say that Ulala was not based

90. *In re NCAA*, 724 F.3d at 1277 (quoting *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 168 (3d Cir. 2013)).

91. *Id.* at 1284.

92. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 617-18 (Cal. App. 2d Dist. 2006).

93. *Id.* at 609-11.

94. *See id.* at 610 (Ulala is a “computer-generated image of a young, fictional, elongated and extremely thin female reporter . . . who works for a news channel called Space Channel 5.”).

95. *Id.* at 609, 610.

96. *See id.* at 616 (noting that “Ulala's extremely tall, slender computer-generated physique” was different from the plaintiff's physique).

97. *Id.*

98. *Kirby*, 50 Cal. Rptr. 3d at 616.

99. *Id.*

100. *Id.*

on the plaintiff's likeness, it also could not conclude that Ulala was a mere imitation of the plaintiff.¹⁰¹

Further, the court rejected the plaintiff's argument that the work was not transformative on the grounds that it failed to comment critically, satirically, or factually on her.¹⁰² The court clarified that the decisive factor was whether the work was transformative, not whether it made social commentary on the plaintiff.¹⁰³ The court also declined the plaintiff's request to refine the Transformative Use test to provide more clarity and predictability in the law.¹⁰⁴ The court concluded that the plaintiff's claims failed because the video game was protected speech under the First Amendment.¹⁰⁵

The Second District Court of Appeal of California again applied the Transformative Use test in *No Doubt v. Activision Publg., Inc.*, holding that the defendant's use of the plaintiff's likeness was not transformative.¹⁰⁶ The defendant's game *Band Hero* allowed users to simulate performing in various rock bands by choosing from various playable characters.¹⁰⁷ The game included avatars, that digitally represented real-life rock stars.¹⁰⁸ The defendant entered an agreement with the plaintiff, one of the bands represented in *Band Hero*.¹⁰⁹ The dispute arose when the band members learned of the game's "unlocking" feature, which allowed players to use avatars from the plaintiff's band to perform any of the songs included in the game.¹¹⁰ The plaintiff filed suit, alleging that the defendant exploited its name, image, and likeness without authorization.¹¹¹ Specifically, the plaintiff took issue with the fact that the game allowed users to perform songs with the band that it would never perform.¹¹²

While the defendant argued that the First Amendment protected its use of the plaintiff's likeness, the court explained that was not

101. *See id.* (adding that "the differences [we]re not trivial").

102. *Id.* at 617.

103. *Id.* (quoting *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003)).

104. *See Kirby*, 50 Cal. Rptr. 3d at 617 (pointing out that "[t]he test simply requires the court to examine and compare the allegedly expressive work with the images of the plaintiff to discern if the defendant's work contributes significantly distinctive and expressive content; i.e., is 'transformative.'").

105. *Id.* at 618.

106. *No Doubt v. Activision Publg., Inc.*, 122 Cal. Rptr. 3d 397, 415 (Cal. App. 2d Dist. 2011).

107. *Id.* at 401.

108. *Id.*

109. *See id.* at 401-02 (per the agreement, the band members were captured in a full-day motion photography session, resulting in avatars that closely resembled their appearances).

110. *Id.* at 402.

111. *Id.* at 402.

112. *No Doubt v. Activision Publg., Inc.*, 122 Cal. Rptr. 3d 397, 402 (Cal. App. 2d Dist. 2011).

necessarily true.¹¹³ The defendant conceded that the avatars were computer-generated versions of the real band members.¹¹⁴ The defendant intended to share with users the experience of being a rock star through the use of literal reproductions.¹¹⁵ The court rejected the plaintiff's contention that realistic depictions automatically removed First Amendment protection.¹¹⁶ Instead, the court explained that the context of the depiction is key to determining whether it is transformative.¹¹⁷ The court then clarified that the objections of band members to performing certain songs were irrelevant to the determination of transformative use.¹¹⁸

Applying the Transformative Use test, the court held that the dispositive factor was whether *Band Hero* transformed depictions of the plaintiff into expressive content by combining them with other elements of the game.¹¹⁹ The court concluded that here, unlike *Kirby*, the depiction was of the band members performing "the same activity by which the band achieved and maintains its fame."¹²⁰ The court also pointed out that the use of the band's likeness showed the defendant's commercial motivation because fans of the plaintiff's band would be influenced to purchase the game.¹²¹ Therefore, the expressive content in the game was "manifestly subordinated to the overall goal of creating a conventional portrait of [No Doubt] so as to commercially exploit [its] fame."¹²² The court held that the defendant's use of the plaintiff's likeness was not transformative.¹²³ *Band Hero* simply displayed depictions of the band members and did not add any elements to transform them into the defendant's artistic expression.¹²⁴ The First Amendment did not protect the defendant's use of the plaintiff's likeness.

113. See *id.* at 406 (clarifying that "[the defendant]'s First Amendment right of free expression is in tension with the rights of [the plaintiff] to control the commercial exploitation of its members' likenesses.").

114. *Id.* at 409.

115. *Id.* at 409-10

116. *Id.* at 410.

117. See *id.* (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001) (if the context of the depiction "creates 'something new, with a further purpose or different character, altering the first [likeness] with new expression, meaning, or message,' the depiction is protected by the First Amendment.")).

118. *No Doubt v. Activision Publ., Inc.*, 122 Cal. Rptr. 3d 397, 410 (Cal. App. 2d Dist. 2011)..

119. *Id.*

120. See *id.* at 411 (reasoning that simply changing the venue or portraying the band performing in a videogame that contains creative elements is not transformative).

121. *Id.*

122. *Id.* (quoting *Comedy III*, 21 P.3d at 810).

123. *Id.* at 415.

124. *No Doubt v. Activision Publ., Inc.*, 122 Cal. Rptr. 3d 397, 415 (Cal. App. 2d Dist. 2011).

1. Application

The most applicable legal remedy for pursuing misappropriation of likeness is a common law right of publicity claim, which affords greater protection against the First Amendment than other legal avenues.¹²⁵ The scenario described earlier (a production company used AI to generate a digital reproduction of Harrison Ford in *Indiana Jones* without his consent or involvement), helps evaluate the potential success of a right of publicity claim. Ford's primary argument would be that the movie would not sufficiently transform his likeness and, therefore, should not be protected the First Amendment right of expression.

Under the first factor, Harrison Ford's likeness would arguably be the sum and substance of the work. A production company could use Ford's likeness as the raw materials for *Indiana Jones*, making sufficiently transformative changes. As in *Kirby*, it could create a character that shared similar features to Ford but was sufficiently transformative. The company could generate an Indiana Jones resembling Harrison Ford but taller, more muscular, or shorter. This creation could entail a significant risk of a court finding such changes not sufficiently transformative. Suppose a production company—like Sega—created an alien version of Indiana Jones, incorporating his likeness.¹²⁶ A production company could also easily cast a new actor in the role, thereby avoiding the risks of litigation, rather than attempting to generate Ford's Indiana Jones in a way that was both transformative *and* familiar to the audience. However, it would risk losing continuity in the franchise and providing the familiarity that originally drew fans to the series: Ford's likeness.

Obviously, a production company could conceivably utilize AI to generate an identical image to Harrison Ford as Indiana Jones. This depiction would be analogous to the uses in *In re NCAA* and *No Doubt*. Ford would have a strong argument that the use was not transformative because it simply depicted him performing the same activity that made him famous.¹²⁷ Like the videogame makers in *No Doubt*, the production company could change the film's plot, setting, and supporting characters and claim that the use is transformative. The production company could argue that a court should find such changes transformative, as the depiction is distinguishable from *No Doubt*. Instead of band members playing songs in a new setting, the company could

125. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1273 (9th Cir. 2013) (explaining that a court must balance a right of publicity claim against the First Amendment).

126. See *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 610-11 (Cal. App. 2d Dist. 2006) (discussing whether Kirby's likeness was incorporated to an alien character).

127. See *No Doubt*, 122 Cal. Rptr. 3d at 411 (noting how the avatars are performing the same activities that made the band famous).

argue that it depicts the character: Indiana Jones. While this argument is creative, it is unlikely to be decisive.

If a court restricted its scope to the highest level of abstraction, then it might rule that the use is sufficiently transformative—given a new plot, setting, and supporting characters. However, a court need only “break to fourth wall” to conclude that the production company is engaging in the same production pattern as the video game producers in *No Doubt* and *In re NCAA*.¹²⁸ If a court finds that the AI-generated depiction of Indiana Jones is actually a depiction of Harrison Ford acting as Indiana Jones, the argument fails. The production company simply depicts Harrison Ford doing his job as an actor. This construction necessarily entangles the second and third factors of the test.¹²⁹ Imagine a court trying to determine if the Indiana Jones character expresses something other than Harrison Ford’s likeness, or determining what percentage of the depiction is imitative of Ford versus creative. A court would have difficulty disentangling Ford’s likeness from the fictional character. It is difficult to imagine a court finding that a production company satisfied the requirements of either factor.

The most difficult Transformative Use factors for a production company to satisfy are factors four and five.¹³⁰ The California Supreme Court indicated that the last two factors are applied in close cases.¹³¹ While the Harrison Ford scenario does not appear to be a close call, exploring how a court could analyze the remaining factors is still informative. Clearly, the decision to use Harrison Ford’s likeness is connected to continuing the franchise’s commercial success. Given that there is some argument for continuity from a creative standpoint, the frequency of production companies casting new actors in roles signals an alternative driving factor.¹³² Furthermore, the threat of legal action by Ford should deter a production company from using his likeness absent economic incentives.

128. See Ken Miyamoto, *What Does Breaking the Fourth Wall Mean?*, SCREENCRAFT (May 9, 2023), <https://screencraft.org/blog/what-does-breaking-the-fourth-wall-mean/#:~:text=Breaking%20the%20Fourth%20Wall%20Meaning&text=This%20is%20usually%20done%20by,are%20in%20such%20a%20work> [https://perma.cc/3U5P-N8S7] (discussing what breaking the fourth wall means). Breaking the fourth wall refers to removing an imaginary wall that exists between the actors and the audience. It allows the audience to observe the performance of the actor or to break apart the actor from the character.

129. See *In re NCAA*, 724 F.3d at 1274 (noting that under the second factor the court determines if the work expresses something other than the likeness of the celebrity, and under the third factor the court makes a quantitative judgment as to whether imitative or creative elements dominate the work).

130. Both factors evaluate economic incentives of the defendant to determine whether the primary function of the use of a celebrity’s likeness is commercial exploitation. *Id.* (citing *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001)).

131. *Comedy III*, 21 P.3d at 809.

132. See Meslow, *supra* note 64 (discussing switching actors in movie franchises).

The fourth factor requires a court to determine if the economic value of the work is derived primarily from the likeness at issue.¹³³ All the films in the Indiana Jones franchise feature Harrison Ford, making the analysis more difficult. A court might compare the current installment in the series, *Indiana Jones and the Dial of Destiny*, to its predecessor, *Indiana Jones and the Kingdom of the Crystal Skull*. The most recent movie is instructive. While Ford is cast as Indiana Jones, it introduces the audience to his anticipated successor.¹³⁴ The film brought in less than half of the box office proceeds than its predecessor, performing worse than the previously lowest-grossing 1989 installment, *Indiana Jones and the Temple of Doom*.¹³⁵ Given the poor performance of this current film, a court could conclude that the franchise primarily derives its economic value from Ford's likeness.

Finally, the analysis of the fifth factor mirrors the transformative analysis under copyright law.¹³⁶ In this context, courts determine whether the depiction is merely a trivial variation or the artist's creation.¹³⁷ In the Harrison Ford scenario, the more creative the depiction of Ford's likeness, the less benefit a production company would realize from its use because it reduces the familiarity and continuity that originally made the use of his likeness advantageous. The production company might argue that the depiction is like Andy Warhol's silkscreens of celebrities, garnering First Amendment protection.¹³⁸ Courts have noted that "the distinction between protected and unprotected expression will sometimes be subtle . . ."¹³⁹ Given the economic incentives to use Ford's likeness, production companies are more likely to generate a depiction of Ford that is analogous to Activision's depiction of No Doubt than to Warhol's depiction of celebrities, subordinating its skill to the goal of creating a literal depiction of Ford to commercially exploit. Ultimately, Ford would likely prevail in a right of publicity claim against a production company using AI to generate his likeness in future movies without his consent.

Assuming that actors would likely prevail in a right of publicity claim where AI was used to generate their likenesses, why would they

133. *In re NCAA*, 724 F.3d at 1274 (quoting *Comedy III*, 21 P.3d at 810).

134. Adam Brown, *Is Phoebe Waller-Bridge Replacing Harrison Ford in the Indiana Jones Franchise?*, MOVIEWEB (July 10, 2023), <https://movieweb.com/is-phoebe-waller-bridge-replacing-harrison-ford-in-the-indiana-jones-franchise/> [https://perma.cc/UU8V-ERBE].

135. *Box Office History for Indiana Jones Movies*, THE NUMBERS, <https://www.the-numbers.com/movies/franchise/Indiana-Jones#tab=summary> [https://perma.cc/HFA8-AQ5C] (last visited Nov. 18, 2024).

136. *Comedy III*, 21 P.3d at 810.

137. *Id.* (quoting *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976)).

138. *See generally* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

139. *Comedy III*, 21 P.3d at 811.

demand strict AI guidelines in the recent SAG-AFTRA contract?¹⁴⁰ Contracts provide stable, forward-looking plans that conserve time and resources spent in litigation, coordinate decisions over time, and provide certainty in areas of the law that have not yet been decided.¹⁴¹ By setting strict guidelines for using AI in contracts, SAG-AFTRA has given actors certainty and time to see how the courts will address AI.

III. SCREENWRITERS

This section discusses how the utilization of AI in creating screenplays or scripts implicates the rights of screenwriters. Screenwriters' protections are grounded in copyright law. Courts apply the fair use doctrine when determining whether a use infringes an author's copyrighted work.¹⁴² Courts have historically decided copyright claims of writers—like those predicted in the recent WGA strike—by siding against them through the application of the fair use doctrine.¹⁴³ The most striking difference between copyright law and the right of publicity is that copyright law does not provide the same level of robust protection. This Section analyzes whether generative AI uses of screenwriters' works infringe their copyright protections. It argues that generative AI's uses of these protected works will likely fall into the fair use doctrine, meaning that the use will not infringe the screenwriter's copyright protections.¹⁴⁴ It briefly discusses contract law issues for screenwriters that further complicate the extension of copyright protection.¹⁴⁵ Finally, it argues that courts should shift the focus of copyright law from the work to the author in the AI context.¹⁴⁶

A. Copyright Infringement

The case law that follows illustrates how copyright law fails to protect writers from AI. Under current law, the fair use doctrine will permit AI to use copyrighted screenplays to produce new ones, providing production companies with a cheaper and more efficient alternative to screenwriters.

140. SAG-AFTRA Members Approve 2023 TV/Theatrical Contracts Tentative Agreement, SAG-AFTRA (Dec. 5, 2023), <https://www.sagaftra.org/sag-aftra-members-approve-2023-tvtheatrical-contracts-tentative-agreement#:~:text=SAG%2DAFTRA's%20transformational%20agreement%20with,to%20the%20traditional%20residuals%20formulas> [https://perma.cc/R3AZ-QS35].

141. Curtis Bridgeman, *Contracts As Plans*, 2009 U. ILL. L. REV. 341, 367-69 (2009).

142. See generally 17 U.S.C. § 107 (providing the statutory framework for the fair use doctrine as a limit on copyright protection).

143. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015); *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 (9th Cir. 1992) (providing useful analogs where courts applied the fair use doctrine to permit the defendant's use (at least in part)).

144. See *infra* Section IV.B.

145. See *infra* Section IV.C.

146. See *infra* Section IV.D.

In *Authors Guild, Inc. v. Google, Inc.*, the Second Circuit Court of Appeals held that the defendant's unauthorized use of the plaintiff's copyright-protected works was permissible under the fair use doctrine.¹⁴⁷ The authors of various copyrighted books filed a class action copyright infringement claim against Google for scanning the authors' books and making them available to users through their Google Books and Google Library Project.¹⁴⁸ The district court applied the fair use doctrine and granted summary judgment in favor of the defendant, concluding that the uses of the copyrighted books were fair uses and thus protected.¹⁴⁹

On appeal, the Second Circuit Court of Appeals affirmed.¹⁵⁰ The court explained that it must consider both the authors and the public when determining whether a copyrighted work has been infringed.¹⁵¹ Therefore, for copyright law to serve its intended function, the public must have some access to the copyrighted information.¹⁵² The Copyright Act of 1976, specifically §107, outlines the extent, scope, and limits of copyright.¹⁵³ To determine whether the fair use doctrine protects a use, a court must consider 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.¹⁵⁴

The Supreme Court, in *Campbell v. Acuff-Rose Music, Inc.*, noted that the factors are non-exhaustive and simply give courts guidelines for determining fair use.¹⁵⁵

Addressing the first factor, the court analyzed whether Google's use of the work was transformative.¹⁵⁶ The court segmented and

147. 804 F.3d 202, 229 (2d Cir. 2015).

148. *Id.* at 208-211.

149. *Id.* at 211.

150. *Id.* at 230.

151. *Id.* at 212.

152. *Id.*

153. 17 U.S.C. § 107 (providing that “[T]he fair use of a copyrighted work, including such use by reproduction in copies or . . . by any other means specified . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”) (alteration in original).

154. 17 U.S.C. § 107(1)-(4).

155. 510 U.S. 569, 577-78 (1994).

156. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214-15 (2d Cir. 2015) (noting that derivative works that “generally involve transformations in the nature of *changes of form*,” are not considered transformative for the purposes of fair use).

considered Google's search function and snippet view function of the copyrighted works separately.¹⁵⁷ The snippet view function showed a user only enough text surrounding a searched term to gain its proper context, aiding in the decision of whether to purchase the book but not allowing a reader to read the book without purchasing it.¹⁵⁸ Conceding that the search and snippet functions were transformative, the plaintiffs argued that the commercial nature of the defendant's use precluded it from being classified as fair use.¹⁵⁹ The court noted that the defendant had received no revenues from its project, but the plaintiff argued that it sought to indirectly profit from its market dominance.¹⁶⁰ However, commercial use of a copyrighted work is "not conclusive" in the analysis of the first factor but "a fact to be weighed along with other[s] in fair use decisions."¹⁶¹ The court quoted the Supreme Court's opinion in *Campbell* instructing that "the more transformative the [secondary] work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."¹⁶² Against this backdrop, the court determined that the defendant's commercial motivation did not outweigh the transformative nature of its use.¹⁶³ The court applied much of the reasoning from the first factor to the second factor, finding the secondary use transformed information about the original works and did not provide a meaningful substitute for them.¹⁶⁴ Thus, the second factor favored fair use.¹⁶⁵

Addressing the third factor, the court noted that as more of a protected work is copied, it is more difficult to find a fair use.¹⁶⁶ Regarding the search function, the court found that without copying the entire work, the defendant could not achieve its transformative purpose.¹⁶⁷ Regarding the snippet view function, the court determined that the key aspect of its analysis was "the amount and substantiality of what *is thereby made accessible* to a public for which it may serve as a

157. See *Id.* at 216-18 (concluding that the search function created digital copies of the books that allowed users to search for terms of interest within them was a transformative purpose and that the snippet view function was transformative because it did not permit the user to view large portions of the book).

158. *Id.* at 217-18.

159. *Id.* at 218.

160. *Id.*

161. *Id.* at 219 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, at 585) (quoting H.R. REP NO. 94-1476, at 66 (1976)).

162. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 219 (2d Cir. 2015) (quoting *Campbell*, 510 U.S. at 579).

163. *Id.*

164. *Id.* at 220.

165. *Id.*

166. See *id.* at 221 (the court again analyzed the search function and snippet view function separately).

167. *Id.*

competing substitute.”¹⁶⁸ The more copyrighted text that a user can see, the more apt he is to use the snippet view as a free substitute for the text.¹⁶⁹ The court determined that the defendant’s snippet view feature protected the plaintiff’s material enough to avoid classification as a “competing substitute” because users could only read portions of a page and could not read entire pages.¹⁷⁰

Analyzing the fourth fair use factor, the court concluded that the defendant’s use of the plaintiff’s work did not create a market substitute that would affect the potential market for or value of the copyrighted work.¹⁷¹ The court recognized that there could be some loss in sales due to the snippet function, but some loss in sales was not enough to militate against fair use.¹⁷² Rather, the court determined that the economic effect must be significant.¹⁷³ Taken together, the court concluded that the defendant’s work was a fair use and did not infringe the plaintiff’s copyrights.¹⁷⁴ Rather, the court determined that the economic effect must be significant.¹⁷⁵ Taken together, the court concluded that the defendant’s work was a fair use and did not infringe the plaintiff’s copyrights.¹⁷⁶

Similarly, in *Sega Enter. Ltd. v. Accolade, Inc.*, the Ninth Circuit Court of Appeals held that the copying of copyrighted works could be, but was not per se infringement, regardless of whether the final product infringes the copyright protections.¹⁷⁷ Sega—a video game production company—filed a copyright infringement claim against Accolade—one of Sega’s competitors—for copying Sega’s code, enabling Accolade games to be compatible with Sega’s Genesis console.¹⁷⁸ Accolade (the defendant) reverse-engineered Sega’s (the plaintiff) object code for its games by copying the code in its available “machine-readable” format, disassembling it into a “human-readable” format, studying the patterns in the legible format, and using the information gathered to produce games compatible with the plaintiff’s console.¹⁷⁹ At trial, the court found that the defendant’s copying of the plaintiff’s code was an infringement under the Copyright Act and enjoined the defendant from continuing its practices.¹⁸⁰

168. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 222 (2d Cir. 2015).

169. *Id.*

170. *Id.*

171. *Id.* at 224-25.

172. *Id.*

173. *Id.*

174. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 224-25 (2d Cir. 2015).

175. *Id.*

176. *Id.* at 224-25.

177. *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 (9th Cir. 1992).

178. *Id.* at 1517.

179. *Id.* at 1514-15.

180. *Id.* at 1519-20.

On appeal, the court rejected the defendant's argument that its "intermediate copying" of the object code as opposed to the final product allowed it to circumvent copyright infringement.¹⁸¹ Next, the court rejected the defendant's contention that copying the functional object code was lawful per se.¹⁸² But, the court agreed with the defendant's fair use argument regarding the disassembly of the object code.¹⁸³ The court noted that while copying for a commercial purpose typically weighed against fair use, the defendant's copying was indirectly related to its commercialization.¹⁸⁴ The defendant copied the plaintiff's code to access its functional aspects so the defendant could create its own expressive work.¹⁸⁵ Vis-a-vis market harm, the court determined that the defendant simply sought to enter into the market as a competitor with the plaintiff, affecting the plaintiff's market indirectly.¹⁸⁶ The court concluded that although the plaintiff's sales may be affected, the final products were not substantially similar enough to weigh against fair use.¹⁸⁷ The court found that because disassembly of the plaintiff's code was necessary to access its functional aspects, the second factor also weighed in favor of fair use.¹⁸⁸ While the court reasoned that the third factor weighed against a finding of fair use because the defendant copied all of the code, it held that the third factor was not dispositive to a finding of fair use overall.¹⁸⁹ The court concluded that "where disassembly is the only way to gain access to the ideas and functional elements . . . , disassembly is a fair use of the copyrighted work, as a matter of law."¹⁹⁰

B. Application of Copyright Law

The only legal remedy a screenwriter can use to prevent AI from using his work is copyright infringement. Whether copyright law will protect authors from the emergence of AI turns on whether using copyrighted material to train AI is protected by the fair use doctrine.¹⁹¹ Like the defendants in *Sega*, AI must first convert raw data into a form

181. *Id.* at 1517,1519.

182. *Id.* at 1519-20 (noting that "[t]he need to disassemble object code arises, if at all, only in connection with operations systems . . . and then only when no alternative means of gaining an understanding of those ideas and functional concepts exists" and determining that object code was best analyzed on a case-by-case basis).

183. *See Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520 (9th Cir. 1992), as amended (Jan. 6, 1993) (agreeing with the defendant that disassembly was necessary to analyze the ideas and functions within the code and thus a fair use).

184. *Id.* at 1522

185. *Id.*

186. *Id.* at 1523.

187. *Id.* at 1524.

188. *Id.* at 1526.

189. *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1526 (9th Cir. 1992).

190. *Id.* at 1527-28.

191. Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 746 (2021).

that is legible to it, recognize patterns in the legible form, and produce a new expressive work.¹⁹² Some claim that “[t]he clearest potential infringement takes place when training data are reproduced in order to be incorporated into a dataset.”¹⁹³ Production companies could create training data and subsequently a dataset for AI using existing screenplays. Professor James Grimmelmann addresses this issue in a recent article.¹⁹⁴ He claims that thus far, copyright law has given the computer a pass, with courts regarding its engagement with copyrighted material to be fair use.¹⁹⁵

Historically, simply reading copyrighted material has never been considered a copyright infringement.¹⁹⁶ American copyright law promotes a utilitarian philosophy that rewards authors but “ultimately serve[s] the cause of promoting broad public availability of literature, music, and the other arts.”¹⁹⁷ Fair use is predicated on the view that the public should have access to and limited use of protected works.¹⁹⁸ AI presents a new problem for fair use.¹⁹⁹ Technologies like AI perform a task that if performed by a human qualifies as a fair use. The human version of this process is illustrated in this paper. One can read multiple expressive works, extract ideas from those works, and generate a work of his own expression. Grimmelmann points out this fact and questions whether the digital copying required to train AI constitutes infringement.²⁰⁰ Unlike others who claim that direct copying to train AI is a direct infringement, Grimmelmann claims it is not.²⁰¹ However,

192. See Brown, *supra* Note 16.

193. Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45, 61 (2017).

194. James Grimmelmann, *Copyright for Literate Robots*, 101 IOWA L. REV. 657, 657 (2016).

195. *Id.* at 658.

196. *Id.* at 659.

197. PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2023 VOLUME II: COPYRIGHTS, TRADEMARKS & STATE IP PROTECTIONS* 527-28, n.8 (2023) (Lord Mansfield's statement in *Sayre v. Moore*, quoted in a footnote to *Cary v. Longman*, 1 East *358, 362 n.(b), 102 Eng. Rep. 138, 150 n. (b) (1801), is relevant:

[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.)

198. *Id.* at 527.

199. Grimmelmann, *supra* note 194, at 661.

200. *Id.* at 664.

201. *Id.* (noting that “[v]erbatim copying of a complete work will be protected as fair use if the copy is used solely as input to a process that does not itself use the works expressively.”).

following the reasoning of the Ninth Circuit in *Sega*, the copying itself constitutes infringement.²⁰²

In the *Sega* court's second factor analysis it emphasized that the wholesale copying of the plaintiff's code might have been necessary for humans to access the functional aspects of the work.²⁰³ The non-expressive use of copyrighted works—reading protected works to extract ideas—has never been considered an infringement.²⁰⁴ Readers may extract facts, ideas, functions, methods, or plot devices from a copyrighted work and use it.²⁰⁵ Conversely, AI would be copying screenplays that are readily accessible to humans and converting them into a form that it could read. While proponents of the technology argue that AI is only interested in the functional aspects of the work, there is no issue of public access with screenplays.²⁰⁶ As Mark A. Lemley and Bryan Casey point out, “[u]nlike humans [AI] can’t read to learn or observe the idea in a painting or song without making a copy of the whole thing in their training data set.”²⁰⁷ Given that the functional elements of screenplays are readily accessible (like the prose, structure, and literary conventions), the need for copying like in *Sega* disappears. Therefore, a production company using AI could not claim fair use as a matter of law for its copying.²⁰⁸ Furthermore, because the functional aspects of copyrighted screenplays are readily accessible, a court would arguably find the second factor weighs against fair use.

In the screenwriter context, the AI analysis under the first fair use factor differs from *Google Books*. AI copying is like the intermediate copying by the defendant in *Sega*. AI would use copyrighted screenplays to produce new, competing screenplays, whereas Google Books used copyrighted books to provide an identification and educational service to purchasers.²⁰⁹ While AI would produce different works from the originals, some could be protected derivative works. For example, a production company that used AI to write new installments of George Lucas' *Star Wars* and *Indiana Jones* franchises would infringe on his right to produce derivative works. However, if a production company trained AI using *Star Wars* and *Indiana Jones* to produce a completely new movie series, the new series would likely be a fair use

202. *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 (9th Cir. 1992).

203. *Id.* at 1520-21.

204. MENELL ET AL., *supra* note 197, at 571.

205. *Id.*

206. Lemley & Casey, *supra* note 191 at 773.

207. *Id.* at 776.

208. *See Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992) (explaining that the need for copying arises when the public is unable to access the functional aspects of the work).

209. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015); *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 (9th Cir. 1992) (Google Books provided users with search results and significant excerpts from scanned books).

under the first factor. If a production company, like the defendant in *Sega*, can show that it copied the underlying work only to access its functional aspects, a court would favor a finding of fair use. The ultimate analysis of the first factor in this context is factually dependent on how the AI product differs from the original work. The greater the differences, the more likely the product was derived from functional rather than expressive aspects of the original. Therefore, AI could learn the literary techniques found in screenplays and generate a new, non-infringing screenplay.

The third factor is important regarding AI's use of copyrighted screenplays because AI copies the entire work. Here, the analysis mirrors the analysis in *Sega* and *Google*. AI needs to copy an entire work to learn, explaining why AI cannot perform its transformative purpose of creating a new screenplay without copying the entire work. The Supreme Court in *Campbell* determined that the reasonableness of the copying was determined by "the degree to which the [copied work] may serve as a market substitute for the original or potentially licensed derivatives."²¹⁰ Like the defendant in *Sega*, production companies would seek to compete with existing works, and by extension screenwriters. Therefore, a court would likely find that the third factor favors fair use.

The analysis of the fourth factor in this scenario resembles the analysis in *Sega*. Like the defendant in *Sega*, AI's use of copyrighted works would affect their market indirectly. As noted in *Sega*, a court's determination of the first factor weighs heavily on its analysis of the fourth factor.²¹¹ When copying a work to produce an independent creative expression, the fourth factor favors fair use. As long as the screenplay AI produces is not substantially similar to the copyrighted work, a production company will satisfy the fourth fair use factor. Taken together, unless the use at issue involved a derivative work, a court would likely find fair use under the four factors.

C. Contract Issues Precluding Copyright Protection

Copyright protection does not extend to screenwriters given the structure of screenwriter contracts. The Writer's Guild of America presents its members with a Writers Guild Standard Writing Services Contract.²¹² The contract provides an acknowledgment that the product is a work-made-for-hire, meaning that the screenwriter

210. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

211. *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992).

212. *The Writers Guild Standard Writing Services Contract: Writers Theatrical Short-Form Contract (For Employees)*, WRITERS GUILD OF AMERICA WEST, <https://www.wga.org/contracts/contracts/other-contracts/standard-theatrical> [https://perma.cc/Q5DW-ADSD], (last visited Oct. 27, 2023).

relinquishes all rights as author and copyright owner of his or her work.²¹³ Screenwriters contract away authorship and copyright ownership because historically scripts were written to produce one. If the screenwriter retained rights to the script, he or she could license it to multiple production companies. Production companies do not want a race to be the first to produce a movie using the same script. Thus, screenwriters and production companies contract to avoid this problem. For each successive movie, a production company contracts with a screenwriter to produce a new script. To the extent that screenwriters enter work-made-for-hire contracts, the advent of AI threatens to turn the industry upside down. Screenwriters fear their role will diminish to editing scripts drafted by AI.²¹⁴

D. *Should Copyright Law Change to Address AI?*

Under copyright law, screenwriters receive little protection from being replaced by AI. Instead of entering a contract with screenwriters to produce a screenplay for a new movie, production companies could simply introduce their old screenplays to AI and produce a new screenplay in a matter of seconds. Unless courts decide to treat AI differently in their application of fair use, the technology threatens to swallow the screenwriting industry. The Copyright Office and the United States D.C. District Court already signaled that AI should receive different treatment in *Thaler v. Perlmutter*.²¹⁵ However, that case only addresses whether AI is eligible for copyright protection, the issue of AI copyright infringement remains undecided. In an article of the same name, Lemley and Casey advocate for a principle they call “fair learning,” which would allow AI to use copyrighted works to learn unprotectable facts, ideas, and functions of the work.²¹⁶ They concede the use should be permissive only if the intention is not to “obtain or incorporate the copyrightable elements.”²¹⁷ Their solution would protect many authors who retain their copyrights, but the screenwriter industry would likely disappear overnight because screenwriters generally sell their copyrights to production companies as part of the contract.

Instead, a more drastic shift in the application of the fair use doctrine (when AI engaged in the use) is necessary. Courts should expand

213. *Id.*

214. Holly Willis, *What Are Hollywood Actors And Writers Afraid Of? A Cinema Scholar Explains How AI Is Upending The Movie And TV Business*, THE CONVERSATION (August 7, 2023), <https://theconversation.com/what-are-hollywood-actors-and-writers-afraid-of-a-cinema-scholar-explains-how-ai-is-upending-the-movie-and-tv-business-210360#:~:text=Generative%20AI%20is%20a%20new,for%20writing%20tools%20to%20sample> [https://perma.cc/VG8P-HG6K].

215. See *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 142 (D.D.C. 2023) (where the Copyright office denied the plaintiff’s copyright application for lack of human authorship and the court held that AI-generated works were not eligible for copyright protection).

216. Lemley & Casey, *supra* note 1191, at 776.

217. *Id.*

copyright protections by interpreting both the first and the fourth fair use factors to protect screenwriters from AI. The Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enter.* stated that the “last factor is undoubtedly the single most important element of fair use.”²¹⁸ The Court stressed heightened protections if a use threatened a widespread impact on potential markets for the protected work.²¹⁹ Additionally, as noted in *Sega*, courts consider the first and fourth factors in tandem.²²⁰ Taking these two factors together, courts could protect screenwriters from the threat of AI-generated works without barring AI from interacting with the copyrighted works.

Courts could construe the first factor more broadly and analyze AI’s use at both time one and time two, affording protection against new works downstream from the original in the AI context. In *Warhol*, the Court signaled a move towards this sort of protection by narrowing the focus of the first fair use factor.²²¹ The Court stressed that the character of a use is not its substantive distinctiveness, but its nature (commercial or not).²²² This shift away from analyzing only whether the substance of the use is transformative opens an avenue to robust protections for screenwriters against AI. Under the *Warhol* analysis, a production company that uses a screenplay to train AI *and* produce new screenplays is engaging in a secondary use with the same purpose as the copyrighted work: production of a new screenplay for commercial purposes. When the commerciality of a secondary use is similar to the original, “a particularly compelling justification” is necessary to satisfy the first factor.²²³ Copying a work to convey a “new meaning or message” is not a compelling justification.²²⁴

Simply applying *Warhol* to AI will not protect screenwriters. The *Warhol* Court considered a secondary work with a small degree of transformation in terms of both substance and purpose. Alternatively, AI can provide screenplays that are unrecognizable from the original that it copied. The degree of transformation of the substance is likely strong enough to overcome the similarities in commerciality under the

218. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 566 (1985).

219. *See id.* at 567 (noting one claiming infringement need only show that the potential infringing use would adversely affect the potential market if it were to become popular) (also holding that a court must consider the potential market harms for derivative works).

220. *See Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) (explaining that the purpose and character inquiry, as part of the first factor analysis, is relevant in determining whether the challenged use would affect the potential market for the protected work).

221. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (holding that “[i]f an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying”).

222. *Id.* at 538 n.14.

223. *Id.* at 547.

224. *Id.*

Warhol analysis.²²⁵ Thus, courts should focus singularly on the purpose or character of the secondary use when the product is an AI creation. If AI has been employed to produce a work of similar commercial purpose to the original copyrighted work that it copied, the first factor should weigh against fair use.

Similarly, courts should shift their focus when analyzing whether AI has satisfied the fourth fair use factor. Rather than applying the fourth factor to the protected work, courts should choose to focus on the market for the potential value of the screenwriter.²²⁶ Courts have not historically applied the fourth factor so broadly, but in a recent opinion, the Supreme Court signaled that its understanding of the factor is evolving.²²⁷ The Court implicitly considered infringement upon the current device and future devices that may use the protected technology.²²⁸ Similarly, AI could utilize information from the protected work to create new works that—like the telephonic devices in *Oracle*—might be unrecognizable from the original.²²⁹ The screenwriter context is distinguishable from that case because here, there is only one market. AI-generated screenplays constitute a market substitute for future screenplays and would destroy the market for screenwriters. The fourth factor exists to protect the commercial value of copyrighted works for their creators. However, without shifting the focus from the work to the creator, AI's historically non-infringing creations would leave the fourth factor toothless. If the court adopted this approach in the AI context, anytime AI was utilized to create a new screenplay from an existing one, the copyright holder could successfully claim it threatened to usurp the industry.

Such a drastic shift in the application of fair use will certainly raise concerns of a slippery slope. Some may ask whether such a solution is necessary since courts have held that AI is not eligible for copyright protection.²³⁰ Lack of copyright protection for AI-generated works will discourage production companies from utilizing AI. If a company cannot protect an AI-generated screenplay, other companies could use it, making each movie release a race to market with short-lived promise of profits. Nevertheless, the companies would still achieve the benefits of significantly reduced costs and increased efficiency. The benefits could outweigh the costs. Therefore, a judicial shift in application of fair use remains a necessity to protect screenwriters.

225. *Id.* at 510 (stating that “the degree of transformation required to make ‘transformative’ use of an original work must go beyond that required to qualify as a derivative”).

226. *Id.* at 551.

227. *See* *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 37 (2021) (noting that if the device at issue did not operate in a distinctly different market, that would militate against fair use).

228. *See id.* at 36.

229. *Id.*

230. *Thaler v. Perlmutter*, 687 F. Supp. 3d 140, 150 (D.D.C. 2023).

Others may conclude that the solution places too much power in the hands of authors, threatening one of the twin aims of copyright.²³¹ Yet, AI threatens to seize the other aim, depriving human creators of their just merits.²³² When determining whether AI generation or human creativity should succeed, a reminder of the purpose of copyright is necessary. Courts have already decided that copyright only protects human creativity against that of animals, signaling that there is something unique to human creativity worth preserving.²³³ AI can only mimic human creativity through identifying patterns and reorganizing works so that they seem new.²³⁴ If AI is permitted free reign to generate new works under the fair use doctrine, copyright law will lose its central founding principle: providing authors with incentives to create new works.²³⁵ Not only will copyright lose one of its aims, but the public will lose access to new innovations. Without incentive to create new works, there will be far fewer innovations for the public to access. It will be left to the repackaged mimicry of innovation through AI generation. To maintain the integrity of copyright protection, shifting the focus of the first and fourth fair use factors in the AI context and grounding the rights in the individual author is necessary. This solution does not bar AI from interacting with and learning from protected works, but it does prevent AI generation from stifling human creativity.

1. *The Problem of Secondary Liability*

An additional problem that arises in AI-related litigation is liability.²³⁶ Although there are also issues with service of process and remedy, the issue of liability presents a massive problem in litigation. AI-models own no assets, earn no profits, and are essentially judgement-proof.²³⁷ Yvette Liebesman presents two possible solutions: subjecting AI to direct liability through a guardian or conservatorship theory, or subjecting AI to indirect liability through vicarious or contributory liability.²³⁸ Liebesman contends that where a human directs or

231. See MENELL ET AL., *supra* note 197, at 527 (explaining that the purpose of copyright law is to reward authors and provide public access to their works).

232. *Id.*

233. See *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) (concluding that the Copyright Act was only designed to protect the authorship of humans).

234. See discussion *supra* Section II.

235. See Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN ST. L. REV. 111, 114 (2005) (humans would be disincentivized to work once AI severely limits their ability to profit from their works through its ability to instantaneously generate competing works).

236. Yvette Joy Liebesman & Julie Cromer Young, *The AI Author in Litigation*, 69 U. KAN. L. REV. 103, 105-06 (2020).

237. *Id.* at 106.

238. *Id.* at 130, 131.

authorizes AI to infringe, he can be held responsible through direct liability.²³⁹ This scenario seems most applicable to the screenwriter scenario. A human employee of the company would be directing or authorizing AI to generate a new screenplay in his role as an agent of the company. Although direct liability seems like a possibility in the AI context, vicarious liability is another. Liebesman suggests that while the degree of control aspect is likely met in the AI context, there is an issue with lack of financial benefit.²⁴⁰ The issue she raised seemed to be directed at open-AI models that generate no profit. If a production company utilized AI to generate a screenplay, it would be engaged in a for-profit endeavor. Thus, the financial benefit prong of vicarious liability should be met.

2. *The Problem with Statutory or Contractual Solutions*

Another potential solution is a congressional amendment to the Copyright Act, protecting screenwriters from AI infringement. However, such a solution might prove impracticable, as it may be impossible to police or enforce due to difficulty in ascertaining which works the technology used. Also, a statutory solution risks painting with a broad brush that prohibits AI from interacting with copyrighted material entirely.²⁴¹ Furthermore, in a recent interview, Haibing Lu, associate professor of Information Systems and Analytics at Santa Clara University, said she did not think a ban on the technology was possible.²⁴² Instead, Lu proposed that “[a]ll parties need to sit down and figure out what’s the proper way to channel the profits.”²⁴³ In the recent resolution of the aforementioned strike, the WGA contracted with the Alliance of Motion Picture and Television Producers (AMPTP) around AI.²⁴⁴ Per the new agreement, “AI will not be able to write or rewrite literary material, and AI-generated material will not be able to be used as a source material.”²⁴⁵ While the agreement appears to be a temporary fix to screenwriter concerns, it may not prevent the breaking of

239. *Id.* at 130.

240. *See id.* at 131 (noting that “since the guardian/conservator cannot benefit from any transaction taken on behalf of its AI ward, a plaintiff would likely not be able to satisfy a vicarious liability claim against the AI’s guardian.”).

241. *See generally Artificial Intelligence 2023 Legislation*, NAT. CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/technology-and-communication/artificial-intelligence-2023-legislation> [<https://perma.cc/C753-H9VK>] (last visited May 5, 2024) (describing recent AI legislation).

242. Lawler, *supra* note 2.

243. *Id.*

244. Alex Cranz, *The New WGA Contract Will Change How Hollywood Works*, THE VERGE (September 26, 2023), <https://www.theverge.com/2023/9/26/23891835/wga-contract-summary-ai-streaming-data> [<https://perma.cc/38E7-CN82>].

245. *Id.*

the dam that holds back the floodwaters of AI.²⁴⁶ The contract does afford screenwriters certainty in the face of legal uncertainty. However, upon expiration of this new agreement, screenwriters could find themselves again at ground zero. Fortunately, the agreement does allow time for congressional or judicial solutions concerning AI and copyright law.

CONCLUSION

It is clear that actors and screenwriters do not share the same level of protection under existing law. Actors enjoy enhanced protection under the Transformative Use test of the common law right of publicity. Screenwriters, however, are currently afforded inadequate protection under existing copyright law *vis-a-vis* the fair use doctrine and prior industry contracts. The recently negotiated industry contract, ending the strike, is a short-term solution at best. This paper asserts that taken together, the first and fourth fair use factors construed differently in the AI context, provide a solution that does not preclude AI from interacting with copyrighted works, but protects screenwriters from being replaced by AI entirely.

246. Taylor Romine & Samantha Delouya, *Writers Union Ratifies Its New Contract With Hollywood and TV Studios*, CNN BUSINESS (October 9, 2023), <https://www.cnn.com/2023/10/09/media/wga-contract-ratified/index.html#:~:text=Of%20the%208%2C525%20valid%20votes,%2C%202026%2C%20the%20release%20said> [<https://perma.cc/H43J-Y83T>], (stating that the new contract expires in 2026).

