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ARTICLES

Privacy of Personal Data in the Generative AI Lifecycle
Mindy Nunez Duffourc, Sara Gerke, & Konrad Kollnig

Art ©aches
Richard Chused

Personalizing Patent Law with Social Credit Data
Taorui Guan

NOTES

Purse, Painting, NFT: The Crisis of the Object in Trademark Law
Victoria Thede

Get Real: The Tension Between Stardom and Justice for Reality Television Participants
Amanda Cort

VOLUME 13 NUMBER 2

NEW YORK UNIVERSITY
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VOLUME 13 NUMBER 2

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Consistent with its unique development, the New York University Journal of Intellectual Property & Entertainment Law (JIPEL) is a nonpartisan periodical specializing in the analysis of timely and cutting-edge topics in the world of intellectual property and entertainment law. As NYU's first online-only journal, JIPEL also provides an opportunity for discourse through comments from all of its readers. There are no subscriptions or subscription fees; in keeping with the open-access and free discourse goals of the students responsible for JIPEL's existence, the content is available for free to anyone interested in intellectual property and entertainment law.

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PREFACE

Our Spring 2024 Issue—Volume 13, Number 2—looks to how intellectual property (IP) shapes culture and society in various spaces. Our authors consider the effects of governance—social, technological, and legal—as places where IP impacts our consumption and behavior.

In our first article, Professors Mindy Duffourc, Sara Gerke, and Konrad Kollnig examine artificial intelligence (AI) and the effect of the generative AI (GenAI) data lifecycle on personal data. The team looks at the development of GenAI, its sources of information, how the information is used and stored, privacy implications, and governance in the EU and US. The article takes steps to identify gaps in protection and the related privacy concerns levied to consumers and internet users.

Second, Professor Richard Chused explores governance and cultural norms of art collection and storage. Chused argues that art should be thought of as a public good—imploring collectors and museums to showcase their archives for the public to enjoy. The article follows the effect of the Federal Arts Project in the 1930s and 40s and its impact on democratizing art, then models key legislative hurdles seen today and necessary reforms in the arena of displaying art.

Third, Dr. Taouri Guan analyzes China's social credit system (SCS) and its application in the Chinese patent system as a form of Ben-Shahar and Porat's personalized law. Guan uses existing literature on personalized law to generate an analytical framework from which crude personalized law can be categorized and studied. His novel work argues that SCS, as an applied form of personalized law, simultaneously streamlines administration and reduces government oversight in the patent application system while promoting innovation.

Our fourth piece is a note from recent NYU graduate Victoria Thede. Thede uses recent developments in the NFT space to illustrate the convergence of the art and fashion industries. Her work asks a fundamental and recurring question in trademark law—the philosophical distinction between art and mark—and how questions asked in the courts between fundamental expression and intent can mangle the answer. The note challenges distinctions drawn in the court system between the two and where creative spaces like fashion land in the law's protection of marks.

Fifth, a note from recent NYU graduate Amanda Cort asks what stops reality television producers from legal ramifications for poor workplace protections. Cort looks to the social and legal factors that dictate where power

lies between participants on these shows and producers. The note zooms in on the dichotomy presented by fame and how participants are often motivated by the desire for both more and less fame simultaneously.

Sincerely,

Joseph Salmaggi
Editor-in-Chief
NYU Journal of Intellectual Property & Entertainment Law

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PRIVACY OF PERSONAL DATA IN THE GENERATIVE AI DATA LIFECYCLE

MINDY NUNEZ DUFFOURC* SARA GERKE** & KONRAD KOLLNIG†

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Introduction

Generative AI ("GenAI") is a powerful tool in the content generation toolbox. Its modern debut via applications like ChatGPT and DALL-E enamored users with human-like renditions of text and images. As new user accounts grew exponentially, these models soon gained a foothold in various industries, from law to medicine to music. The GenAI honeymoon period ended when questions about GenAI development and content began to mount: Is this content reliable? Can GenAI harm consumers and others? What are the implications for intellectual property (IP) rights? Does GenAI violate data privacy laws? Is it ethical to use AI-generated content? Users have already faced the consequences of putting blind faith in GenAI. For example, a lawyer who relied on ChatGPT to perform legal research was sanctioned for including fictional cases in his court pleadings.[1] Additionally, GenAI developers began to encounter scrutiny related to their development and marketing of GenAI tools. In Europe, Italy temporarily banned ChatGPT, citing concerns about data privacy violations.[2] Recently, a non-profit organization focused on private enforcement of data protection laws in the European Union (EU) claimed that ChatGPT's provision of inaccurate personal data about individuals

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[1] Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 451, 460–66 (S.D.N.Y. 2023).

[2] *ChatGPT: Italy blocks AI chatbot over privacy concerns*, Deutsche Welle (Mar. 31, 2023), https://www.dw.com/en/chatgpt-italy-blocks-ai-chatbot-over-privacy-concerns/a-65200137 [https://perma.cc/743G-XV8C].

violates data privacy.[3] In the United States (US), lawsuits alleged violations of IP, privacy, and property rights resulting from developers' use of massive amounts of data to train GenAI.[4]

The increasing development and use of GenAI has spurred data privacy concerns in both the EU and the US. According to the FTC, "[c]onsumers are voicing concerns about harms related to AI—and their concerns span the technology's lifecycle, from how it's built to how its [sic] applied in the real world."[5] While the introduction of new technologies has generally led to significant legislative retooling in the area of data privacy in the last decade—with the EU adopting the General Data Protection Regulation ("GDPR"), and several US states following suit—legislators designed these laws before GenAI models, like ChatGPT, were on the radar. In April 2023, the European Data Protection Board (EDPB) developed a ChatGPT taskforce to coordinate regulatory enforcement in the EU Member States "on the processing of personal data in the context of ChatGPT."[6]

The use of personal data to develop and update GenAI models can harm individuals by disclosing personal data, including sensitive personal data, to a broad audience; enabling individual profiling for targeting, monitoring, and potential discrimination; producing false information; and limiting an individual's ability to keep their personal data private.[7] This article examines how the current

[3] *ChatGPT provides false information about people, and OpenAI can't correct it*, NYOB (Apr. 29, 2024), https://noyb.eu/en/chatgpt-provides-false-information-about-people-and-openai-cant-correct-it [https://perma.cc/G5S9-RVQU].

[4] *See e.g.*, Class Action Complaint, Silverman. v. Open AI, Inc., No. 3:23-cv-03416 at ¶¶ 35–36 (N.D. Cal. Jul. 7, 2023).

[5] Simon Fondrie-Teitler & Amritha Jayanti, *Consumers Are Voicing Concerns About AI*, FTC TECH. BLOG (Oct. 3, 2023), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/10/consumers-are-voicing-concerns-about-ai [https://perma.cc/YU2W-P5HP].

[6] EUROPEAN DATA PROTECTION BOARD (EDPB), REPORT OF THE WORK UNDERTAKEN BY THE CHATGPT TASKFORCE 4 (May 23, 2024), https://www.edpb.europa.eu/our-work-tools/our-documents/other-guidance/report-work-undertaken-chatgpt-taskforce_en [https://perma.cc/X8GB-YTSE] (last visited Jun. 3, 3024).

[7] *See generally* CONFEDERATION OF EUR. DATA PROT. ORGS. AI WORKING GRP., GENERATIVE AI: THE DATA PROTECTION IMPLICATIONS (Oct. 16, 2023), https://cedpo.eu/generative-ai-the-data-protection-implications-16-10-2023 [https://perma.cc/G4AX-QC82] (discussing concerns that AI-generated content about individuals might lead to biased decisions and discrimination that affect data subjects); FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS 33 (2012), https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers [https:

approaches to data privacy in the US and EU govern personal data in the GenAI data lifecycle. We focus specifically on the flow of *personal data* in the GenAI data lifecycle because its collection and use have important data privacy implications for users.

Part I introduces GenAI models. It traces the development of GenAI architecture and provides a technical overview of modern GenAI. It discusses the capabilities and limitations of GenAI and provides a quick glimpse into the data sources that power these models.

Part II sets forth the current frameworks governing personal data in the US and EU. It discusses how these frameworks aim to protect personal data and provides the basic definitions for various types of data that have important implications in the GenAI data lifecycle. This part is supplemented by tables in the appendices that provide a summary comparison of the treatment of various types of data—including personal data, sensitive personal data, de-identified, pseudonymized, and anonymized data, and publicly available data—in US and EU regulatory frameworks.

Part III outlines the flow of personal data in the GenAI data lifecycle and its implications on data privacy. It describes the role of personal data in GenAI development and training, how GenAI developers might use personal data to improve existing GenAI models or develop new models, and how personal data can become part of a GenAI model's output. Finally, it discusses the retention of personal data in the GenAI data lifecycle.

Part IV identifies data privacy implications that arise as personal data flows through the GenAI data lifecycle and analyzes how the current frameworks governing personal data might address these data privacy implications in the US and EU. First, it discusses the privacy implications and governance of using publicly available data in the GenAI data lifecycle. Second, it discusses the privacy implications and governance of using private and sensitive personal data in the

//perma.cc/CR7Z-7RU4] ("The extensive collection of consumer information — particularly location information — through mobile devices also heightens the need for companies to implement reasonable policies for purging data. Without data retention and disposal policies specifically tied to the stated business purpose for the data collection, location information could be used to build detailed profiles of consumer movements over time that could be used in ways not anticipated by consumers.").

GenAI data lifecycle. Finally, it discusses the loss of control over personal data in the GenAI data lifecycle.

I
Generative AI

GenAI describes AI models that create content like images, videos, sounds, and text. Even if the public release of the latest generation of GenAI models came as a surprise to many, the underlying technologies had been in development for decades.[8] One strand of GenAI takes the form of large-language models (LLMs), like ChatGPT, that use sophisticated deep learning models for next-word prediction to generate human-like text.[9] Next-word prediction is possible because words do not randomly follow each other in a text, but are context-dependent.[10] In other words, if one knows what other words have been written so far in a piece of text, then it is possible, with relatively high accuracy, to build a "model" that predicts the following word.

Some of the earliest approaches for next-word prediction were *n-gram models* that date back to Claude Shannon's revolutionary work on information theory in the 1940s.[11] An *n-gram model* is a very simple language model. It looks at a fixed

[8] An early example of chatbots was ELIZA. It was developed in the 1960s by Joseph Weizenbaum at MIT to create the illusion of genuine human interaction. Human participants would engage in an exchange of text messages with a computer, similarly to how users now engage with ChatGPT. *See* Joseph Weizenbaum, *ELIZA—A Computer Program for the Study of Natural Language Communication Between Man and Machine*, 9 COMMUN. ACM 36, *passim* (1966).

[9] *See* David Nield, *How ChatGPT and Other LLMs Work—and Where They Could Go Next*, WIRED (May 9, 2023), https://www.wired.com/story/how-chatgpt-works-large-language-model [https://perma.cc/3APZ-QQES] (discussing how LLMs like ChatGPT work using next-word prediction). Deep learning describes a subset of AI that uses many layers of artificial neural networks (ANNs) to produce an output. *See* Zubair Ahmad et al., *Artificial Intelligence (AI) in Medicine, Current Applications and Future Role with Special Emphasis on Its Potential and Promise in Pathology: Present and Future Impact, Obstacles Including Costs and Acceptance Among Pathologists, Practical and Philosophical Considerations. A Comprehensive Review*, 16 DIAGNOSTIC PATHOLOGY art. 24, 2021, at 2, https://doi.org/10.1186/s13000-021-01085-4 [https://perma.cc/L8U5-ACMH].

[10] *See* Nield, *supra* note 9 ("One of the key innovations of [this neural network architecture] is the self-attention mechanism … [W]ords aren't considered in isolation, but also in relation to each other in a variety of sophisticated ways.").

[11] *See generally* Claude E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379, 386–89 (1948).

number of words and tries to guess what word is most likely to come next.[12] For example, a 2-gram model (where n = 2) only looks at *one* word to predict the next one (*i.e.*, a total of *two* words, hence "2-gram").[13] For example, if a 2-gram model is given the word "How" as context, it might guess that the next word is "are" because "How are" is a common pairing of words. Then, it can use "are" to guess the next word, maybe "you." This, overall, gives the text "How are you." By predicting the next word again and again, it is then possible for algorithms to write large amounts of text that may or may not look like it was written by a human, depending on the quality of the model. Like other language models, including LLMs, *n-gram models* are trained on large corpora of text to learn what word is—statistically speaking—most likely to come next.[14]

Modern-day LLMs also use next-word prediction for text generation but are significantly more sophisticated than *n-gram models*. Unlike n-grams, they are not limited to a fixed number of words but can, instead, reason over much larger inputs of text. To do so, they are made up of hundreds of billions of parameters, which are "mathematical relationship[s] linking words through numbers and algorithms."[15] To train such a large number of parameters, a large amount of training data is necessary (i.e., hundreds of gigabytes of data), as well as significant computational resources (i.e., millions of dollars of energy consumption and computing hardware). For example, OpenAI trained GPT-3 with the Common Crawl, WebText2, Books1, Books2, and English-language Wikipedia datasets.[16] Google's original LLM model, Bard, used Language Models for Dialog Applications ("LaMDA"), which was trained using 1.56 trillion words of publicly available text and dialogue on the internet.[17] According to Meta, its LLM, Llama

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[12] Daniel Jurafsky & James H. Martin, *N-gram Language Models*, *in* Speech and Language Processing (3d ed. forthcoming 2024) (manuscript at 32–33), https://web.stanford.edu/~jurafsky/slp3/ed3book.pdf [https://perma.cc/6LC5-UJ2S].

[13] *Id.* at 33.

[14] *See id.* at 15–17 (describing the text used to train NLP models).

[15] Nield, *supra* note 9.

[16] Tom B. Brown et al., *Language Models are Few-Shot Learners*, 33 Advances in Neural Info. Processing Sys., 1877 (2020), https://proceedings.neurips.cc/paper_files/paper/2020/hash/1457c0d6bfcb4967418bfb8ac142f64a-Abstract.html [https://perma.cc/W2GM-KCM]. OpenAI, the company that developed ChatGPT, has not published much information on the training of GPT-3's successor (and current foundation for ChatGPT), GTP-4.

[17] Romal Thoppilan et al., *LaMDA: Language Models for Dialog Applications*, arXiv, Jan. 2022, at 1–3, https://arxiv.org/abs/2201.08239 [https://perma.cc/ZH4D-5W3J].

2, is also trained with the enormous amount of publicly available text on the internet.[18] By training LLMs on the vast text available on the internet and in books, they have become extremely good at mimicking previous human-generated work through next-word prediction. Yet, since these models are so dependent on previously existing text, they currently struggle with producing accurate textual outputs beyond their training data.[19] Thus, LLMs are good at producing text that looks reliable, but since they have no semantic understanding of the text that they write, they have been deemed "stochastic parrots."[20]

The models that underpin all state-of-the-art LLMs rely on the "Transformers"—or a closely related—architecture.[21] This type of deep learning model architecture was invented by researchers at Google and first released in 2017.[22] Transformers use "self-attention," which simplified the model architecture compared to previous models and achieved cutting-edge performance on language tasks—including text generation.[23]

Other GenAI models also use deep learning models but create *non-textual* outputs like images, videos, and sounds—or even combine different such

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[18] *Llama 2: open source, free for research and commercial use*, META, https://llama.meta.com/llama2 [https://perma.cc/4XN9-E6KC].

[19] Steve Yadlowsky et al., *Pretraining Data Mixtures Enable Narrow Model Selection Capabilities in Transformer Models*, ARXIV, Nov. 2023, at 2, https://arxiv.org/abs/2311.00871 [https://perma.cc/6HGR-VYNS].

[20] *See* Emily M. Bender et al., *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?*🦜, *in* 2021 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 610, 616–17 (Ass'n for Computing Mach., ed., 2021), https://dl.acm.org/doi/10.1145/3442188.3445922 [https://perma.cc/H4V6-7HJP].

[21] *See generally* Mostafa Ibrahim, *An Introduction to Transformer Networks*, WEIGHTS & BIASES (Dec. 15, 2022), https://wandb.ai/mostafaibrahim17/ml-articles/reports/An-Introduction-to-Transformer-Networks--VmlldzoyOTE2MjY1 [https://perma.cc/YT4U-SLQE] ("[T]ransformers are a neural network with a novel architecture that aims to solve sequence-to-sequence complex language tasks like translation, question answering, and chatbots, all while managing long-range dependencies."); Dana Leigh, *How Does Chat GPT Actually Work?*, TECHROUND (Feb. 15, 2023), https://techround.co.uk/guides/how-does-chat-gpt-actually-work/ [https://perma.cc/YL7R-NKWG] ("At its core, Chat GPT is the implementation of a type of neural network known as a transformer. Transformers are a type of deep learning algorithm that is commonly used in the field of natural language processing (NLP).").

[22] Ashish Vaswani et al., *Attention Is All You Need*, *in* 31ST CONFERENCE ON NEURAL INFORMATION PROCESSING SYSTEMS *passim* (I. Guyon et al. eds., 30th ed. 2017), https://proceedings.neurips.cc/paper/2017/file/3f5ee243547dee91fbd053c1c4a845aa-Paper.pdf [https://perma.cc/936G-ZXHK].

[23] *Id.* at 2–3, 6–7.

"modalities" (e.g., producing an image based on textual input). While these models rarely use the Transformers architecture, all GenAI models share many of the same challenges and limitations. For example, like LLMs, other GenAI models also need to be trained on vast amounts of data. Much of this data comes from information on the internet that is extracted or "scraped" by automated tools. Large-Scale Artificial Intelligence Open Network ("LAION") provides a publicly available image data set that can be used to train GenAI models.[24] Stable Diffusion's AI model, which underlies popular AI image generation applications like Midjourney and Dreamstudio, was trained with 2.3 billion images scraped from the internet by the nonprofit organization Common Crawl.[25] This dataset includes stock images, but also hundreds of thousands of images from individuals on social media and blogging platforms, like Pinterest, Tumblr, Flickr, and WordPress.[26] OpenAI's DALL-E, too, was trained using millions of images on the internet.[27] Google trained its text-to-music GenAI model, MusicLM, with datasets that are primarily sourced from over 2 million YouTube clips containing not only music, but a variety of other human, animal, natural, and background sounds.[28] Google replaced Bard with a new multi-modal model, Gemini, which is trained not only with text, but also with images, audio, and video.[29]

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[24] LAION, https://laion.ai/ [https://perma.cc/Z98L-VVU2].

[25] Andy Baio, *Exploring 12 Million of the 2.3 Billion Images Used to Train Stable Diffusion's Image Generator*, WAXY (Aug. 30, 2022), https://waxy.org/2022/08/exploring-12-million-of-the-images-used-to-train-stable-diffusions-image-generator/ [https://perma.cc/TX38-DF6G] ("All of LAION's image datasets are built off of Common Crawl, a nonprofit that scrapes billions of webpages monthly and releases them as massive datasets.").

[26] *Id.*

[27] *DALL·E 2 pre-training mitigations*, OPENAI, https://openai.com/research/dall-e-2-pre-training-mitigations [https://perma.cc/WQA8-646Q] ("DALL•E 2 is training on hundreds of millions of captioned images from the internet, and we remove and reweight some of these images to change what the model learns.").

[28] Ezra Sandzer-Bell, *Google's AI Music Datasets: MusicCaps, AudioSet and MuLan*, AUDIOCIPHER (May 17, 2023), https://www.audiocipher.com/post/musiccaps-audioset-mulan [https://perma.cc/Y28E-QXCL] ("Behind the scenes, Google has used three music datasets, called MusicCaps, AudioSet and MuLan, to trained [sic] their music models for MusicLM"); *AudioSet*, GOOGLE, https://research.google.com/audioset/dataset/index.html [https://perma.cc/QV7N-FSVH].

[29] GEMINI TEAM, GOOGLE, GEMINI: A FAMILY OF HIGHLY CAPABLE MULTIMODAL MODELS, 1 (2024), https://storage.googleapis.com/deepmind-media/gemini/gemini_1_report.pdf [https://perma.cc/MAR2-HKJY].

GenAI has wide-ranging uses, from designing magazine covers,[30] to creating new music,[31] to summarizing medical records.[32] These uses present a wide range of legal issues that stem from their use of massive amounts of data for development and training. For example, some of this data, like copyrighted books, might implicate IP rights.[33] Some of this data, like an individual's biographical information or photograph, might implicate data privacy rights. We now turn our attention to the latter.

II
The Legal Framework Governing Personal Data in the US and EU

Data is the lifeblood of GenAI. Some of this data is "personal data," which is the term we use to refer to data that relates to or can be used to identify an individual. A subset of personal data that reveals particularly sensitive information about individuals is often labeled "sensitive personal data." Personal data can be de-identified, pseudonymized, or anonymized. De-identification or pseudonymization describes a process aimed at preventing the identification of individuals in the data set itself, though it is possible to re-identify individuals by combining de-identified or pseudonymized data with data keys or other datasets. On the other hand, anonymized data usually refers to data that cannot be re-identified. Finally, publicly available data usually describes data, including personal data, that is already accessible to the public either through public records or through an individual's own publication.

A. Legal Framework Governing Personal Data in the US

US data privacy law is "a hodgepodge of various constitutional protections, federal and state statutes, torts, regulatory rules, and treaties."[34] Although there is

[30] Gloria Liu, *The World's Smartest Artificial Intelligence Just Made Its First Magazine Cover*, Cosmopolitan (Jun. 21, 2022), https://www.cosmopolitan.com/lifestyle/a40314356/dall-e-2-artificial-intelligence-cover/ [https://perma.cc/6GPD-QUWN].

[31] Bryan Clark, *Check out this Beatles-inspired song written entirely by AI*, Next Web (Sept. 22, 2016), https://thenextweb.com/news/check-out-this-beatles-inspired-song-written-entirely-by-ai [https://perma.cc/W492-VUP4].

[32] *AI-Powered Medical Record Summarization Platform*, Digit. Owl, https://www.digitalowl.com/ [https://perma.cc/SQ6Q-4JEL].

[33] *See* Class Action Complaint & Demand for Jury Trial, Silverman v. OpenAI, Inc., No. 3:23-cv-03416 (N.D. Cal. Jul. 7, 2023) (alleging that OpenAI used copyrighted works to train ChatGPT).

[34] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 587 (2014).

no single piece of federal legislation that governs personal data, there are several sector-specific federal laws that may offer protection for certain types of personal data, including the Federal Trade Commission (FTC) Act, the Gramm-Leach-Bliley Act, the Children's Online Privacy Protection Act (COPPA), the Family Educational Rights and Privacy Act (FERPA), and the Health Insurance Portability and Accountability Act (HIPAA).[35] At the state level, several states have enacted general data privacy laws, including California and Virginia.[36] Finally, state tort law might also govern the collection and use of some personal data through privacy- and property- related torts.

1. Federal Laws

Section 5 of the Federal Trade Commission (FTC) Act prohibits deceptive and unfair business practices.[37] It gives the FTC legal authority to establish, monitor, and enforce rules concerning deceptive and unfair practices that harm consumers, which can include protecting consumers' personal data.[38] The FTC adopts a consumer-centric concept of personal data by focusing on data that can be "reasonably linked to a specific consumer, computer, or other device."[39] The FTC has indicated that genetic data, biometric data, precise location data, and data concerning health are sensitive categories of consumers' personal data.[40]

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[35] *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45 (consumer data generally); Gramm-Leach-Bliley Act tit. V, 15 U.S.C. §§ 6801–6809, §§ 6821–6827 (financial services consumer data); Children's Online Privacy Protection Act §§ 1301–1308, 15 U.S.C. §§ 6501–6505 (children's online data); Family Educational Rights and Privacy Act § 438, 20 U.S.C. § 1232g (codifying FERPA) (educational data); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, 42 U.S.C.) (healthcare data).

[36] Andrew Folks, *US State Privacy Legislation Tracker*, IAPP (Feb. 2024), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ [https://perma.cc/KNF8-38A4].

[37] Federal Trade Commission Act § 5, 15 U.S.C. § 45.

[38] *Id.* § 5(a), (n).

[39] FTC, *supra* note 7, at 22 (clarifying the final scope of the FTC's framework).

[40] Elisa Jillson, *The DNA of privacy and the privacy of DNA*, FTC BUS. BLOG (Jan. 5, 2024), https://www.ftc.gov/business-guidance/blog/2024/01/dna-privacy-privacy-dna [https://perma.cc/Q8Q2-9JYS] (considering voice recordings and videos highly sensitive data); Kristin Cohen, *Location, health, and other sensitive information: FTC committed to fully enforcing the law against illegal use and sharing of highly sensitive data*, FTC BUS. BLOG (Jul. 11, 2022), https://www.ftc.gov/business-guidance/blog/2022/07/location-health-and-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal [https://perma.cc/2P6N-QFUV] ("Among the most sensitive categories of data collected by connected devices are a person's precise location and information about their health.").

In 2012, the FTC established a Privacy Framework to provide guidance to commercial entities that collect consumer data to help them avoid running afoul of the broad consumer protections that the FTC enforces through the FTC Act.[41] In this framework, the FTC adopted a risk-based approach to data de-identification and considered data that cannot be reasonably linked to a consumer as being in a "de-identified form."[42] Notably, it recommended that companies take measures to reduce the risk of re-identification before considering the data truly de-identified.[43] More recently, the FTC has expressed skepticism of claims that personal data is "anonymous," noting that, "[o]ne set of researchers demonstrated that, in some instances, it was possible to uniquely identify 95% of a dataset of 1.5 million individuals using four location points with timestamps."[44]

Because the FTC focuses generally on deceptive and misleading practices that harm consumers under the FTC Act, there is no exclusion for such practices that involve the use of publicly available data. In the past, the FTC has expressed concerns about the collection of publicly available data by individual reference services (IRSs)—services that provide access to databases with publicly-available data about individuals. In a 1997 report to Congress, the FTC embraced a self-regulatory approach relying on principles developed by the now-defunct IRS industry group to limit access to "non-public information," which the FTC report defined as "information about an individual that is of a private nature and neither available to the general public nor obtained from a public record."[45] Now, publicly available data collected, aggregated, and sold by IRSs can serve as a valuable source of personal data in the GenAI lifecycle.

[41] FTC, *supra* note 7, at 15–71.

[42] FTC, *supra* note 7, at iv, 21.

[43] FTC, *supra* note 7, at 21 (outlining obligations related to use of de-identified data); FTC, *supra* note 7, at 22 (excluding de-identified data from scope of privacy framework).

[44] Cohen, *supra* note 40.

[45] FTC, Individual Reference Services — A Report to Congress (1997), https://www.ftc.gov/reports/individual-reference-services-report-congress [https://perma.cc/4CK4-7UAZ]; *see also* Robert Gellman & Pam Dixon, Many Failures: A Brief History of Privacy Self-Regulation in the United States 7 (2011), https://worldprivacyforum.org/wp-content/uploads/2011/10/WPFselfregulationhistory.pdf [https://perma.cc/2L99-FV76] (describing the history of the IRS industry group, including its termination in 2001).

The Gramm-Leach-Bliley Act regulates consumer data provided in connection with obtaining financial services.[46] The FTC exercises its legal authority to protect the privacy of financial data under the Gramm-Leach-Bliley Act through the Financial Privacy Rule (FPR).[47] Under the FPR, "[p]ersonally identifiable financial information" includes information about a consumer obtained in connection with the provision of financial services and products that can be used to identify an individual consumer.[48] On the other hand, the FPR does not govern "[i]nformation that does not identify a consumer" as "[p]ersonally identifiable financial information."[49] It lists "aggregate information" as an example of information that will not be governed as "personally identifiable financial information."[50] The FPR does not distinguish a separate category of "sensitive" personal information.[51] The Rule only governs "nonpublic personal information,"[52] and does not regulate most "publicly available information," described as "information that you have a reasonable basis to believe is lawfully made available to the general public."[53]

The FPR takes two main approaches to protecting the privacy of nonpublic personal information. First, it requires financial institutions to provide information about their privacy policies and disclosure practices.[54] Generally, this information should be contained in a privacy notice and include a description of nonpublic personal information that is collected and disclosed, the recipients of this information, information about the ability to opt out of certain third-party disclosures, and an explanation about how information security and confidentiality are protected.[55] Second, it limits disclosures of nonpublic personal information and requires financial institutions to provide individuals with an opportunity to "opt

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[46] Gramm-Leach-Bliley Act tit. V, 15 U.S.C. §§ 6801–6809, §§ 6821–6827.

[47] Financial Privacy Rule, 16 C.F.R. § 313 (2023).

[48] 16 C.F.R. § 313.3(o)(1).

[49] 16 C.F.R. § 313.3(o)(2)(ii)(b).

[50] *Id.*

[51] *See* 16 C.F.R. § 313.3(n), (o).

[52] 16 C.F.R. § 313.1(b) (excluding publicly available information from the scope of the privacy rule); *see also* 16 C.F.R. § 313.3(n) (excluding publicly available information from the definition of nonpublic personal information).

[53] 16 C.F.R. § 313.3(p)(1).

[54] 16 C.F.R. § 313.1(a)(1), (2).

[55] 16 C.F.R. § 313.6(a).

out" of certain disclosures of their nonpublic personal information.[56] Generally, the FPR allows disclosure if the required information has been provided in a privacy notice and if, after a reasonable period of time, the individual has not opted out of the disclosure.[57] However, disclosures are allowed without providing an opt-out if they are made for the purpose of having a third party perform services on the company's behalf if the company's use of the information is limited and the individual received an initial privacy notice.[58] Disclosures are allowed without providing either a privacy notice or opt-out if they are made (1) for the purpose of processing transactions requested by the individual, (2) with the individual's consent, (3) to protect confidentiality and prevent fraud, (4) in connection with compliance with industry standards, or (5) as required by law.[59]

COPPA protects the personal information of children under the age of 13.[60] The FTC implements COPPA protections through the Children's Online Privacy Protection Rule (COPPR).[61] The COPPR defines "personal information" as "individually identifiable information about an individual collected online."[62] The rule does not distinguish a separate category of "sensitive" personal data.[63] Under COPPA, de-identified data may not fall under the definition of regulated "personal information" if it does not include identifiers or trackers such as internet protocol addresses or cookies.[64] COPPR governs only personal information when it is collected from a child online, but this could also include a subset of publicly available personal data.[65]

Under COPPR, online operators cannot collect and use personal information from children without first obtaining "verifiable parental consent."[66] It also requires operators of online services to disclose information about their collection and

[56] 16 C.F.R. § 313.1(a)(3).
[57] 16 C.F.R. § 313.10.
[58] 16 C.F.R. § 313.13.
[59] 16 C.F.R. § 313.14; 16 C.F.R. § 313.15.
[60] Children's Online Privacy Protection Act §§ 1301–1308, 15 U.S.C. §§ 6501–6505.
[61] Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2022); *see also* 15 U.S.C. § 6505 (granting enforcement authority to the FTC).
[62] 16 C.F.R. § 312.2.
[63] *See id.*
[64] *See* 15 U.S.C. § 6501(8).
[65] 16 C.F.R. § 312.2.
[66] 16 C.F.R. § 312.3(b).

use of personal information obtained from children and take measures to protect the confidentiality and security of such information.[67] COPPR gives parents the right to review their children's personal information and withdraw consent for any further use of such information.[68] However, parental consent is not required when the operator collects only necessary cookies, when information is provided for the purpose of obtaining consent, or in some cases when information is used for the limited purposes of protecting the safety of a child, responding to a specific and direct request from a child, protecting website security, or complying with legal obligations.[69] Finally, COPPR requires the deletion of personal information once it is no longer "reasonably necessary to fulfill the purpose for which the information was collected."[70]

The Family Educational Rights and Privacy Act (FERPA), which is administered and enforced by the US Department of Education (DOE), provides privacy protections for educational records, which include all information directly relating to a student that is maintained by an educational institution.[71] Under FERPA, "[p]ersonally identifiable information" includes information such as names, addresses, identification numbers, date and place of birth, as well as "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."[72] Like COPPA and the Gramm-Leach-Bliley Act, FERPA does not distinguish a separate category of sensitive data.[73] FERPA allows the non-consensual disclosure of de-identified records and information, which it describes as "the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information."[74] The DOE recognizes data aggregation as a potential

[67] 16 C.F.R. § 312.3(a), (e).
[68] 16 C.F.R. § 312.3(c).
[69] 16 C.F.R. § 312.5(c).
[70] 16 C.F.R. § 312.10.
[71] Family Educational Rights and Privacy Act § 438, 20 U.S.C. § 1232g.
[72] 34 C.F.R. § 99.3 (2022).
[73] *See* 20 U.S.C. § 1232g(a)(1)(D)(4) (defining scope of education records governed by FERPA).
[74] 34 C.F.R. § 99.31(b)(1).

method for de-identifying educational data under FERPA.[75] FERPA protects personal data in education records regardless of whether the data is otherwise publicly available.[76]

FERPA prohibits disclosure of most personally identifiable information in educational records to parties outside of the educational institution unless the student (or parent for students under 18) have provided prior written consent or the disclosure meets one of the enumerated exceptions (i.e., disclosure is required to comply with law or standard, to protect the student, etc.).[77] To be valid, this consent must identify the specific records being disclosed, the purpose of the disclosure, and party or parties receiving the disclosure.[78] However, FERPA does not limit the disclosure of "directory information," which includes "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student."[79] Finally, FERPA provides students (or parents) with rights to access educational records and request amendments, including correction and deletion, of records if they are "inaccurate, misleading, or in violation of their rights of privacy."[80]

The Health Insurance Portability and Accountability Act (HIPAA)[81] governs a subset of personal data known as "[p]rotected health information" (PHI), which comprises, among other things, "[i]ndividually identifiable health information" that is created, used, or disclosed by so-called "[c]overed entit[ies]" in the course

[75] Priv. Tech. Assistance Ctr., U.S. Dep't of Educ., *Frequently Asked Questions—Disclosure Avoidance*, Student Priv. Pol'y Off. 2, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FAQs_disclosure_avoidance_0.pdf [https://perma.cc/3V8T-27AR] (updated May 2013) (discussing aggregation as a "disclosure avoidance method . . . ").

[76] *See* 20 U.S.C. § 1232g.

[77] 20 U.S.C. § 1232g(b)(1); *accord.* 34 C.F.R. § 99.30 (requiring consent from parents); *see also* 20 U.S.C. § 1232g(d) (transferring parents' rights under FERPA to students when they turn 18 or enroll in postsecondary education).

[78] 34 C.F.R. § 99.30.

[79] 20 U.S.C. § 1232g(a)(5)(A).

[80] 20 U.S.C. § 1232g(a)(2) (providing right to correction and deletion); *see also* 20 U.S.C. § 1232g(a)(1)(A) (providing right to access).

[81] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, 42 U.S.C.).

of providing healthcare services.[82] "Individually identifiable health information" describes health information that identifies or can be reasonably used to identify an individual.[83] The US Department of Health and Human Services (HHS) regulates PHI privacy through HIPAA's Privacy Rule.[84] The Privacy Rule governs the use and disclosure of patients' PHI by a limited category of "covered entities," which generally includes healthcare providers, insurers, clearinghouses, and the "business associates" of covered entities.[85] Health data is not regulated as PHI under HIPAA's Privacy Rule if it "does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual."[86] PHI can be de-identified either through an expert determination that the re-identification risk is "very small" or by removing 18 specific identifiers.[87] De-identification can be accomplished using data aggregation, usually in combination with other de-identification techniques.[88] HIPAA does not exempt publicly available personal information, which would still be considered PHI if it is created or maintained by a covered entity and sufficiently relates to a patient's medical treatment.[89]

HIPAA prohibits covered entities from using or disclosing PHI except in the following circumstances: (1) disclosure to the individual concerned, (2) for healthcare-related purposes, (3) pursuant to an authorization from the individual concerned or their representative, (4) to maintain directory information or for notification purposes after allowing the concerned individual an opportunity to object, (5) in emergency situations, (6) as required by law or public interest, or

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[82] 45 C.F.R. § 160.103 (2023).

[83] *Id.*

[84] 42 U.S.C. § 1302(a); *see also* 42 U.S.C. §§ 1320d–1320d-9 (outlining responsibilities of the Department of Health and Human Services); HIPAA Privacy Rule, 45 C.F.R. § 164 (2023).

[85] 45 C.F.R. § 160.102 (defining covered entities).

[86] 45 C.F.R. § 164.514(a).

[87] 45 C.F.R. § 164.514(b).

[88] *See Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, U.S. Department of Health and Human Services [hereinafter *Guidance Regarding Methods for De-identification of Protected Health Information*] https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html [https://perma.cc/TT45-UATR] (last updated Oct. 25, 2022) (discussing aggregation to de-identify PHI); Priv. Tech. Assistance Ctr., *supra* note 75 (discussing aggregation as a "disclosure avoidance method").

[89] *See* Health Insurance Portability and Accountability Act of 1996, §1171, 42 U.S.C. § 1320d; *accord.* 45 C.F.R. § 160.103 (2023).

(7) when a limited data set that excludes certain direct identifiers is used for research, public health or health care operations.[90] For an authorization to be valid, it must provide information about the specific PHI disclosed and the person receiving the PHI and contain an expiration date.[91] Additionally, HIPAA sets forth the "minimum necessary" standard, which generally requires covered entities to limit their use and disclosure of PHI to what is necessary to accomplish a particular purpose.[92] Finally, HIPAA provides individuals with the right to review their PHI and the right to request amendments to inaccurate or incomplete PHI.[93]

2. *State Laws*

At the State level, California was the first state to pass a comprehensive data privacy law in 2018 (effective since January 2020),[94] followed by Virginia in 2021 (effective since January 2023).[95] Meanwhile, several other states have passed broad privacy laws, all of which have already become effective or will become effective in the next few years.[96] In this article, we focus on the regulation of personal data in California and Virginia.

In California, the California Consumer Privacy Act (CCPA), recently amended by the California Privacy Rights Act (CPRA),[97] uses the term "personal information," which is defined as "information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[98] Virginia's Consumer Data Protection Act (VCDPA) defines "personal data" as "any

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[90] 45 C.F.R. § 164.502(a).

[91] 45 C.F.R. §§ 164.501, 164.532.

[92] 45 C.F.R. § 164.502(b), *accord.* 164.514(d).

[93] 45 C.F.R. § 164.524 (regarding right to access PHI); 45 C.F.R. § 164.526 (regarding right to amend PHI).

[94] California Consumer Privacy Act of 2018, 2018 Cal. Legis. Serv. Ch. 55 (West) (codified as amended at CAL. CIV. CODE §§ 1798.100 –.199.100 (West 2023)).

[95] Consumer Data Protection Act, 2021 Va. Acts Ch. 35 (codified as amended at VA. CODE ANN. §§ 59.1–575 to–585 (West 2023)).

[96] *See generally* Folks, *supra* note 36; Conor Murray, *U.S. Data Privacy Protection Laws: A Comprehensive Guide*, FORBES (Apr. 21, 2023), https://www.forbes.com/sites/conormurray/2023/04/21/us-data-privacy-protection-laws-a-comprehensive-guide/?sh=ce3727c5f925 [https://perma.cc/5APB-EBJ3] (providing timeline of state data protection laws).

[97] California Privacy Rights Act of 2020 § 24, Cal. Legis. Serv. Prop. 24 (West) (approved by the voters at the Nov. 3, 2020 election) (codified as amended at CAL. CIVIL CODE § 1798.185 (West 2024)).

[98] CAL. CIVIL CODE § 1798.140(v) (West 2024).

information that is linked or reasonably associated to an identified or identifiable natural person."[99] Both the CCPA and the VCDPA recognize a subcategory of sensitive personal data. The CCPA uses the term "sensitive personal information," which includes a consumer's government identification numbers, financial account information, geolocation data, email and text message content, genetic and biometric data used to identify an individual, and data concerning race, religion, ethnicity, philosophical beliefs, union membership, health, sexual orientation, and sex life.[100] Under the VCDPA, "sensitive data" is personal data that reveals an individual's race, ethnicity, religion, medical diagnoses, sexual orientation, citizenship, immigration status, personal data of a child, geolocation data, and genetic or biometric data processed for the purpose of identifying an individual.[101]

The CCPA and VCDPA both generally describe de-identified data as information that cannot be reasonably linked to an individual consumer.[102] In these cases, de-identified data is not regulated as personal data as long as companies take reasonable measures to ensure that the data is properly de-identified and reduce the risk of re-identification.[103] Because the CCPA and the VCDPA do not govern de-identified data (albeit with a relatively narrow definition of such data), the more stringent category of anonymous data also falls outside of their scope. Regarding data aggregation, the CCPA explicitly excludes "aggregated consumer information," which it defines as "information that relates to a group or category of consumers, from which individual consumer identities have been removed, that is not linked or reasonably linkable to any consumer or household, including via a

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[99] VA. CODE ANN. § 59.1-575 (West 2023).

[100] CAL. CIVIL CODE § 1798.140(ae) (West 2024).

[101] VA. CODE ANN. § 59.1-575 (West 2023). Other States have passed data privacy laws that include similar categorizations of sensitive personal data. *See generally* Zachary S. Schapiro, *Update: Processing Sensitive Personal Information under U.S. State Privacy Laws*, GREENBERG TRAURIG, LLP (Sept. 12, 2023), https://www.gtlaw-dataprivacydish.com/2023/09/update-processing-sensitive-personal-information-under-u-s-state-privacy-laws/ [https://perma.cc/9X5A-K4KA].

[102] CAL. CIV. CODE § 1798.140(m) (West 2023) ("'Deidentified' means information that cannot reasonably be used to infer information about, or otherwise be linked to, a particular consumer."); VA. CODE ANN. § 59.1-575 (West 2023) ("'De-identified data' means data that cannot reasonably be linked to an identified or identifiable natural person, or a device linked to such person.").

[103] *See* CAL. CIV. CODE § 1798.140(m) (West 2023) (outlining obligations related to use of de-identified data); CIV. § 1798.140(v)(3) (excluding de-identified data from the definition of "personal information"); VA. CODE ANN. § 59.1-581(A) (West 2023) (outlining obligations related to use of de-identified data); § 59.1-575 (excluding de-identified data from the definition of personal data).

device."[104] While the VCDPA does not expressly exempt aggregate data from its scope, aggregate data that can no longer be linked to an individual will likely fall outside of the definition of "personal data" under the act.[105]

Neither the CCPA nor the VCDPA govern publicly available data. The CCPA excludes "publicly available information," which includes "information made available by a person to whom the consumer has disclosed the information if the consumer has not restricted the information to a specific audience."[106] Similarly, the VCDPA excludes "publicly available information," which it defines as

> [I]nformation that is lawfully made available through federal, state, or local government records, or information that a business has a reasonable basis to believe is lawfully made available to the general public through widely distributed media, by the consumer, or by a person to whom the consumer has disclosed the information, unless the consumer has restricted the information to a specific audience.[107]

Unlike the VCDPA, the CCPA does not consider "biometric information collected by a business about a consumer without the consumer's knowledge" to be publicly available.[108]

The CCPA and VCDPA impose several obligations on businesses that collect and/or use consumers' personal data. Prior to or at the time of collection, businesses must provide consumers with information about the types of personal data collected, the purposes of the collection, and information about sharing data with third parties.[109] Unlike the CCPA, which only requires notification, the VCDPA requires consent prior to the collection or use of sensitive personal data.[110] Additionally, under both regimes, the collection and use of consumers'

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[104] Cal. Civ. Code § 1798.140(b) (West 2024).

[105] *See* David Zetoony, *What Is Aggregated Data?*, Greenberg Traurig, LLP (Oct. 21, 2022) (citing Va. Code Ann. § 59.1-571 (2022)), https://www.gtlaw-dataprivacydish.com/2022/10/what-is-aggregated-data/ [https://perma.cc/W2YR-EJ5F].

[106] Cal. Civ. Code § 1798.140(v)(2) (West 2024).

[107] Va. Code Ann. § 59.1-575 (West 2023).

[108] Cal. Civ. Code § 1798.140(v)(2) (West 2024) (excluding collection of biometric information without consumer's consent from the definition of "publicly available").

[109] Cal. Civ. Code § 1798.100(a)(1)–(2) (West 2024); Va. Code Ann. § 59.1-578(C) (West 2023).

[110] *Compare* Cal. Civ. Code § 1798.100(a)(2) (West 2024) (requiring notification), *with* Va. Code Ann. § 59.1-578(A)(5) (West 2023) (requiring consumer consent).

personal data must be "reasonably necessary and proportionate" to accomplish the stated purpose or compatible purposes.[111] Under both laws, consumers have the right to opt-out of the sale, sharing, or further disclosure of their personal information,[112] request deletion of personal information,[113] and request the amendment of inaccurate personal information.[114]

In addition to public laws that regulate the collection and use of personal data, private law might also govern personal data when it intersects with certain privacy interests. An individual has an interest in the privacy of their personal data, which includes a right to "control of information concerning his or her person."[115] A violation of such interest may give rise to tort claims for invasion of privacy, disclosure of private information, or intrusion upon seclusion if an individual suffers a legally cognizable harm.[116] However, not all personal data implicate protected privacy interests. An individual must first have a reasonable expectation of privacy in the type of personal data that is obtained or disclosed.[117] Absent this, the individual will not suffer the type of harm that is sufficient to confer standing.[118] To determine whether users have a protected privacy interest in their personal data, it is relevant to consider "whether the data itself is sensitive *and* whether the manner it was collected . . . violates social norms."[119] Using these considerations, the Ninth Circuit agreed that Facebook users had a reasonable expectation of privacy in the "enormous amount of individualized data" that Facebook secretly obtained by using cookies to track the browsing activity of users who were logged out of the platform.[120] On the other hand, the District Court for the Western District of Washington noted that "[d]ata and information that has been found insufficiently

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[111] CAL. CIV. CODE § 1798.100(c) (West 2024); *accord.* VA. CODE ANN. § 59.1-578(A)(1)–(2) (West 2023) (requiring data collection and further processing to be "adequate, relevant, and reasonably necessary in relation to the purposes for which such data is processed" and "compatible with the disclosed purposes.").

[112] CAL. CIV. CODE § 1798.135 (West 2024) (notification of consumers right to opt out); CIV. § 1798.120 (consumers' right to opt out); VA. CODE ANN. § 59.1-575, 577(A)(5) (West 2023) (consumers' right to opt out of disclosure to third parties).

[113] CAL. CIV. CODE § 1798.105 (West 2024); VA. CODE ANN. § 59.1-577(A)(3) (West 2023).

[114] CAL. CIV. CODE § 1798.106 (West 2024); VA. CODE ANN. § 59.1-577(A)(2) (West 2023).

[115] U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

[116] *See* Cook v. GameStop, Inc., No. 2:22-CV-1292, 2023 WL 5529772, at *4 (W.D. Pa. Aug. 28, 2023).

[117] *See* Saeedy v. Microsoft Corp., No. 23-CV-1104, 2023 WL 8828852, at *6 (W.D. Wash. Dec. 21, 2023).

[118] *See* Popa v. PSP Grp., LLC, No. C23-0294JLR, 2023 WL 7001456, at *3–5 (W.D. Wash. Oct. 24, 2023).

[119] *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 603 (9th Cir. 2020).

[120] *Id.*

personal includes mouse movements, clicks, keystrokes, keywords, URLs of web pages visited, product preferences, interactions on a website, search words typed into a search bar, user/device identifiers, anonymized data, product selections added to a shopping cart, and website browsing activities."[121]

B. The GDPR Framework Governing Personal Data in the EU

In the EU, the collection, use, and retention of personal data is generally prohibited unless allowed by law. The General Data Protection Regulation (GDPR), effective since May 18, 2018, is an EU Regulation that directly governs the processing of personal data in all 27 EU Member States.[122]

In general, the GDPR governs entities that process personal data of individual "data subjects."[123] These entities are regulated as "Controllers" and/or "Processors" depending on what they do with the personal data. Controllers "determine[] the purposes and means of the processing of personal data," while processors "processes personal data on behalf of the controller."[124] Additionally, the GDPR is said to have an extraterritorial scope because, under certain conditions, it can govern controllers and processors outside of the EU who process personal data of a data subject located in the EU.[125]

Data "processing" means "any operation or set of operations which is performed on personal data," and includes, for example, collection, using, storing, de-identifying, transferring, and deleting personal data."[126] Under the GDPR, personal data can include any information that identifies a natural person or can be used to identify a natural person (directly or indirectly), including "a name, an identification number, location data, an online identifier or to one or more factors

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[121] *Saeedy*, 2023 WL 8828852, at *4.

[122] General Data Protection Regulation, 2016 O.J. (L 119) Art. 4.2. The Regulation defines "processing" as:

> any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

[123] *Id.* at Art. 3 (providing scope of GDPR); *Id.* at Art. 4.1 (defining "Data Subject").

[124] *Id.* at Art. 4.7 (defining "Controller"); *Id.* at Art. 4.8 (defining "Processor").

[125] *Id.* at Art. 3.

[126] *Id.* at Art. 4.2.

specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."[127] Notably, the GDPR does not exclude publicly available data from its scope.[128] "Special categories of data" (or sensitive personal data), under the GDPR include "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation."[129]

The EU GDPR does not recognize a category of "de-identified data." Instead, it refers to personal data that has undergone "pseudonymization," which is

> the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person.[130]

Notably, the GDPR does not exempt pseudonymized data from its scope, but instead views pseudonymization as a method for protecting personal data.[131] Conversely, the GDPR does not govern anonymous data, which it describes as, "information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable."[132] However, there is conflicting regulatory

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[127] *Id.* at Art. 4.1.

[128] Piotr Foitzik, *Publicly available data under the GDPR: Main considerations*, IAPP (May 28, 2019), https://iapp.org/news/a/publicly-available-data-under-gdpr-main-considerations/ [https://perma.cc/4CGW-RRJF].

[129] General Data Protection Regulation, 2016 O.J. (L 119) Art. 9.1.

[130] *Id.* at Art. 4.5.

[131] *See* Recital 28 (noting that pseudonymization "is not intended to preclude any other measures of data protection."); art. 23 (describing pseudonymisation and encryption as a security measure); art. 25 (defining pseudonymization as a technical and organizational measure to safeguard data); Recital 26 (explaining that pseudonymized data is considered data relating to an "identifiable natural person").

[132] Recital 26.

guidance in the EU about how to interpret the anonymization standard.[133] Some regulatory authorities take an absolutist approach that considers data anonymous only when it is impossible to re-identify the data, while others adopt a risk-based approach that considers data anonymous when there is no reasonable chance of re-identification.[134] Since absolute anonymization may be "statistically impossible," EU regulatory authorities have tended to adopt a risk-based approach to anonymization.[135] The GDPR will also not apply to fully "aggregated and anonymised datasets" when the "original input data … [is] destroyed, and only the final, aggregated statistical data is kept."[136]

The GDPR protects personal data through its principles of lawfulness, fairness, transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity, confidentiality, and accountability.[137] To lawfully process personal data under the GDPR, there must be a lawful basis to support data processing.[138] Under Article 6, there are six legal justifications upon which personal data processing can be based: (1) consent, (2) contract, (3) legal obligation, (4) vital interests of natural person, (5) public interest or official authority, and (6) legitimate interests of controller or third party.[139] Processing special categories of personal data, including biometric data, data concerning health, data revealing racial or ethnic origins, and data potentially revealing sexual orientation, political opinions, religious, or philosophical beliefs, is generally

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[133] *See generally* Andrew Burt, Alfred Rossi & Sophie Stalla-Bourdillon, *A guide to the EU's unclear anonymization standards*, IAPP (Jul. 15, 2021), https://iapp.org/news/a/a-guide-to-the-eus-unclear-anonymization-standards/ [https://perma.cc/2FGM-QB54].

[134] *Id.*

[135] Andrew Burt & Sophie Stalla-Bourdillon, *The definition of 'anonymization' is changing in the EU: Here's what that means*, IAPP (Jun. 27, 2023), https://iapp.org/news/a/the-definition-of-anonymization-is-changing-in-the-eu-heres-what-that-means/ [https://perma.cc/Q3CJ-RSMU].

[136] EUR. DATA PROT. SUPERVISOR, OPINION 10/2017, EDPS OPINION ON SAFEGUARDS AND DEROGATIONS UNDER ARTICLE 89 GDPR IN THE CONTEXT OF A PROPOSAL FOR A REGULATION ON INTEGRATED FARM STATISTICS 10 (2017), https://www.edps.europa.eu/sites/default/files/publication/17-11-20_opinion_farm_statistics_en.pdf [https://perma.cc/9F5Y-EN37].

[137] General Data Protection Regulation , 2016 O.J. (L 119) Art. 5.

[138] Art. 6.

[139] *Id.*

prohibited and only allowed under certain conditions laid out in Article 9, such as obtaining "explicit" consent of the natural person.[140]

Consent can only be a valid legal basis for processing personal data if it is (1) freely given, (2) specific, (3) informed, (4) unambiguous, and (5) as easy to give as to withdraw.[141] For consent to be freely given, users must be able to refuse consent without suffering "significant negative consequences."[142] For consent to be specific, the user must provide consent for a specific purpose.[143] According to the EDPB (previously the Article 29 Data Protection Working Party, which coordinates GDPR enforcement), neither blanket consent "for all the legitimate purposes" nor consent based on "an open-ended set of processing activities" are valid.[144] For consent to be informed, the user must have the following information: (1) the identity of the controller(s), (2) the purpose for collecting and further processing the data, (3) the category of data collected, (4) the right to withdraw consent, (5) the existence of automated decision making (if any), and (6) the risks and safeguards associated with transferring data to third countries.[145] For consent to be unambiguous, the user should provide consent via an "affirmative action."[146] A clear affirmative action in the digital sphere can include sending an email, submitting an online form, using an electronic signature, or ticking a box.[147] Consent based on a user's silence or inaction will not be valid.[148]

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[140] Art. 9 (prohibiting the processing of special categories of data except in the following cases: (1) explicit consent; (2) employment social security, or social protection; (3) vital interests of a natural person incapable of providing consent; (4) when data subject makes the data public; (5) substantial public interest; (6) healthcare; (7) public health; and (8) archiving, scientific or historical research, and statistical purposes); *see also* EUR. DATA PROT. BD., GUIDELINES 3/2019 ON PROCESSING OF PERSONAL DATA 18–20 (2020) [hereinafter GUIDELINES ON PROCESSING OF PERSONAL DATA], https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201903_video_devices.pdf [https://perma.cc/RSP3-N6DZ].

[141] Art. 4.11.

[142] EUR. DATA PROT. BD., GUIDELINES 05/2020 ON CONSENT UNDER REGULATION 2016/679 9, 12 (2020), https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf [https://perma.cc/358Y-H8X2].

[143] *Id.* at 14–15.

[144] ART. 29 DATA PROT. WORKING PARTY, 01187/11/EN, OPINION 15/2011 ON THE DEFINITION OF CONSENT 17 (2011), https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp187_en.pdf [https://perma.cc/9Y4M-R56J].

[145] GUIDELINES ON PROCESSING OF PERSONAL DATA, *supra* note 140, at 15–16.

[146] GUIDELINES ON PROCESSING OF PERSONAL DATA, *supra* note 140, at 26.

[147] GUIDELINES ON PROCESSING OF PERSONAL DATA, *supra* note 140, at 26.

[148] GUIDELINES ON PROCESSING OF PERSONAL DATA, *supra* note 140, at 36.

At the time of personal data collection, the GDPR also requires that data subjects be informed about the existence and purposes of the processing, which includes providing information about the "specific circumstances and context in which the personal data are processed."[149] This information should be in clear, plain, and easily understandable language.[150] Once collected, the GDPR requires personal data to be stored in a manner that is sufficient to protect it "against unauthorised or unlawful processing and against accidental loss, destruction or damage."[151] This requires the implementation of technical and organizational measures to protect personal data.[152] These measures should include pseudonymization and encryption of personal data and the implementation of measures that ensure confidentiality and integrity of processing systems as well as the ability to restore data if necessary.[153] Personal data should not be stored for any longer than needed to accomplish the purposes for which it is being processed.[154] However, data can be stored for a longer period "solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes" as long as it is sufficiently protected.[155]

Finally, data subjects have a right, among other things, to make requests to withdraw consent,[156] access,[157] rectify,[158] erase,[159] transfer,[160] restrict[161] or object[162] to the processing of their personal data. The GDPR also gives individuals who suffer "material or non-material damage" as a result of a GDPR "infringement" the "right to receive compensation" and holds data controllers (and potentially even processors) "liable for the damage caused by processing which

[149] Recital 60; *accord.* art. 14.
[150] Art. 12.1.
[151] Art. 5.1(f).
[152] Art. 5.1(e); art. 32.
[153] Art. 32.
[154] Art. 5.1(e).
[155] *Id.*
[156] Art. 7.3.
[157] Art. 15.
[158] Art. 16.
[159] Art. 17.
[160] Art. 20.
[161] Art. 18.
[162] Art. 21.

infringes this Regulation."[163] As a result, not only does the GDPR regulate data privacy in public law, it also provides a private right of action for individuals who are harmed by violations of the GDPR.

III
The Flow of Personal Data Flow in the GenAI Data Lifecycle

Personal data flows through the GenAI data lifecycle in various stages. In the development phase, personal data can be used to train the model. Once the GenAI model is released, users can provide more personal data while signing up and using the model. Next, the GenAI models themselves produce data in the form of outputs provided to users, which can also include personal data. Finally, developers can retain personal data that users input or that the AI models output to improve GenAI models or develop new models.

A. Training Data

Creators of GenAI use large datasets, sourced primarily from publicly available information on the internet, to train models.[164] This data can be scraped from public social media profiles (e.g., LinkedIn), online discussions (e.g., Reddit), photo sharing sites (e.g., Flickr), blogs (e.g., WordPress), news media (e.g., arrest reports), information and research sites (e.g., Wikipedia), and even government records (e.g., voter registration records).[165] Paywalls are not always effective at protecting online data from web scrapers, and pirated data, like illegal copies of books, can end up in a scraped data set.[166]

Personal data is no exception. For example, Meta admits that personal information like a blog post author's name and contact information may be

[163] Art. 82 ("Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.").

[164] *See, e.g.*, Brown, *supra* note 16.

[165] Lauren Leffer, *Your Personal Information Is Probably Being Used to Train Generative AI Models*, Sci. Am. (Oct. 19, 2023), https://www.scientificamerican.com/article/your-personal-information-is-probably-being-used-to-train-generative-ai-models/ [https://perma.cc/P2PP-WJKR].

[166] *Id.*

collected to train its GenAI models.[167] Even sensitive personal data can be scraped to train GenAI models. Photos from a patient's medical record were included in LAION, a publicly available data set used to train some GenAI image models.[168]

B. User Input of Data

Users of GenAI applications provide various data to the companies that control and deploy the AI models, including specific user account data, user behaviors, and more general data that users input to facilitate the generation of new content by GenAI. It is no surprise that many companies collect personal data from account holders (e.g., name, age, contact information, and billing details) to provide information and services. Perhaps less obvious to users, but still considered routine, is the collection of user data for website analytics, which provide companies with insight into how users interact with their websites and applications.[169] Finally, developers can also collect personal data that users enter into various online applications, including personal data that users provide to prompt AI content generation. This is a broad category of data that can range from details about a private business deal for contracts, to information about students for letters of recommendation, to a patient's medical history for a referral. Users might also provide voice and image data to GenAI models that create art or music.

Developers might use user-provided personal data to develop or improve GenAI models.[170] According to OpenAI's Privacy Policy, it may use data that users provide, including user input of data to ChatGPT and DALL-E, for the development, training, and improvement of its GenAI models.[171] Google Cloud

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[167] Priv. Center, *How Meta Uses Information for Generative AI models*, META, https://www.facebook.com/privacy/genai [https://perma.cc/RQD9-3QJ7].

[168] Benji Edwards, *Artist Finds Private Medical Record Photos in Popular AI Training Data Set*, ARS TECHNICA (Sept. 21, 2022), https://arstechnica.com/information-technology/2022/09/artist-finds-private-medical-record-photos-in-popular-ai-training-data-set/ [https://perma.cc/V2ES-6UZW].

[169] Google Mktg. Platform, *Analytics*, GOOGLE, https://marketingplatform.google.com/about/analytics/ [https://perma.cc/FWE6-M7L8].

[170] *See* Paul F. Christiano et al., *Deep Reinforcement Learning from Human Preferences*, 30 ADVANCES IN NEURAL INFO. PROCESSING SYS., 2017, *passim* (discussing the ability of deep learning algorithms to improve performance in response to human interaction and feedback though a process called Reinforcement Learning through Human Feedback (RHLF)).

[171] *Privacy Policy*, OPENAI, https://openai.com/policies/privacy-policy [https://perma.cc/9P59-DHPG] (updated Nov. 14, 2023).

Services claims that it does not train its AI models with data provided by its Cloud users without permission.[172] However, Google's Privacy Policy states that it "collect[s] the content you create, upload, or receive from others when using our services … includ[ing] things like email you write and receive, photos and videos you save, docs and spreadsheets you create, and comments you make on YouTube videos."[173] Elsewhere, the same policy states generally that Google "use[s] the information [they] collect in existing services to help [them] develop new ones" and that it "uses information to improve [their] services and to develop new products, features and technologies that benefit [their] users and the public," which can include "us[ing] publicly available information to help train Google's AI models."[174] Meta's Privacy Policy describes how it uses both the content provided by users and information about user activity to develop, improve, and test its products, which can include GenAI products.[175] This can include a Facebook user's posts, messages, voice, camera roll images and videos, hashtags, likes, and purchases.[176] Additionally, Meta's use of users' AI prompts, "which could include text, documents, images, or recordings," are also governed by broad use provisions in the Meta Privacy Policy.[177]

User-provided content might also be shared with third parties. OpenAI's privacy policy states that it may share personal information with third parties, including vendors, service providers, and affiliates.[178] OpenAI sets almost no limitations on its use of anonymous, aggregated, and de-identified data.[179] Google claims that it does not share personal information with third parties except in the following circumstances: (1) the user consents, (2) in the case of organizational use of Google by schools or companies, (3) for external processing, or (4) when sharing

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[172] Andrew Moore, *Sharing Our Data Privacy Commitments for the AI Era*, GOOGLE CLOUD BLOG (Oct. 14, 2020), https://cloud.google.com/blog/products/ai-machine-learning/google-cloud-unveils-ai-and-ml-privacy-commitment [https://perma.cc/GA46-48ZX].

[173] *Privacy Policy*, GOOGLE, https://policies.google.com/privacy#infosharing [https://perma.cc/G2JL-2YAG] (describing policies for sharing information).

[174] *Id.*

[175] *Privacy Policy*, META, https://www.facebook.com/privacy/policy?section_id=2-HowDoWeUse [https://perma.cc/RXX5-DRNY].

[176] *Id.*

[177] *Meta AIs Terms of Service*, META, https://www.facebook.com/policies/other-policies/ais-terms [https://perma.cc/M2PK-TWHU].

[178] *Privacy Policy*, OPENAI, *supra* note 171.

[179] *Privacy Policy*, OPENAI, *supra* note 171.

is required or permitted by law.[180] Google states, however, that it "may share non-personally identifiable information publicly and with [their] partners—like publishers, advertisers, developers, or rights holders."[181] According to Meta, "[b]y using AIs, you are instructing [them] to share your information with third parties when it may provide you with more relevant or useful responses."[182] This includes personal information about the user or third parties.[183] Meta's Privacy Policy articulates the broadest data sharing practices to include sharing all user data, including personal data, with partners, vendors, service providers, external researchers, and other third parties.[184] Meta advises users "not [to] share information that you don't want the AIs to retain and use."[185]

C. AI-Generated Output of Data

The output that GenAI models produce in response to user prompts is another source of data in the GenAI data life cycle. These outputs can include personal data that the model learned either through training or user-provided data. Despite efforts to prevent GenAI models from leaking personal data memorized in the model parameters during model training,[186] researchers were able to extract personal data, including names, phone numbers, and email addresses, from GPT-2.[187] In a later study, researchers extracted data from both open models—those with publicly available training data sets, algorithms, and parameters—and semi-open models—those with only publicly available parameters.[188] They were "able to extract over 10,000 unique verbatim memorized training examples" from ChatGPT 3.5.[189] These samples included personal data such as "phone numbers, email

[180] *Privacy Policy*, Google, *supra* note 173.
[181] *Privacy Policy*, Google, *supra* note 173.
[182] *Meta AIs Terms of Service*, *supra* note 177.
[183] *Meta AIs Terms of Service*, *supra* note 177.
[184] *Privacy Policy*, Meta *supra* note 175.
[185] *Meta AIs Terms of Service*, *supra* note 177.
[186] *How ChatGPT and Our Language Models Are Developed*, OpenAI, https://help.openai.com/en/articles/7842364-how-chatgpt-and-our-language-models-are-developed [https://perma.cc/3EAS-E74C] ("[W]e try to train our models to reject requests for private or sensitive information about people.").
[187] Nicholas Carlini et al., *Extracting Training Data from Large Language Models*, 30 USENIX Security Symposium 2633, 2640–41 (2021), https://www.usenix.org/system/files/sec21-carlini-extracting.pdf [https://perma.cc/MKN7-SEP8].
[188] Milad Nasr, et al., *Scalable Extraction of Training Data from (Production) Language Models*, arXiv, Nov. 2023, at 7–10, https://arxiv.org/abs/2311.17035 [https://perma.cc/VV4X-BHSG].
[189] *Id.* at 9.

addresses, and physical addresses (e.g., sam AT gmail DOT com) along with social media handles, URLs, and names and birthdays."[190] Over eighty-five percent of this information was the personal data of real individuals, rather than hallucinated.[191] This research cautioned that attackers with more resources could likely gather up to 10 times more training data from ChatGPT.[192] GenAI developers disclose that outputs may be inaccurate but provide little information about the risk of the model disclosing a user's personal data.[193] OpenAI gives users the option to submit a correction request in cases where the model provides inaccurate information about a user; however, this does nothing to cure GenAI output of accurate personal data.[194]

D. Data Retention

Once personal data is collected by companies for developing and improving GenAI models, it may be retained for further use. OpenAI claims that ChatGPT does not store its training data.[195] However, it states that it stores users' personal information, which includes user input, "as long as we need in order to provide our Service to you, or for other legitimate business purposes such as resolving disputes, safety and security reasons, or complying with our legal obligations."[196] This is presumably for as long as a user has an active account.[197] Although OpenAI provides users with an option to request that their personal data no longer be processed, removal of personal information from OpenAI's applications is not guaranteed.[198] For example, OpenAI notes that it will consider requests "balancing

[190] *Id.* at 10.

[191] *Id.*

[192] *Id.* at 1.

[193] *See Privacy Policy*, OpenAI, *supra* note 171; *see also Meta AIs Terms of Service*, *supra* note 177 (warning user's about the content and accuracy of output); Google AI for Developers, *Generative AI APIs Additional Terms of Service*, Google, https://ai.google.dev/terms [https://perma.cc/765N-FLCG] (noting that Google's model may provide inaccurate or offensive content).

[194] *See Privacy Policy*, OpenAI, *supra* note 171.

[195] *How ChatGPT and Our Language Models Are Developed*, *supra* note 186.

[196] *Privacy Policy*, OpenAI, *supra* note 171.

[197] Aaron Drapkin, *Does ChatGPT Save My Data? OpenAI's Privacy Policy Explained*, tech.co, https://tech.co/news/does-chatgpt-save-my-data [https://perma.cc/4RS7-ZXLZ] (last updated Jun. 29, 2023).

[198] *OpenAI Personal Data Removal Request*, OpenAI, https://share.hsforms.com/1UPy6xqxZSEqTrGDh4ywo_g4sk30 [https://perma.cc/Q8GX-UUBQ].

privacy and data protection rights with public interests like access to information, in accordance with applicable law."[199]

Meta also allows users to submit a request to obtain, delete, or restrict Meta's use of their personal information to train its AI models.[200] Notably, this request only relates to personal data that Meta obtains from third parties and not data that it obtains directly from the user.[201] To limit the use of personal data that users provide to Meta directly for any purpose, including training GenAI models like Llama 2, users are instructed to delete their Meta accounts (Facebook and Instagram) or to exercise their rights under data protection laws.[202]

Figure A illustrates the flow of personal data in the GenAI data lifecycle.

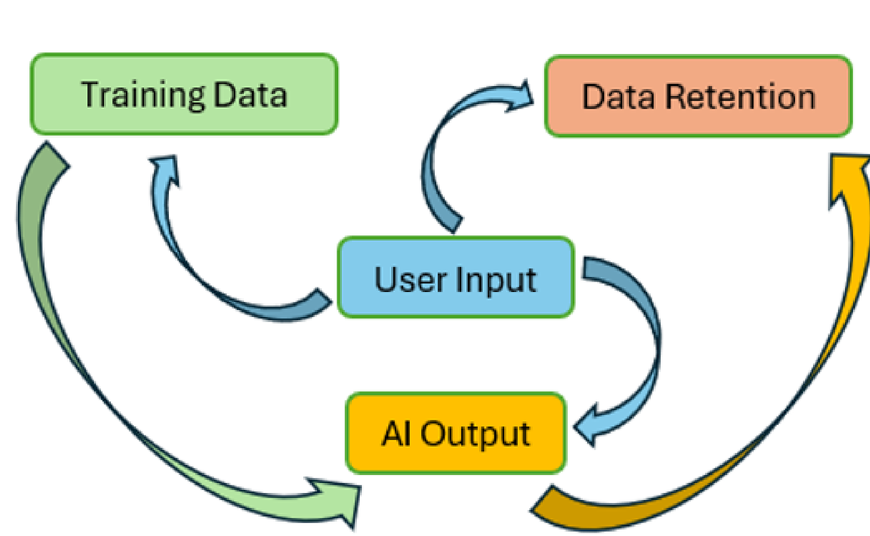

Figure A: Flow of Personal Data in the GenAI Data Lifecycle

[199] *OpenAI Privacy Center*, OPENAI, https://privacy.openai.com/policies?modal=take-control&submissionGuid=378496de-9581-4d9e-b8dd-dc48b35b219b [https://perma.cc/Q8GX-UUBQ].

[200] *Generative AI Data Subject Rights*, FACEBOOK, https://www.facebook.com/help/contact/510058597920541 [https://perma.cc/QVH6-SZLX] (describing "personal information" as "information about you").

[201] *Id.*

[202] *Privacy Policy*, META *supra* note 175.

IV
THE PROTECTION OF PERSONAL DATA IN THE GENAI DATA LIFECYCLE IN THE US AND EU

As demonstrated above, the flow of personal data through the GenAI data lifecycle is complex, and it can be difficult for users to keep track of how GenAI developers and third parties might access and use their personal data. As a result, several data privacy implications arise in connection with the use of publicly available, private, and sensitive personal data in the GenAI data lifecycle in both the US and EU. Additionally, individuals may also lose control over the accuracy and retention of their personal data.

A. Publicly Available Personal Data

GenAI training datasets include troves of publicly available personal data scraped from the internet. Third parties can examine these datasets to extract personal data in ways that can threaten individuals' privacy. For example, researchers analyzing the open access German-language LAION dataset were able to determine both the identity of a man in a naked photograph and the exact address where a baby's photograph was taken.[203] Additionally, GenAI models themselves might disclose personal data to third parties because they "memorize portions of the data on which they are trained; as a result, the model can inadvertently leak memorized information in its output."[204]

One view is that individuals should expect that any data they share publicly online is up for grabs and not subject to any privacy protections.[205] On the other hand, the reproduction of personal data that individuals provide online could still violate reasonable expectations of data privacy. An individual might decide to disclose personal data in a specific public online setting for a specific purpose without any expectation that the same data will be used to train GenAI models.

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[203] Elisa Harlan & Katharina Brunner, *We Are All Raw Material for AI*, NETZWELT (Jul. 7, 2023), https://interaktiv.br.de/ki-trainingsdaten/en/index.html [https://perma.cc/KGM6-3A3B].

[204] Amy Winograd, *Loose-Lipped Large Language Models Spill Your Secrets: The Privacy Implications of Large Language Models*, 36 HARV. J.L. TECH. 615, 625 (2023).

[205] *See, e.g.*, Harlan & Brunner, *supra* note 203 (reporting statement from one of LAION's founders, Christoph Schuhmann, that "[i]n principle, that means that at the moment I make my image and my data publicly available on the internet, I should be aware that there is a very good chance that someone will download it and use it for models").

In fact, many users who originally provided personal data online could not have reasonably expected that future technology would be used by companies that did not yet exist to collect, use, profit from, and potentially publish their personal data far outside of the parameters in which it was originally shared.[206] For example, a Reddit user might share personal data in a city-based group about depression for the purpose of obtaining mental health support, but the same user would likely not expect this information to become available to a virtually unlimited audience as part of a GenAI training data set. Additionally, the context and privacy implications of disclosing personal data may change over time.[207] For example, imagine that the same user also disclosed to the online support group that her mental health condition was related to a legal abortion, and months later, that same abortion procedure is deemed illegal.

In the US, the FTC expressed early concerns about the IRS industry's collection and use of publicly available personal data, noting that "advances in computer technology have made it possible for more detailed identifying information to be aggregated and accessed more easily and cheaply than ever before."[208] It worried that consumers would be "adversely affected by a perceived privacy invasion, the misuse of accurate information, or the reliance on inaccurate information" and noted the "potential harm that could stem from access to and exploitation of sensitive information in public records and publicly available information."[209] Unfortunately, it appears that the FTC's interest in this topic seems to have waned considering the current absence of regulatory efforts focused on protecting consumers from harm that may stem from access, aggregation, and use of publicly available personal data. The US federal laws that govern subsets of personal data also offer little protection from broad disclosure of publicly available personal data. The Gramm-Leach-Bliley Act does not regulate personal

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[206] *See, e.g.*, Sara Morrison, *The tricky truth about how generative AI uses your data*, Vox (Jul. 27, 2023), https://www.vox.com/technology/2023/7/27/23808499/ai-openai-google-meta-data-privacy-nope [https://perma.cc/4H4S-ZXQX].

[207] *See, e.g.*, FTC, *supra* note 45 ("[T]he same piece of information (e.g., age) may raise different privacy concerns at different points in a person's life.").

[208] FTC, *supra* note 45.

[209] FTC, *supra* note 45.

information that is lawfully made public.[210] While COPPA, FERPA, and HIPAA do not exclude publicly available information from regulation, these laws offer only limited and fragmented protection for certain subcategories of personal data that are collected and used under certain circumstances and would likely not protect publicly available personal data from data scraping practices or from being accessed in the resulting datasets.[211]

The exclusion of publicly available information from general state data privacy laws like the CCPA and VCDPA leaves open questions about whether all personal data scraped from the web is considered "publicly available."[212] Notably, the CPRA's amendments to the CCPA broadened the scope of what is considered "publicly available" to include information in government records that is used for a purpose other than that for which it was originally collected.[213] The drafters worried that limiting the use of information in public records would infringe upon constitutionally protected free speech.[214] However, personal data disclosed online might not be considered "publicly available" if the individual restricted their self-publication to a specific audience. Similarly, if a third party publishes personal data about an individual outside of the original audience restrictions, this data may not be considered publicly available. Theoretically, data scraping should not collect self-published personal data that is not available to the "general public" because of audience restrictions; however, it can be difficult to determine whether personal data published to the general public by a third party was originally restricted to a specific audience. For example, individuals, companies, or government organizations might make the personal data of another individual publicly available, and the collection of this data to train GenAI might violate the data subject's privacy.

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[210] 16 C.F.R. § 313.1(b) (excluding publicly available information from the scope of the privacy rule); § 313.3(n) (excluding publicly available information from the definition of nonpublic personal information), see also § 313.3(p)(1) (defining publicly available information).

[211] *See supra* Part II.A.1.

[212] CAL. CIV. CODE § 1798.140(v)(2) (West 2024) (excluding publicly available information); *accord.* VA. CODE ANN. § 59.1-575 (West 2023) (excluding publicly available information).

[213] Act of October 11, 2019 § 7, 2019 Cal. Legis. Serv. Ch. 757 (West) (codified as amended at CAL. CIV. CODE § 1798.140) (West 2024) ("For these purposes, 'publicly available' means information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information.").

[214] *See* S. 2019-1355, Reg. Sess., at 4 (Cal. 2019).

Unlike US privacy laws, the GDPR does not exclude publicly available data from its scope, and processing of such data requires a valid legal basis.[215] Consent, contract, and/or legitimate interests are the most likely legal bases for processing personal data in the GenAI data lifecycle.[216] However, because scraping publicly available personal data generally occurs without knowledge of or contact with the data subjects concerned, advisory committees have noted that there should be sufficient legitimate interests to support the processing of personal data through data scraping.[217] However, the public availability of data can increase the supporting legitimate interests of a processor, "if the publication was carried out with a reasonable expectation of further use of the data for certain purposes."[218] On the other hand, the broad collection and use of publicly available data implicates a wide range of privacy concerns for a large number of data subjects who are likely not aware that their personal data will be used for training GenAI models.[219] The EDPB ChatGPT taskforce notes that when balancing the data controller's legitimate interests with data subjects' fundamental rights, "reasonable expectations of data subjects should be taken into account."[220] However, it also indicates that data controllers who employ technical measures to (1) exclude certain

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[215] Piotr Foitzik, *Publicly available data under the GDPR: Main considerations*, IAPP (May 28, 2019), https://iapp.org/news/a/publicly-available-data-under-gdpr-main-considerations/ [https://perma.cc/8M8L-B5VU]; Art. 29 Working Party, WP251rev.01, Guidelines on Automated Individual Decision-making and Profiling for the Purposes of Regulation 2016/679 (2018) (noting that publicly available personal data is still personal data governed by GDPR).

[216] *See* Confederation of Eur. Data Prot. Orgs. AI Working Grp., *supra* note 7, at 8; *see also What is our legal basis?*, Meta, https://www.facebook.com/privacy/policy/?subpage=7.subpage.1-WhatIsOurLegal [https://perma.cc/6HLQ-3Y8Y] ("We process your information that's necessary to fulfil our contracts with you . . . We process your information if you give your consent . . . We process your information as necessary for our or others' legitimate interests. Our interests include providing an innovative, personalised, safe and profitable service to our users and partners, and responding to legal requests.") (last accessed from the Netherlands on Jun. 4, 2024).

[217] *See* Confederation of Eur. Data Prot. Orgs. AI Working Grp., *supra* note 7, at 10 ("[T]here is very little room for the contract basis when training an AI system."); Confederation of Eur. Data Prot. Orgs. AI Working Grp., *supra* note 7, at 8 ("The entire apparatus used for the training of AI systems makes it almost impossible to obtain consent.").

[218] Art. 29 Data Prot. Working Party, 844/14/EN, Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller Under Article 7 of Directive 95/46/EC 39 (2014) [hereinafter Opinion 06/2014] (explaining that the data may have been originally published "for purposes of research or for purposes related to transparency and accountability").

[219] *Id.* (noting that impact on fundamental rights considers the amount of data processed and the breath of access to personal data).

[220] EDPB, *supra* note 6, at 6.

categories of data from data scraping and (2) delete or anonymize data that has been scraped are more likely to succeed in claiming legitimate interests as a valid legal basis for processing training data.[221]

Scraping publicly available data for training GenAI can be particularly intrusive when the data can be used to make predictions about an individual's behavior.[222] In Europe, the French, Italian, and Greek national data protection authorities ("DPAs"), charged with national enforcement of the GDPR, imposed fines on US-based Clearview AI for GDPR violations stemming from the company's data scraping practices.[223] Specifically, the DPAs found that Clearview AI's scraping of over 10 billion publicly available facial images and associated metadata for the purpose of further processing those images to create a facial recognition database violated the GDPR's requirements of lawfulness, fairness, and transparency in personal data processing.[224] The DPAs rejected the company's alleged legitimate interests in making a business profit as a valid legal basis for their data processing and ordered the erasure of such data, banned further collection, and fined the company 20 million euros each.[225] In assessing the balance between the Clearview AI's economic interest and data subjects' fundamental rights, the DPAs highlighted that (1) the biometric data produced from the processing of these images was particularly intrusive and concerns a large number of people, and (2) the data subjects were not aware and could not have reasonably expected that their photographs and the associated metadata would be used to develop

[221] *See* EDPB, *supra* note 6, at 6–7.

[222] *See* ART. 29 DATA PROT. WORKING PARTY, *supra* note 144, at 39.

[223] GARANTE PER LA PROTEZIONE DEI DATI PERSONALI [GUAR. FOR THE PROT. OF PERS. DATA], ORDINANZA INGIUNZIONE NEI CONFRONTI DI CLEARVIEW AI [INJUNCTION ORDER AGAINST CLEARVIEW AI] (2022), https://www.gpdp.it/web/guest/home/docweb/-/docweb-display/docweb/9751362 [https://perma.cc/FR9U-AYTG] (Italy); *Hellenic DPA fines Clearview AI 20 million euros*, EUR. DATA PROT. BD. (July 20, 2022), https://www.edpb.europa.eu/news/national-news/2022/hellenic-dpa-fines-clearview-ai-20-million-euros_en [https://perma.cc/SFW5-3BT2] (Greece); COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS [NAT'L COMM'N FOR INFO. TECH & LIBERTÉS], SAN-2022-019, DÉLIBÉRATION DE LA FORMATION RESTREINTE N° SAN-2022-019 DU 17 OCTOBRE 2022 CONCERNANT LA SOCIÉTÉ CLEARVIEW AI [DELIBERATION OF THE RESTRICTED PANEL CONCERNING THE COMPANY CLEARVIEW AI] (2022), https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000046444859 [https://perma.cc/6MZY-9TQD] (France).

[224] *See* INJUNCTION ORDER AGAINST CLEARVIEW AI, *supra* note 223.

[225] *See* INJUNCTION ORDER AGAINST CLEARVIEW AI, *supra* note 223; *Hellenic DPA fines Clearview AI 20 million euros*, *supra* note 223; DELIBERATION OF THE RESTRICTED PANEL CONCERNING THE COMPANY CLEARVIEW AI, *supra* note 223.

facial recognition software when they consented to the original publication of their photographs.[226]

Although, as demonstrated by the Clearview AI case, the general framework of the GDPR is already flexible enough to govern the large-scale processing of publicly available personal data, the EU also appears focused on protecting data subjects from illegal use of publicly available personal data for the specific purpose of training GenAI models. In addition to the EDPB's ChatGPT taskforce, the Confederation of European Data Protection Organizations (CEDPO), which seeks to harmonize data protection practices in the EU member states, developed its own taskforce to address GDPR compliance during the processing phase of the GenAI data lifecycle.[227] On the national level, the French data protection authority issued an action plan that will consider, among other issues, "the protection of publicly available data on the web against the use of scraping, or scraping, of data for the design of tools."[228] Notably, the EU is not ignoring the potential benefits of GenAI or attempting to regulate these models out of existence; instead, the CEDPO recognizes that, "[t]here will be no future without generative AI, and with data playing such a pivotal role in the training and operating of these systems, DPOs will play a central role in ensuring that both data protection and data governance standards are at the heart of these technologies."[229]

Finally, although data scraping is intended to collect only data that is legally available to the general public, it is also important to recognize that this practice can amplify existing data privacy violations resulting from the unauthorized disclosure of sensitive personal data online. For example, an outdated data protocol for electronic medical record storage resulted in the unauthorized online disclosure of more than 43 million health records, which included patients' names, genders, addresses, phone numbers, social security numbers, and details from medical

[226] *See* Injunction Order Against Clearview AI, *supra* note 223; *Hellenic DPA fines Clearview AI 20 million euros*, *supra* note 223; Deliberation of the restricted panel concerning the company CLEARVIEW AI, *supra* note 223.

[227] Confederation of Eur. Data Prot. Orgs. AI Working Grp., *supra* note 7.

[228] *Artificial intelligence: the action plan of the CNIL*, Commission Nationale de l'Informatique et des Libertés (May 23, 2023), https://www.cnil.fr/en/artificial-intelligence-action-plan-cnil [https://perma.cc/2YA6-H3V9].

[229] Confederation of Eur. Data Prot. Orgs. AI Working Grp., *supra* note 7, at 2.

examinations.[230] This sensitive personal data might be collected in a data scrape, used to train GenAI models, and end up in the hands of third parties, even though it should not have been publicly available to begin with.

B. Private and Sensitive Personal Data

As a source of personal data in the GenAI data lifecycle, individual users can supply private (i.e. not publicly available) and sensitive personal data about themselves or others while using services and software provided by GenAI companies, including the GenAI applications themselves. In fact, the conversational nature of GenAI applications can cause users to let their guard down and overshare personal data.[231] The GenAI model might then use this personal data to infer more personal data—even sensitive personal data—about an individual.[232] The EDPB ChatGPT taskforce notes that despite policies that warn users to refrain from providing personal data to ChatGPT, "it should be assumed that individuals will sooner or later input personal data," and that this data must still be processed lawfully.[233] Additionally, geolocation services and wearable technology might also provide troves of sensitive personal data. While users might agree to share location data to use Google Maps and Uber, they may not realize that this data can "reveal a lot about people, including where we work, sleep, socialize, worship, and seek medical treatment."[234] Additionally, other technologies, like smartwatches and apps that monitor blood sugar or menstrual cycles, collect sensitive personal data from users. Once private and sensitive personal data are in the digital marketplace,

[230] Carly Page, *Millions of patient scans and health records spilling online thanks to decades-old protocol bug*, TechCrunch (Dec. 6, 2023), https://techcrunch.com/2023/12/06/medical-scans-health-records-dicom-pacs-security/ [https://perma.cc/W383-BTZU]. In the IP context, data scraping can also retrieve copyright-protected work contained in illegal online "shadow libraries." *See e.g.*, Class Action Complaint, Silverman. v. Open AI, Inc., No. 3:23-cv-03416 at ¶¶ 35–36 (N.D. Cal. Jul. 7, 2023).

[231] Dana Mancuso, *Privacy considerations for Generative AI*, Univ. of Ill. (July 17, 2023), https://cybersecurity.illinois.edu/privacy-considerations-for-generative-ai/ [https://perma.cc/VP5C-ZTSE]; *see also* Mason Marks & Claudia E. Haupt, *AI Chatbots, Health Privacy, and Challenges to HIPAA Compliance*, 330(4) JAMA 309 (2023), https://jamanetwork.com/journals/jama/article-abstract/2807170 [https://perma.cc/QB65-PATY].

[232] Mason Marks & Claudia E. Haupt, *AI Chatbots, Health Privacy, and Challenges to HIPAA Compliance*, 330(4) JAMA 309 (2023), https://jamanetwork.com/journals/jama/article-abstract/2807170 [https://perma.cc/QB65-PATY].

[233] EDPB, *supra* note 6, at 8.

[234] Cohen, *supra* note 40.

they can become part of the datasets used to train GenAI models and available to third parties. The "unexpected revelation of previously private information … to unauthorized third parties" can be harmful, particularly when this personal data is later used for discriminatory purposes.[235]

In the US, the FTC has expressed some concern about whether the companies that develop LLMs are "engaged in unfair or deceptive privacy or data security practices," particularly when sensitive data is involved.[236] The FTC considers itself uniquely positioned to address consumer concerns about unfair or deceptive practices involving personal data collection and use in digital markets because it considers interests in both consumer protection and competition.[237] This includes protecting consumer's data privacy and ensuring that businesses do not gain an unfair competitive advantage as a result of illegal data practices.[238] For example, after a photo and video storage company used data uploaded by consumers for GenAI development without users' consent, the FTC, relying on its authority under the FTC Act, ordered the platform to obtain user consent for using biometric data from videos and photos stored on the platform and to delete any algorithms that were trained on biometric data without explicit user consent.[239] The FTC has also taken legal action against companies that obtained, shared, sold, or failed to protect consumers' sensitive data, including location data for places of worship and medical offices, health information, and messages from incarcerated individuals.[240] On the other hand, the FTC's ability to protect personal data is limited by the scope of the FTC Act, which only prohibits data practices that are

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[235] FTC, *supra* note 7; *see also* FTC, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 52 n.91 (2014) (discussing dangers of downstream discriminatory uses of personal data).

[236] FTC, FTC FILE NO. 232-3044, CIVIL INVESTIGATIVE DEMAND ("CID") SCHEDULE (2023), https://www.washingtonpost.com/documents/67a7081c-c770-4f05-a39e-9d02117e50e8.pdf?itid=lk_inline_manual_4 [https://perma.cc/23H7-2A7Y].

[237] FTC, FTC REPORT TO CONGRESS ON PRIVACY AND SECURITY 4 (2021), https://www.ftc.gov/system/files/documents/reports/ftc-report-congress-privacy-security/report_to_congress_on_privacy_and_data_security_2021.pdf [https://perma.cc/PWR7-UT2K].

[238] *Id.* at 4.

[239] Everalbum, Inc., 170 F.T.C. 723 (2021); FTC REPORT TO CONGRESS ON PRIVACY AND SECURITY, *supra* note 237, at 4.

[240] Complaint for Permanent Injunction and Other Relief, FTC v. Kochava, Inc., 671 F. Supp. 3d 1161 (D. Idaho June 5, 2023) (No. 2:22-cv-00377), 2022 WL 4080538; BetterHelp, Inc., Docket No. C-4796 (2023); Global Tel*Link Corp., Docket No. C-4801 (2023); X-Mode Social, Inc., File No. 2123038 (2024).

either deceptive or unfair from the perspective of a reasonable consumer.[241] The FTC has urged Congress to enact more general data protection laws, and some FTC Commissioners have called specifically for Congress to "take reasonable steps … to ensure that the consumer data they obtain was procured by the original source … with notice and choice, including express affirmative consent for sensitive data."[242]

Sector-specific federal laws offer limited upstream protection for certain subcategories of personal data that may end up in the GenAI data lifecycle. The Gramm-Leach-Bliley Act's disclosure and opt-out requirements can provide individuals with notice and some control over how their nonpublic personal information is collected and used by financial institutions, including the sharing of such data with third parties for GenAI development, but does not require explicit consent.[243] COPPR and FERPA likely both require consent prior to the collection and use of personal data concerning children and personal data contained in education records, respectively, in the GenAI data lifecycle.[244] However, FERPA's failure to prohibit the publication of "directory information," would allow some categories of personal information to become publicly available and subject to third party collection via data scraping.[245] Neither the Gramm-Leach-Bliley Act, nor COPPR, nor FERPA provide special protections for sensitive personal data.[246] HIPAA, on the other hand, governs only a subcategory of sensitive personal data through its regulation of PHI.[247] Outside of exceptions for limited data sets, HIPAA would prohibit the use and disclosure of PHI for the purpose of GenAI development without the individual's consent.[248] For example, if a healthcare provider inputs PHI into a GenAI model without patient authorization, this disclosure would

[241] FTC Report to Congress on Privacy and Security, *supra* note 237, at 1 (noting that in the absence of a general data privacy law, the FTC is limited by the scope of the FTC Act).

[242] FTC Report to Congress on Privacy and Security, *supra* note 237, at 1.

[243] *See* 16 C.F.R. § 313.1(a)(1)–(3) (2023) (regarding disclosure obligations and opt out requirement).

[244] *See* 20 U.S.C. § 1232g(b)(1), (d); 16 C.F.R. § 312.3(b) (2023) (regarding consent under COPPR); 34 C.F.R. § 99.5(a) (2023) (transferring rights under FERPA from parents to students when they turn 18 or enroll in postsecondary education); 34 C.F.R. § 99.30 (2023) (requiring consent from parents).

[245] *See* 20 U.S.C. § 1232g(a)(5)(A), (b)(1) (allowing disclosure of directory information).

[246] *See* 20 U.S.C. § 1232g(a)(1)(D)(4) (regarding FERPA); 16 C.F.R. § 312.2 (2023) (regarding COPPR); 16 C.F.R. § 313.3(n), (o) (2023) (regarding the Gramm-Leach-Bliley Act).

[247] *See* 45 C.F.R. § 160.103 (2023) (defining "Covered entity," "Individually identifiable health information," and "Protected health information").

[248] 45 C.F.R. § 164.502(a) (2023) (listing exceptions to prohibition of PHI disclosure).

likely violate HIPAA.[249] Notably, COPPR, FERPA, and HIPAA only govern the activities of specific actors in their respective industries, leaving the regulation of more general personal data processing to the FTC and state data privacy laws. For example, in most cases, HIPAA would not protect the privacy of PHI that individuals provide to GenAI models because the companies that own these models are not "covered entities" or "business associates" under HIPAA.[250]

The CCPA and VCDPA rely primarily on information obligations and the consumer's ability to opt out of data sharing (or disclosure to third parties) to protect personal data.[251] Both laws would require businesses to inform consumers of plans to collect and use personal information for GenAI purposes prior to data collection. Theoretically, consumers can either initially refrain from sharing personal data for GenAI purposes or subsequently limit the sharing of their personal data.[252] In addition to information obligations, the VCDPA, but not the CCPA, would prohibit the collection and use of sensitive personal data for GenAI purposes unless the consumer provided consent.[253]

The GDPR does not distinguish between publicly available personal data and private personal data. As a result, the collection of personal data from an individual data subject, like the collection of publicly available data through data scraping, must also be supported by a valid legal basis. In March 2023, the Italian DPA banned ChatGPT because "OpenAI had no legal basis to justify 'the mass collection and storage of personal data for the purpose of 'training' the algorithms underlying the operation of the platform.'"[254] In April 2023, the ban was lifted after OpenAI responded with increased transparency about how the company processed user data and offered an opt-out option for users who did not want their conversations used to train ChatGPT.[255] However, in January 2024, the Italian DPA

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[249] *See* Genevieve P. Kanter & Eric A. Packel, *Health Care Privacy Risks of AI Chatbots*, 330(4) JAMA 311 (2023).

[250] Marks & Haupt, *supra* note 231.

[251] CAL. CIV. CODE § 1798.100(a)(1), (2) (West 2023); VA. CODE ANN. § 59.1-578 (C) (West 2023).

[252] *See* CAL. CIV. CODE § 1798.120 (West 2024) (consumers right to opt out); VA. CODE ANN. § 59.1-577(A)(5) (West 2023) (consumers right to opt out).

[253] *Compare* CAL. CIV. CODE § 1798.100(2) (West 2024) (requiring notification), *with* VA. CODE ANN. § 59.1-578 (A)(5) (West 2023) (requiring consumer consent).

[254] *ChatGPT: Italy blocks AI chatbot over privacy concerns*, *supra* note 2.

[255] *Italy lifts ban on ChatGPT after data privacy improvements*, DEUTSCHE WELLE (Apr. 29, 2023), https://www.dw.com/en/ai-italy-lifts-ban-on-chatgpt-after-data-privacy-improvements/a-65469742#:

launched new allegations that OpenAI is again violating the GDPR, though the details of this investigation have not yet been released.[256]

The GDPR does offer additional protections for special categories of data, also known as sensitive data. Processing such data in the GenAI data lifecycle is generally prohibited unless it falls under one of the Article 9 exceptions. Notably, none of these exceptions allow processing special categories of personal data for the entrance or performance of a contract or to advance legitimate interests.[257] While special categories of personal data that are "manifestly made public by the data subject" are excepted from Article 9's prohibition on processing, the EDPB's ChatGPT taskforce warns that public availability itself is not enough; instead, the data subject must have "intended, explicitly and by a clear affirmative action, to make the personal data in question accessible to the general public" for this exception to be valid.[258] As a result, processing special categories of personal data for the development and continued operation of GenAI will likely require explicit consent, requiring an "express statement of consent" from the data subject.[259]

C. Control Over Personal Data

It is challenging for individuals to control the flow of their personal data in the GenAI data lifecycle. The FTC warns that "[t]he marketplace for this information is opaque and once a company has collected it, consumers often have no idea who has it or what's being done with it."[260] Although the EU and US both seek to provide individuals with some rights to control their personal data vis-à-vis rights to request access, correction, and deletion of their personal data, exercising these rights can be difficult, or impossible, in the context of the GenAI data lifecycle.

~:text=Why%20was%20ChatGPT%20banned%20in,to%20train%20the%20site's%20algorithms [https://perma.cc/4ES4-S4RV].

[256] *ChatGPT: Garante privacy, notificando a OpenAI l'atto di contestazione per le violazioni alla normativa privacy* [*ChatGPT: Italian DPA notifies breaches of privacy law to OpenAI*], GARANTE PER LA PROTEZIONE DEI DATI PERSONALI (Jan. 29, 2024), https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9978020#english [https://perma.cc/ENP2-7VBX] (Italy).

[257] *Compare* General Data Protection Regulation 2016 O.J. (L 119) Art. 6.1(b), (f)(allowing contract and legitimate interests to serve and legal bases for processing generally) *with* art. 9.2 (not listing contract or legitimate interests as exceptions to the prohibition on processing sensitive personal data).

[258] EDPB, *supra* note 6, at 7.

[259] GUIDELINES ON PROCESSING OF PERSONAL DATA, *supra* note 140.

[260] Cohen, *supra* note 40.

Once personal data enters the GenAI data lifecycle, individuals may not be able to effectively exercise their rights to correct or delete personal data under either US or EU data privacy laws. This is especially problematic because GenAI can produce incorrect information about a real individual. For example, ChatGPT generated a false but detailed accusation of sexual harassment by a real law professor, citing a Washington Post article that it hallucinated.[261] It also falsely reported that an Australian mayor served a prison sentence for bribery.[262] In these cases, the use of personal data for GenAI training led to defamatory statements about real identifiable individuals. In the US, the FTC filed an information request to OpenAI, which indicates concern that OpenAI "violated consumer protection laws, potentially putting personal data and reputations at risk" in connection with ChatGPT's ability to "generate false, misleading, or disparaging statements about real individuals."[263] In Europe, the CEDPO also recognizes the danger of inaccurate GenAI outputs, noting that "[g]enerative AI systems must provide reliable and trustworthy outputs, especially about European citizens whose personal data and its accuracy is protected under the GDPR."[264] Recently, nyob, a non-profit organization that seeks to privately enforce GDPR violations, filed a complaint alleging that ChatCPT's continuous inaccurate output concerning an individual's date of birth violates the accuracy principle in Article 5(1)(d) of the GDPR.[265] The complaint further alleges that OpenAI's inability to prevent ChatGPT from hallucinating inaccurate personal data or to erase or rectify the inaccurate data also constitutes a violation of Article 5(1)(d).[266] Nyob's complaint against OpenAI requests, among other things, that the Austrian DPA investigate

[261] Pranshu Verma & Will Oremus, *ChatGPT invented a sexual harassment scandal and named a real law prof as the accused*, WASH. POST (Apr. 5, 2023), https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies/ [https://perma.cc/32ML-U2K2].

[262] Byron Kaye, *Australian mayor readies world's first defamation lawsuit over ChatGPT content*, REUTERS (Apr. 5, 2023), https://www.reuters.com/technology/australian-mayor-readies-worlds-first-defamation-lawsuit-over-chatgpt-content-2023-04-05/ [https://perma.cc/AK86-29YJ].

[263] Benji Edwards, *Chasing defamatory hallucinations, FTC opens investigation into OpenAI*, ARS TECHNICA (Jul. 13, 2023), https://arstechnica.com/information-technology/2023/07/chasing-defamatory-hallucinations-ftc-opens-investigation-into-openai/ [https://perma.cc/8AQD-SF2N].

[264] CONFEDERATION OF EUR. DATA PROT. ORGS. AI WORKING GRP., *supra* note 7, at 18.

[265] Complaint at 4, Österreichische Datenschutzbehörde [DSB] [Austrian Data Protection Authority] Apr. 29, 2024, Case No. C-078, https://noyb.eu/sites/default/files/2024-04/OpenAI%20Complaint_EN_redacted.pdf [https://perma.cc/WSV7-FPT9].

[266] *Id.* at ¶¶ 26–31.

and fine OpenAI for these alleged data privacy violations.[267] The EDPB ChatGPT taskforce notes that although OpenAI might warn users that ChatGPT can produce inaccurate data to satisfy the GDPR's transparency principle, this does not relieve OpenAI of its obligation to comply with the GDPR's data accuracy principle.[268]

Despite privacy rights designed to protect the use and accuracy of personal data in both the US and EU, there are several reasons why individuals' requests to delete or correct their personal data might be futile. First, data scraped from the internet will be retained in the resulting dataset even if it is later removed from an online public forum. As a result, "even if individuals decide to delete their information from a social media account, data scrapers will likely continue using and sharing information they have already scraped, limiting individuals' control over their online presence and reputation."[269] Second, once personal data is used to develop a GenAI model, it can be difficult to extract specific data from the model to remove it after-the-fact.[270] Third, individuals may not be able to provide sufficient proof that their personal data is being used in the GenAI data lifecycle. For example, some users who submitted data deletion requests report that Meta provides a boilerplate response claiming that "it is 'unable to process the request' until the requester submits evidence that their personal information appears in responses from Meta's generative AI."[271] Similarly, OpenAI and Midjourney failed to respond to an individual's request to have her image deleted.[272]

Conclusion

The flow of personal data through the GenAI data lifecycle introduces new challenges for data privacy. This Article provides interdisciplinary insight into the role and legal implications of personal data in the modern GenAI data lifecycle

[267] *Id.* at ¶¶ 32–35.

[268] EDPB, *supra* note 6, at 8–9.

[269] *Joint statement on data scraping and the protection of privacy*, ICO (Aug. 24, 2023), https://ico.org.uk/media/about-the-ico/documents/4026232/joint-statement-data-scraping-202308.pdf [https://perma.cc/68NG-6HU9].

[270] Melissa Heikkilä, *OpenAI's hunger for data is coming back to bite it*, MIT Tech. Rev. (Apr. 19, 2023), https://www.technologyreview.com/2023/04/19/1071789/openais-hunger-for-data-is-coming-back-to-bite-it/ [https://perma.cc/TA8W-GFBX].

[271] Kate Knibbs, *Artists Allege Meta's AI Data Deletion Request Process Is a 'Fake PR Stunt'*, Wired (Oct. 26, 2023), https://www.wired.com/story/meta-artificial-intelligence-data-deletion/ [https://perma.cc/9K5K-BP6V].

[272] Harlan & Brunner, *supra* note 203.

and examines the resilience of data privacy frameworks in the US and EU in light of these implications. In Part I, we described the architecture behind modern GenAI models. Part II identified the relevant data privacy frameworks in the US and EU. We dissected and compared the US's fragmented approach and the EU's comprehensive approach to data privacy to reveal that while both jurisdictions offer some data privacy protections through a combination of information obligations and use restrictions, as a default, the US allows personal data processing unless specifically prohibited, while the EU prohibits personal data processing unless specifically allowed. In Part III, we described how personal data is stored inside GenAI models—commonly without express consent—and present at every stage of the data lifecycle in GenAI. We explained how personal data, including publicly available personal data as well as private and sensitive personal data, come from a variety of sources and how they are used to train, operate, and improve GenAI models.

Part IV identified several implications that the flow of personal data through the GenAI data lifecycle has on data privacy and explored whether the US and EU's data privacy frameworks are equipped to deal with these new data privacy concerns. We first explained how the widespread disclosure of publicly available personal data might violate individuals' expectations of privacy. We concluded that in the US, the data privacy framework offers little protection to publicly available data collected through data scraping and used to develop GenAI models. On the other hand, the EU's GDPR does not distinguish between private and publicly available data and, as such, offers more protection. Next, we discussed how GenAI models could collect and disclose private and sensitive personal data. Both the US and EU protect private and sensitive personal data in the GenAI data lifecycle by regulating disclosure of such data; however, the US' piecemeal approach to data privacy regulation still leaves gaps, particularly in cases where individuals did not authorize and are not aware that their personal data are being processed in the GenAI data lifecycle. Finally, although both jurisdictions seek to provide individuals with rights to control the accuracy of and access to their personal data, we highlight how GenAI's ability to produce inaccurate data about individuals or retain personal data indefinitely may not be remedied by individuals' rights to request, correct, and delete their information under US and EU data privacy laws.

As one of the latest applications of data-hungry technology, GenAI introduces new concerns about data privacy. These concerns are already on the radar of

regulators in the US and EU and can already be managed to some extent by the data privacy frameworks in place; however, both jurisdictions should pay special attention to the unprecedented and sweeping collection and use of personal data from public sources that underpin GenAI models, particularly because many individuals may not even be aware of how their personal data is used in the GenAI data lifecycle nor have ever explicitly agreed, either individually or collectively, to such processing in the first place.

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Appendix

Appendix A. Summary Comparison of Data Types in General Data Protection Laws in the US and EU

	FTC Act (US) (based on FTC policy documents)	**CCPA (California)**	**VDPA (Virginia)**	**GDPR (EU)**
Personal	• Reasonably linked to an individual consumer or device[273]	• Reasonably capable of being associated with a particular consumer or household[274]	• Reasonably associated to an individual[275]	• Relates to an identified or identifiable natural person[276]
Sensitive	• Genetic • Biometric • Precise location • Concerning health • Voice recordings & videos[277]	• Genetic • Biometric • Geolocation • Concerning race, religion, ethnicity, philosophical beliefs, union membership, health, sexual orientation, and sex life • Government identification numbers • Financial accounts • Email and text messages[278]	• Genetic • Biometric • Geolocation • Revealing individual's race, ethnicity, religion, medical diagnoses, sexual orientation, citizenship, immigration status • Personal data of a child, geolocation data[279]	• Genetic • Biometric • Concerning health, sex life, sexual orientation • Revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, life or sexual orientation[280]

[273] FTC, *supra* note 7, at 22.
[274] CAL. CIV. CODE § 1798.140(v) (West 2024).
[275] VA. CODE ANN. § 59.1-575 (West 2023).
[276] General Data Protection Regulation, 2016 O.J. (L 119) art. 4.1.
[277] FTC, *supra* note 7, at 58.
[278] CAL. CIV. CODE § 1798.140(ae) (West 2024).
[279] VA. CODE ANN. § 59.1-575 (West 2023).
[280] General Data Protection Regulation, 2016 O.J. (L 119) art. 9.1.

(Continued from previous page)				
De-identified/ Pseudonymized	• Cannot be reasonably linked to a consumer[281]	• Cannot be reasonably linked to a consumer[282]	• Cannot be reasonably linked to a consumer[283]	• No longer be attributed to a specific data subject without the use of additional information + measures to prevent reidentification[284]
Anonymous	• N/A	• N/A	• N/A	• Does not relate to an identified or identifiable natural person[285]
Aggregate	• N/A	• Group data in which consumer identities have been removed and cannot reasonably be linked to consumer[286]	• N/A	• Potential method for anonymization[287]
Publicly Available	• N/A	• Made available to general public with no audience restrictions[288]	• Lawfully made available or reasonable basis to believe is lawfully made available to the general public with no audience restrictions[289]	• N/A

[281] Fondrie-Teitler & Jayanti, *supra* note 5, at iv, 21.
[282] CAL. CIV. CODE § 1798.140(m) (West 2024).
[283] VA. CODE ANN. § 59.1-575 (West 2023).
[284] General Data Protection Regulation, 2016 O.J. (L 119) art. 4.5.
[285] General Data Protection Regulation, 2016 O.J. (L 119) recital 26.
[286] CAL. CIV. CODE § 1798.140(b) (West 2024).
[287] EUR. DATA PROT. SUPERVISOR, *supra* note 136, at 10. (noting that GDPR does not govern fully "aggregated and anonymised datasets" when the "original input data … [is] destroyed, and only the final, aggregated statistical data is kept").
[288] CAL. CIV. CODE § 1798.140(v)(2) (West 2024).
[289] VA. CODE ANN. § 59.1-575 (West 2023).

Appendix B. Summary Comparison of Data Types in Sector-Specific Laws

	The Gramm-Leach-Bliley Act	**COPPA**	**FERPA**	**HIPAA**
Main Type of Personal Data Governed	• Obtained in connection with the provision of financial services and products that can be used to identify an individual consumer[290]	• Individually identifiable information collected from a child online[291]	• Identifies or could be used to identify a student with reasonable certainty[292]	• Health information that identifies or can be reasonably used to identify an individual[293]
De-Identified/ Pseudonymized	• Does not identify a consumer[294]	• Stripped of identifiers and trackers[295]	• Removal of all personally identifiable information + reasonable efforts to protect against re-identification[296]	• Does not identify an individual + no reasonable basis to believe that the information can be used to identify an individual[297]
Anonymous	• N/A	• N/A	• N/A	• N/A

[290] 16 C.F.R. § 313.3 (o)(1) (2023).

[291] Children's Online Privacy Protection Act §§ 1301–1308, 15 U.S.C. §§ 6501–6505 (protecting the personal information of children under the age of 13); 16 C.F.R., § 312.2 (2023) (defining "personal information" as "individually identifiable information about an individual collected online).

[292] 34 C.F.R. § 99.30 (2023).

[293] 45 C.F.R. § 160.103 (2023).

[294] 16 C.F.R. § 313.3(o)(2)(ii)(b) (2023).

[295] *See* 15 U.S.C. § 6501(8).

[296] 34 C.F.R. § 99.31(b)(1) (2023) ("An educational agency or institution … may release records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution … has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information,").

[297] 45 C.F.R. § 164.514(b) (2023).

(Continued from previous page)				
Aggregate	• Example of information not governed[298]	• N/A	• Potential method for de-identification[299]	• Potential method for de-identification[300]
Publicly Available	• Reasonable basis to believe is lawfully made available to the general public[301]	• N/A	• N/A	• N/A

[298] 16 C.F.R. § 313.3(o)(2)(ii)(b) (listing "aggregate information" as an example of information that will not be governed as "personally identifiable financial information").

[299] Priv. Tech. Assistance Ctr., *supra* note 75.

[300] *See Guidance Regarding Methods for De-identification of Protected Health Information*, *supra* note 88 (noting that de-identification can be accomplished using data aggregation, usually in combination with other de-identification techniques).

[301] *See* Financial Privacy Rule, 16 C.F.R. § 313.3(p).

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ART ©ACHES

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INTRODUCTION

A vast amount of two- and three-dimensional fine art[1]—paintings, sculptures, and prints—is held in private locations and storage facilities remote from human sight. Much of it is deemed to be of superb quality and extremely valuable.[2] Yet these works—whether treasured or not—sit year after year in whatever caches they occupy—art museum storage areas, secure off-site storage sites, isolated freeports,[3] and privately housed collections—typically unavailable for viewing by

[1] There obviously are many other kinds of creative tangible works of interest to the human mind, many protected by various provisions of the copyright statute. But this article is devoted only to the stated, limited list of endeavors.

[2] *See* Christopher Groskopf, *Museums Are Keeping a Ton of the World's Most Famous Art Locked Away in Storage*, QUARTZ (Jan. 20, 2016), https://qz.com/583354/why-is-so-much-of-the-worlds-great-art-in-storage/ [https://perma.cc/34ZK-3G58]; Graham Bowley & Doreen Carvajal, *One of the World's Greatest Art Collections Hides Behind This Fence*, N.Y. TIMES (May 28, 2016), https://www.nytimes.com/2016/05/29/arts/design/one-of-the-worlds-greatest-art-collections-hides-behind-this-fence.html [https://perma.cc/DQB4-GCSF]; Tim Schneider, *The Gray Market: The Unknown Cost of Keeping Art in Museum Storage (and Other Insights)*, ARTNET NEWS (Jan. 15, 2018), https://news.artnet.com/market/gray-market-big-numbers-missing-museum-scandals-insights-1199105 [https://perma.cc/3JD8-FHWK]; Kimberly Bradley, *Why Museums Hide Masterpieces Away*, BBC (Jan. 23, 2015), https://www.bbc.com/culture/article/20150123-7-masterpieces-you-cant-see [https://perma.cc/8UY3-MCDT].

[3] Freeports, both in the United States and overseas, are typically import and export tax-free zones allowing for secret, and highly secure, storage of works in transit or for safekeeping. A large and highly secure freeport was recently established in New York. *See* Eileen Kinsetta, *Inside the Uber-High-Tech Art Warehouse That Doubles as New York's First-Ever Freeport*, ARTNET NEWS (May 2, 2018), https://news.artnet.com/market/the-first-ever-freeport-in-new-york-is-a-super-high-tech-art-warehouse-1275194 [https://perma.cc/9DUS-5MWM]. Others exist across the globe. *See* David Segal, *Swiss Freeports Are Home for a Growing Treasury of Art*, N.Y. TIMES (July 21, 2012), https://www.nytimes.com/2012/07/22/business/swiss-freeports-are-home-for-a-growing-treasury-of-art.html [https://perma.cc/EW6X-JHKM]. This aspect of the problem is largely beyond the scope of this article. Complying with international law and procedure and the ownership secrecy allowed by some nations raises questions largely beyond the roles of property and intellectual property law in our domestic settings. But works stored in highly secure locations within the United States, and perhaps works that originated at the hands of American artists, should be subject to the same changes in display norms as those discussed in this article.

the public—often by no one at all.[4] In addition, much of the American public lacks access to any, let alone important, museums. Rural areas, small towns, and midsize and smaller cities often lack art museums open to the public.[5] Moreover, many major museums charge admission fees that are beyond the means of a significant portion of the population, especially when the cost of transportation and parking is considered.[6] Some institutional managers and art aficionados seem not to care. Should it be that way?

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[4] Since money laundering appears to be tightly related to secretly stashing art, there is no reason for some owners to reveal their holdings. *See* Graham Bowley, *As Money Launderers Buy Dalís, U.S. Looks at Lifting the Veil on Art Sales*, N.Y. Times (June 19, 2021), https://www.nytimes.com/2021/06/19/arts/design/money-laundering-art-market.html [https://perma.cc/4J69-2LGZ].

[5] There are, of course, important exceptions. *See* Nicholas DeRenso, *America's 15 Best Small-Town Art Museums*, Travel & Leisure (Apr. 30, 2023), https://www.travelandleisure.com/attractions/museums-galleries/americas-best-small-town-museums [https://perma.cc/DS34-QYGL]. Some of those mentioned in this article are, not surprisingly, close to major urban areas or well-known artistic regions such as Dia Beacon just north of New York City, Mass MoCA in North Adams at the north end of the Berkshire region of Western Massachusetts, and the Taos Art Museum in Georgia O'Keeffe's hometown. But, in general, states with large land areas tend to lack museums in rural areas. Just charting the number of museums outside of urban areas in larger states confirms this. States with few rural museums include Alaska, Arizona, Minnesota, Missouri, Nevada, Idaho, Wyoming, and Colorado. Serving non-urban populations is a clear problem. A list of museums in the United States is available at *List of Art Museums in North America*, Wikipedia, https://en.wikipedia.org/wiki/List_of_art_museums#North_America [https://perma.cc/6XMG-Z6XU].

[6] Both the Museum of Modern Art and the Metropolitan Museum of Art charge $30 for adults, $22 for seniors, $17 for students, and children receive free admission. *Admission*, Museum of Mod. Art, https://www.moma.org/visit/#moma-info [https://perma.cc/HQ6D-MA7M]; *Plan Your Visit*, Metro. Museum of Art, https://www.metmuseum.org/visit/plan-your-visit#tickets [https://perma.cc/E7Q9-D4Q7]. However, for residents of the region, the Metropolitan Museum of Art is legally barred from charging a mandatory entrance fee, though the museum asks for a donation on entry. The Chicago Art Institute charges $32 for adults, $26 for seniors, students, and teens, and children receive free admission. Chicago residents and Illinois residents outside of the city gain admission for lower amounts. *Visit*, Chi. Art Inst., https://www.artic.edu/visit [https://perma.cc/JJ4X-KAAT]. The San Francisco Museum of Modern Art charges adults $30, seniors $25, aged 19-24 years old $23, and children no entry fee. *Tickets*, S.F. Museum of Mod. Art, https://tickets.sfmoma.org/tickets [https://perma.cc/7HMR-CXAF]. The Los Angeles County Museum of Art charges adults $28, seniors $24, and children $13, and Los Angeles residents gain admission for reduced prices. L.A. Cnty. Museum of Art, https://www.lacma.org/tickets [https://perma.cc/FG2K-NG3Y]. These museums all have memberships and accept various regional or national museum passes that may be purchased at various rates. Some also have special times when access is free of charge for some or all people. Both the Guggenheim Museum and the Whitney Museum in New York recently raised their admission fees to $30. *See* Zachary Small, *$30: The Entrance Fee to America's Museums Keeps Rising*, N.Y. Times (Aug. 1, 2023), https://www.nytimes.com/2023/08/01/arts/design/museums-raise-admission-fees-guggenheim.html [https://perma.cc/N588-WBTY]; Alex Greenberger, *Guggenheim Museum to Raise Admission to $30, Becoming One of the Most Expensive Institutions in the US*, ARTnews (Aug. 1, 2023), https://www.artnews.com/art-news/news/guggenheim-museum-raises-admission-tickets-1234675993/

This article explores a single set of ideas that emphasizes the myriad ways in which human creativity is frustrated by the failure of American society to provide large numbers of people with ready access to art collections. It is the general public that is my primary concern here—its access to, understanding of, and benefits gained from seeing art and sculpture. Viewing art enhances civil society, allows for widespread cultural discourse, and encourages deeper and more thoughtful reactions to issues of public importance. Deep constraints on access to art foster barriers to human creativity, ingenuity, and progress—the very purposes copyright law is designed to enhance.[7] The right to view art, in short, should be thought of as a public good, as a human right.[8]

This broadly stated goal to widen access to fine art is frustrated by an array of rules limiting the display of fine art derived from copyright law, property law, legally binding agreements, norms promulgated by museum organizations, customary museum practices, and lack of funds for museum development and growth in underserved areas. Artists, collectors, private and public museums, art galleries, auction houses, and other settings in which art transactions are consummated, as well as government agencies, may be reluctant to change. Auction houses, for example, routinely send important works off to anonymous buyers and unknown destinations—results desired by all interested parties. Institutional goals to amass collections, sell art, or maintain high prices often conflict with the notion of wide distribution of works they control. Efforts to change the legal rules about displaying fine art are bound to have an impact on all involved entities. The array of norms and interested parties render efforts to rethink art display practices challenging. The first part of this article discusses the theories underlying my

[https://perma.cc/MQW6-WSV6]. The Smithsonian Institution museums, including the National Gallery, are all free—a wonderful exception to the normal rule for major institutions.

[7] The standard rhetoric is that the basic goal of copyright is utilitarian—that it is designed to create sufficient incentives for the creation of original works while still allowing enough distribution of work to satisfy and nurture cultural needs. *See, e.g.*, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV 1569, 1572–81 (2009). Artists, of course, don't always like their work. They might paint over such pieces, destroy, or discard them, or simply leave them around gathering dust. Like writers and other creative souls, they choose the works that they are willing to allow out of their studios. And those choices certainly should be respected. But once a work is released from direct artistic control, widespread viewing should often be the norm.

[8] There certainly are other important public needs—the right to suitable housing, quality education, health care, sufficient food, and safe surroundings. But the goal to achieve such public needs, especially education, is enhanced by widespread availability of art for public viewing.

aspiration to expand public access to art. That is followed by exploration of the variety of settings in which display issues arise, the impact of various constraints on expanding access to artistic works, and the possible pitfalls of undertaking significant efforts to do so.

I

Benefits and Burdens of Enhancing Access to Art

A. The Theory

Artists ordinarily want their work to be seen. When observed, viewers may be enthralled, aggravated, or befuddled for reasons they find difficult to express. The range of possibilities buried in such reactions—whether silent or expressed—is vast. Art may confirm viewers' perceptions of the world, send them away in annoyance, transmit or redefine history lessons, communicate both intolerance and empathy, convey emotions, provide new ways of looking at or thinking about life, create a sense of amazement at the level of proficiency, wisdom, insensitivity, or beauty evident in a work, stimulate demands for cultural change, or [*you fill in the blank*]. The boundless scope of possibilities, by itself, supports the proposition that hiding large quantities of art from public view frustrates human advancement. And it may also frustrate the hope of artists that work they release for exhibition or sale will be seen, contemplated, and absorbed by a large number of people.[9] A single in-person viewing of Picasso's *Guernica* should confirm the importance of widespread public access.[10]

[9] In this article, I do not question or critique the decisions of artists to hold their own work back from view by the general public. Presumably the art they sell, show in galleries, or display in other ways is ready in their minds for general viewing. The works they elect to retain may well be items that they have not finished, works that they do not think the art market is prepared to accept, or treasured items that they wish to retain as exemplars of their best, most personally inspiring work. Since my wife is an artist, I know well how difficult it can be to decide when an object is "finished" or "ready" to show. And some works, deemed finished for the moment, she later revisits and substantially revises. The decision to release a work for possible sale at an exhibition is sometimes quite fraught. *See* Kate Feiffer, *How Do You Know When You're Finished?*, Martha's Vineyard Arts & Ideas (July 2016), https://d3zr9vspdnjxi.cloudfront.net/sites/elizab36/sup/1811982-download.pdf [https://perma.cc/4F3E-7F3L].

[10] Pablo Picasso (Pablo Ruiz Picasso), *Guernica*, Museo Nacional Centro de Arte, https://www.museoreinasofia.es/en/collection/artwork/guernica [https://perma.cc/A3AB-49SA].

Pablo Picasso's *Guernica*

A work of art is difficult for a human mind to *permanently* "capture," to fully understand, or to vividly recall later in all its detail and meaning. Even if an image of a piece is saved on an electronic device, the actual viewing experience can hardly be fully retained, the momentary understandings about the work gleaned from observation will evolve over time, and perceptions may be altered by later or repetitive viewing. Returning to see an image again, whether in person or electronically, will not necessarily recreate the original viewing experience; nor will it replicate reactions to an earlier encounter. This is especially true for paintings and sculptural works which ideally are seen from a variety of visual perspectives in galleries allowing for easy circulation in front of or around objects.

David Joselit's recently published *Art's Properties* provides an important reappraisal of the way we should think about, perceive, and view art. In the prologue of his book, he wrote:

> If art cannot be captured by history, it may nonetheless generate unlimited narratives. In this regard, the museumgoer-photographer again demonstrates something fundamental: if the value of art can never be captured, nor can it be fully consumed. The power of art is its capacity—its *infinite* capacity—to generate experience over time.[11]

Joselit suggests the ability of art to produce changing experiences over our lifetimes should be treated as a public goods issue—the public's need to experience

[11] DAVID JOSELIT, ART'S PROPERTIES, at xviii (2023).

and *reexperience* art over time should be protected beyond the present willingness of art owners to provide it, present understandings of the copyright code to require it, and contours of property law to compel it.[12] Coping with the present, inadequate efforts to protect and enhance this public good, turns out to be a complex, non-obvious, and politically challenging undertaking.

The challenges were made painfully clear by the denouement of the most important and unique, but all too short-lived, national effort in United States history to substantially enhance public access to and understanding of art. Many of the cultural benefits of art's accessibility were revealed in dramatic fashion during the short life of federally supported arts projects during the Great Depression beginning in 1934 and ending in 1943. These programs began in 1934 when the Public Works of Art Project was created to distribute grants for the creation of works in or on public buildings. The following year, it was broadened to include a variety of grants to artists as part of the Federal Arts Project ("FAP") overseen by the Works Progress Administration ("WPA").[13] In that era, artists, like many segments of the public, were in the midst of significant financial struggles. While such difficulties were hardly unknown to the pre-Depression lives of many artists, the survival problems intensified during the 1930s.

The story is told that in 1933 when Harry Hopkins, who was placed in charge of work relief programs by Franklin Roosevelt, was flippantly asked whether artists should be considered as "beneficiaries" of the work program since they had no "jobs" to lose, replied, "Hell, they've got to eat just like other people!"[14] But as the FAP was organized in 1935 under Holger Cahill, the first national director of

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[12] The point is well made in a recent essay by Roberta Smith, art critic for the New York Times. When reviewing an exhibit entitled *Death and the Maid* by Cecily Brown at the Metropolitan Museum of Art, she explains why her largely negative appraisal of Brown's work more than twenty years earlier had changed to a quite positive perspective. As Smith claims, her repetitive viewing of Cecily Brown's work reconstructed her perceptions of the artist. Roberta Smith, *I Was Wrong About Cecily Brown*, N.Y. TIMES (Apr. 13, 2023), https://www.nytimes.com/2023/04/13/arts/design/cecily-brown-metropolitan-museum-painter.html [https://perma.cc/9LQW-TZ5Q].

[13] The FAP was created under the broad terms of the Emergency Relief Appropriation Act of 1935, 49 STAT. 115, 15 U.S.C.A § 728 (enacted as temporary legislation). Under that legislation, $300,000,000 was appropriated for "assistance for educational, professional and clerical person." The earlier Public Works of Art Project was established under the Federal Emergency Relief Act of 1933, 48 STAT. 211, 15 U.S.C.A. §§ 721, 722 (enacted as temporary legislation).

[14] Jerry Adler, *1934: Art of the New Deal*, SMITHSONIAN MAG. (June 2009), https://www.smithsonianmag.com/arts-culture/1934-the-art-of-the-new-deal-132242698/ [https://perma.cc/B3LZ-2TYJ].

the government program, it operated not only as a program for supporting artists in troubled economic times, but also as a way of making artworks broadly available to the general public—as a way of fulfilling the idea that widespread access to and creation of art was an important public good. It involved not only work in or on public buildings,[15] but also teaching, community art centers, and various ways to support the basic needs of both artists and the general public.[16]

This desire to "democratize" the arts was a major theme of a series of essays written by those involved in organizing, operating, and influencing the operation of the FAP during the 1930s.[17] Perhaps the most important of these essays was by Cahill, who was himself deeply influenced by the major American philosopher and pragmatist, John Dewey.[18] Dewey's best-known book on the relationships between aesthetics and society, *Art as Experience*, was published in 1934. Victoria Grieve, in her seminal book on the FAP, described Dewey's theory:

> When people experience their daily lives with the self-consciousness of artists at work, realizing life's full potential for meaning and value, existence itself became an art. It was through the creation of significant, meaningful, and fulfilling lives that a truly democratic society functioned. Because art formed the basis of human experience, Dewey believed that a theory of aesthetics was "central to the philosophical project" and a crucial test of any philosophy's ability to fully explain experience.[19]

[15] One of the most important recent displays of FPA murals in public buildings was the resurrection of works from the Williamsburg Housing Project at the Brooklyn Museum in 2012. Some of the works may be found at *Williamsburg Murals: A Rediscovery*, BROOKLYN MUSEUM, https://www.brooklynmuseum.org/exhibitions/williamsburg_murals [https://perma.cc/8HMP-KLSV].

[16] The story is told in some detail in *Oral History Interview with Holger Cahill*, SMITHSONIAN INST.: ARCHIVES OF AM. ART (Apr. 12 and 15, 1960), https://www.aaa.si.edu/download_pdf_transcript/ajax?record_id=edanmdm-AAADCD_oh_212570 [https://perma.cc/DBD6-XJPX]. Many artists were benefited by the FAP, including Lee Krasner, Willem de Kooning, and others who later became central players in the abstract expressionist movement of the mid-twentieth century. *See* MARY GABRIEL, NINTH STREET WOMEN: LEE KRASNER, ELAINE DE KOONING, GRACE HARTIGAN, JOAN MITCHELL, AND HELEN FRANKENTHALER: FIVE PAINTERS AND THE MOVEMENT THAT CHANGED MODERN ART 29–34 (2018); MARK STEVENS & ANNALYN SWAN, DE KOONING: AN AMERICAN MASTER 121–31 (2004).

[17] ART FOR THE MILLIONS: ESSAYS FROM THE 1930S BY ARTISTS AND ADMINISTRATORS OF THE WPA FEDERAL ART PROJECT 19 (Francis V. O'Connor ed., 1973).

[18] For information on Dewey's theories about art and his relationship to the FAP, see VICTORIA GRIEVE, THE FEDERAL ART PROJECT AND THE CREATION OF MIDDLEBROW CULTURE 11–36, 107–09 (2009).

[19] *Id.* at 30.

While Cahill did not fully agree with Dewey's proposition that life itself is art,[20] he certainly believed artistic experiences are central to human development. In the introduction to the catalog for the first public exhibit of works created under the auspices of the FAP, for example, Cahill wrote:

> [T]he works shown in this exhibition indicate important phases of a year's accomplishment. From the point of view of the artist and the public they have a significance far beyond that of the record, beyond even value as individual works of art. Taken as a whole they reveal major trends and directions in contemporary expression, and a view toward new horizons. Surely art is not merely decorative, a sort of unrelated accompaniment to life. In a genuine sense it should have use; it should be interwoven with the very stuff and texture of human experience, intensifying that experience, making it more profound, rich, clear and coherent. This can be accomplished only if the artist is functioning freely in relation to society, and if society wants what he is able to offer.[21]

During the first year of the FAP, Cahill oversaw the hiring and supervision of over 5,000 artists, as well as the work they exhibited in their own studios and produced or performed for public institutions and displays. Mary Gabriel, in *Ninth Street Women*, another seminal work on major artists who emerged in the 1930s, noted the critical importance of the support they received, in part with the help of federal arts programs:

> The Project kept painters and sculptors alive, but it had other unanticipated consequences. It created a community where none had previously existed. Suddenly artists who had worked in isolation began discovering one another. And it gave artists a sense of worth: For the first time, the government had recognized them as individuals with a talent that could benefit the broader society.[22]

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[20] It is not surprising that this debate arose during the Great Depression. The early decades of the twentieth century witnessed increasing use of everyday objects in art, development of journalistic and artistic photography, and growth and sophistication of collaged works containing an array of commonly used items went hand in hand with the intensifying interest in democratizing art.

[21] Holger Cahill, *Introduction* to Museum of Mod. Art, New Horizons in American Art 40 (Museum of Modern Art) (1936).

[22] Gabriel, *supra* note 16, at 31.

The FAP, therefore, not only exposed the general society to more artistic works, but also helped develop a culture that encouraged artists in their work, broadened cultural awareness of struggling painters and other creative people laboring in related arenas, provided the support they needed to be more productive, and enhanced public interest in contemporary artistic endeavors. The entire culture benefitted. Indeed, there are scientific studies suggesting that widespread interest and experience in art, music, dance, dramatics, or other related endeavors, whether by making or doing things or by experiencing the work of others, is beneficial to the well-being, longevity, and brain health of everyone.[23]

Unfortunately for society as a whole, the FAP, like other New Deal programs, fell by the wayside during and shortly after World War II. Public opposition to government support of the arts as socialist and wasteful took its toll.[24] By 1943, the great experiment ended. But the FAP had an enormous long-term impact on the survival, acceptance, and continuing appeal of mid-twentieth century and later art movements in American life.[25] The increasing numbers of people now streaming to major art museums in large cities across the country to see both traditional works as well as new and contemporary creations is a testament to the dam-breaking impact of the FAP.[26] It is those lessons that must be taken to heart in framing new rules about the display of art to the general public and crafting public support for increased access to the arts.[27] The issue is deemed to be so important by the

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[23] *See* Christina Caron, *How the Arts Can Benefit Your Mental Health (No Talent Required)*, N.Y. Times (May 22, 2023), https://www.nytimes.com/2023/05/22/well/mind/art-mental-health.html [https://perma.cc/ZS67-5F8W].

[24] Grieve, *supra* note 18, at 163–66.

[25] The story of the FAP's ending may be found in Grieve's book *The Federal Art Project and the Creation of Middlebrow Culture*. *See* Grieve, *supra* note 18, at 163–80.

[26] American artists were not the only souls benefitted by the change in cultural understandings generated by the FAP and other modern currents in American life. Pablo Picasso's long struggle to gain a foothold in American culture finally gained traction in the 1930s as well. For more details on Picasso's rise to success, see generally Hugh Eakin, Picasso's War: Howe Modern Art Came to America (2022). Eakin's book was very favorably reviewed by Phillip Lopate. *See* Phillip Lopate, *Picasso & Company: The Artists Who (Finally) Conquered America*, N.Y. Times (July 16, 2022), https://www.nytimes.com/2022/07/16/books/review/picassos-war-hugh-eakin.html [https://perma.cc/9JCC-VQLC]. Among other things, Eakin describes the critical work of Alfred Barr, the first director of the Museum of Modern Art, who not only was instrumental in Picasso's eventual success in America, but also mounted the first exhibition of work created under the auspices of the FAP. Eakin, *supra*, at 195–201; *see also* Cahill, *supra* note 21, at 17.

[27] It is intriguing that there is continuing interest in programs to provide stipends and support to the arts, both in America and around the world. *See* Alex Marshall, *Ireland Asks: What if Artists*

international community that a right to enjoy the arts has been included in The Universal Declaration of Human Rights.[28] Article 27 provides: "Everyone has the right freely to participate in the cultural life of the community, *to enjoy the arts* and to share in scientific advancement and its benefits."[29] Finding ways to fulfill this lofty international norm inspired the writing of this project.

B. Introduction: Roadblocks to Enhancement of Art Displays

Two recent news stories about large donations of two-dimensional art to major museums stimulated my initial recognition of the deep complexity involved in describing the extent of art in hiding, the sorts of restrictions often imposed on display of creativity, the large array of relevant institutions, and the challenges to refashioning common understandings. The first story told of an incredible collection that was eventually widely distributed to museums with no admission charge—one institution in each state. This heart-warming story did lead to widespread distribution of fine art to sometimes underserved areas; it did not, however, lead to the bulk of the huge collection routinely being on public view. Its large beneficial impact resulted from the decision by the collection's owners to make their assemblage of art available to many institutions that did not house major collections. The result was broad access by segments of the public not typically exposed to the largely minimalist and conceptual artwork they accumulated. The second tale described a large group of paintings and other works by one famous artist quite generously donated with restrictions in 2022 to and accepted by the Metropolitan Museum of Art ("Met") in New York City. The Met, of course, is one of the largest and most important institutions in the world; the enormity of its collection makes it impossible to fully display its collection, even in the huge building it occupies. The first story suggests that important art need not be squirreled away in the vaults of large collectors; the second suggests that it does. Both present instances where public access to art was simultaneously expanded

Could Ditch Their Day Jobs?, N.Y. Times (Mar. 23, 2023), https://www.nytimes.com/2023/03/23/arts/ireland-basic-income-artists.html [https://perma.cc/36UP-NGCJ]. Marshall notes that similar efforts are afoot in New York, California, and Minnesota. These efforts are in addition to the small amount of financial assistance provided by the National Endowment for the Arts. *See* Nat'l Endowment for the Arts, https://www.arts.gov [https://perma.cc/AJ8R-CHLS].

[28] *See* Jonathan M. Barrett, *Under the Aspect of Eternity: The Human Right to Enjoy the Arts*, 45 Colum. J.L. & Arts 371, 372 (2022).

[29] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (emphasis added).

and restricted. Together, they strongly suggest that private generosity, even of the loftiest sort, is unable to meet the needs for increased access to art.

Story #1: The Vogel Collection. In 2009, a remarkable documentary entitled *Herb and Dorothy* was released.[30] Herb Vogel worked in a New York City post office; his wife, Dorothy Vogel, was employed by the Brooklyn Public Library. Over a period of forty-five years, they lived on Dorothy's salary and spent Herb's salary on art. They couldn't house large pieces in their small apartment. Nor could they afford expensive works. But they had a good eye for up-and-coming talent. They managed to house what developed into a large collection in their small, rent-controlled apartment on the east side of Manhattan. The Vogels became well-known visitors at New York gallery openings and, over time, at artists' studios, often buying drawings, prints, collages, and paintings by new, unknown, or emerging artists. By the early 1990s their huge collection included "the work of Sol LeWitt, Donald Judd, Richard Tuttle, Robert Mangold, Lynda Benglis and dozens of other artists who would come to represent the crème de la crème of Minimalist and Conceptual art."[31] They typically didn't buy well-known work; they bought "what they liked."[32]

Their apartment became so crammed that they ran out of room for more works in closets, under beds and furniture, behind dressers, in stacked piles, or hanging on or leaning against walls. After much thought and discussions with a number of institutions, they decided to transfer the entire collection to the National Gallery of Art in Washington, D.C. They did so because of the institution's importance to the nation, its lack of an admission fee, and a policy of not selling their works.

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[30] *Herb and Dorothy: About the Documentary*, PBS, https://www.pbs.org/independentlens/documentaries/herb-and-dorothy/ [https://perma.cc/36NW-RCFN]; Nathan Lee, *Studio, Apartment*, N.Y. TIMES (June 4, 2009), https://www.nytimes.com/2009/06/05/movies/05herb.html [https://perma.cc/M543-W9HT]; Miriam Bale, *Sharing the Bounty of Priceless Art*, N.Y. TIMES (Sept. 12, 2013), https://www.nytimes.com/2013/09/13/movies/herb-dorothy-50x50-tracks-the-vogel-collection.html [https://perma.cc/7Y3H-9XCR]. As of this writing, it is available on YouTube. *See* Digitized, *Herb and Dorothy*, YOUTUBE (Apr. 10, 2022), https://www.youtube.com/watch?v=RnYcPLLiGFk [https://perma.cc/Q9QJ-VTNK].

[31] Lee, *supra* note 30.

[32] *See* Sara Rimer, *Collecting Priceless Art, Just for the Love of It*, N.Y. TIMES (Feb. 11, 1992), https://www.nytimes.com/1992/02/11/nyregion/collecting-priceless-art-just-for-the-love-of-it.html [https://perma.cc/B7YR-3U8Z]; *Vogel, Dorothy (1935—)*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/women/encyclopedias-almanacs-transcripts-and-maps/vogel-dorothy-1935 [https://perma.cc/3VUD-MU2P].

They were paid for it, but only in a modest amount dramatically below the actual market value.[33] The Vogels had no interest in selling the collection for the seven figures many said it would easily produce at auction. Rather, they wanted to "give back" their collection to the nation that had allowed them to live a full, if intentionally humble, life. The National Gallery arranged to carefully package the entire collection into appropriate acid-free art files, containers, and crates, and to load it onto five(!) large semi-trailer trucks for transport to the nation's capital.

After the gallery curators unpacked, cataloged, and appropriately stored the works, they evaluated the massive assemblage and concluded that it was impractical for the museum to permanently house and manage, let alone display, the entire collection in the museum's facilities. With the full agreement of Herb[34] and Dorothy Vogel, a decision was made to send 2,500 works, in fifty groups of about fifty pieces each, to fifty museums, one in each state.[35] The rest remained at the National Gallery. The recipient institutions agreed to display the works they received for a time after they arrived and if they ever transferred them, to do so only as a complete group. The generosity of Herb and Dorothy was a remarkable display of sensitivity to the cultural and educational need for art to be available to a large cross-section of people all across the country. The documentary film, along with its sequel on the distribution of the collection around the nation,[36] presented a remarkable portrayal of this gentle, unassuming, beautiful couple.[37]

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[33] Rimer, *supra* note 32.

[34] Herb died in 2012. Bale, *supra* note 30.

[35] *See* Anabeth Guthrie, *The Dorothy and Herbert Vogel Collection: Fifty Works for Fifty States, A National Gift Program of Contemporary Art is Launched by the National Gallery of Art, The National Endowment for the Arts, and The Institute of Museum and Library Services*, NAT'L GALLERY OF ART (Apr. 11, 2008), https://www.nga.gov/press/2008/2008-vogel50x50.html [https://perma.cc/6MR3-8JKU]. A link listing the fifty museums receiving parts of the collection is available on this page. To view the entire collection of distributed works, see VOGEL 50X50, https://vogel5050.org [https://perma.cc/558T-N9DK]. The story of the distribution of the Vogel collection around the country is told in some detail in THE DOROTHY AND HERBERT VOGEL COLLECTION: FIFTY WORKS FOR FIFTY STATES (Don Ball ed., 2008). The impressive volume also contains images of many of the works now housed in each state. They are presented alphabetically by the name of the state where they are located.

[36] The sequel, *Herb and Dorothy 50x50*, about the distribution to the fifty museums, was created by the same documentary filmmaker as the original. *See* Miriam Bale, *Sharing the Bounty of Priceless Art*, N.Y. TIMES (Sept. 12, 2013), https://www.nytimes.com/2013/09/13/movies/herb-dorothy-50x50-tracks-the-vogel-collection.html [https://perma.cc/AVR9-6JJZ].

[37] I have watched both films. I also had the good fortune to spend time with Dorothy Vogel. As the credits rolled for the first film, a note of thanks appeared suggesting that Herb Vogel was the brother of someone I

They participated in the process of selecting the places where their collection went, personally visited many of the institutions, and met with visitors at a number of opening receptions. Their willingness to distribute their collection so widely was profoundly important and moving beyond words.

Story #2: The Guston Collection. At the other end of the donative spectrum is the 2022 gift by Philip Guston's daughter, Musa Guston Mayer, of a collection of two hundred and twenty pieces from her personal collection, all by her famous artist father, to the Met in New York City.[38] This certainly was not the first major gift of art to the Met. The collection has largely been built by the generosity of wealthy collectors of art, including some with less than savory reputations.[39] This gift, however, raised concerns rarely publicly voiced over the years. Roberta Smith, the well-known art critic of the *New York Times*, wrote a trenchant and critical article about the donation, pondering the wisdom of concentrating so much art created by one person, as well as so much art from many sources, in one institution:

> How much is too much? It's a question that consumers should ask themselves every time they shop, build or step onto a fuel-guzzling jet.
>
> It is also a question that museums might raise before adding works of art to their collections. This does not seem to have happened when the Metropolitan Museum of Art decided to accept 220 works by the celebrated—and prolific—American painter Philip Guston (1913-1980) from the personal collection of his daughter, Musa Guston Mayer.
>
> The gift came with a big bright bow: Mayer and her husband, Thomas, are also giving the museum $10 million to establish the Philip

knew well in the early 1970s, long before I moved back to New York City in 2008 from Washington, D.C. After getting in touch with her, we had several meals together with Dorothy. The visits completely confirmed the sensitivity and accuracy of the documentaries.

[38] *See The Met Announces Transformative Gift of 220 Works by Philip Guston from the Collection of Musa Mayer—the Largest Single Collection of Works by the Important American Artist*, METRO. MUSEUM OF ART (Dec. 22, 2022), https://www.metmuseum.org/press/news/2022/philip-guston-gift [https://perma.cc/7BPE-JU4S].

[39] The story is well told in a comprehensive and compelling history of the museum: MICHAEL GROSS, ROGUES' GALLERY: THE SECRET HISTORY OF THE MOGULS AND THE MONEY THAT MADE THE METROPOLITAN MUSEUM (2009).

> Guston Endowment Fund to support Guston scholarship, which will instantly make the museum the world's center for Guston studies.[40]

The gift terms also required the Met to place at least twelve of the works on display at all times for the next fifty years, regardless of how that would crimp the museum's ability to properly show a broad range of other twentieth and twenty-first century American artistic styles in the limited amount of space devoted to recent time periods in their sprawling complex of galleries.[41] The requirement that a small segment of the gift be displayed at all times is therefore a mixed blessing. On the one hand, it is wonderful that museum visitors will always be able to see some Guston works. On the other hand, it is not clear that using such a significant share of wall space for one artist's work allows for the fair management of the museum's modern collection. The Vogel gift was also a mixed blessing. The broad distribution of the works was an amazing decision. But the Vogel gift need not be on long term display either in whole or in part anywhere. The National Gallery is not obligated to show any of the collection to the public; nor are the fifty recipient museums around the country obligated to display their images after a first post-arrival exhibition.

The entire Met collection consists of over one and one-half million objects.[42] Despite the huge size of the museum building, it can display only a tiny portion of the collection at any given point in time. Gallery space for fairly recent work is especially limited, though plans to expand the areas devoted to such work are afoot.[43] May, Roberta Smith asks, such an institution responsibly accept such a huge number of items by one artist, regardless of how important that creative soul may be? In the absence of the presentation of a significant Guston retrospective

[40] Roberta Smith, *The Philip Guston Hoard, A Boon of Overkill?*, N.Y. Times (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/arts/design/philip-guston-met-museum.html [https://perma.cc/9996-MQNF].

[41] According to one source, the Met has the largest square footage display area of any museum in the world, though not the largest collection. That honor goes to the Hermitage Museum in St. Petersburg. The Louvre is also huge, though it matches neither the Met nor the Hermitage in collection size. The Met has over 2.5 million objects; and the Hermitage has over 3 million. Rosie Lesso, *What are the Largest Museums in the World?*, The Collector (Dec. 2, 2022), https://www.thecollector.com/what-are-the-largest-museums-in-the-world/ [https://perma.cc/6CJC-67UG].

[42] Max Hollein, *Building and Caring for the Met Collection*, Metro. Museum of Art (Feb. 17, 2021), https://www.metmuseum.org/blogs/now-at-the-met/2021/building-and-caring-for-the-met-collection [https://perma.cc/AD6B-MAYZ].

[43] Robin Pogrebin, *With $125 Million Gift, Met Museum Jump-Starts New Modern Wing*, N.Y. Times (Nov. 30, 2021), https://www.nytimes.com/2021/11/30/arts/design/met-museum-modern-wing-gift.html [https://perma.cc/76XW-48A8].

exhibition at some point in the future, the bulk of the donation will remain hidden away all the time. In addition, Smith noted:

> Accepting so many free Guston paintings flies in the face of the challenge that many museums face right now to redefine their missions in the wake of the Black Lives Matter movement. Practically, and symbolically, it takes up too much of the oxygen in the room. To broaden their collections and audiences, museums should be seeking to avoid, not reinforce, the so-called master narrative that has largely excluded the achievements of women and artists of color.
>
> This is also a period when museums are seen as overstocked treasure houses. Careful consideration should be given to how many artworks museums assume responsibility for. It would seem the last thing the Met needs is an enormous monument to an exemplar of America's most famous art movement.[44]

These two stories display a small part of the depth of issues frustrating efforts to make art widely visible. The Vogel collection's distribution was designed to spread the wealth among many institutions, including an array of "minor" collections in locations lacking notable museums, while not requiring that the pieces be publicly displayed on a regular basis. Indeed, the National Gallery of Art retained over 1,500 items from the collection. It is impossible for the museum to display that number of pieces simultaneously. They have neither the inclination nor the space. The museum simply has an informal policy to always have a few of the pieces from the collection on public view.[45] Similarly, the addition of a large number of Guston works, some of which must always be on view, to

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[44] Smith, *supra* note 40.

[45] On April 5, 2023, I spoke on the phone for about half an hour with Emily Ann Francisco, a Curatorial Assistant at the National Gallery of Art, about the status of the Vogel collection and other matters. She confirmed the statements made in the text. In addition, she noted that the museum has a set policy to regularly bring portions of the collection in storage out for public viewing on a rotating basis. In addition, some works in storage are brought out for special exhibitions. Given the size of the collection, a number of works are stored off-site; the facilities on the mall are unable to continually handle the entire mass of work. In addition, works on paper and other fragile works must be kept out of the light most of the time. That issue restrains the ability to publicly display a large portion of the Vogel collection. The museum also does not have any ability to allow visitors to roam in storage areas to see art. The Gallery does have a large and growing visibility online that is easily accessible at NAT'L GALLERY OF ART, www.nga.gov [https://perma.cc/R7GS-7EQ3]. Access to the portion of the Vogel collection distributed around the country may be seen online. VOGEL 50X50, https://vogel5050.org [https://perma.cc/2QY7-K5Q3]. Much of the rest of the Vogel collection is also available

the already massive hoard of art owned by an organization incapable of fully housing, let alone simultaneously displaying, a significant segment of its now extant collection, makes it virtually impossible for all of the Guston works to be shown simultaneously, either at the museum or elsewhere.[46] Though, as these two stories suggest, some of the display issues involve practical limitations on the ability of institutions to regularly display the entire donated collections, other very important constraints also operate. That exploration follows.

C. Legal and Statutory Constraints

Taking the need for widespread public visibility of art seriously is also significantly constrained by the present structure of American law and the nation's long history of art collecting. Despite the need to support the arts and to generate widespread access to the beauty, disturbance, reorientation, stimulation, intensity, and controversy it generates, deeply embedded cultural structures and misdirected economic incentives hide too much art from public view. Neither extant intellectual nor personal property laws provide any obvious clues about what, if anything, should be done to enhance the public's ability to see art and to limit the scope of art caching. The problems are accentuated by the terms of copyright law that are thought to make it virtually impossible for artists to regain control over display of works after they leave their studios and fall into the hands of purchasers and successor owners. While both copyright and property law give artists and copyright holders a significant degree of control over decisions to display works in their possession prior to transfer,[47] it does not explicitly provide them with authority to compel others owning their works to make them available for viewing, whether

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online. *Collection Search Results*, NAT'L GALLERY OF ART, https://www.nga.gov/collection-search-result.html?donorList=992&donorObj=98947 [https://perma.cc/PBK5-PGJZ].

[46] And, of course, a number of such large-scale gifts are made every year to museums all over the world. The Roy Lichtenstein Foundation recently made such a gift to five different museums. *See* Maximilíano Durón, *Roy Lichtenstein Foundation Donates 186 Artworks to Five Museums Ahead of Artist's Centennial*, ARTNEWS (June 1, 2023, 1:43 PM), https://www.artnews.com/gallery/art-news/photos/roy-lichtenstein-centennial-museum-donations [https://perma.cc/6GH9-N5NR]. The gift partially went to two small museums. The recipients included Colby College Museum of Art in Waterville, Maine; the Nasher Museum of Art at Duke University in Durham, North Carolina; the Los Angeles County Museum of Art in Los Angeles, California; the Whitney Museum in New York, New York; and the Albertina in Vienna, Austria.

[47] 17 U.S.C. § 106(5) states that the owner of a copyright "has the exclusive right to … display the copyrighted work publicly." But ownership of the intellectual property rights in a work of art are treated separately from private ownership rights in an art object. 17 U.S.C. § 202 provides:

it be by a small group or by the general public. Finding pathways for compelling art owners—whether private or public—to bring works they own into public view is the central goal of this article.

The statute appears to provide on its face that copyright in a work of art remains with its artist and the artist's successors in interest for the copyright term, which is typically life of the artist plus seventy years,[48] unless the copyright is specifically transferred in writing.[49] To effectuate the authority of copyright owners over display of their creations, the act grants an "exclusive right" to a copyright owner "to display the copyrighted work publicly."[50] Personal property rights in art held by artists prior to disposition also give them physical control over private and public display.

But those apparently large grants of authority are undermined by two critical statutory exceptions to the artist's control over public access. First, the act provides that "the owner of a particular copy"[51] of an art object "is entitled, without the authority of the copyright owner, to display that copy publicly … to viewers present at the place where the copy is located."[52] In addition, this provision of the

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

[48] 17 U.S.C. § 302.
[49] 17 U.S.C. § 204(a).
[50] 17 U.S.C. § 106(5).
[51] In the case of works of art, this phrase applies to the single copy typically created by an artist. Prints, photographs, and other creative formats, of course, present a broader array of options.
[52] 17 U.S.C. § 109(c). This provision may not include the full panoply of public display encompassed by the definition of public display in 17 U.S.C. § 101. That section provides:

> To perform or display a work 'publicly' means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

copyright code, when read together with the personal property rights of art owners, is generally thought to allow the non-artist owner of a work control over loaning a work for exhibition, holding a work in a non-public way, or storing it in a location of the owner's choosing. In all of these settings, the property owner effectively may determine the place where the work "is located."

Second, the statute provides that "the owner of a particular copy … or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."[53] While this provision does not deal specifically with display rights, it does allow an owner to transfer an artwork to anyone without regard to the desires of the artist, the successor copyright owner, or the intentions of the new owner to display or not to display the work. Given the statutory language, there is no apparent way for the copyright holder to object if a work is transferred to a party unlikely to ever display it. These results, it is thought, take precedence over the exclusive public display rights held by the copyright owner. And once a copyright finally expires, there are no statutory or other limitations on the ability of the possessor of a work of art to decide where and when to display it.[54]

Finally, the copyright statute itself understandably, though perhaps perversely, places significant limitations on the ability of non-copyright owners holding works still protected by the statute to actually display them online. The copyright statute's definition of "display" includes online views.[55] A number of important museums,

§ 109(c) encompasses only public display *at the places* where the work "is located," while the § 101 definition may also include widespread forms of electronic or other methods of display transmitted to other locations. Whether § 109(c) encompasses the broad meaning of the § 101 definition is unclear. The addition at the end of the phrase "or to viewers at locations other than where the place where the work is located" would clearly broaden it.

[53] 17 U.S.C. § 109(a). This "first sale" doctrine may well bar use of any contractual provision restricting the right of the owner of an artwork to freely transfer it. *See* Close v. Sotheby's, Inc., 894 F.3d 1061, 1070 (9th Cir. 2018).

[54] And note well that variations on this theme apply to other types of work beyond the fine arts. 17 U.S.C. § 109(c) applies to any copy of a work listed in 17 U.S.C. § 106(5), which reads: "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works." Sculpture—typically made in single copies—is obviously the most similar to painting. But successor owners of other sorts of works are under no obligation to display the copies they own.

[55] The definition of "display" of a work in 17 U.S.C. §101 "means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."

including the Met, have recently created continually enlarging web displays of significant portions of their collections.[56] But these changes are limited both by the willingness of museums to develop extensive online systems and their inability to place works still protected by copyright online without permission from the artist or the successor copyright holder. Though museums have the right to *physically* display all the works in their collections on their institutional walls at the place where they are located, including works in copyright, they need the permission of copyright holders to make digital copies of such works and display them online.[57]

The origins of this rule are perfectly understandable. Allowing widespread display of all sorts of work is a common way for copyright holders trying to monetize their creativity. It is a form of advertising. Use of that marketing strategy, standard thinking goes, should be in the hands of the copyright holder. Breaking through this constraint to encourage more widespread online visibility of contemporary artistic works no longer held by the copyright owner is an important problem to resolve. In any case, museum internet presence today is typically limited to works no longer protected by copyright law. Therefore, none of the collections of the Met, the National Gallery of Art, the Museum of Modern Art, the Chicago Art Institute, the Philadelphia Museum of Art, the Boston Museum of Fine Arts, the Houston Museum of Fine Arts, the Los Angeles County Museum of Art, or any other major museum are fully displayed online. In addition, an array of other American institutions has a small or non-existent online presence for any of their holdings.

As a result of the underlying legal structure, a museum, business, individual, or other entity owning a painting or sculpture, famous or not, is treated as having the right to decide whether to display it where it is located, even over the objections of

[56] Google maintains a massive listing of online museums, now numbering over 2,000. *See Collections*, Google Arts & Culture, https://about.artsandculture.google.com/partners/ [https://perma.cc/DAY6-78LS]. Those portions of museum collections still covered by copyright law may not be displayed online without permission of the copyright owner or a justifiable claim of fair use, because of the owner of the intellectual property retains the right to reproduce the works. See 17 U.S.C. § 106(1).

[57] *See* 17 U.S.C. § 106(1), (2). This puts aside for the moment the issue of displaying online images as they look on gallery walls where they are located. *See infra* note 93.

the artist,[58] or to not display it at all.[59] Nor is it thought that a copyright owner may compel the property owner to display the work online. Works of art may therefore become perfect collectables—secure assets with hopefully increasing value—rather than cultural markers worthy of widespread viewing and admiration by the general public.[60] They may be symbols of aesthetic understandings and admirable teaching vehicles, but there are often neither audiences granted the ability to appreciate such cultural attributes nor controls on where the property owner may keep it.[61]

Are there ways to break through the legal and cultural constraints? That is the question the rest of this article explores. What follows are observations about the various types of settings in which art may be hidden, suggestions about a variety of ideas to allow artists greater control over the display of their creations and about techniques for distributing collections across underserved geographic areas, as well as discussion of the practical limits to enhancing display.

[58] There are extremely narrow exceptions to this statement provided by the moral right provisions in 17 U.S.C. § 106A(a). An artist may claim to the author if an item is improperly displayed, to disclaim authorship of a mutilated work, or to prevent mutilation or destruction of a work in some circumstances.

[59] While the owner of a painting generally controls the location of display under 17 U.S.C. § 109(c), other attributes of the display right, such as the making of posters or using images in publications, remain with the copyright owner. For purposes of this article, however, that is only a minor limitation. The discussion here is about public display of the actual object, not ancillary rights that fail to allow viewers to see a full unobstructed view of the actual work. The problems raised here may be more pronounced for two-dimensional works than for three-dimensional pieces. The latter are typically, though certainly not always, bulkier and therefore more costly to store.

[60] A quite recent example was the record setting auction sale of the Klimt painting *Dame mit Fächer (Lady with a Fan)* for well over $108,400,000 by the London branch of Sotheby's. The buyer was an unidentified collector in Hong Kong and the painting presumably will disappear from public view. That contrasts notably with the purchases of other Klimt works by Ronald Lauder, who put them on permanent display at the Neue Gallery in New York City. Oscar Holland & Jacqui Palumbo, *Klimt's 'Last Masterpiece' Sells for Record-breaking $108.4 Million*, CNN (June 27, 2023, 2:43 PM), https://www.cnn.com/style/klimt-portrait-sothebys-auction-record-dame-mit-facher/index.html [https://perma.cc/F2F4-XABE].

[61] A perhaps all too common story has recently been told about a Van Gogh that has disappeared into the collection mists. *See* Michael Forsythe, Isabelle Qian, Muyi Xiao & Vivian Wang, *The Mystery of the Disappearing van Gogh*, N.Y. Times (May 29, 2023), https://www.nytimes.com/2023/05/29/world/asia/van-gogh-china-buyer.html [https://perma.cc/V8UH-C38N].

II
ART ©ACHES

Art caches—collections in storage—are housed in different settings for a variety of reasons. The bulk of them are in either private collections or museum facilities. The works in private hands tend to be located in personal living and workspaces or in storage facilities. The art in personal spaces may be seen by those living or working there, or by visitors, but typically are closed off to the general public. The items in storage may well be in settings where no one sees the works for very long periods of time. Those places may be used either because the owners are out of room in their more standard personal spaces or because the owners see the works as investment assets[62] rather than aesthetically alluring items appropriate for viewing by human eyes.[63] In a small proportion of settings, wealthy collectors have opened their homes for public viewing or constructed or remodeled older buildings to house their collections and make them easily accessible to the general population. There are a number of examples of such facilities, including the Kreeger Museum in Washington, D.C.,[64] the Rubell Museum sites in New York and Miami, the Margulies Collection at the Warehouse and other institutions in Miami, Florida,[65] and a host of others across the nation and world.[66] In such settings, personal collections take on the characteristics of a museum while often

[62] Abby Schultz, *Art Is a Rising Focus for Wealth Managers and Family Offices*, BARRONS (Nov. 29, 2023, 4:17 PM), https://www.barrons.com/articles/art-is-a-rising-focus-for-wealth-managers-and-family-offices-9033323b [https://perma.cc/TL6E-BSTP].

[63] Some items held by private parties may also need special care due to preservation concerns, but most items like that are probably held in museums and special collections.

[64] *History*, THE KREEGER MUSEUM, https://www.kreegermuseum.org/about-us/history [https://perma.cc/6ARE-JFDZ].

[65] Patricia Azze, *Miami's Finest Private Art Collections*, GREATER MIA. CONVENTION & VISITORS BUREAU (Feb. 14, 2023), https://www.miamiandbeaches.com/things-to-do/art-and-culture/galleries/miamis-private-art-collections [https://perma.cc/K33F-6DFY].

[66] Sarah Cascone, *Top 10 Private Contemporary Art Museums in the US*, ARTNET NEWS (Oct. 20, 2015), https://news.artnet.com/art-world/private-contemporary-art-museums-338126 [https://perma.cc/VW57-GVRV]; Lucy Andia, *Top 10 Must-Visit Private Museums in the USA*, THE CULTURE TRIP (Feb. 11, 2022), https://theculturetrip.com/north-america/usa/articles/top-10-must-visit-private-museums-in-the-usa/ [https://perma.cc/KCB8-963Y]; Kristina J. Kolbe, Olav Velthuis, Johannes Aengenheyster, Andrea Friedmann Rozenbaum & Mingxue Zhang, *The Global Rise of Private Art Museums A Literature Review*, POETICS, Dec. 2022, at 1, 5, https://www.sciencedirect.com/science/article/abs/pii/S0304422X22000870 [https://perma.cc/BT8D-6CCB]; Kathryn Brown, *Public vs Private Art Collections: Who Controls our Cultural Heritage?*, THE CONVERSATION (Aug. 11, 2017, 9:53 AM), https://theconversation.

providing tax benefits to their owners.[67] Stored works owned by museums and other institutions, whether privately or publicly owned, are most likely in hiding because the institutions lack the space to show them, the art is deemed unworthy of display in the present aesthetic milieu, the museum has a surfeit of works representing certain artists, eras, or movements, or the fragility of the pieces requires that they be kept in special locations for preservation or conservation. Many museums and libraries have special systems set up that allow for a diverse array of researchers to study works in storage.[68]

The varying causes for the existence of art caches, along with the extant legal limitations, make analysis of the hoarding issues and the potential cures for any problems difficult and complex to explore. Questions of privacy, property rights, and investment goals dominate standard attitudes about the personal hoards. Interests of the public in viewing the works, if any, are difficult to legally support and financially sustain in the present milieu.[69] Attempts to control museum collections also involve property interests, as well as the ethics and rules of collecting and deaccessioning, the purposes for the existence of art collecting institutions, the educational missions of museums, the impact of public funding, and the public's desires to experience the ability to see and think about the works in the collections. Put together with the quite different concerns of private art owners, these museum problems add additional complications to the discussion. Even if limitations on the caching of artworks were to be imposed, how long should such

com/public-vs-private-art-collections-who-controls-our-cultural-heritage-80594 [https://perma.cc/T3AM-Q5BR].

[67] Abuse may also crop up. *See* E. Alex Kirk, *The Billionaire's Treasure Trove: A Call to Reform Private Art Museums and the Private Benefit Doctrine*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 903–04 (2017).

[68] *See, e.g.*, *Libraries and Research*, METRO. MUSEUM OF ART, https://www.metmuseum.org/art/libraries-and-research-centers [https://perma.cc/Y932-NVEM]; *Study Centers*, MUSEUM OF MOD. ART, https://www.moma.org/research/study-centers/ [https://perma.cc/42ZK-B3VQ].

[69] In addition, a number of the storage locations, especially for work held as assets rather than as objects worthy of public display, are in domestic freeports or in other free trade zones often outside of the authority of American law to control. This aspect of the problem is beyond the scope of this article. Coping with international law and procedure and the ownership secrecy allowed by some nations raises questions far beyond the roles of property and intellectual property law in our domestic settings. But works stored in secure storage settings within the United States should be subject to the same reforms as those described in this article.

limitations exist after the death of the artists, and who should have the ability to force art owners to make the works they own available for public viewing?

A. *Museum Collections*

Museums own an enormous amount of art that rarely sees the light of day.[70] Instincts to amass collections, typically thought to describe librarians, also are deeply embedded in the psyches of large institutions like the Met, as well as at some privately created museums.[71] The limitations on such institutions wishing to deaccession art—psychic, normative, and legal—can seriously constrain their ability to reduce the size of their rarely seen or less interesting holdings by transferring them to museums with available display space.[72] Robin Pogrebin vividly described the issues in a recent article in the New York Times.[73] She used two charts displayed below to demonstrate the enormous scale of the problems. The first shows the dramatic growth in the size of some major collections, and the second shows the proportion of holdings that are publicly displayed at any given time by such important museums. While the numbers are staggering, don't lose sight of the fact that almost all privately held art is not available for public viewing. The number of privately held pieces is probably larger than the volume of stored museum works.[74] And it is also true that a significant number of privately held

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[70] *See* Robin Pogrebin, *Clean House to Survive? Museums Confront Their Crowded Basements*, N.Y. Times (Mar. 12, 2019), https://www.nytimes.com/interactive/2019/03/10/arts/museum-art-quiz.html [https://perma.cc/9B8M-UMF5]; Geraldine Fabrikant, *The Good Stuff in the Back Room*, N.Y. Times (Mar. 12, 2009), https://www.nytimes.com/2009/03/19/arts/artsspecial/19TROVE.html [https://perma.cc/A3QP-3SRK]. An institution like the Met typically displays less than ten percent of its holdings in its buildings at any one time. *See* Pogrebin, *supra*.

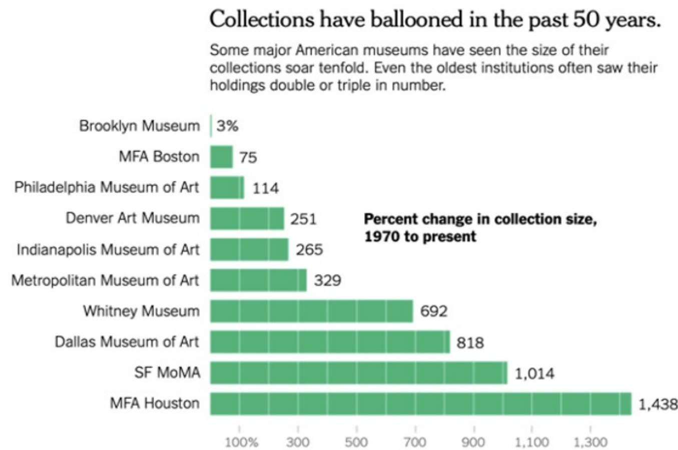
[71] Malcolm Gladwell has posted a fascinating audio on this subject focused on the psychology of hoarding and its impact on the Warhol Museum and the Met. Malcolm Gladwell, *Dragon Psychology 101*, Revisionist Hist. (June 18, 2020), https://omny.fm/shows/revisionist-history/dragon-psychology-101 [https://perma.cc/S9YM-MKV7]; *see also* Randy O. Frost & Gail Steketee, Stuff: Compulsive Hoarding and the Meaning of Things (2011) (describing the hoarding instincts of individuals but reflective of some of the same instincts extant in large institutions). Librarians are often affected with the same sort of collection instincts, though that has been reduced of late, especially by the availability of much printed material online.

[72] *See* Meredith Ingersoll Loy, *Sell the Warhol, Save the World: Deaccessioning Freedoms and Ethical Funding Solutions for Art Museums in the United States*, 90 UMKC L. Rev. 457, 480 (2021); Jorja Ackers Cirigliana, *Let Them Sell Art: Why a Broader Deaccession Policy Today Could Save Museums Tomorrow*, 20 S. Cal. Interdisc. L.J. 365, 393 (2011).

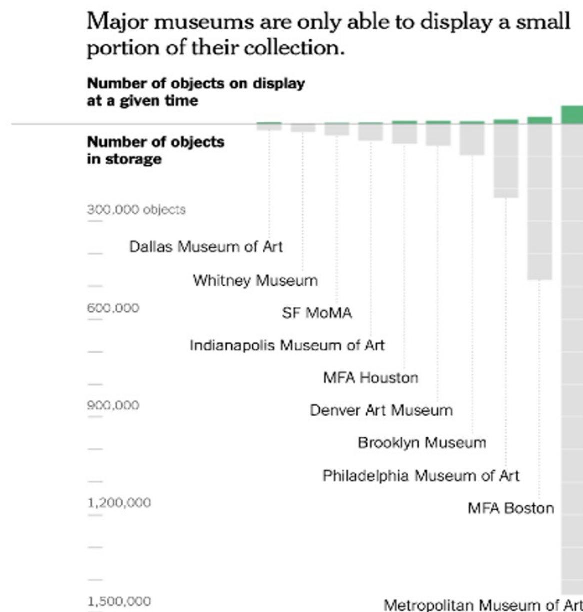
[73] Pogrebin, *supra* note 70.

[74] I don't have recent data on this, but logically it almost surely is correct. There are over 330,000,000 people in the United States. About 75% of them are age 18 or older, or about 245,000,000. Even if only 10%

works are just as important exemplars of artistic quality as those in major museum collections.



Robin Pogrebin, *Clean House to Survive? Museums Confront Their Crowded Basements*



Robin Pogrebin, *Clean House to Survive? Museums Confront Their Crowded Basements*

of them own one work of art, that means there are 24,500,000 pieces in private hands. That conclusion is supported by a 2008 survey of the National Endowment for the Arts. The survey reported that "[i]n 2008, 20 percent of adults (46 million Americans) reported owning original art. There was no statistically significant difference between the rate found in 2008 and the *rate from the 2002 SPPA (19 percent)*." NAT'L ENDOWMENT FOR THE ARTS, 2008 SURVEY OF PUBLIC PARTICIPATION IN THE ARTS 49 (2009) (emphasis added), https://www.arts.gov/sites/default/files/2008-SPPA.pdf [https://perma.cc/YC7B-WSJ4].

Pogrebin went on to note:

> It doesn't benefit anyone when there are thousands, if not millions, of works of art that are languishing in storage," said Glenn D. Lowry, the director of the Museum of Modern Art. "There is a huge capital cost that has a drag on operations. But more importantly, we would be far better off allowing others to have those works of art who might enjoy them.[75]

The Museum of Modern Art regularly culls its collection and in 2017 sold off a major Léger to the Houston Art Museum. Yet, it too is in the midst of another costly renovation (price tag $400 million) to be able to exhibit more of its ever-growing collection.[76]

Part of the problem is that acquiring new things is far easier, and more glamorous, than getting rid of old ones. Deaccessioning, the formal term for disposing of an art object, is a careful, cumbersome process, requiring several levels of curatorial, administrative and board approval. Museum directors who try to clean out their basements often confront restrictive donor agreements and industry guidelines that treat collections as public trusts.

There also are unforeseen risks in relying on large collecting institutions beyond the sheer mass of items they hold. The unwieldy nature of massive collections generates specific risks absent in many other collection settings. Keeping track of the collections, maintaining systems for finding proverbial needles in haystacks when access is desired, ensuring vigilance over the condition and integrity of the works over time, and guaranteeing security becomes more difficult and expensive as collections grow in size. That was recently made quite clear when a curator managed to remove 2,000 items over the last decade from storage facilities at the famed British Museum.[77] Size may not guarantee greater safety and security than private owners and smaller museums. Dispersion of collections and size reduction may lessen the likelihood of similarly huge thefts from occurring in the future.

[75] Pogrebin, *supra* note 70.

[76] Pogrebin, *supra* note 70.

[77] Jason Felch, *What a Scandal at the British Museum Reveals*, N.Y. Times (Sept. 16, 2023), https://www.nytimes.com/2023/09/16/opinion/museum-artifacts-looting.html [https://perma.cc/8R78-WBQF].

1. Limitations on Dispersal and Viewing Museum Collections

The Met and most other museums may be constrained in their desire to deaccession works for display in different settings not only by the power of their instinct to amass collections, but also by five different sets of rules—limitations established by the institution's founding documents, limiting terms contained in documents for gifts accepted by the institution,[78] legal rules surrounding operation of the legal form under which the institution operates, state statutory obligations on non-profit organizations, and norms established by national organizations with long histories of setting guidelines for museum operations.[79]

The Met was created as a non-profit corporation under a state charter adopted by the New York General Assembly in 1870 "for the purpose of establishing and maintaining ... a Museum and library of art, of encouraging and developing the study of the fine arts, and the application of arts to manufactures and practical life, of advancing the general knowledge of kindred subjects, and, to that end, of furnishing popular instruction and recreation."[80] The museum's ownership structure is unusual; the building and the land it is on in Central Park are publicly owned while the collection is held by the museum. The institution's obligations flow not to the members of its governing board but to the general public; its duties are to benefit the public not itself. Use of the term "library" in the 1870 legislation connotes the development of a substantial array of works, perhaps inevitably given the wealth of some city residents, leading to an enormous growth in its holdings. Nonetheless, in recent times the Met has regularly culled its collection.[81] Simply as a matter of space, it has become impractical to retain all of its pieces. Similarly, Charles L. Venable, the director of the Indianapolis Museum of Art at

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[78] See the description of the gift of Philip Guston accepted recently by the Met. Metro. Museum of Art, *supra* note 38.

[79] A thorough review of deaccession problems, especially those that arose when the Berkshire Museum in Pittsfield, Massachusetts, may be found in Jenny Lyubomudrova, *From Museum to the Auction Block: Regulating the Deaccessioning of Art*, 42 Cardozo L. Rev. 2065, 2081 (2021). Lyubomudrova also discusses a 1972 dispute over the planned deaccession of work by the Met to enable purchase of a valuable Velazquez painting that led to a lengthy review of the museums practices and a promise to notify the public when the museum planned to sell works of more than $5,000 in value. *Id.*

[80] Metro. Museum of Art, Charter of the Metropolitan Museum of Art and Laws Relating to It: Constitution, By-laws, Lease § 1 (1900), https://libmma.contentdm.oclc.org/digital/collection/p15324coll10/id/157962 [https://perma.cc/3DV4-5E98].

[81] Pogrebin, *supra* note 70.

Newfields, recently cancelled a planned storage space expansion by taking the very unusual step of removing from the collection works that received a grade of D or below when rated by the staff as to whether their retention would be a "drain on resources."[82]

While the founding charter of the Met states very broad purposes and goals for the museum, norms at other institutions may be much more constraining. That is vividly demonstrated by a recently filed legal proceeding challenging the desire of Valparaiso University's Brauer Museum of Art in Indiana to sell works, including three of its most valuable pieces by Georgia O'Keefe, Frederic E. Church, and Childe Hassam, to raise money for improvement of the university's first year student dormitories.[83] The dispute arose due to concerns over spending the money raised on non-art related undertakings as well as the deed of gift for the 400 pieces originally used to establish the museum required that it would "display a representative selection of the works of said Junius R. Sloan in a suitable place not less frequently than once in each year."[84] The museum, however, claimed that nothing in the donative documents established a deaccessioning policy and that the university was free to dispose of the works. The university's faculty voted to oppose the planned sale, in part because members of the art faculty regularly used the collection in their classes,[85] a practice strongly supported by the cultural need for creativity to be easily seen by the general population.[86]

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[82] Pogrebin, *supra* note 70.

[83] Daniel Grant, *Lawsuit Filed to Block University's Sale of Georgia O'Keeffe Painting to Fund Dormitory Renovations*, ART NEWSPAPER (Apr. 25, 2023), https://www.theartnewspaper.com/2023/04/25/lawsuit-valparaiso-university-deaccession-georgia-okeeffe [https://perma.cc/44GJ-LQP8]. Grant notes that similar disputes have arisen recently at other institutions, including Fisk University in Nashville, Tennessee, Rockford College in Rockford, Illinois, Randolph College in Lynchburg, Virginia, and Brandeis University in Waltham, Massachusetts.

[84] *Id*. The original donor was one of the plaintiffs.

[85] Angelica Villa, *University Faculty Vote Against Plan to Deaccession Paintings at Brauer Museum of Art*, ARTNEWS (Mar. 6, 2023), https://www.artnews.com/art-news/news/valparaiso-university-deaccession-brauer-museum-art-1234659963/ [https://perma.cc/WVU3-HKNV].

[86] There certainly are counter pressures in the case of a university. Such institutions have an array of goals and objectives, of which art education is only one. Some may claim that at times ownership of some art objects is less critical than improving the living circumstances of attending students, especially if the dorms at issue are noticeably rundown.

While the Valparaiso dispute was recently dismissed,[87] other controversies leave a mixed picture about how severe the legal and cultural limitations are on deaccessioning, as well as on public visibility of art. For example, a 2017 decision by the Berkshire Museum in Pittsfield, Massachusetts to sell assets, including two Norman Rockwell paintings, because of the institution's dire financial condition, caused a significant uproar in the local area and led to litigation in the New York courts. The dispute's outcome—sale of the two works[88]—demonstrated that deaccessioning may cause a decrease rather than an increase in public access to art in the absence of efforts by the selling museum to oversee the selection of the ultimate buyer. One of the two works found its way to another museum while the second, auctioned at Sotheby's, fell into unknown hands.[89]

The sales by the Berkshire Museum were enmeshed not only in local and legal controversy, but also in public opposition from major institutions setting standards for museum operations. Both the Association of Art Museum Directors ("AAMD") and the American Alliance of Museums strongly criticized the sales of the Rockwells and other works.[90] The AAMD imposed sanctions on the museum by requesting that other museums "refrain from lending works to the Berkshire Museum or collaborating with it on exhibitions."[91] Though the AAMD rules were modified in 2022, the museum still would have violated the new norms. Professional Practice Rule 2.5 provides that "[f]unds received from the disposal

[87] A hearing on a motion for summary judgment filed by the museum was heard on September 27, 2023. Caitlynn Shipe, *Press Release: Art Sale at Standstill*, The Torch (Sept. 27, 2023), http://www.valpotorch.com/news/article_c626f186-5d75-11ee-bca3-9f062908f777.html [https://perma.cc/JTR4-XYYX]. A short time later, the case was dismissed on standing grounds. Caitlynn Shipe, *Press Release: Art Sale Lawsuit Dismissed, Judge Rules Lack of Standing*, The Torch (Oct. 27, 2023), http://www.valpotorch.com/news/article_3c04d060-750b-11ee-8fa8-7328a984a99a.html [https://perma.cc/LU27-U56Y]. An appeal, of course, is possible.

[88] Colin Moynihan, *Judge Allows Berkshire Museum to Sell Rockwell Painting and Other Works*, N.Y. Times (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/arts/berkshire-museum-norman-rockwell.html [https://perma.cc/H7AL-VMEU].

[89] Deaccessioning issues also arise overseas. The Museum Langmatt in Baden, Switzerland has recently been involved in controversy over the sale of prized Cezanne paintings. *See* Catherine Hickley, *Amid Criticism, a Museum Says It Must Sell Its Cézannes to Survive*, N.Y. Times (Nov. 8, 2023), https://www.nytimes.com/2023/11/08/arts/cezannes-sale-museum-langmatt.html [https://perma.cc/B484-GWUN].

[90] Lyubomudrova, *supra* note 79, at 2066.

[91] Colin Moynihan, *Sanctions Are Imposed on Berkshire Museum for Sale of Artworks*, N.Y. Times (May 27, 2018), https://www.nytimes.com/2018/05/27/arts/design/berkshire-museum-sanctions-aamd.html [https://perma.cc/2UAN-CVSX].

of a deaccessioned work of art including any earnings and appreciation thereon, may be used only for the acquisition of works of art in a manner consistent with the museum's policy on the use of restricted acquisition funds or for direct care of works of art."[92] Norms like this simply enhance the collector instincts of museums without much consideration for the need to display works to the public or for the difficulties of operating and supporting institutions unable to manage and maintain their collections.[93]

2. *Techniques for Opening Museum Collections*

Given the array of limitations on museum behavior, it is difficult to imagine steps institutions could take that would significantly alter the present situation. Most being tried have a limited impact. Enhanced online systems and open storage facilities, for example, have provided limited steps toward wider access. Displays of online images[94] certainly cannot substitute for onsite views. They do not provide viewers with comprehensive impressions of the works. Even if magnification of segments of an online object are made available, the perspective gained by onsite viewing of the entire object cannot possibly be duplicated. Large compositions, in particular, simply "disappear" when viewed on standard desktop technology outside of a museum. Nonetheless, online displays certainly are much better than failing to display works in any format; and for copyright purposes they are deemed to be public displays.

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[92] *Membership of AAMD Approves Change to Deaccessioning Rule*, Ass'n of Art Museum Dirs. (Sept. 30, 2022), https://aamd.org/for-the-media/press-release/membership-of-aamd-approves-change-to-deaccessioning-rule-bringing [https://perma.cc/Z285-PR4G].

[93] On the other hand, a recent sale of major works by MoMA did not lead to a major controversy. The museum's September 2022 disposal of works by Francis Bacon, Pierre Bonnard, and others, under its care since 1990 as part of the Paley Collection was used to endow its expansion into digital art. *See* Travis Diehl, *MoMA's Daydream of Progress*, N.Y. Times (Dec. 15, 2022), https://www.nytimes.com/2022/12/15/arts/design/refik-anadol-unsupervised-moma-review.html [https://perma.cc/VB7C-3ZDD]; Dorian Batycka, *$70 Million Worth of Art That Hung in MoMA Is Hitting the Auction Block*, Artnet (Sept. 14, 2022), https://news.artnet.com/market/70-million-worth-of-art-that-hung-in-moma-is-hitting-the-auction-block-2175230 [https://perma.cc/WV9Q-2AP2]. Though technically this was the sale of works not owned by the museum, they had hung at MoMA for a long term. The sale was effectively a gift. *See* Carlie Porterfield, *Balthus Painting Deaccessioned by the Art Institute of Chicago Could Bring as Much as $18m at Auction*, Art Newspaper (Oct. 6, 2023), https://www.theartnewspaper.com/2023/10/06/balthus-painting-deaccessioned-art-institute-chicago-sothebys-auction [https://perma.cc/2AN8-LHTV].

[94] For a summary of some of the programs, see discussion *supra* Part I.C.

Another fascinating possibility for online viewing has recently appeared with the creation of online systems allowing users to scan gallery walls, including an ability to focus in on works hung there.[95] Though it does not expand the number of works publicly displayed for onsite, in person viewing, it does remove common limitations on access by avoiding entrance fees and eliminating transportation difficulties and costs. Though these systems may not always display images of works still copyrighted, they easily could. Would this violate a copyright owner's right to control the making and distribution of copies of their works, or would it fall under the right of museums to publicly display works in the place where they are located? Public display, after all, includes the right to use online technology, but are the images produced at the place where the work is located? Similar problems would arise if a private owner or museum created an online system displaying apartment rooms or galleries with art on the walls. I suspect the answer is that such systems create copying problems under the statute, especially if the technology allows users to enlarge the images on screen. They both create copies of works and facilitate the making of images by users by simple copying or screen capture techniques.[96] But the answer to the statutory conundrum—especially questions about location—is not obvious. Nor is it clear if such display systems would be fair use.[97] No one, of course, anticipated such systems when the statutory display provisions were originally drafted.

Another solution is now provided by a few institutions that have "open-view" storage areas allowing visitors to browse among works stored in places with sliding or other accessible viewing systems.[98] These facilities allow both for appropriate compact storage and for actual rather than online viewing of works not on display in regular galleries. Though lacking in the provision to museum audiences of many-

[95] *See, e.g.*, Andrea Romano, *These 12 Famous Museums Offer Virtual Tours You Can Take on Your Couch*, TRAVEL + LEISURE (Apr. 27, 2022), https://www.travelandleisure.com/attractions/museums-galleries/museums-with-virtual-tours [https://perma.cc/WU38-GUPW]; *The Met 360 Project*, METRO. MUSEUM OF ART, https://www.metmuseum.org/art/online-features/met-360-project [https://perma.cc/7D8G-DPQQ].

[96] *See* 17 U.S.C. § 106(1) (granting the copyright holder the exclusive right to reproduce works, which includes the making of images suitable for posting online, in addition to the right to publicly display a work).

[97] Compare the cases involving thumbnails framed on screens in systems like Google Images. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1176 (9th Cir. 2007) (finding such uses fair under 17 U.S.C. § 107).

[98] *See* Fabrikant, *supra* note 70.

sided views of a work from varying distances or perspectives, these facilities do allow visitors to capture a reasonably direct sense of a work's impact. A few institutions also have arranged surprisingly wonderful exhibitions organized by members of their staffs specifically designed to bring works out of storage for public viewing.[99] And of course, the large number of works in private collections are completely out of public view, either in person or online. As noted in the opening pages of this article, however, some large private collectors have made significant efforts to put their art troves in publicly accessible museums[100] or online.[101]

But perhaps the most intriguing system for broadening public access to art collections operates in France. The structure of the collection and display systems in France has allowed for an entirely different approach to making museum art more visible to the general population. It relies on the fact that a very large portion of the major works on French soil are part of the national collection. Major steps to broaden public access across the nation to the enormous number of government-owned works have been taken in recent decades. Rather than being retained in Paris, many important works have been distributed to a significant number of institutions scattered across the country. Creating this broad array of sites was consciously planned to broaden public access to works of art.[102] Even mobile displays housed in large trucks roam around the country.[103] Among the stated goals of establishing the museum network was "to ensure the reception of the widest possible audience,

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[99] *See, e.g.*, *Stories from Storage*, CLEVELAND MUSEUM OF ART, https://www.clevelandart.org/exhibitions/stories-storage [https://perma.cc/KYU4-2QM6]. This site provides access to a series of videos in which curators tell stories about their motivations for bringing a set of works into public view.

[100] Important private collection museums are certainly scattered across the nation. *See* Sarah Cascone, *Top 10 Private Contemporary Art Museums in the US*, ARTNET (Oct. 20, 2015), https://news.artnet.com/art-world/private-contemporary-art-museums-338126 [https://perma.cc/3P4F-27J5].

[101] Some private collections are also online. *See* Sophie Haigney, *Art Disappears in Private Hands. Can Social Media Resurface It?*, N.Y. TIMES (Aug. 14, 2019), https://www.nytimes.com/2019/08/14/arts/design/art-collection-digital-museum.html [https://perma.cc/8WLS-ZEE6]. The most prominent website for such collections is Collecteurs. *See id.*; COLLECTEURS, https://www.collecteurs.com [https://perma.cc/QKB2-S5EX].

[102] *See National Museums: The Network of Museums with National Collections*, MINISTRY OF CULTURE (June 29, 2023), https://www.culture.gouv.fr/en/Thematic/Museums/Les-musees-en-France/The-museums-of-France/National-Museums-The-Network-of-Museums-with-National-Collections [https://perma.cc/TM8J-ECR2] (highlighting the 61 museums scattered across France).

[103] The most notable involves the Pompidou Museum. *See The MuMo x Centre Pompidou museum truck created with Art Explora*, ART EXPLORA, https://www.artexplora.org/project/the-mumo-x-centre-pompidou-museum-truck-produced-with-art-explora [https://perma.cc/A2UN-49KJ].

to develop its attendance, to promote knowledge of their collections, to design and implement educational and dissemination actions aimed at ensuring equal access to culture for all."[104] This policy, strongly analogous to the distribution of the Vogel collection described near the outset of this article,[105] suggests one way of thinking about how to remedy some of the difficulties of using large stand-alone institutions as the backbone for public art viewing in a nation as large and diverse as the United States.

The United States owns an important—but relatively small—national art collection, which is currently housed in various Smithsonian Buildings, mostly in Washington, D.C.[106] Adopting a system here like the one in France would require a noticeable change in attitudes about making art located in our major private and publicly owned museums outside the Smithsonian umbrella more easily accessible. Since most major holdings are not in government hands, Congress would have to enact a system of federal encouragement and spending to create branches of large museums and arrange traveling exhibitions. Large construction and building maintenance grants should be given to entice institutions to display parts of their collections in scattered locations under the same sort of rules proposed above and in the proposed statutory amendment described below for privately held works.[107] Legislation could also be passed to override deaccession rules by allowing for the sale or exchange of works to an array of museums that promise to display the works on a regular basis. Such locational shifts would emulate the way in which public funds benefited the public during the years the FAP was extant. Of course, Congress could also simply compel museums to show all items in their collections at least

[104] *National Museums: The Network of Museums with National Collections*, *supra* note 102.

[105] *See supra* Part I.B.

[106] Only two of the national museums are not located in the Washington, D.C. area and they both are in New York City. *See Hours and Locations*, SMITHSONIAN INST., https://www.si.edu/visit/hours [https://perma.cc/XW4G-833Q]. Some of the collections might be dispersed, but the fine art portions of the institution's collections come nowhere near matching the scale of France's national holdings. The National Gallery of Art holds only about 150,000 objects. *See About the National Gallery*, NAT'L GALLERY OF ART, https://www.nga.gov/about.html [https://perma.cc/4NH4-ZXRL]. The Smithsonian system includes the National Museum of American Art, the National Portrait Gallery, the Renwick Gallery, the African Art Museum, and others. The entire collection is smaller than many major museums scattered around the country. Collections sizes of the various Smithsonian collections are available online. *Smithsonian Collections*, SMITHSONIAN (Aug. 1, 2018), https://www.si.edu/newsdesk/factsheets/smithsonian-collections [https://perma.cc/6YPH-5GTB].

[107] *See* discussion *infra* Section II.C.1. Such a plan would almost surely have to be implemented over a period of time.

once a decade, or some other reasonable period of time. In short, there are ways that the nation can emulate French policy even though most museums are not owned by the national government and large important collections are privately held.

B. Private Collector Art ©ache Problems and Possible Solutions

Are there ways to enhance public viewing of art in privately held collections located in the non-public living or work places, in privately created museums, or in storage? Given the typical American predilection for allowing owners of tangible property to do as they wish with their assets, any challenge to the "right" of art collectors to keep their collections private will inevitably run into stiff cultural headwinds. An art owner's property right to control access to and possession of their work and the copyright statute's provision granting control over public display of an art object where it is located to the owner of the physical asset, rather than to the copyright owner, are typically thought to create substantial barriers to altering traditional rules.

That view is short sighted, however. There are some issues worth exploring in this arena. At least three paths exist to increase the frequency of public access to privately owned works, whether hung in personal spaces or placed in storage. First, the statutory exception to a copyright owner's display right giving a private property owner the privilege to publicly show art where it is located should not continue to operate when the owner declines to display it to anyone, let alone to the public. A new look at the statutory language is a first step toward increasing public access to works hung in private locations visible only to a few or indefinitely stored away out of sight. The standard construction of the statute's grant of authority to successor owners of art, I suggest, is vastly overstated. Second, private contracts or other legal systems of constraint on buyers signed at the time of first sale of a work may be used to force art owners to make works they own available for display, either to limited or to significant numbers of people. Third, the best solution to the dilemmas posed by privately owned hidden art is to amend the display provisions of copyright law to grant artists more control over what happens to their work after it leaves their studios and to grant the government the right to compel some art no longer protected by copyright to be publicly displayed.

1. Reconsidering the Statutory Display Provisions

As already noted, artists[108] are thought not to have a right to compel private owners of the works in which the artists hold copyright to make them available for viewing by members of the general public. The combined abilities of non-artist owners to exercise their property-based power to decide about display of their personal assets and their statutory authority to publicly display work where it is normally located are typically believed to allow removal of art from public view at the whim of the owner. But surprisingly, the wording of the statute is quite open to a more limited interpretation than typically thought. That, together with the enormous public benefit gained when the access to art is widely available, suggests that there are ways to reconstruct the presumed meanings of the statutory rules of public display.

The code states that an owner of a physical item of art "is entitled, without the authority of the copyright owner, to display that copy *publicly* . . . to viewers present at the place where the copy is located."[109] It does not say that the owner has the right to "control all places where a work is displayed," or to "have unlimited control over whether to display or not to display a work" or to "exercise complete dominion and control over when and where a work" is displayed or to only display it in ways that are not "public." There certainly are "holes" left in the language about what happens when the owner of a work elects to display it rarely or not at all in either a private or a public location. While the statute may be construed to include all the negative as well as the positive meanings of the statutory phrase granting an owner the right to publicly display a work where it is "located," that result is not mandatory; it contradicts the apparent meaning of its language and undermines the public purposes for displaying art.

The owner's statutory display authority is framed as an *exception* to the general rule granting copyright holders the exclusive authority to exercise dominion over public display of works in which they hold copyrights. That exclusive authority of the copyright owner should be construed broadly in light of the public benefits bestowed on society by displaying rather than hiding creative works. In a setting like this where the statutory meaning is difficult to precisely discern, the ambiguity

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[108] Most of this article will use the word "artist" or "artists" when discussing display rights rather than a more verbose phrasing such as "an artist or an artist's successors."

[109] 17 U.S.C. § 109(c) (emphasis added).

should be resolved in favor of copyright owners retaining some authority over when and where their art is publicly displayed.[110] The strong public policy reasons for publicly displaying art as often as possible lead naturally to denying a non-copyright holding owner of an artwork an unfettered right to *not* display it publicly. Such unbounded power vested in the owner of an art object is an unwarranted and broad expansion of the narrowly drawn statutory exception granted to an art owner to publicly display a work where it is located.

The reality that artists' typically unspoken intentions routinely include a desire that their creativity be seen, and an expectation that those perusing art gain ineffable public benefits from doing so,[111] supports the conclusion that the statutory authority of a non-copyright holding owner of a work should be construed to include a right to control *public* display of art where it is located, *but not an unbounded right to refuse* to publicly display art anywhere for long periods of time.

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[110] The original version of Section 109 was somewhat different. It read:

> (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. . . .
>
> (c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.
>
> (d) The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

17 U.S.C.A. § 109 (1997). The statute was designed to prevent underground displays of audio-visual works. The present version basically is directed to the same issue in simpler language that states only that the party displaying the work publicly owns it. *Id.* There is no indication in any version of Section 109 that the right of the owner to publicly display a copy also bestows the right to hide it without the knowledge or permission of the copyright holder.

[111] There are of course instances when artists prefer not to display a work in their possession at all. They may deem the work incomplete, not worth showing, or simply bad. Such works might end up in the trash can or stored away in their own spaces for long periods. My artist wife has sometimes left pieces in her studio for long periods, gone back to them years after their initial creation, and reworked them until they look "right." Works that she has sold or otherwise transferred however are ones she is happy to have shown to others. I suspect that sort of thing is typical. It should be an artist's prerogative to have the most control over the release of a work for public display, not the purchaser. It is tightly analogous to granting a novelist the power to decide when to authorize first publication of a book.

State personal property rules should not be allowed to override this conclusion. It would create a significant conflict in purpose between the goals and values of federal and state law that would force a conclusion that state law should be preempted by the Supremacy Clause.[112] The existence of a copyright holder's *exclusive right* to control public display should govern in all settings not explicitly covered by exceptions granted to the physical owners of art.[113] The refusal of an art owner to display a work frustrates the benefits bestowed on the public when art is publicly visible; the owner's display interest should yield when an artist or successor copyright owner reasonably demands that the work be publicly shown in some fashion under the grant of an exclusive right to do so under 17 U.S.C § 106(5).[114]

Given the existing terms of the copyright statute and the lack of express provisions for granting a copyright owner control over public display when the owner of a work keeps it out of view for an unreasonably long period of time,[115] the courts must fashion some fair and reasonable way of organizing the display rights of artists and their successor copyright owners. That balance is best struck by crafting several control mechanisms. First, if an artist's work is initially transferred by a gallery or other third party, the transfer agent should be judicially required to inform the artist of the transferee's contact information and the planned location for the work on consummation of the sale. This is a minor imposition since the agent or gallery would typically be paying the artist upon transfer of the work. If and when the artist wishes to follow up to see if the work has been publicly displayed, this

[112] U.S. Const. art. VI, cl. 2; *see also* Goldstein v. California, 412 U.S. 546, 559–60 (1972). Tightly analogous outcomes exist in trade secret and patent law. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 470 (1974); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 141 (1989).

[113] Also note that the statutory right to display art where it is located is not expressed as an exclusive authority. *See* 17 U.S.C.A. § 109(c).

[114] This conclusion flows naturally from a major 1973 preemption case decided by the Supreme Court. Goldstein v. California, 412 U.S. 546, 551–52 (1973). In that case, California adopted a statute barring the copying and transfer of sound recordings. At the time the case was filed, federal copyright law did not protect against copying of records. That changed in 1972. The Court concluded that the state statute supported the same purposes as federal copyright law by creating incentives for the creation and distribution of original works of authorship. The lack of federal protection at the time did not negate the authority of states to enter the field if the purposes for doing so enhanced the goals of the Intellectual Property Clause of the Constitution. U.S. Const. art. VI, cl. 2. When, however, state law conflicts with the purposes and goals of the Constitution as well as the terms of the copyright statute, the opposite conclusion must result.

[115] This obviously would be a judgment call, but it seems that keeping a work hidden away for more than six months to a year should be deemed unreasonable.

information will allow for tracing inquiries to begin. Included in this legal structure should be a requirement that each owner of a work of art divulge to the artist or successor copyright owner the identity of a transferee of a work if it is sold or otherwise disposed of, as well as the planned location for the work. Second, the artist or copyright holder should be allowed to demand the right to publicly show long hidden works for a reasonable period of time.[116] The cost of display should be the responsibility of the copyright holder, just as it was before the work was transferred.[117] The right being enforced, after all, belongs to the copyright holder who would have managed displays prior to the transfer. Third, if the property rights holder voluntarily places the work on public display for at least ninety days once every three years (for example), the copyright holder might be barred from seeking further visibility unless the work fails to reappear for another significant period of time. Fourth, the copyright holder should be granted the right to demand that a high-resolution digital image of a work be provided to the copyright holder if the owner of the physical copy declines to place the work online upon request.[118]

2. Private Constraints on Display of Art

The complexity of the potential interplay between statutory display rights held by copyright owners and those held by owners of objects suggests that the vagaries of the statute will be challenging for courts alone to resolve. The problems could be reduced or eliminated either by routine use of coherent private legal techniques or by congressional reforms. Past efforts to control display rights privately have largely, though certainly not completely, failed to develop into routine practices. That tale is briefly told here. Suggestions for legislative reforms follow in a later section of this article.

Several types of private arrangements have either been proposed or used—selling or transferring art using contracts "running with the art," limited

[116] Again, what is "a reasonable period of time" is a judgment call. But providing a right to public display for at least two months per year seems a reasonable compromise.

[117] If an artist sells or transfers a work, then the costs of showing the work to the transferee often is borne by the artist, either by paying for a display space or by paying a share of the price of the work to a gallery.

[118] Obviously, it makes sense for artists to retain such images when they transfer a physical copy of a work to facilitate their posting the image if they wish. At present, that right is retained by the artist unless transferred in writing to another party. But if they don't retain a digital copy, the possessor of the work can easily provide one. This norm also could be enlarged to require the possessor of a work to place it online rather than simply provide a digital copy to the artist or successor copyright holder.

liability corporations ("LLCs"), non-fungible tokens ("NFTs"), and conceptual art. The best-known effort to use contracts "running with the art" arose from artist protest demonstrations at the Museum of Modern Art and other locations in the late 1960s and the related creation and widespread distribution of *The Artist's Reserved Rights Transfer and Sale Agreement*[119] published in 1971 by Seth Siegelaub and Bob Projansky. Sale via limited liability corporations or NFTs are more recently minted ideas.[120] Conceptual art became a lively and well-known transfer vehicle in the late 1960s and 1970s and is still used. But none of these techniques has ever become standard practice widely used by either artists or dealers.[121] Each of these arrangements and their problems are surveyed below.

2.1. Contracts Running with the Art

The Artist's Reserved Rights Transfer and Sale Agreement ("Artist's Contract") makes use of legal theories virtually identical to those widely used in creating servitudes running with the land. The central concept generally accepted in real property-based servitude law is fairly simple. The owner of property signs a contract as part of the process of making a conveyance with the clearly stated intention to create a limitation on the land binding both present purchasers and

[119] Seth Siegelaub & Robert Projansky, *The Artist's Reserved Rights Transfer and Sale Agreement*, Primary Information (Feb. 24, 1971) [hereinafter "Artist's Contract"], https://primaryinformation.org/files/english.pdf [https://perma.cc/79R4-HCUD]. For the best history of the demonstrations and agreement published in legal journals to date, see Christopher G. Bradley & Brian L. Frye, *Art in the Age of Contractual Negotiation*, 107 KY. L. Rev. 547, 560–92 (2019). A comprehensive history of the origins, contents, and use of the proposal has been written by Lauren van Haaften-Schick, see generally Lauren van Haaften-Schick, *Collaboration, Critique, and Reform in Art and Law: Origins and Afterlives of "The Artist's Contract" (1971)* (2022) (Ph.D. dissertation, Cornell University) (on file with author). Hopefully it will emerge in book form in the near future. For an earlier essay on the same subject by van-Haaften-Schick, see Lauren van Haaften-Schick, Conceptualizing Artists' Rights: Circulations of the Seigelaub-Projanksy Agreement through Art and Law (2018), https://www.laurenvhs.com/wp-content/uploads/2018/03/Lauren-van-Haaften-Schick_Oxford-Handbooks-in-Law_Conceptualizing-Artists-Rights.pdf [https://perma.cc/4DE3-7A7Z]. Her academic career has been memorialized at Dep't of Hist. of Art & Visual Stud., *Lauren van Haaften-Schick*, Cornell University, https://arthistory.cornell.edu/lauren-van-haaften-schick [https://perma.cc/3NNR-426L].

[120] On LLCs, see generally Christopher G. Bradley, *Artworks as Business Entities: Sculpting Property Rights by Private Agreement*, 94 Tul. L. Rev. 247 (2023). On NFTs, see generally Lauren van Haaften-Schick & Amy Whitaker, *From the Artist's Contract to the Blockchain Ledger: New Forms of Artists' Funding Using NFTs, Fractional Equity, and Resale Royalties*, 46 J. Cultural Econ. 287 (2020).

[121] The literature on conceptual art outside of the legal world is large. The law review literature is less fulsome. Much of it is referred to in one of my articles. *See generally* Richard H. Chused, *"Temporary" Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 Rutgers Comput. & Tech L.J. 1 (2019).

future successors.[122] Since the constraint is routinely inserted in deeds or other instruments used and recorded when interests in land are transferred, the successors in interest always[123] have actual or constructive notice of the restraint in their chain of title and therefore must take its binding impact into account when deciding to invest in the asset. The oft stated legal rule says simply that a party owning land on notice of restrictive terms related to the property itself is bound by them. The device is widely used to craft rules for the operation of condominiums and other "common interest communities."[124] The Artist's Contract uses the same idea to bind purchasers of art to constraints on the transfer, display, and handling, as well as on the care and protection of a work by requiring that successors be placed on notice of the terms of the contract.[125]

The introduction to the Artist's Contract summarizes the basic provisions of the arrangement. The portions I italicized are obviously the most relevant to this article.

> The Agreement is designed to give the artist:
> - 15% of any increase in the value of each work each time it is transferred in the future.
> - a record of who owns each work at any given time.
> - *the right to be notified when the work is to be exhibited, so the artist can advise upon or … veto the proposed exhibition of his/her work.*
> - *the right to borrow the work for exhibition for 2 months every five (5) years (at no cost to the owner).*
> - the right to be consulted if repairs become necessary.

[122] RESTATEMENT THIRD OF PROP. § 2.1 (AM. L. INST. 2000).

[123] Unless, of course, someone messes up the process and fails to record the instrument properly or at all.

[124] A related process is used in sales of cooperative housing units. Such sales are not like those of typical real estate. The owner of a cooperative apartment holds shares of stock in the corporation holding title to the building and a proprietary lease lasting as long as occupancy by the owner continues. The title to the building itself is held by the corporation. Terms of ownership, including payments for operating the building and various obligations and constraints on activities of the occupants, are spelled out in the lease and other documents provided to buyers. At each transfer, the old shares of stock and proprietary lease are canceled, and new ones are issued by the owning corporation to the buyer. The overall effect, however, is practically the same as the use of contracts running with the land. *See generally* Michael H. Schill, Ioan Voicu & Jonathan Miller, *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing In New York City*, 36 J. LEGAL STUD. 275 (2007).

[125] Artist's Contract, *supra* note 119, at 1.

- half of any rental income paid to the owner for the use of the work at exhibitions, if there ever is any.
- all reproduction rights in the work.

> The economic benefits would accrue to the artist for life, plus the life of a surviving spouse (if any) plus 21 years, so as to benefit the artist's children while they are growing up. The artist would maintain aesthetic control only for his/her lifetime.[126]

The agreement has not been frequently used.[127] The reasons, I think, are easy to fathom. Most dealers and purchasers of art, in both the high and low ends of the market, do not find the Artist's Contract to be in their best interests. Given the present legal structures granting largely untrammeled authority to art buyers to control the use and disposition of works they buy, the incentives do not run in a favorable direction for artists. In addition, it is hard for most artists to sell their work. If they want to sell, they have to be willing to abide by the buyer's preferred terms. It would be uncommon, though far from a complete rarity, to find art buyers firmly committed to making the works they purchase regularly available for public viewing and to sharing with the artist any growth in value of the art surfacing in later

[126] Artist's Contract, *supra* note 119, at 2 (emphasis added). The full text of the parts of the actual agreement dealing with display read as follows:

> EXHIBITION. ARTICLE SEVEN: Artist and Collector mutually covenant that
>
> (a) Collector shall give Artist written notice of Collector's intention to cause or permit the Work to be exhibited to the public, advising Artist of all details of such proposed exhibition which shall have been made known to Collector by the exhibitor. Said notice shall be given for each such exhibition prior to any communication to the exhibitor or the public of Collector's intention to cause or permit the Work to be exhibited to the public. Artist shall forthwith communicate to Collector and the exhibitor any and all advice or requests that he may have regarding the proposed exhibition of the Work. Collector shall not cause or permit the Work to be exhibited to the public except upon compliance with the terms of this article.
>
> (b) Collector shall not cause or permit any public exhibition of the Work except with the consent of the Artist to each such exhibition.
>
> (c) Artist's failure timely to respond to Collector's timely notice shall be deemed a waiver of Artist's rights under this article, in respect to such exhibition and shall operate as a consent to such exhibition and to all details thereof of which Artist shall have been given timely notice.

Artist's Contract, *supra* note 119, at 7.

[127] *See* Bradley & Frye, *supra* note 119, at 584–87.

sales.[128] Conceptual artist Hans Haacke is one quite notable exception.[129] Those artists or art owners firmly committed to using the Artist's Contract may often find it difficult to sell their work without price discounts or even to sell their work at all. The artists most likely to successfully convince buyers to adopt the Artist's Contract or something like it are those already well known with a solid coterie of people and institutions eager to purchase their work or those newly arrived on the scene with multiple gallerists eager to sell their work or buyers wanting to get on board.

2.2. Limited Liability Corporations and Non-Fungible Tokens

Similar incentive problems to those that stymy use of running contracts arise in the use of LLCs and NFTs. Though both may be used to craft constraints on art similar to those embedded in the Artist's Contract, they probably run into similar market constraints.[130] An artist using an LLC may create a legal entity in which the artist owns the copyright and a significant share of the LLC, such as 20%, in a painting held by the business organization. The remaining interest in the LLC, but not the copyright, would be sold to a collector. The relationship between the artist and the collector are spelled out in the entity's operating agreement and could include any of the terms in the Artist's Contract or others desired by the parties.

[128] California has adopted a statute requiring sharing of value increases in art, but it is probably preempted by federal law. *See, e.g.*, David E. Shipley, *Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law*, 1 HASTINGS COMM. & ENT. L.J. 1, 2–3 (2017); Nithin Kumar, *Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit de Suite Legislation*, 37 COLUM. J.L. & ARTS 443, 451 (2014).

[129] There are also others, including Daniel Buren, Edward Kienholz, and Carl Andre. *See* Roberta Smith, *When Artists Seek Royalties on Their Resales*, N.Y. TIMES (May 31, 1987), https://www.nytimes.com/1987/05/31/arts/when-artists-seek-royalties-on-their-resales.html [https://perma.cc/5LT6-AJTX]. Smith describes some of the history and the unfolding of a notably successful auction of one of Haacke's pieces at Christie's in May 1987.

[130] It is interesting to note that an important work by Francis Bacon last sold in 2017 for $52,000,000 is now being offered by an LLC using an NFT distribution system selling shares of the LLC with NFT access to a small chunk of the work. *See ARTEX MTF AG: Francis Bacon to be the First Artist Traded on ARTEX*, BUS. WIRE (May 31, 2023, 4:57 AM), https://www.businesswire.com/news/home/20230531005550/en/ARTEX-MTF-AG-Francis-Bacon-to-be-the-First-Artist-Traded-on-ARTEX [https://perma.cc/96AC-P9VV]; Melanie Gerlis, *The Art Market Stock exchange for art opens with $55mn Francis Bacon*, FIN. TIMES (June 1, 2023), https://www.ft.com/content/51a7142f-a771-43fe-ab80-ad84a631aaa6 [https://perma.cc/F4DM-5GDP]. It does not actually transfer possession of any of the work to those participating in the LLC by buying shares via NFTs or guarantee public display of the entire work in any recognizable form.

Provision could be made for rights of display, sharing of proceeds obtained from copyright interests such as poster making, public exhibition, or sale of the work, limiting sale of the work by requiring permission from both the artist and the collector, and guaranteeing that any new member of the LLC would be bound by the same restraints as the original investor. Interests in the LLC could be spread among a larger group than just the artist and a single collector, though the larger the group the more cumbersome management and transfer of interests would become. Sales of interests in an LLC are typically controlled by the terms of the operating agreement.[131] A sale of some shares or a complete sale of all the shares of the LLC owning the painting would result in payment of the appropriate membership share of the price to the artist.

Using NFTs is more technologically and theoretically complex. NFTs themselves are best characterized as ownership "certificates" for a share of a work of art, often evidenced by an image of a small segment or thumbnail of a painting not accessible by other owners of NFTs in the work. The owner of an NFT thumbnail typically also may link to an image of the complete painting online. The owner's NFT certificate is accessible on a blockchain to the owner holding the coded key. And that interest typically is transferable by payment with crypto currency which can be "cashed out" to dollars on a dedicated monetary exchange. As with LLCs, the artist will own a significant share of the NFTs, such as again 20%, as well as the copyright in the actual work. Control over display of the work may easily be maintained by the artist if the party holding the actual work is either the artist or the agent of the artist. The marketing problems are related both to potential reluctance of traditional collectors to yield to such an ownership pattern and to the now well-known issues presently impeding the use of block chain technology and crypto currency transactions.[132]

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[131] For a much more detailed summary of the potential benefits and complexities of the LLC, see Bradley & Frye, *supra* note 119, at 268–98.

[132] An example of the ongoing marketing problems is the recent shutdown of the NFT section at Sotheby's. *See* Shanti Escalante-De Mattei & Angelica Villa, *Sotheby's Cuts Multiple Senior Staffers and NFT Specialists Amid Market Softening*, ARTNEWS (July 12, 2023), https://www.artnews.com/art-news/news/major-staffing-changes-hit-sothebys-phillips-layoffs-1234673955/ [https://perma.cc/2RXF-QRCA. But some transactions are occurring. *See, e.g.*, Gerlis, *supra* note 130.

2.3. Conceptual Art

The most successful and widely used system for allowing artists to control display and marketing of their work is conceptual art, though economic limitations have also hindered its widespread adoption. It is built on the notion that the most critical aspects of art are ideational, not tangible. In a brief essay, Sol LeWitt was among the first to describe the nature of such endeavors:

> In conceptual art the idea or concept is the most important aspect of the work. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art.[133]

LeWitt, along with other famous artists such as Donald Judd and Dan Flavin, are among a number of widely recognized practitioners of this genre. To these artists, the "work" was manifested by documents of title rather than in objects, by written indicia of artistic ideas rather than tangible things. As I described the notion in a previous article:

> Whether the installed work was a wall drawing by LeWitt, a construction by Donald Judd, or a lighting work by Dan Flavin, the pieces were often described by the artists as temporary, movable, or destructible after their installation. Such projects were distinctly different from routine art sales by galleries or auction houses. Rather than obtaining a painting or sculpture, a buyer obtained only the right to seek its creation and installation. It was the creative plan that was the artistic product, not an extant creative work.[134]

Rather than an extant artwork, buyers receive a certificate of ownership or authenticity, as well as a document with instructions on how to install the work.[135] These items typically are written, expressive, original works of authorship

[133] Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, https://www.artforum.com/features/paragraphs-on-conceptual-art-211354/ [https://perma.cc/9K5F-JRGP]. While ideas are not copyrightable, their embodiment in certificate of ownership or other documents transferring rights in conceptual art are typically original expressive works subject to copyright.

[134] Chused, *supra* note 121, at 2–3.

[135] Though under 17 U.S.C. § 102(b) ideas are not copyrightable, the certificate of ownership and the instructions are original works of authorship fixed in a tangible medium of expression. They are copyrightable despite the theoretical nature of conceptual art.

copyrightable by the artist. They overcome the bar on copyrighting ideas. That means that permission of the artist or other copyright owner controlling the exclusive right of display typically is required for each installation. While only those holding a certificate of authenticity[136] may seek to install the work, they do not have total freedom of action. That is because most installations are derivative works[137] of the art as described in the copyrightable certificate of ownership and the instruction set and permission of a copyright holder is required before a derivative work may be made. Because of the complexity of most installations, those doing the work may also hold a copyright interest in the derivative work as derivative work authors.[138] As a result, the copyright owner has control over the location of the installation and often oversees the selection of the installers.[139] Many installations are also temporary and somewhat different project to project. Varying the spaces where works are installed may have an impact on the size and shape of the work. Because of the complexity of the ownership pattern—original author, installer, and certificate owner, complexity may arise if there is a desire to destroy the work or sell it without the permission of a range of people.[140]

Many conceptual artists assemble or arrange for the creation of initial installations. That is the way their reputations are established. One of the most important exhibitions of conceptual art now on display is a huge array of Sol LeWitt wall drawings installed with LeWitt's oversight in Building #7 at the Massachusetts Museum of Contemporary Art. A small segment of the show is displayed below.[141]

[136] There can be multiple holders if the artist can generate interest in that type of market.

[137] The copyright statute grants to the owner of the intellectual property in the work the exclusive right to control the making of derivative works. 17 U.S.C. § 106(2). A derivative work is a work "based upon one or more preexisting works." 17 U.S.C. § 101. In this setting, the preexisting work consists of two documents—the certificate of authenticity and the instruction set. For more details, see Chused, *supra* note 121, at 4–10, 26–30.

[138] If the copyright holder exercises tight control over an installation, then those crafting the object will probably not hold interests. But if the installers are simply given the instruction set and do the work, they are likely to hold a copyright interest. *See* Chused, *supra* note 121, at 27–29.

[139] These standard results may be altered by the certificate of ownership though that is not standard practice.

[140] *See* Chused, *supra* note 121, at 34–35.

[141] *See Sol Lewitt*, MASS MoCA, https://massmoca.org/sol-lewitt/ [https://perma.cc/T5E6-ZWRQ]. A summary of the exhibition history may be found at *Sol Lewitt: A Wall Drawing Retrospective*, MASS MoCA, https://massmoca.org/event/sol-lewitt-a-wall-drawing-retrospective/ [https://perma.cc/5JRH-R6BD]. This particular installation is scheduled to last until 2043.

Sol LeWitt's *A Wall Drawing Retrospective*

The use of certificates of ownership and instruction sets allowed LeWitt and others to continue to control many aspects of their work over time—a goal common to the less frequently used Artist's Contract, LLCs, and NFTs. It also may allow for the sale of a physical object created by artists for permanent rather than temporary exhibit, as well as for additional versions of each work to be made and sold later. The ownership certificate could provide for distribution of the price obtained in such sales. It is extremely flexible and allows art buyers to gain a significant amount of control over the works they purchase by use of conceptual art documents, especially if only one object at a time is allowed. This flexibility for both the artist and the buyer makes it understandable that conceptual art projects are more common than other limited sales techniques. Even here, however, use has been limited. The ongoing interplay between an artist or an artist's successors in interest and art buyers over installation locations and creation may deter many from making purchases. And, of course, works crafted as "permanent," unique items don't fit within the parameters of the typical theoretical foundations surrounding conceptual art.

In sum, the hopes of some that private law mechanisms might enlarge the now limited ability of artists to control the future lives of their art after it is transferred have largely been frustrated by a combination of real and perceived statutory limitations and forces that limit the ability of creative souls to enter negotiations on a level playing field. This is, therefore, an area ripe for legislative intervention.

C. Legislative Reforms

Embedding the various reform proposals in this article into legislation is clearly the best way to handle the situation. Three sets of changes are required—one to the copyright statute display provisions covering the rights of copyright holders to demand displays of their works, another allowing for greater museum flexibility and compelling display of more of their collections, and a third establishing a program for constructing and organizing art displays nationally, especially in presently underserved areas. This section will propose legislative language only for the first two. The third set of legislative enactments will require a much more involved legislative proposal drafted after consultation with the institutions most seriously affected by the program and the federal agencies most directly involved in creative projects.

1. Amending 17 U.S.C. § 109(c)

The terms embedded in 17 U.S.C. § 109(c) granting control over public display rights to non-artist owners of artworks certainly need to be changed. It is important to reemphasize that the definition of public performance or display in 17 U.S.C. § 101 includes both "a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered," as well as a communication "by means of any device or process whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and the same time or at different times." The first part of the definition encompasses physical locations where the work on display is visible to those present, while the second part includes the provision of online viewing. The first display method is more culturally meaningful and important, but also more difficult to guarantee because of the enormous size of some collections. The statutory amendments must take the difference into account. Requiring broader online dissemination of works rather than physical display in a venue might best meet the needs of all parties. And given the importance of public access suggested here, the display rights provided for in any statutory reforms, like traditional moral right provisions, should not be transferable or waivable.[142]

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[142] Because the rights created in the proposed amendments will typically last beyond the death of the artist, there may be complex succession issues that arise. I have not written special rules covering that issue. For the moment defining the new rights as non-transferable is enough.

There is one other issue that should be taken into account. There is a significant difference in the likelihood of public display between unique artistic works— such as paintings, collages, easily reassembled installations, and sculptures—and works often produced in editions of a number of copies, such as prints and photographs. The initial copyright holders of prints and photographs may sell only part of any given series of copies or retain the ability to make additional ones.[143] Even if the artist destroys the plate for a print or the original negative or computer image of a photograph, an argument may be made that additional, strong display powers in the hands of the artists are not as necessary as with unique items, except for prints and like objects made in small numbers. The larger the number of copies made, the greater the likelihood that at least one version will be on public display at any given moment in time.[144]

[143] Print editions normally are numbered in the lower left corners with the number of the particular copy, followed by a slash and the total number of copies made or planned to be made of that print. If, for example, an artist plans to make an edition of twenty-five, then the print made first will be marked "1/25," the fourteenth will be marked "14/25," and the last will be marked "25/25." Sometimes an artist will test a particular printing method or color combination and mark it "AP" for "artist proof." These usually are unique versions. Once the preferred print method is decided upon, the edition will be made, either in part or *in toto*. There are also some print techniques that are not easily reproducible in multiple copies. A paper lithograph is one example. In this print technique, a Xerox copy of an image may be used instead of the more typical metal "plate." There are methods by which the toner of the Xerox copy can be treated to hold ink while the rest of the ink is gently wiped off the white areas of the paper "plate." Such a fragile print "plate" can usually be used only one time. The end product often has imperfections, random shadings, and other artifacts arising from the fragility of the paper "plate." That is both the charm and foundation of their uniqueness. While another "plate" may be made in a Xerox machine, the print it is used to make will always be different from the prior version in some way. The technique is not commonly used, though my artist wife has made a number of prints using the method. *See, e.g.*, Elizabeth Langer, *Mother and Daughter*, https://www.elizabethlanger.com/prints--/figures/view/1795541/1/1795544 [https://perma.cc/CU8P-7X8H]. Viscosity prints are also challenging to make with multiple copies that are alike. With this method, a metal plate is deeply etched and then inked with more than one ink at the same time. Different combinations of color and oil are used to make up each ink applied. Because of their different viscosities, some colors will tend to rise to the more lightly etched areas of the plate while others will tend to sink into more deeply etched areas of the plate. After the ink is applied, wiped, and printed, it would be unusual to have each inking and printing process come out precisely the same way. An example of two viscosity prints in a larger series may be viewed at Elizabeth Langer, *Buddha Series*, https://www.elizabethlanger.com/prints--/buddha-series [https://perma.cc/T4SP-R44X].

[144] The verbatim use of the definition of a "work of visual art" in 17 U.S.C. § 101 and relied upon in the moral rights provisions of the code, therefore, is not appropriate here. In addition, prints typically are made on paper. Some of them, especially if they are old, are fragile and therefore less likely to be publicly shown except for short periods of time. If they are held by museums, they may be seen on request in many cases.

For discussion purposes, I suggest the following redraft (changes *italicized*) of 17 U.S.C. § 109(c) designed to deal with the problems of both privately and institutionally owned art still protected by copyright:

> (c) Notwithstanding the provisions of section 106(5), the *non-copyright holding* owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly,[145] either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located. *With regard to a particular copy of a work of visual art*[146] *originally created in fewer than twenty*[147] *rather than two-hundred copies:*
>
> *(1) Any party transferring ownership of such a copy on behalf of the original creator or owner of the copy shall inform the copyright owner of the contact information, including, location, address, phone number(s), and email addresses of the original transferee.*
>
> *(2) Any non-copyright holding owner*[148] *of such a copy shall make every reasonable effort to inform the copyright owner of that copy of the contact information, including, location, address, phone number(s), and email addresses of the non-copyright owner and all changes in such information that may occur over time.*

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[145] The intention is to take seriously the meaning of the definition of public display in 17 U.S.C. § 101. Note again that this definition includes use of online viewing systems.

[146] Use of this language piggybacks on the definition of visual art in 17 U.S.C. § 101 adopted along with the moral rights section, 17 U.S.C. § 106A, but does not do so in verbatim fashion. The relevant portions of that definition read as follows:

> A "work of visual art" is—
> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

[147] The number "twenty" is somewhat arbitrary and subject to change.

[148] Though the article separately discusses private and institutional display problems, this proposal treats both the same way.

(3) If the non-copyright owner of such a work transfers the copy, the owner must make every reasonable effort to notify the copyright owner of the terms of the transfer, including but not limited to the name and full contact information of the transferee.[149]

(4) The copyright owner of the work retains the authority to display the copy of the work in a place open to the public for a period of at least sixty days if such copy has not been publicly displayed by any non-copyright holding owner for a period of at least ninety days during the prior three years.

(5) The right of public display in a place open to the public held by the copyright owner under subsection (4) is subject to the following limitations:

(A) All reasonable costs associated with arranging for display of the copy in a place open to the public shall be borne by the copyright owner.

(B) Such reasonable costs include insurance, packaging, shipping, and arranging for a display venue.

(C) If the copyright owner elects not to pay the costs imposed under subsections (A) and (B), then the copyright owner may require the non-copyright holding owner of the copy to arrange to publicly transmit or to otherwise communicate or display the work to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times for a period of at least ninety days without payment of any funds from the copyright owner.

(6) The copyright owner retains the authority to publicly transmit or to otherwise communicate or display the work to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times for as long as the copyright owner desires.

(7) The rights held by a copyright owner under subsections (1)-(6) shall not be waivable or transferable.

[149] If these amendments are also designed to require payment of a share of any increase in value of the work to the copyright holder, other terms such as the price may also be included here.

(8) If the non-copyright holding owner of the work demonstrates that the exercise of any right under subsections (1)-(6) held by the copyright owner of the work would place the work under a risk of serious harm and no way exists to safeguard the work from such harm, then the owner of the work may retain possession of the work in a location that does not create a risk of serious harm to the work.

(9) This section applies to all United States works regardless of whether they are located in the United States or elsewhere.

2. *Compelling Display of Items No Longer Protected by Copyright*

Though copyrights last a very long time, work treated as copyrightable subject matter under 17 U.S.C. § 102 published before 1929 is now in the public domain.[150] There are, therefore, many older works of fine art that are now unprotected. Artists or their successors in interest have no rights under extant copyright law. That does not, however, suggest that the benefits to the public at large from their display have also lapsed. Although copyright owners have no claims over works in the public domain, the only way access to them may be gained by the public is either from voluntary display or legal compulsion created outside the ambit of traditional copyright law. Providing for such controls over the display of works now in the public domain probably would not be legislation adopted under the Intellectual Property Clause of the Constitution,[151] but the Commerce Clause. It would, therefore, be appropriate to add a new Chapter 16 to Title 17, requiring some form of display for public domain work now in storage:[152]

[150] 17 U.S.C. § 304 provides for a maximum term of 95 years for works published before 1978. 17 U.S.C. § 302 grants a term running for the life of the author plus 70 years. Some other kinds of works, such as those owned by employers, may last for up to 120 years. Works published before the present copyright act went into effect in 1978 had a maximum term of 95 years. That means that federal copyrights for all works published before 1929 have now expired. Most works unpublished when the present copyright act went into effect in 1978 were covered by state common law copyright. 17 U.S.C. § 303 grants a term similar to the § 302 standard for works not published by 1978. Art is very likely to go unpublished for its entire period of existence, but the federal statute preempts virtually all claims under state common law copyright. *See* 17 U.S.C. § 301 (1978).

[151] The Intellectual Property Clause requires that copyrights may only last for "limited times." U.S. Const. art. 1, § 8, cl. 8. Congress has a great deal of discretion in determining what time is limited, but those decisions are given wide latitude by the Supreme Court. *See* Eldred v. Ashcroft, 537 U.S. 186, 199–200 (2003).

[152] A similar step was taken when Chapter 11 was added to Title 17 of the U.S. Code in 1994, controlling the making of bootleg copies of public music performances which were then unprotected by federal law. 17 U.S.C. § 1101.

Title 16: Display of Works of Visual Art No Longer Protected by Copyright

Section 1601: Display of Works of Visual Art No Longer Protected by Copyright

(1) With regard to any copy of a United States work[153] *of visual art originally created in less than twenty copies that is owned by a private party or museum as part of a collection containing more than 200 such works of visual art that are no longer subject to copyright protection under this title,*[154] *and that has not been displayed in a place open to the general public for a period of at least ninety days in the last three years, the owner of the copy shall make immediate arrangements for such public display of the work for a period of at least ninety days in a place open to the general public.*

(2) The obligation of public display in a place open to the general public created in subsection (1) is subject to the following exceptions and limitations:

(a) Permanently transmitting or otherwise communicating or displaying a high quality digital image of the work to the public on an easily accessible, cost free site by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times site fulfills all obligations under subsection (1).

(b) If the owner of a work demonstrates that meeting the obligation of subsection (1) or (2)(a) would place the work under serious risk of harm and no way exists to safeguard the work from such risk, then the owner of the work may retain possession of the work in a location that does not create a serious risk of harm to the work.

(c) The obligation to display the work in a place open to the public under subsection (1) is not met by charging a large fee for access to the work. "Large fee" means payment of a sum greater than that charged by the museum with the highest entrance fee owning more than one-

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[153] *See* 17 U.S.C. § 101.

[154] This language mirrors the terms of the previous proposal for works still in copyright protection, with the additional provision dealing with the public domain.

thousand works covered by this section located within one-hundred miles of the place where the owner resides or, if there is no such museum, a payment of more than $10.

(3). This section shall be enforced by the Department of Justice on request from the Copyright Office of the United States.[155] *Jurisdiction lies in the United States District Court for the district in which a covered work is located or in the United States District Court for the District of Columbia. Injunctive or any other appropriate relief may be sought. In any case involving violations of this section, the court shall order the party violating this section to pay to the Copyright Office an appropriate amount of attorney fees or other costs of suit born by the Copyright Office and the Department of Justice. In addition, the court shall order the payment of $1000 to the Copyright Office for each work not displayed at a place open to the public or not placed online as required by this section.*[156]

Conclusion: Questions and Pipedreams

Some certainly will raise questions about the wisdom of the proposals made here. Three immediately come to mind. The first is that if implemented, the recommendations will distort the market for fine art in the United States in ways that would undermine the economic well-being of already struggling artistic communities in the nation. Second, some museum collections are so large that complying with the display obligations described here would, as a practical matter, be difficult and perhaps impossible to meet. The third takes me to task for suggesting the impossible. No Congress in our lifetimes will ever adopt fine art support systems like the ones I suggest. It may be so outlandish a suggestion that it is nothing more than a pipedream. But it is critical to meeting the ultimate goals of this article. And, of course, one can always hope; the future is often less predictable than we imagine.

The first two concerns—market harm and controlling vast collections—are actually minor. The art market in the United States and much of the developed

[155] Since reliance on copyright owners is not possible for public domain works, some provision must be made for enforcement.

[156] Alternatively, the statute could provide for payment to a fund supporting the distribution of works for display to sights around the country, as described in Section II.B.2.

world is seriously constrained by the development of art as an investment business rather than a pursuit of creativity and learning. It is not issues like those I raise that have disturbed the market. The market is already askew. That, together with the lack of major public investment in the arts, has reduced interest in nurturing the development and visibility of unrecognized and underappreciated segments of the artistic world. While large galleries look for artists they think will be the next investor "hit," attention to vast areas of creativity is stifled or ignored. The lack of significant investment from sources not involved in the search for valuable assets constrains the ability of unknowns to make a living off their talents. Prices for art thought to be important have become so high that museums often can no longer purchase major pieces for their collections—they must rely on gifts from those with monetary assets substantial enough to make purchases and with charitable instincts strong enough to result in large institutional gifts. Public financial support for artists and investments in collection development at both private and government supported museums is lacking—so is public support for collection development and dispersal of large collections to satellite sites. Indeed, if suggestions to constrain the rights of art purchasers reduce prices for major works of art, that is a positive good, not a dangerous distortion.

The proposals in this article are designed in large part to ameliorate some of these market problems by enhancing the ability of artists to get their work displayed. In this setting, display is advertising. The actual costs of fulfilling the proposed display obligations for those owning artworks is quite small. In most cases it only involves placing works online.[157] Displaying a work at a site open to the general public for onsite viewing may well be more expensive, though widespread use of such display methods is certainly desirable. But the contention that imposing the display obligations proposed here will be costly is false. Online display is cheap. Distortion of the art market will not occur for that reason. Similarly, fears of art buyers that they will lose control over the siting and location of works they own are unjustified. Use of online systems certainly doesn't lead to a loss of physical control. And even if in-person viewing is preferred by a copyright owner, that would be done with fully implemented safeguards and with financial support by the copyright holder.

[157] That entails either using an extant site and paying their fees or purchasing a URL and access to a server system to house the site. Initial costs are likely to be under $200 for the first year.

But, you might suggest, if one of my most important claims is that in-person viewing is superior to online presentation, the whole article turns out to be full of lofty ideas with only a minor payoff. That contention is partially correct. But online viewing certainly would be beneficial for those unable to go to museums or other display venues because of distance, cost, or limited mobility. In addition, the proposals here are not limited to legal changes enhancing public access. While the recommendations about statutory meanings and legislative reforms may be limited, other changes calling for substantial public investment in new venues to view art and in programs supporting creativity more generally would have substantial and widespread benefits. There is simply no way that large American museums can display the bulk of their collections without help. And asking small art collectors and unknown artists to bear the costs of displaying works at the bottom of the market also is pushing the limits of reality. Support for museums and the "lower" echelons of the art world is critical, just as it was during the Great Depression, if they are to flourish and grow. Legislation should be adopted to reinstitute the sorts of programs operated during the FAP era for support of artists and community art projects. It should also require museums to display more than 15% (or any other portion thought wise) of their collections at any given time and to regularly rotate their displays. If they don't have the physical space to do so, they should be able to seek funding to pay for satellite facilities or arrange loans to sites in underserved areas. And even if large museums can meet a 15% display threshold, funds should be made available to create new onsite viewing sites for the rest of their collections. Following the French model of distributing art nationwide is critical to enhancing knowledge and understanding of art and encouraging local artists in their work.

Perhaps the best ending for an article like this one is a dash of optimism. Though the federal government has not displayed a great deal of interest since the New Deal in creating public art projects or supporting artists,[158] a raft of local projects has taken root in recent years. Examples include publicly supported

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[158] The major exception is the art projects grant program of the National Endowment for the Arts ("NEA"). *See Grants for Arts Projects: Program Description*, NAT'L ENDOWMENT FOR THE ARTS, https://www.arts.gov/grants/grants-for-arts-projects/program-description [https://perma.cc/WW8E-RVTY]. But the NEA itself suffers from small budgets. For fiscal 2023, their budget was only $207 million. *E.g.*, Ruthie Fierberg, *President Biden Signs Budget Bill Increasing Spending for National Endowment for the Arts*, BROADWAY NEWS (Jan. 3, 2023, 4:56 PM), https://www.broadwaynews.com/president-biden-signs-budget-bill-increasing-spending-for-national-endowment-for-the-arts/ [https://perma.cc/UZ33-M83L].

street art districts and programs,[159] and public art projects supported by local governments and charities.[160] One of the most fascinating public projects is the art collection of the New York City Health and Hospital Department.[161] The system began displaying art at all of its hospitals during the FAP era in the 1930s.[162] The collection has grown over the years to include thousands of works. Publicly visible murals from the FAP era are scattered throughout the hospital system and new ones are now in the works. Older pieces are being restored and prepared for rehanging. Works by famous artists, including Andy Warhol, Lee Krasner, Alexander Calder, Romare Bearden, Robert Rauschenberg, Helen Frankenthaler, Sam Gilliam, and a host of others, are part of the collection.[163] Those who work, visit, and receive treatment at the hospitals, the staff says, all benefit from the

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[159] The online listings for quality street art sites in the United States are endless. *See generally, e.g.*, Amy Estes, *7 Cities With Amazing Public Art: In These Creative Cities, A Blank Wall is a Canvas*, LIVABILITY (Dec. 20, 2021), https://livability.com/topics/love-where-you-live/7-cities-with-amazing-public-art/ [https://perma.cc/K764-WDAE]; Vittoria Benzine, *America's Most Interesting Street Art Cities Right Now*, FIFTY GRANDE (Nov. 2, 2022), https://www.fiftygrande.com/most-interesting-street-art-cities/ [https://perma.cc/37MY-NMMS]; Wendy Altschuler, *America's Mural Magic: How Street Art Can Transform Communities And Help Businesses*, FORBES (Nov. 2, 2022), https://www.forbes.com/sites/wendyaltschuler/2020/03/23/americas-mural-magic-how-street-art-can-transform-communities-and-help-businesses/?sh=76aa97171739 [https://perma.cc/W4GF-AHSF]; 10Best Editors, *See the Best Street Art in These 10 Cities Across the Country*, USA TODAY (Aug. 14, 2022, 9:00 AM), https://www.usatoday.com/picture-gallery/travel/10best/awards/2022/08/14/10-best-cities-street-art-across-us-according-readers/10288976002/ [https://perma.cc/EWM6-8RDU].

[160] Many cities now run such programs. *See, e.g.*, PUB. ART FUND, https://www.publicartfund.org [https://perma.cc/TYB2-C8MV]; CHI. PUB. ART PROGRAM, https://www.chicago.gov/city/en/depts/dca/provdrs/public_art_program.html [https://perma.cc/ZEJ9-TJ69]; S.F. ARTS COMM'N, https://www.sfartscommission.org/our-role-impact/programs/public-art [https://perma.cc/X7L3-3QR2]. An encyclopedic list of such programs exists. *Public Art Program Directory*, AMS. FOR THE ARTS, https://www.americansforthearts.org/by-program/reports-and-data/toolkits/PAPD [https://perma.cc/7UWQ-24XS].

[161] *See generally Art Collection*, N.Y.C. HEALTH & HOSPITALS, https://www.nychealthandhospitals.org/artsinmedicine/art-collection/ [https://perma.cc/M5YP-3848]. The story of the collection is nicely told in an article, Winnie Hu, *In Stress-Filled Halls, an Artistic Balm: [Metropolitan Desk]*, N.Y. TIMES (Oct. 8, 2023) https://www.nytimes.com/2023/10/08/nyregion/nyc-hospitals-public-art.html [https://perma.cc/TH6C-2MSS], and a video. Jeffrey Brown et al., *Art and Medicine Intersect in New York City Hospitals*, PBS (Aug. 17, 2022), https://www.pbs.org/newshour/show/art-and-medicine-intersect-in-new-york-city-hospitals [https://perma.cc/JA3W-NJR3].

[162] Hu, *supra* note 161. For a list of other WPA projects in New York State, see Nancy Lorance, *New Deal/WPA Art In New York*, WORK PROGRESS ADMIN. MURALS, http://www.wpamurals.org/newyork.htm [https://perma.cc/LM9E-TZJH]. A national listing is available at Nancy Lorance, *New Deal Art During the Great Depression*, WORK PROGRESS ADMIN. MURALS, http://www.wpamurals.org/index.htm [https://perma.cc/5NY5-NSBT].

[163] *See Art Collection*, *supra* note 161; Brown et al., *supra* note 161.

collection. Dr. Eric Wei, an administrator and emergency room physician for the system, spoke optimistically about the impact of the collection on the staff. They gain, he said,

> [A] full tank, and that full tank of empathy, that full tank of having a clear mind, not being distracted, not being stressed, not being burnt out. And so we need to leverage everything that we have. And art is so powerful. We need to use this powerful tool to heal our healers.[164]

And the collection also helps those being cared for. The children's wards and treatment areas contain a great deal of art. In a deeply moving moment, a young patient walking into Woodhull Hospital stated that the hospital's art put him at ease when walking into the institution:

> At Woodhull Hospital the other day, Tijae Medina, 13, was getting anxious about his dental appointment. But then he turned down a gleaming white corridor and looked up to find a spotted dragon in high heels. Or was that a cow?
>
> He instantly felt more at ease.
>
> "I feel like walking into a hospital is scary," he said. "It took my mind off it for a second."[165]

Keith Haring Mural at Woodhull Hospital

[164] Brown et al., *supra* note 161.
[165] Hu, *supra* note 161.

Or imagine what an ailing youngster might feel when entering Brooklyn's Woodhull Hospital and seeing the huge mural pictured here that Keith Haring painted in the entrance lobby in 1986.[166] The power and spirit of art like that envisioned by the FAP lives on.[167]

[166] *See, e.g.*, Laura Itzkowitz, *8 Places to See Art by Keith Haring in NYC*, UNTAPPED N.Y., https://untappedcities.com/2023/02/16/keith-haring-art-nyc/4/ [https://perma.cc/WR77-WBQH].

[167] Another major hospital art collection is housed at the Martha's Vineyard Hospital off the south shore of Cape Cod. Walking the halls is like visiting a major museum. The island has long been a home for artists. The hospital, like those in New York City, has been the beneficiary of their generosity along with that of residents and visitors. *See generally The Edward Miller and Monina von Opel Art Collection at Martha's Vineyard Hospital*, MASS GEN. BRIGHAM: MARTHA'S VINEYARD HOSP., https://mvhospital.org/healing-spaces/permanent-art-collection/ [https://perma.cc/XJB7-4X5B].

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PERSONALIZING PATENT LAW WITH SOCIAL CREDIT DATA

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In the era of digitization, data has become a pivotal force driving advancements across various sectors and transforming legal systems worldwide. China, in particular, is exploring new data-driven governance models. A prime example of this is its integration of the patent system with the Social Credit System (SCS). This paper aims to fill the void in theoretical research on this subject, moving beyond the prevalent narrative of the SCS as either a tool of state surveillance or a reputation-based regulatory mechanism. Instead, it introduces the concept of personalized law in the context of China's patent system.

The paper suggests that the integration of social credit data within China's patent law system aligns the system's operations more closely with its objectives. This offers a personalized approach that provides individual market entities with tailored incentives based on their unique characteristics. To analyze this approach, the paper proposes a novel four-part analytical framework: profiling, personalization, communication, and adjustment. The paper then applies this framework to the two core mechanisms that result from the integration of the patent system with the SCS: the Reward and Punishment Mechanism and the Tiered Regulation Mechanism. This analysis reveals

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that these mechanisms are still in the stage of crude personalization and grapples with challenges such as narrow data scope, lack of transparency, and over-penalization.

The paper discusses two implications of personalized law reform: the redistribution of power toward administrative bodies—which necessitates a rebalancing of powers to avoid abuse and protect individual rights—and the possible expansion of the law's functions—which might not align with existing normative theories and might have unintended consequences. The process of personalization requires scholars and policymakers to adapt and refine these theories as well as to identify and eliminate unintended consequences.

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Introduction

In the digital age, the increasing prominence of data is reshaping diverse fields beyond the realm of technology, influencing commercial practices and the foundations of governance.[1] In the legal sector, this shift is evident as governments employ data to enhance the operation of their legal systems.[2] The response to the COVID-19 pandemic exemplified the pivotal role of data, where law enforcement strategies informed by real-time data were instrumental in addressing public health challenges.[3] Such scenarios illustrate the burgeoning trend of integrating data analytics into legal and governance frameworks,[4] establishing data-driven laws as an imminent reality.[5] China's adoption of the Social Credit System (SCS) within its

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[1] *See generally* Dan L. Burk, *Algorithmic Fair Use*, 86 U. Chi. L. Rev. 283, 283 (2019) ("Legal governance and regulation are becoming increasingly reliant on data collection and algorithmic data processing."); Niva Elkin-Koren & Michal S. Gal, *The Chilling of Governance-by-Data on Data Markets*, 86 U. Chi. L. Rev. 403, 404 (2019) (noting that Big Data has emerged as a crucial resource in both commercial and legal domains, significantly influencing governance by shaping enforcement priorities, altering evidentiary methods, and even transforming legal norms); Cary Coglianese, *Moving Toward Personalized Law* 2 (Univ. of Pa. L. Sch., Public L. Rsch. Paper No. 22, 2022) (noting that advancements in predictive analytics tools, such as machine learning and artificial intelligence, are enabling more accurate and personalized decision-making in various fields).

[2] *See* Coglianese, *supra* note 1, at 11 (suggesting that governments are progressively digitizing their functions and sometimes utilizing algorithms to aid in both adjudicatory and administrative functions, while some countries have given priority to the process of digitizing and automating various government operations); Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 Wash. L. Rev. 35, 36 (2014) (highlighting Big Data's impact on government's function in various fields, including public health, transportation, and policing).

[3] *See generally* Nahla Khamis Ibrahim, *Epidemiologic Surveillance for Controlling Covid-19 Pandemic: Types, Challenges and Implications*, 13 J. Infection & Pub. Health 1630, *passim* (2020).

[4] *See, e.g.*, Lina Dencik et al., *The 'Golden View': Data-Driven Governance in the Scoring Society*, 8 Internet Pol'y Rev. 1, 1–2 (2019) (noting the increasing use of data analytics in public services and governance in UK); Sofia Ranchordás & Abram Klop, *Data-Driven Regulation and Governance in Smart Cities* 17 (Univ. of Groningen Faculty of L., Rsch. Paper No. 7, 2018) (noting that cities like Moscow, Los Angeles, Chicago, and New Orleans are increasingly using data analytics, including spatio-temporal data and social network analysis, for public safety and crime prevention); Isabel Debre, *At Dubai Airport, Travelers' Eyes Become Their Passports*, AP News (Mar. 8, 2021, 11:56 AM), https://apnews.com/article/dubai-airport-iris-scanner-verify-identity-4c8f2fb1f62df394e29e8365b3bd105e [https://perma.cc/X2YB-X5AT] (noting that Dubai's airport has introduced an iris-scanning system that integrates with the country's facial recognition databases, allowing passengers to bypass traditional travel document checks, amidst concerns about privacy and the expansion of surveillance technology in the UAE).

[5] Larry Catá Backer, *Next Generation Law: Data-Driven Governance and Accountability-Based Regulatory Systems in the West, and Social Credit Regimes in China*, 28 S. Cal. Interdisc. L.J. 123, 126 (2018) (noting that the rule of law is evolving towards data-driven systems, where compliance by

legal framework, utilizing social credit data for dynamic insights into behaviors,[6] marks a significant stride in this global movement.

The broader applications of China's SCS and its data-driven paradigm have increasingly gained scholarly attention.[7] However, a specific and critical area remains less explored: the integration of the SCS within patent law, particularly through the implementation of two key mechanisms—the Reward and Punishment Mechanism[8] and the Tiered Regulation Mechanism.[9] Introduced through the State

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individuals and enterprises is monitored and regulated by authorities making constrained decisions for the public interest).

[6] *See generally* Yongxi Chen & Anne S. Y. Cheung, *The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System Special Issue: Transparency Challenges Facing China*, 12 J. Comp. L. 356, 377 (2017); Daithí Mac Síthigh & Mathias Siems, *The Chinese Social Credit System: A Model for Other Countries?*, 82 Mod. L. Rev. 1034, 1034 (2019); Sheng Zou, *Disenchanting Trust: Instrumental Reason, Algorithmic Governance, and China's Emerging Social Credit System*, 9 Media & Commc'n 140, 140 (2021).

[7] *See, e.g.*, Chen & Cheung, *supra* note 6, at 356; Anne S. Y. Cheung & Yongxi Chen, *From Datafication to Data State: Making Sense of China's Social Credit System and Its Implications*, 47 L. & Soc. Inquiry 1137, 1137 (2022); Yu-Jie Chen, Ching-Fu Lin & Han-Wei Liu, *Rule of Trust: The Power and Perils of China's Social Credit Megaproject*, 32 Colum. J. Asian L. 1, 4 (2018); Rui Hou & Diana Fu, *Sorting Citizens: Governing via China's Social Credit System*, 37 Governance 59, 59 (2022); Fan Liang & Yuchen Chen, *The Making of "Good" Citizens: China's Social Credit Systems and Infrastructures of Social Quantification*, 14 Pol'y & Internet 114, 114 (2022); Síthigh & Siems, *supra* note 6, at 1034; Rogier Creemers, *Disrupting the Chinese State: New Actors and New Factors*, U. Leiden 1, 1 (May 24, 2016), https://papers.ssrn.com/abstract=2978880 [https://perma.cc/47E7-93W9]; Rogier Creemers, *China's Social Credit System: An Evolving Practice of Control*, U. Leiden 1, 1 (May 22, 2018) [hereinafter Creemers, *China's Social Credit System*], https://www.ssrn.com/abstract=3175792 [https://perma.cc/2MEZ-S7BR].

[8] Zhi Shi Chan Quan Xin Yong Guan Li Gui Ding de Tong Zhi (知识产权信用管理规定》的通知) [Provisions on the Administration of Intellectual Property Credit] (promulgated by the St. Intell. Prop. Admin., Jan. 24, 2022, effective Jan. 24, 2022) [hereinafter Credit Management Regulations], CLI.4.5113906(EN) (Lawinfochina); Shichang Jiandu Guanli Yanzhong Weifa Shixin Mingdan Guanli Banfa (市场监督管理严重违法失信名单管理办法) [Management Methods for the Serious Illegal and Untrustworthy Entities List] (promulgated by the St. Admin. for Mkt. Regul., July 30, 2021, effective Sept. 1, 2021) [hereinafter Untrustworthy Entities Management Methods], CLI.4.5054683(EN) (Lawinfochina). *See also infra* Appendix Table 1. While the specific title "Reward and Punishment Mechanism" is not directly mentioned in the cited legal documents, I've used this term to effectively encapsulate the functionalities of the described regulations in a way that is understandable for an international readership unfamiliar with the intricate details of China's legal reforms.

[9] Zhuanli Daili Xinyong Pingjia Guanli Banfa (Shixing) (专利代理信用评价管理办法（试行)) [Patent Agency Credit Evaluation Measures (Trial)] (promulgated by the St. Intell. Prop. Admin., Mar. 31, 2023, effective May 1, 2023) [hereinafter Credit Evaluation Measures], CLI.4.5163809(EN) (Lawinfochina). *See also infra* Appendix Table 2. The State Intellectual Property Administration carries out the Credit Evaluation Measures regulation through the Tiered Regulation Mechanism. While the specific title "Tiered Regulation Mechanism" is not directly mentioned in the cited legal documents, I've used this term to effectively

Council's 2014 initiative for "credit construction in intellectual property," these mechanisms represent a pioneering approach to melding social credit data with the operation of the patent system.[10] This strategic integration of the Reward and Punishment Mechanism and the Tiered Regulation Mechanism, crystallized in the 2019 *Regulation on Management of the List of Joint Punishments for Seriously Untrustworthy Entities in the Patent Field (Trial)*, reflects China's commitment to enhancing intellectual property laws and curbing infringement using data-driven methods.[11] Studying this integration is crucial, as it exemplifies the evolution of a legal regime of property into a data-driven domain, offering a distinctive example of how legal systems can be transformed through the application of data analysis.

Existing literature primarily oscillates between portraying the SCS as a tool for state surveillance and as a model for reputation-based regulation.[12] However, these interpretations do not fully capture the essence of the Reward and Punishment

encapsulate the functionalities of the described regulations in a way that is understandable for an international readership unfamiliar with the intricate details of China's legal reforms.

[10] Shehui Xinyong Tixi Jianshe Guihua Gangyao (2014-2020 Nian) (社会信用体系建设规划纲要(2014–2020年)) [Outline of the Plan for the Construction of the Social Credit System (2014-2020)] (promulgated by the St. Council, June 14, 2014, effective June 14, 2014) [hereinafter Outline of Social Credit System Construction], https://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm [https://perma.cc/5BNP-HP8T] ("Establish and improve the intellectual property integrity management system and introduce credit evaluation methods for intellectual property protection. . . . Carry out credit building for intellectual property service institutions and explore the establishment of various types of intellectual property service standardization systems and integrity evaluation systems.").

[11] Zhuanli Lingyu Yanzhong Shixin Lianhe Chengjie Duixiang Mingdan Guanli Banfa (Shixing) (专利领域严重失信联合惩戒对象名单管理办法（试行)) [Regulation on Management of the List of Joint Punishments for Seriously Untrustworthy Entities in the Patent Field (Trial)] (promulgated by the St. Intell. Prop. Admin., Oct. 16, 2019, effective Dec. 1, 2019), CLI.4.336686(EN) (Lawinfochina). The phrase "enhancing intellectual property laws" in this context refers specifically to the enhancement of the efficacy of these laws. This is achieved through the alignment of the laws' operational mechanisms more closely with their fundamental objectives, which are to protect intellectual property rights and deter infringement, thereby fostering innovation.

[12] *Compare* Fan Liang et al., *Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure*, 10 Pol'y & Internet 415, 416 (2018) (describing SCS as a state surveillance tool), *and* Nicholas Loubere & Stefan Brehm, *The Global Age of the Algorithm: Social Credit, Xinjiang, and the Financialisation of Governance in China*, *in* Xinjiang Year Zero 175, 181 (Darren Byler, Ivan Franceschini & Nicholas Loubere eds., 2022) (describing SCS as a state surveillance tool), *with* Xin Dai, *Toward a Reputation State: A Comprehensive View of China's Social Credit System Project*, *in* Social Credit Rating: Reputation und Vertrauen beurteilen 139, 139 (Oliver Everling ed., 2020) (describing SCS as a reputation-based regulatory tool), *and* Síthigh & Siems, *supra* note 6, at 1048 (describing SCS as a reputation-based regulatory tool).

Mechanism and Tiered Regulation Mechanism within the realm of patent law. Scholars like Nicholas Loubere, Stefan Brehm,[13] and Fan Liang[14] depict the SCS as surveillance infrastructure, integral to state control and the maintenance of stability. This narrative, which Lauren Yu-Hsin Lin and Curtis J. Milhaupt developed further under the concept of "surveillance state capitalism," regards the SCS as a tool for monitoring and controlling economic actors, enhancing corporate compliance, and aligning market behavior with the political objectives of the Chinese Communist Party.[15] Anne S.Y. Cheung and Yongxi Chen have further developed this perspective, portraying the SCS as a mechanism that could transform China into a "data state."[16] In this data state, the government would use data collection and data-driven methods extensively to monitor, assess, and regulate the behavior of its citizens.[17] Scholars holding this view generally believe that the integration of SCS with the legal system is likely to have undesirable consequences, including curtailing individual autonomy,[18] infringing on human rights,[19] and undermining the principles of the rule of law.[20]

However, framing the SCS solely as an instrument for consolidating state power does not reflect its actual application and impact. While there are legitimate concerns surrounding privacy and security risks associated with the SCS, Xin Dai suggests that focusing exclusively on these aspects may overlook the system's potential to advance China's regulatory regimes.[21] The alignment of the SCS with policies like "streamlining administration, delegating powers, and improving services"[22] indicates a move away from stringent governmental oversight, as

[13] Loubere & Brehm, *supra* note 12, at 181.

[14] Liang et al., *supra* note 12, at 416.

[15] Lauren Yu-Hsin Lin & Curtis J. Milhaupt, *China's Corporate Social Credit System: The Dawn of Surveillance State Capitalism?*, 256 CHINA Q. 835, 838–40 (2023).

[16] Cheung & Chen, *supra* note 7, at 1157.

[17] Cheung & Chen, *supra* note 7, at 1157.

[18] *See, e.g.*, Cheung & Chen, *supra* note 7, at 1137–38.

[19] *See, e.g.*, Chen, Lin & Liu, *supra* note 7, at 5.

[20] *See, e.g.*, Marianne von Blomberg, *The Social Credit System and China's Rule of Law*, 2 MAPPING CHINA J. 77, 80 (2018); Shen Kui (沈岿), *Shehui Xinyong Tixi Jianshe De Fazhi Zhi Dao* (社会信用体系建设的法治之道) [*The Approach Consistent with the Rule of Law to Constructing the Social Credit System*], 5 ZHONGGUO FAXUE [CHINA L. SCI.] 25, 26 (2019).

[21] *See, e.g.*, Dai, *supra* note 12, at 139.

[22] Guowuyuan Bangongting Guanyu Yunyong Dajushujiaqiang Dui Shichang Zhuti Fuwu He Jianguan De Ruogan Yijian (国务院办公厅关于运用大数据加强对市场主体服务和监管的若干意见) [Several Opinions of the General Office of the State Council on Strengthening the Service and Supervision of

evidenced by reduced state oversight in certain domains.[23] This contradicts the concerns about heightened control. Furthermore, a national survey showing over 80% of China's connected population engaging with the SCS and acknowledging its positive role in promoting accountability, regulations adherence, and quality of life,[24] suggests that the perceptions of the SCS are varied and may be influenced by its integration into various facets of governance, likely including those that streamline and improve administrative services.

Dai's alternative perspective views the integration of SCS into the legal system as the introduction of a reputation-based regulatory model that relies on social credit data. In this context, the SCS employs mechanisms like blacklisting and scoring in response to a range of governance issues, from market deception to government misconduct.[25] While these mechanisms might resemble aspects of state surveillance, the primary focus of a reputation-based state is on encouraging compliance and self-discipline through reputational incentives, rather than on pervasive monitoring and control. Echoing this view, Daithí Mac Síthigh and Mathias Siems note that the SCS has facilitated China's transition from a

Market Entities by Utilizing Big Data] (promulgated by the Gen. Off. of the St. Council, June 24, 2015), CLI.2.250479(EN) (Lawinfochina).

[23] *See, e.g.*, Guanyu Jin Yi Bu Shen Hua Shuiwu Lingyu "Fang Guan Fu" Gaige Peiyu He Jifa Shichang Zhuti Huoli Ruogan Cuoshi De Tongzhi (关于进一步深化税务领域"放管服"改革培育和激发市场主体活力若干措施的通知) [Notice on Further Measures to Further Deepen the Reform of "Delegating Power, Delegating Regulation and Services" in the Taxation Field and Cultivating and Stimulating the Vitality of Market Entities] (promulgated by the St. Tax'n Admin., Oct. 12, 2021, effective Oct. 12, 2021), CLI.4.5078142(EN) (Lawinfochina) (emphasizing the reduction of items, processes, and materials that relate to regulation, further unburdening and energizing market entities); Wang Ke, *"Streamlining Administration, Delegating Power, and Improving Services" Unleashes New Dividends*, People's Daily, May 11, 2017, https://www.gov.cn/xinwen/2017-05/11/content_5192748.htm [https://perma.cc/X2FN-GXUH] (pointing out that the implementation of the "Streamlining Administration, Delegating Power, and Improving Services" policy has led to the cancellation of 323 administrative approval intermediary services under State Council departments and a cumulative reduction of nearly 90% in the proportion of enterprise investment projects approved at the central government level).

[24] The data indicating a high level of approval, particularly among the wealthier and more educated segments, suggests that many see benefits in the system. However, my intention in citing these statistics is not to challenge the prevalent negative view on the SCS and emphasize the importance of a technical analysis of the system. Genia Kostka, *China's Social Credit Systems and Public Opinion: Explaining High Levels of Approval*, 21 New Media & Soc'y 1565, 1570, 1585 (2019).

[25] Dai, *supra* note 12, at 140.

"reputation society" to a "reputation state."[26] This perspective effectively captures the integration of the SCS with legal frameworks.

However, focusing solely on the reputation aspect does not adequately capture the entire spectrum of the SCS's implications for patent law. The Reward and Punishment Mechanism and the Tiered Regulation Mechanism extend beyond reputational impact to substantive economic consequences such as limiting access to finance and constraining operational activities.[27] Cheung and Chen observe that the concept of "credit" in this context is becoming increasingly complex.[28] The SCS employs a broad range of data, moving away from a strict association with individual or corporate reputation and toward a broader set of attributes and behaviors.[29] This evolution in the scope and application of data calls for a more comprehensive analytical framework through which to understand the integration of the SCS with patent law.[30]

This paper proposes that we can understand the integration of social credit data in China's patent law more comprehensively through the concept of "personalized law" that Omri Ben-Shahar and Ariel Porat have developed.[31] Personalized law systems tailor legal rules to individual circumstances rather than applying uniform rules in every case.[32] Although theoretical discussion of

[26] Síthigh & Siems, *supra* note 6, at 1048.

[27] *See infra* Part II.B.2, C.2; *see also* Cheung & Chen, *supra* note 7, at 1146–50 (documenting reward and punishment measures that cause impact beyond reputational).

[28] Cheung & Chen, *supra* note 7, at 1152.

[29] Cheung & Chen, *supra* note 7, at 1152; *see also* Outline of Social Credit System Construction, *supra* note 10 (indicating that the SCS employs a broad range of data, moving away from a strict association with individual or corporate reputation and toward a broader set of attributes and behaviors, such as complying with legal and contractual obligations, fulfilling economic and social responsibilities, and even contributing to public welfare and charity work).

[30] Rogier Creemers has noted that the SCS should not be viewed as a monolithic structure, but rather as a cluster of varied initiatives sharing common goals and methodologies. This paper acknowledges the validity of other scholars' insights into the essence of the SCS, particularly related to its integration with other legal sectors. However, it posits that these insights may not be directly applicable to the unique amalgamation of the patent system with the SCS, an area hitherto unexplored in academic research. *See* Creemers, *China's Social Credit System*, *supra* note 7, at 25.

[31] Omri Ben-Shahar & Ariel Porat, *Personalized Law: Different Rules for Different People passim* (2021).

[32] *See* Omri Ben-Shahar & Ariel Porat, *How to Evaluate Personalized Law*, U. Chi. L. Rev. Online, Mar. 9, 2022, at 4 ("Personalized law would reinvent disclosures, warnings, and food labels with different bits of

personalized law spans a range of legal domains, from traffic regulations[33] to consumer protection,[34] there has been little practical implementation.[35] This paper suggests that the integration of the patent system with the SCS is an example of this concept, and that it marks a significant step toward the application of personalized law.[36] Viewing the Reward and Punishment Mechanism and the Tiered Regulation Mechanism as forms of personalized law not only enriches our understanding of the nuanced interplay between social credit data and the patent system, but also highlights the potential of personalized law to transform legal systems in a technologically advanced and contextually relevant manner.[37]

Part I of this paper delves into the practical challenges confronting China's patent law and theoretical underpinnings of its integration with the SCS. There are two primary obstacles impeding the effectiveness of the patent system in promoting innovation: the rise of speculative patent applications and the inadequacy of the system's remedies for infringement.[38] The Reward and Punishment Mechanism and the Tiered Regulation Mechanism address these challenges by allowing the patent system to incorporate social credit data strategically. Through the use of social credit data, these mechanisms personalize the rules of the patent system, aligning operations more closely with its function of incentivizing genuine innovation and effective knowledge dissemination, thereby mitigating the limitations of the traditional, one-size-fits-all approach.[39] Presently, this model exemplifies the crude personalization phase of personalized law as outlined by Ben-Shahar and Porat, which involves forming "discrete buckets of treatment" based on

information electronically delivered to people at the point of decision."). *See generally* Sandra G. Mayson, *But What Is Personalized Law*, U. Chi. L. Rev. Online, Mar. 9, 2022, at 2 (2022).

[33] Horst Eidenmuller, *Why Personalized Law?*, U. Chi. L. Rev. Online, Mar. 7, 2022, at 8.

[34] Ben-Shahar & Porat, *supra* note 31, at 71; Mayson, *supra* note 32, at 1.

[35] Ben-Shahar & Porat, *supra* note 31, at 2 ("[T]he overwhelming landscape of legal tailoring is not personalized."); Gregory Klass, *Tailoring Ex Machina: Perspectives on Personalized Law*, U. Chi. L. Rev. Online, Mar. 7, 2022, at 1 (suggesting that personalized law is "a type of law that does not today exist"); H. Javier Kordi, *Personalized Enfranchisement*, 2022 U. Chi. L. Rev. Online, Mar. 7, 2022, at 9 ("The story of Personalized Law might remain a tale of science fiction for some time.").

[36] *Infra* Part II.

[37] *See infra* Part I.B, Part IID.2.

[38] *See infra* Part I.A.

[39] *See infra* Part I.B.

individual characteristics and applying these treatments accordingly, moving away from a uniform approach to more nuanced and individualized legal applications.[40]

In Part II, this paper presents a comprehensive analysis of the Reward and Punishment Mechanism and the Tiered Regulation Mechanism of China's patent system, utilizing a novel analytical framework derived from personalized law literature. This framework—comprised of profiling rules, personalized rules, communication rules, and adjustment rules—serves as a tool for dissecting and understanding these mechanisms as forms of crude personalized law.[41] Applying this framework, this paper highlights the mechanisms' intricacies and implications, demonstrating that they function as manifestations of personalized law, and evaluating their effectiveness and challenges.[42]

Part III of this paper explores the profound implications of personalizing patent law with social credit data. This section describes how personalized law shifts the balance of power within the state, enhancing the role of administrative bodies.[43] It discusses the need for enhanced legislative, judicial, and public engagement mechanisms to balance this shift.[44] Additionally, Part III examines how personalized law can expand the functions of patent law—from fostering innovation to promoting a compliant and disciplined market environment.[45] This functional expansion highlights the need for reevaluation of existing legal theories and normative justifications of patent law, as well as for meticulous appraisal of the resultant societal impacts, emphasizing the necessity of academic engagement to provide robust descriptive and normative frameworks for the evaluation of legal functions in an age of personalized law.[46]

This paper contributes to the literature in three significant ways. First, it provides an alternative—and potentially more fitting—theoretical perspective on the current integration of social credit data in China's patent law. This perspective is crucial, as it enhances our understanding of how law is changing in the context

[40] BEN-SHAHAR & PORAT, *supra* note 32, at 5–6.
[41] BEN-SHAHAR & PORAT, *supra* note 32, at 5–6.
[42] *Infra* Part II.B, C, D.
[43] *Infra* Part III.A.
[44] *Infra* Part III.A.
[45] *Infra* Part III.B.
[46] *See Infra* Part III.B.

of advanced data systems and digital governance.[47] Moreover, on a practical level, the analysis of personalized patent law not only aids domestic entities in China but also provides valuable insights for enterprises operating in the Chinese market from foreign countries, including the United States.[48] Second, the paper provides an example of personalized law in practice. This is particularly noteworthy as the field of personalized law lacks substantial real-world applications.[49] This, then, is a valuable case study, which sheds light on the potential effects of personalized law, particularly on the distribution of powers and the expanding roles and objectives of legal systems. Third, this paper pioneers an analytical framework that advances the understanding of personalized law. The novelty of this framework lies in its application to the "crude" stage of personalized law, which has not yet engaged with Big Data and algorithms. This framework would assist scholars and practitioners in comprehending the operations and impacts of personalized law during its developmental phase or as it transitions to more advanced stages.

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[47] Zou, *supra* note 6, at 140 (suggesting that SCS should be understood within a global context of algorithmic governance).

[48] The U.S. and other developed nations have long criticized the Chinese government for not providing adequate protection for foreign enterprises within China. *See, e.g.*, Nan Lan, *Why Tariffs against China Are Ineffective for Intellectual Property Protection*, 11 AM. U. INTELL. PROP. BRIEF 17, 19 (2020) (noting that the "trade war" between the United States and China that started in 2016 involves tariffs imposed by both nations, with one of the U.S.'s major reasons being the protection of intellectual property); Mark Liang, *A Three-Pronged Approach: How the United States Can Use WTO Disclosure Requirements to Curb Intellectual Property Infringement in China*, 11 CHI. J. INT'L L. 285, 287 (2010) (noting that the prevalence of intellectual property infringement in China results in significant financial losses for key U.S. industries and contributes to the U.S.–China trade deficit, while also posing substantial risks for U.S. companies doing business in China); Mirjam Meissner, *China's Social Credit System: A Big-Data Enabled Approach to Market Regulation with Broad Implications for Doing Business in China*, MERICS (May 24, 2017), https://www.chinafile.com/library/reports/chinas-social-credit-system-big-data-enabled-approach-market-regulation-broad [https://perma.cc/D767-CBM9] (noting SCS's potential to enhance China's economic regulatory capabilities and the resulting effect on domestic and foreign business compliance practices).

[49] *See* Ben-Shahar & Porat, *supra* note 32, at 2 ("But the overwhelming landscape of legal tailoring is not personalized."); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1418 (2013) ("Law is impersonal. The state generally does not tailor the contents of the law to people's characteristics and traits.").

I
Toward Personalized Patent Law

A. Patent Law Faces Two Challenges

The patent system seeks to promote innovation.[50] It does this in two ways. First, it awards inventors exclusive rights to their discoveries.[51] This exclusivity gives them the ability to derive financial rewards from their inventions.[52] Having exclusive rights allows creators to demand substantially greater prices for their products than would be feasible in a competitive marketplace,[53] which encourages creators to invent.[54] Second, rooted in the disclosure theory,[55] it makes the inventions' technical information accessible to the public.[56] With the details

[50] *See generally* Daniel J. Hemel & Lisa Larrimore Ouellette, *Innovation Policy Pluralism*, 128 Yale L.J. 544, 547 (2019) ("From the perspective of the inventor or creator, IP is an innovation incentive. . . . ").

[51] *See generally* Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. Chi. L. Rev. 129, 131 (2004).

[52] *See generally* William Fisher, *Theories of Intellectual Property*, *in* New Essays in The Legal and Political Theory of Property 168, 173 (Stephen R. Munzer ed., 2001) ("References to the role of intellectual-property rights in stimulating the production of socially valuable works riddle American law. Thus, for example, the constitutional provision upon which the copyright and patent statutes rest indicates that the purpose of those laws is to provide incentives for creative intellectual efforts that will benefit the society at large."); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 Va. L. Rev. 1745, 1746 (2012) ("According to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with just enough incentive to create artistic, scientific, and technological works of value to society by preventing certain would-be copiers' free-riding behavior.").

[53] *See generally* Fisher, *supra* note 52, at 169 ("Pursuit of that end in the context of intellectual property, it is generally thought, requires lawmakers to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.").

[54] *E.g.*, Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. St. People's Cong., Oct. 17, 2020, effective June 1, 2021), 2020(5) Standing Comm. St. People's Cong. Gaz. 713 [hereinafter Patent Law], art. 1 ("This Law is enacted to protect the lawful rights and interests of patentees, to encourage invention-creation. . . . "); *see also* Hemel & Ouellette, *supra* note 50, at 547.

[55] *See* Brenner v. Manson, 383 U.S. 519, 533 (1966) ("[O]ne of the purposes of the patent system is to encourage dissemination of information concerning discoveries and inventions."); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 151 (1989) ("[T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure."); *see also* Lisa Larrimore Ouellette, *Do Patents Disclose Useful Information*, 25 Harv. J.L. & Tech. 545, 554–57 (2012).

[56] Patent Law, *supra* note 54, art. 1 ("This Law is enacted . . . to promote the exploitation of invention-creation, to enhance innovation capability, and to promote the advancement of science and technology and the development of economy and society.").

of patented inventions, the public can enhance, modify, or freely employ these inventions after the patents expire.[57]

China's patent system faces two significant challenges in fulfilling its incentive and disclosure functions. The first arises from the prevalence of speculative patent applications.[58] These speculative patent applications, often of low technical quality, stem not from a genuine need for innovation protection but rather from the desire to exploit the exclusivity of patent rights for profit.[59] Patent agencies and attorneys who, motivated by financial gains—including government subsidies for application fees—encourage and support the submission of these low-quality patents exacerbate the problem.[60] Such opportunistic behavior has led to an influx of inferior patents into the system, creating a "patent bubble."[61]

These speculative applications, along with the complicit actions of the patent agencies and attorneys, obstruct the objective of patent law—promoting innovation. Patents derived from speculative applications fail to serve the system's

[57] *See generally* Mark A. Lemley, *Economics of Improvement in Intellectual Property Law*, 75 Tex. L. Rev. 989, 1083–84 (1996–1997) (describing that the justification of intellectual property law includes potential improvements to existing works).

[58] Yang Liu (杨柳), *Guojia Zhishichanquan Ju Qunian, Yanli Daji Fei Zhengchang Zhuanli Shenqing He Shangbiao Eyi Qiangzhu Xingwei* (国家知识产权局去年严厉打击非正常专利申请和商标恶意抢注行为) [*Last Year, the National Intellectual Property Office Cracked Down on Abnormal Patent Applications and Malicious Trademark Registration Activities*], Zhishi Chanquan Bao [Intell. Prop. News], (Jan. 26, 2022), https://www.cnipa.gov.cn/art/2022/1/26/art_53_172926.html [https://perma.cc/3F96-LKBN]; Xu Buyi (徐卜一), Jin Peng (金鹏) & Zhu Yudi (朱雨迪), *Feizhengchang Zhuanli Shenqing de Shibie Biaozhun yu Cailiang Tantao* (非正常专利申请的识别标准与裁量探讨) [*Standards for Identification and Discretionary Discussion of Abnormal Patent Applications*], 2023(07) Zhonguo Faming Yu Zhuanli [China Invention & Pat.] 25, *passim* (highlighting both the volume and speculative nature of many patent filings in China).

[59] *See* Liu, *supra* note 58.

[60] *See* Guojia Zhishi Chanquan Ju Guanyu Chixu Shenhua Zhishi Chanquan Dai Li Hangye "Lantian" Zhuanxiang Zhengzhi Xingdong De Tongzhi (国家知识产权局关于持续深化知识产权代理行业"蓝天"专项整治行动的通知) [Notice of the State Intellectual Property Office on Continuing to Deepen the "Blue Sky" Special Rectification Action for the Intellectual Property Agency Industry] (promulgated by the St. Intell. Prop. Admin., Mar. 31, 2022, effective Mar. 31, 2022), https://www.cnipa.gov.cn/art/2022/3/31/art_75_174340.html [https://perma.cc/FV3A-9M8Z] (noting that the State Intellectual Property Administration of China has adopted measures to intensify scrutiny and regulation of patent agencies and attorneys who, driven by financial incentives such as government subsidies, contribute to the proliferation of low-quality patent applications).

[61] Shen Yu (申宇), Huang Hao (黄昊) & Zhao Lin (赵玲), *Difang Zhengfu "Chuangxin Chongbai" Yu Qiye Zhuanli Paomo* (地方政府"创新崇拜"与企业专利泡沫) [*Local Government "Cult of Innovation" and Corporate Patent Bubble*], 39(4) Keyan Huanli [Sci. Rsch. Mgmt.] 83, 89–90 (2018).

intended purpose of protecting the interests of genuine creators. Instead, they are often used as tools to improperly obtain financial benefits, such as government subsidies or tax breaks, without contributing to actual innovation.[62] Moreover, they consume valuable examination resources, leading to longer processing times for substantial and innovative patent applications and potentially hindering true innovators from receiving timely rewards.[63] The proliferation of low-quality patents also impedes researchers and businesses in their technological research searches, which undercuts the patent system's goal of disseminating knowledge.[64]

The second challenge pertains to the inadequacy of remedies for patent infringement.[65] Patent holders in China often experience extended delays before receiving court judgments, particularly in cases involving foreign parties.[66] Zhang Chenguo's empirical research shows these cases take an average of 11.7 months, with some extending to 63.3 months, far exceeding the statutory six-month limit.[67] In infringement cases, rights holders struggle to gather sufficient evidence,[68]

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[62] *See Pop Patent Bubble to Promote Innovation*, CHINA DAILY (Apr. 27, 2021), http://www.chinadaily.com.cn/a/202104/27/WS60874b8aa31024ad0baba897.html [https://perma.cc/Q3SL-FWPG] (noting that the exploitation of patent incentives—like tax reductions, commutation of sentences for criminals, and favorable treatment for higher education—through speculative applications has led to a surge in low-quality patents).

[63] *See* Tang Daisheng (唐代盛), Fei Zhengchang Zhuanli Shenqing Xingwei Falu Guizhi Xianzhuang, Fansi Yu Chonggou (非正常专利申请行为法律规制现状、反思与重构) [*Current Status, Reflection and Reconstruction of Legal Regulation of Abnormal Patent Application Behavior*], 36(22) KEJI JINBU YU DUICE [SCI. & TECH. PROGRESS AND POL'Y] 112, 112 (2019).

[64] *Id.*

[65] *See, e.g.*, Jiang Huasheng (蒋华胜) & Yang Lan (杨岚), *Minying Qiye Zhishi Chanquan Sifa Baohu Ruogan Wenti (Shang)——Jiyu Guangzhou Zhishi Chanquan Fayuan De Shizheng Shuju Fenxi Wei Shijiao* (民营企业知识产权司法保护若干问题(上)——基于广州知识产权法院的实证数据分析为视角) [*Several Issues of Judicial Protection of Intellectual Property in Private Enterprises (Part I) — An Empirical Data Analysis Perspective Based on the Guangzhou Intellectual Property Court*], 10 DIANZI ZHISHI CHANQUAN [ELEC. INTELL. PROP.] 69, 70 (2017) (conducting empirical research on intellectual property litigation and pointing out the issue of low compensation).

[66] *See* Zhang Chenguo (张陈果), *Zhuanli Susong "Quanli Jiujie Shixiao" de Shizheng Fenxi—Jian Ping Zhongguo Zhuanli Fa Xiuding De Chengxiao Yu Weilai* (专利诉讼"权利救济实效"的实证分析——兼评中国专利法修订的成效与未来) [*Empirical Analysis of the "Effectiveness of Rights Relief" in Patent Litigation – Commentary on the Effectiveness and Future of the Amendment to China's Patent Law*], 2 DANGDAI FAXUE [CONTEMP. JURIS.] 81, 87–88 (2017).

[67] *Id.*

[68] *Id.* at 92; Zhan Ying (詹映) & Zhang Hong (张弘), *Woguo Zhishi Chanquan Qinquan Sifa Panli Shizheng Yanjiu—Yi Weiquan Chengben He Qinquan Daijia Wei Zhongxin* (我国知识产权侵权司法判例实证研究——以维权成本和侵权代价为中心) [*Empirical Study on Judicial Precedents of Intellectual*

and courts often award damages that are significantly lower than claimed.[69] For instance, in the city of Nanjing, courts typically award only about 40.7% of the claimed damages.[70] Enforcement of judgments also presents challenges,[71] exacerbating the issue of insufficient remedies. Between 2008 and 2012, over 70% of judgment debtors in national courts attempted to evade, avoid, or even violently resist enforcement.[72] This judicial inefficiency encourages opportunistic and repeated infringements. Insufficient compensation and frequent infringements both diminish innovators' incentives for innovation and discourage them from disclosing their technology through patents.

B. Personalization of Patent Law as a Solution

To address the challenges of speculative patent applications and inadequate remedies for patent infringement, the Chinese government introduced two mechanisms into its patent law: the Reward and Punishment Mechanism and the Tiered Regulation Mechanism, both of which rely on social credit data. This paper posits that these mechanisms reflect an overarching strategy to personalize the rules in the legal system, aligning its operation more closely with its objectives. In the context of patent law, this means tailoring the rules in the patent system to improve

Property Infringement in China—Focused on the Cost of Rights Protection and Infringement], 7 KEYAN GUANLI [SCI. RSCH. MGMT.] 145, 152 (2015).

[69] Wang Guozhu (王国柱), *Zhishi Chanquan "Yan Ge Bao Hu" Sifa Zhengce De Fali Jie Xi——Bianjie, Qiangdu, Shouduan, Xiaoguo De Siwei Shijiao* (知识产权"严格保护"司法政策的法理解析——边界、强度、手段、效果的四维视角) [*Legal Analysis of the "Strict Protection" Judicial Policy of Intellectual Property Rights — A Four-Dimensional Perspective of Boundaries, Intensity, Means, and Effects*], 52 HUADONG SHIFAN DAXUE XUEBAO: ZHEXUE SHEHUI KEXUE BAN [J. E. CHINA NORMAL UNIV.: PHIL. & SOC. SCIS.] 107, 111 (2020).

[70] *Id*.

[71] *Cf*. Zuigao Renmin Fayuan Guanyu Luoshi "Yong Liang Dao San Nian Shijian Jiben Jiejue Zhixing Nan Wenti" De Gongzuo Gangyao (最高人民法院关于落实"用两到三年时间基本解决执行难问题"的工作纲要) [Work Outline of the Supreme People's Court on Implementing the "Resolution of the Difficulties in Execution within Two to Three Years"] (promulgated by the Supreme People's Court, May 11, 2016, effective May 11, 2016), http://www.kxrmfy.gov.cn/bencandy.php?fid=37&id=1091 [https://perma.cc/GDW9-QBS9].

[72] Yi Jiming (易继明), *Wo Guo Zhishi Chanquan Sifa Baohu de Xianzhuang He Fangxiang* (我国知识产权司法保护的现状和方向) [*The Current Situation and Direction of Intellectual Property Judicial Protection in China*], 5 XIBEI DAXUE XUEBAO: ZHEXUE SHEHUI KEXUE BAN [J. NW. UNIV.: PHIL. & SOC. SCIS.] 50, 54 (2018).

its fostering of innovation and dissemination of knowledge,[73] or at least to correct the system where it currently deviates from these objectives.

Personalization enhances the precision of legal rules by tailoring them to individual circumstances, characteristics, or behaviors,[74] as opposed to applying one-size-fits-all rules. Advocates of personalized law argue that uniform rules might be "good on average" but they often do not adequately cater to entities with diverse traits,[75] as they are potentially both "over- and under-inclusive."[76]

In theory, personalized law can apply to a broad range of legal domains, such as traffic regulations,[77] negligence,[78] criminal procedure,[79] contracts,[80] copyrights,[81] consumer protection,[82] data privacy,[83] and pre-commitments.[84] A ubiquitous example in academic discussions is personalized traffic regulations, where speed limits are customized based on the distinct characteristics of each

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[73] *Cf.* Adi Libson & Gideon Parchomovsky, *Toward the Personalization of Copyright Law*, 86 U. Chi. L. Rev. 527, 549–50 (2019) (advocating for a personalized copyright regime, utilizing Big Data to tailor penalties for copyright infringement based on the likelihood of individuals to purchase copyrighted content, arguing that this approach would enhance social welfare and efficiency, the goals that copyright law pursues).

[74] *E.g.*, Omri Ben-Shahar, *Personalized Elder Law*, 28 Elder L.J. 281, 285, 287 (2021).

[75] *Id.* at 290 ("A uniform rule may be good on average, but it misfires in individual cases.").

[76] Coglianese, *supra* note 1, at 2 (noting that there is a series of enduring criticisms regarding personalized laws and regulations including that rules are imprecise tools, they can exhibit both over- and under-inclusivity, and the world's diversity means that one-size-fits-all rules may not always be suitable).

[77] Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 Ind. L.J. 1401, 1404 (2017).

[78] Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. Rev. 627, 629 (2016) ("Rather than addressing each actor as a nondistinct member of a large pool and commanding her to meet the level of reasonable precautions that correspond to the average competence within the pool, a *personalized negligence law* would separate the actor from the pool and require her to meet her *own* customized standard of care.").

[79] Deborah W. Denno, *Neuroscience and the Personalization of Criminal Law*, 86 U. Chi. L. Rev. 359, 394–95 (2019); Matthew B. Kugler & Lior Jacob Strahilevitz, *Assessing the Empirical Upside of Personalized Criminal Procedure*, 86 U. Chi. L. Rev. 489, 491 (2019).

[80] Omri Ben-Shahar & Ariel Porat, *Personalizing Mandatory Rules in Contract Law*, 86 U. Chi. L. Rev. 255, 256 (2019); Porat & Strahilevitz, *supra* note 49, at 1475.

[81] Libson & Parchomovsky, *supra* note 73, at 542–46.

[82] Ben-Shahar & Porat, *supra* note 31, at 72–73.

[83] Christoph Busch, *Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law*, 86 U. Chi. L. Rev. 309, *passim* (2019).

[84] Lee Anne Fennell, *Personalizing Precommitment*, 86 U. Chi. L. Rev. 433, *passim* (2019).

driver.[85] Under such a framework, drivers with varying risk profiles would face different legal rules even in identical external conditions. This nuanced personalization of traffic laws considers various factors that contribute to a driver's risk level.[86] For example, it might classify a driver with a history of accidents as high-risk and would consequently assign him more conservative speed limits. In contrast, those with a clean driving record might be permitted to drive at higher speeds. This aligns the legal framework more closely with the objective of reducing road accidents by holding high-risk drivers to stricter standards. The sophistication of such personalized traffic regulations can be enhanced by leveraging Big Data and algorithmic analysis.[87] This would allow for the formulation of highly individualized speed limits based on an array of personal attributes, including a driver's eyesight, reaction instincts, driving experience, and even real-time measures of fatigue.[88] Additionally, the algorithmic model could incorporate factors like age, sex, and credit score, which actuarial models often associate with driving risk.[89] This level of detail would ensure that each driver's speed limit is optimized based on a comprehensive assessment, thereby contributing to safer traffic management.

Similarly, in the patent law context, personalized rules could subject entities with a history of filing speculative patent applications or engaging in intentional or repeated infringements to more stringent oversight or potent counter-incentives. Conversely, entities whose actions align with the goals of the patent law system could receive positive incentives, encouraging them to maintain or even elevate their standards of operation in ways that better advance the patent system's goals.[90]

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[85] *E.g.*, BEN-SHAHAR & PORAT, *supra* note 31, at 19–20; Casey & Niblett, *supra* note 77, at 1404 ("[M]icrodirective might provide a speed limit of 51.2 miles per hour for a particular driver with twelve years of experience on a rainy Tuesday at 3:27 p.m.").

[86] BEN-SHAHAR & PORAT, *supra* note 31, at 19–20.

[87] BEN-SHAHAR & PORAT, *supra* note 31, at 19–20. The term "Big Data" in this paper refers to the use of massive datasets with large, varied, and complex structures to uncover hidden patterns and secret correlations. *See generally* Seref Sagiroglu & Duygu Sinanc, *Big Data: A Review*, *in* 2013 INT'L CONF. ON COLLABORATION TECHS. AND SYS. 42, 42 (2013), https://ieeexplore.ieee.org/document/6567202 [https://perma.cc/4FA2-ANKM].

[88] BEN-SHAHAR & PORAT, *supra* note 31, at 19–20.

[89] BEN-SHAHAR & PORAT, *supra* note 31, at 19–20.

[90] *See infra* Part II.D.2.

Data plays a crucial role in enabling this personalization.[91] Without data, the government could not discern individual traits and craft tailored rules that would allow it to achieve its legal objectives more effectively.[92] The Reward and Punishment Mechanism of China's patent system classifies entities into categories based on their social credit data, which indicates whether they are "trustworthy" or "untrustworthy," and applies corresponding incentives in the forms of rewards or punishments.[93] The Tiered Regulation Mechanism, on the other hand, assesses entities based on their social credit scores, assigning them ratings that dictate the level of regulation they receive.[94] This differentiated approach allows the government to tailor its rules more finely.

In the realm of personalized law, scholars recognize different degrees of personalization, ranging from more sophisticated to more rudimentary. High-degree personalization involves the use of large datasets and algorithmic analysis to generate rules based on individual traits, situational contexts, and legal objectives.[95] Casey and Niblett refer to these as "microdirectives," or highly precise rules.[96] When the system cannot attain this level of detail, it uses a more

[91] *See* Ben-Shahar, *supra* note 74, at 287 ("Personalized law depends on information."); *cf*. Andrew Verstein, *Privatizing Personalized Law*, 86 U. Chi. L. Rev. 551, 558 (2019) ("When it is technically feasible and normatively acceptable to gather and use granular data concerning individuals, personalized law promises to better link directives with capacities and needs.").

[92] Ben-Shahar, *supra* note 74, at 286 ("Intense customization based on every relevant individual trait is the primary defining feature of personalized law. . . . To tailor good personalized commands, we need data about people's physical and cognitive skills, preferences, income and wealth, experience and habits — any personal feature that is correlated with the desired calibration of the command.").

[93] Outline of Social Credit System Construction, *supra* note 10 (proposing "strengthening rewards and incentives for trustworthy entities" and "enhancing constraints and penalties for untrustworthy entities").

[94] "Shisi Wu" Guojia Zhishi Chanquan Baohu He Yunyong Guihua ("十四五"国家知识产权保护和运用规划) [The 14th Five-Year Plan for National Intellectual Property Protection and Application] (promulgated by the St. Council Oct. 28, 2021, effective Oct. 28, 2021) [hereinafter The 14th Five-Year IP Plan], https://www.gov.cn/zhengce/content/2021-10/28/content_5647274.htm [https://perma.cc/63R7-HX9S] (proposing "the establishment of a credit-based graded and categorized regulatory model in the field of intellectual property").

[95] *E.g.*, Ben-Shahar & Porat, *supra* note 31, at 19 ("At the extreme, when Big Data is used, algorithms are coded to identify relations between people's attributes and the outcome of interest, to design fully individualized commands.").

[96] Anthony J. Casey & Anthony Niblett, *A Framework for the New Personalization of Law*, 86 U. Chi. L. Rev. 333, 338 (2019) (noting that microdirectives are the "extreme form" of personalization and the "idealized version" of personalized law); Casey & Niblett, *supra* note 77, at 1403 ("These microdirectives will provide ex ante behavioral prescriptions finely tailored to every possible scenario.").

preliminary approach—crude personalization.[97] According to Ben-Shahar and Porat, crude personalization in law means forming "discrete buckets of treatment" based on individual characteristics, and applying these treatments accordingly.[98] They suggest that "much of the benefit" of personalized law "could be achieved this way."[99] Currently, both the Reward and Punishment Mechanism and the Tiered Regulation Mechanism in China's patent system represent this form of crude personalization.[100]

A typical example of crude personalization in law in the academic discourse is the personalized alcohol purchase age.[101] Instead of applying a uniform age requirement, such as 21, the legal system could implement a stratified approach that reflects varying risk levels of alcohol abuse among individuals. This model could avoid reliance on highly sensitive information like mental health records.[102] Instead, a stratified approach could use more general data to determine risk categories. For instance, this might allow individuals deemed least risky, based on factors such as driving records and evidence of risk-seeking behavior, to purchase alcohol at age 18.[103] It might set the legal purchase age at 20 for those with a moderate risk level, while the system might restrict the highest risk individuals until age 22.[104] This method of categorization would utilize less intrusive data while still attempting to tailor legal obligations to individuals' idiosyncratic risks and behaviors.

II
Analysis

To understand the Reward and Punishment Mechanism and the Tiered Regulation Mechanism within China's patent system as a crude form of personalized law, we need an analytical framework. Since no studies have yet provided such a framework, this paper proposes one by synthesizing insights

[97] *Cf.* Hans Christoph Grigoleit, *Personalized Law: Distinctions and Procedural Observations*, U. Chi. L. Rev. Online, Mar. 9, 2022, at 9 (suggesting that restricting personalized law to crude features is more realistic).
[98] Ben-Shahar & Porat, *supra* note 32, at 5.
[99] Ben-Shahar & Porat, *supra* note 32, at 5.
[100] *See infra* Part II B.1, Part II.B.2, Part II.C.1, & Part II.C.2.
[101] Ben-Shahar & Porat, *supra* note 32, at 5–6.
[102] Ben-Shahar & Porat, *supra* note 32, at 5–6.
[103] Ben-Shahar & Porat, *supra* note 32, at 5–6.
[104] Ben-Shahar & Porat, *supra* note 32, at 5–6.

from personalized law literature. While scholars initially proposed many of these insights in the context of advanced stages of personalized law that is based on Big Data and algorithms, they apply equally to the analysis of its crude form. Utilizing this framework, the paper delves into a detailed analysis and assessment of both mechanisms.

A. An Analytical Framework

The essence of personalized law lies in providing different rules for different individuals. However, to sustain this system, merely having personalized rules is insufficient. This paper categorizes the rules in personalized law into four types, by function: profiling rules, personalized rules, communication rules, and adjustment rules.

Profiling rules: The personalization of rules relies on identifying the characteristics of regulated entities.[105] Therefore, in a personalized law system, there must be rules outlining how the government may use data to create individuals' profiles.[106] We can call these "profiling rules." Profiling rules must address several issues. First, they need to specify the entities responsible for data collection.[107] Elkin-Koren and Gal note that this can involve government-collected data, such as from speeding cameras and tax returns, and data that private firms collect, such as from wearable technology or smartphones.[108] Where government data is inadequate, a blend of governmental and private data sources might be necessary in order to craft effective personalized laws.[109] Second, profiling rules must address the scope of the data collection. A broad scope can be advantageous, as more data facilitates the formation of detailed and accurate profiles.[110] However, factors such as collection cost, the capacity of data processing, and the need

[105] Ben-Shahar, *supra* note 74, at 287 ("Personalized law depends on information."); Ben-Shahar & Porat, *supra* note 32, at 2 (noting that personalization is "data-guided").

[106] *See* Ben-Shahar & Porat, *supra* note 80, at 258 ("Many issues related to implementation-what data could be used. … "); *see also* Burk, *supra* note 1, at 294 ("'Big data' does not simply mean a lot of data; data must be collected, structured, and groomed for processing.").

[107] *See generally* Ben-Shahar & Porat, *supra* note 31, at 2 ("Who owns the information, how may it be used, and what limits on data collection to install are the central questions of the law of digital data.").

[108] Elkin-Koren & Gal, *supra* note 1, at 408–11.

[109] Elkin-Koren & Gal, *supra* note 1, at 408–09.

[110] *See* Ben-Shahar & Porat, *supra* note 31, at 19 ("As the amount of information increases, more fine partitioning of people becomes possible.").

to protect privacy limit its scope.[111] Third, profiling rules also need to control the formation of profiles, ensuring that the government can derive meaningful conclusions from the collected data.[112] An example is Adam Davidson's discussion of using data to identify "the dangerous few"—those most likely to re-offend.[113] In this context, the essence of a profile lies in its practical application: pinpointing "the dangerous few" informs tailored approaches, such as specific incarceration or surveillance measures.[114]

Personalized Rules: Personalized rules are the crux of personalized law. The government can generate them algorithmically, including through AI, based on the collected data, to ensure alignment with the system's objectives.[115] However, infinitely increasing precision in personalization is impractical due to cost and technical constraints.[116] A more feasible alternative is crude personalization, where the government creates discrete buckets of treatment based on broad profiles, and imposes them accordingly.[117] While this approach reduces precision, it also curtails the costs of data collection and decreases reliance on algorithms.[118] Personalized rules fall into two categories—unilateral and bilateral.[119] Unilateral personalization, the simpler type, addresses the interests of a single party.[120] We see this in scenarios such as customizing regulations to individual consumer needs in consumer protection laws or tailoring the preferences of a testator.[121] Bilateral personalization involves balancing the interests of two parties, as occurs in contract

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[111] *See generally* Ben-Shahar, *supra* note 74, at 287 (noting cost concerns); Grigoleit, *supra* note 97, at 8 (examining data processing capacity); Casey & Niblett, *supra* note 96, at 351 (evaluating privacy concerns).

[112] *See* Burk, *supra* note 1, at 294 ("Data processing routines are structured with particular audiences and purposes in mind; they are tailored and retailored according to predicted uses.").

[113] Adam Davidson, *Personalized Law, Political Power, and the Dangerous Few*, U. Chi. L. Rev. Online, Mar. 7, 2022, at 2.

[114] *Id*. at 4–5.

[115] *See generally* Mayson, *supra* note 32, at 9 (suggesting that personalized law represents a transformative approach that leverages big-data technology to create and convey precise, individualized legal requirements aimed directly at achieving specific societal outcomes).

[116] Grigoleit, *supra* note 97, at 7–8.

[117] Ben-Shahar & Porat, *supra* note 32, at 5–6.

[118] Grigoleit, *supra* note 97, at 9; *see also* Ben-Shahar, *supra* note 74, at 287 ("The optimal level of personalization is therefore a balance between its precision benefits and the information and technological costs of implementation.").

[119] Grigoleit, *supra* note 97, at 7.

[120] Grigoleit, *supra* note 97, at 7.

[121] Grigoleit, *supra* note 97, at 7.

law.[122] This approach recognizes the intricacies and price sensitivities involved in adjusting legal parameters like warranty periods, depending on each party's unique characteristics.[123]

Communication Rules: The way that the government communicates personalized rules to the relevant entities is critical. This paper defines the strictures governing this process as "communication rules." A vital aspect of these rules is the timing of their communication. Generally, the government should communicate an entity's personalized rules before it undertakes relevant actions, enabling the entity to adjust its behavior.[124] The communication can be immediate or non-immediate. Immediate communication uses technology to relay rules to individuals just before they act.[125] Non-immediate communication allows for the dissemination of rules in advance, giving entities sufficient time to understand and integrate these norms into their decision-making processes, and avoids the potential pitfalls of haste.[126] This is particularly applicable to circumstances where real-time behavior adjustment is not necessary.

Adjustment Rules: Adjustment rules regulate or correct both the outcomes and the formulation of the aforementioned rules. Adjustment rules are essential for maintaining the integrity of the personalized law system and for safeguarding the rights of those regulated. Ben-Shahar and Porat's discussion highlights the

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[122] Grigoleit, *supra* note 97, at 7.

[123] Grigoleit, *supra* note 97, at 7.

[124] *See generally* Casey & Niblett, *supra* note 96, at 347 (arguing personalization through Big Data allows the law's tailored effects to be communicated to a citizen based on their individual circumstances and characteristics in a timely manner, ensuring clarity "before the citizen has to act"); Grigoleit, *supra* note 97, at 4 ("[P]ersonalized rules might be generated in advance and communicated to an individual in order to allow them to adapt their conduct accordingly."); Jared I. Mayer, *Implementing Personalized Negligence Law*, U. Chi. L. Rev. Online, Mar. 9, 2022, at 6. ("In order to successfully implement personalized negligence law, then, we need to (a) promote ex ante knowledge of one's standard of care while (b) not relying on self-knowledge and (c) not sacrificing personalized negligence law's wide applicability."); Mayson, *supra* note 32, at 2 (noting that one of the shifts from conventional law to personalized law is "toward greater ex ante specification of what rules require of individuals").

[125] Ben-Shahar & Porat, *supra* note 32, at 2 ("Personalized law would reinvent disclosures, warnings, and food labels with different bits of information electronically delivered to people at the point of decision."); *cf.* Grigoleit, *supra* note 97, at 1 (noting that Big Data's role in personalized law allows for real-time communication of highly specific commands to individuals, enabling them to act in accordance with these tailored directives).

[126] *Cf.* Mayer, *supra* note 124, at 5 (pointing out the appropriateness of informing the regulated subjects in advance about the personalized standards they are expected to follow).

importance of these rules, arguing that personalized law, as a departure from "the uniformity of rules," means stepping into challenging territories where "things could go wrong in many ways."[127] The government should "regularly audit" personalized rules and actively "identify and correct unintended effects."[128] While scholars agree on the need for this adjustment mechanism,[129] they raise concerns over its effectiveness as personalized law evolves, particularly when the government uses algorithms to generate rules.[130] In this case, the rules' complexity and sophistication might surpass human understanding, which makes it difficult to identify and address errors.[131]

B. *The Reward and Punishment Mechanism*

The Reward and Punishment Mechanism in China's patent law operates on the principle that governmental entities apply rewards or sanctions based on the profiles of individuals or enterprises. This approach is not limited to patents but extends to other sectors like taxation and environmental protection.[132] Currently, two departmental regulations—*The National Intellectual Property Administration's Intellectual Property Credit Management Regulations* ("*Credit Management Regulations*")[133] and *The Market Supervision Administration's Management Methods for the Serious Illegal and Untrustworthy Entity List*

[127] Ben-Shahar & Porat, *supra* note 32, at 1; *accord* Peter N. Salib, *Complex Algorithmic Law*, U. CHI. L. REV. ONLINE, Mar. 9, 2022, at 6 (discussing the broader challenge of "misalignment" in governance by algorithm, where the goals of algorithms are "not quite aligned with" human desires).

[128] Ben-Shahar & Porat, *supra* note 32, at 4.

[129] *See* Busch, *supra* note 83, at 324 (implying that personalized mechanisms should be combined with a monitoring system that provides feedback by relevant entities for future improvement of the design of the mechanisms); Casey & Niblett, *supra* note 96, at 354 (noting that while algorithms play a pivotal role in decision-making, human intervention remains crucial to address potential algorithmic errors, some of which are clear, while others may appear counterintuitive).

[130] *See* Burk, *supra* note 1, at 301 ("The complexity of the algorithm in operation creates opacity. Even if the system is entirely open to inspection by experts, the experts are unlikely to understand how it operates."); Salib, *supra* note 127, at 8–9 (delving into the challenge of "intellectual debt" by highlighting the enigmatic nature of complex algorithms in personalized law, which can often make decisions based on mysterious criteria, leaving their causal mechanisms obscured).

[131] *See* Casey & Niblett, *supra* note 96, at 354 (noting that some errors that algorithms make are difficult for humans to identify); *see also* Salib, *supra* note 127, at 6–7 (highlighting the complex nature of algorithms learning via feedback loops, and warning that this complexity can lead to strange and surprising misalignments that may challenge conventional human anticipations).

[132] *E.g.*, Cheung & Chen, *supra* note 7, at 1148.

[133] Credit Management Regulations, *supra* note 8.

("*Untrustworthy Entities Management Methods*")[134]—govern the reward and punishment mechanism in the patent domain. The following diagram helps to illustrate this mechanism's structure and functionality.

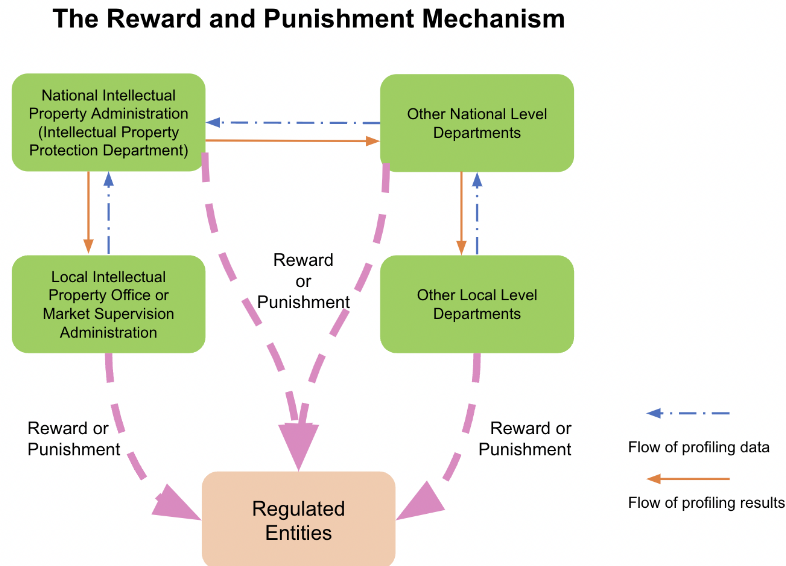

Figure 1. The Reward and Punishment Mechanism

Figure 1 illustrates the structure and key components of the Reward and Punishment Mechanism in China's patent law. The central component is the Intellectual Property Protection Department (IP Protection Department), which aggregates social credit data and creates profiles of regulated entities.[135] The IP Protection Department aggregates data collected by other departments responsible for patent-related work and patent agency regulation.[136] Based on this data, the IP Protection Department categorizes entities into three profiles: "Untrustworthy Entities," "Seriously Illegal and Untrustworthy Entities," and "Entities with Good Credit for Three Consecutive Years."[137] The first two profiles are associated with various punitive measures, while the last profile qualifies entities for rewards. The specific punitive measures and rewards are predetermined and officially declared to the public.

[134] Untrustworthy Entities Management Methods, *supra* note 8.
[135] Credit Management Regulations, *supra* note 7, at art. 11.
[136] Credit Management Regulations, *supra* note 8., at art. 10.
[137] Credit Management Regulations, *supra* note 7, at arts. 9, 16, 21.

1. Profiling Rules

The Reward and Punishment Mechanism primarily collects data through government channels. The National Intellectual Property Administration, particularly the IP Protection Department, is at the core of this mechanism.[138] Other departments responsible for patent-related work and patent agency regulation also contribute to data collection.[139] These departments collect data during their "execution of statutory duties and provision of public services" and report to the IP Protection Department.[140] Currently, the scope of data collection in the patent field is relatively narrow, limited to data concerning an entity's specific types of legal violations.[141] Categorization in either of the first two categories ("Untrustworthy Entities" and "Seriously Illegal and Untrustworthy Entities") can lead to sanctions,[142] while the last category ("Entities with Good Credit for Three Consecutive Years") opens opportunities for rewards.[143]

To label an individual or enterprise as an "Untrustworthy Entity," the IP Protection Department must identify at least one act of "untrustworthy conduct."[144] Strict rules govern the recording of untrustworthy conduct data, limiting records to legally effective documents such as notices of abnormal patent application rejection, administrative penalty decisions for illegal patent agency activities, and decisions or penalties recognizing refusal or evasion of execution despite having the ability to comply.[145] Article 6 of the *Credit Management Regulations* enumerates six categories of untrustworthy conduct, mostly related to patents. These include abnormal patent applications not aimed at protecting innovation, activities in patent agencies that violate laws or administrative regulations and result in administrative penalties, and actions involving the refusal to execute or the evasion of administrative penalties or decisions despite having the ability to

[138] *See* Credit Management Regulations, *supra* note 7, at arts. 4, 10.
[139] Credit Management Regulations, *supra* note 7, at art. 5.
[140] Credit Management Regulations, *supra* note 7, at art. 10.
[141] Credit Management Regulations, *supra* note 7, at arts. 6, 8.
[142] Credit Management Regulations, *supra* note 7, at arts. 9, 17.
[143] Credit Management Regulations, *supra* note 7, at art. 20.
[144] Credit Management Regulations, *supra* note 7, at arts. 6, 11–13.
[145] Credit Management Regulations, *supra* note 7, at art. 8.

comply.[146] These categories are not exhaustive, and the IP Protection Department can deem other behaviors untrustworthy as well.[147]

To categorize an individual or enterprise as a "Seriously Illegal and Untrustworthy Entity," the IP Protection Department relies on four types of information.[148] First, records of having engaged in seriously illegal patent agency activities coupled with having received "relatively heavy administrative penalties," such as fines or license revocation.[149] Second, records of having refused to execute administrative decisions despite having the ability to comply, along with findings that such behavior significantly undermines the credibility of the National Intellectual Property Administration.[150] Third, a history of intentional patent infringement, along with heavier administrative punishment from the departments for market regulation.[151] And fourth, being identified as having submitted abnormal or malicious patent applications, with an official determination that these applications harm the public interest.[152]

In contrast to the IP Protection Department's identification of "Untrustworthy Entities" and "Seriously Illegal and Untrustworthy Entities," there is no established list of "Entities with Good Credit for Three Consecutive Years" under Article 20 of the *Credit Management Regulations*.[153] Consequently, entities believing they

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[146] Credit Management Regulations, *supra* note 7, at art. 6.

[147] Credit Management Regulations, *supra* note 7, at art. 6 ("The National Intellectual Property Administration, according to laws and regulations, designates the following behaviors as untrustworthy conducts: . . . (7) Other actions that are included in the specific entries of public credit information in the field of intellectual property and should be recognized as untrustworthy conducts.").

[148] Credit Management Regulations, *supra* note 7, at art. 16.

[149] Credit Management Regulations, *supra* note 7, at art. 16. Article 2 of the Untrustworthy Entities Management Methods specifies that "heavier administrative penalties" include four categories: "(1) imposition of fines according to the principle of heavier punishment, based on the administrative penalty discretion benchmarks; (2) downgrading of qualifications, revocation of permits, or business licenses; (3) restrictions on production and business operations, orders to cease production or business activities, orders to close, or restrictions on employment; and (4) other heavier administrative penalties as stipulated by laws, administrative regulations, and departmental rules." Untrustworthy Entities Management Methods, *supra* note 7, at art. 2.

[150] Credit Management Regulations, *supra* note 7, at art. 16.

[151] Credit Management Regulations, *supra* note 7, at art. 16; Untrustworthy Entities Management Methods, *supra* note 7, at arts. 2, 9.

[152] Credit Management Regulations, *supra* note 7, at art. 16; Untrustworthy Entities Management Methods, *supra* note 7, at art. 9.

[153] *See* Credit Management Regulations, *supra* note 7, at art. 20.

fit this category must declare their status in order to claim government-provided benefits.[154] At present, entities petitioning for this status must demonstrate that they have operated for three consecutive years without garnering negative credit information.[155] In practical terms, departments responsible for administering incentives only need to confirm the absence of negative credit records in the social credit system's database.[156]

2. Personalized Rules

Currently, the personalization approach in China's patent system represents a form of crude personalization.[157] In other words, the government sorts individuals and enterprises into broad categories based on their profiles and applies corresponding sets of rules to each category. Article 9 of the *Credit Management Regulations* outlines six distinct punitive measures,[158] which we can put into four categories. The first increases the difficulty of obtaining benefits from the government, such as requiring stringent approval for government-funded projects and for preferential policies related to patent applications.[159] The second involves the withdrawal of eligibility for certain benefits, including disqualification from

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[154] Phone call with State Intellectual Property Administration, to author (Nov. 1, 2023) (+86 010-6235-6655).

[155] Guowuyuan Guanyu Jianli Wanshan Shouxin Lianhe Jili He Shixin Lianhe Chengjie Zhidu Jiakuai Tuijin Shehui Chengxin Jianse De Zhidao Yijian (国务院关于建立完善守信联合激励和失信联合惩戒制度加快推进社会诚信建设的指导意见) [Guiding Opinions of the State Council on Establishing and Improving the Joint Incentive Systems for Trustworthiness and the Joint Punishment System for Untrustworthiness to Accelerate the Establishment of the Social Credit System] (promulgated by the St. Council, May 20, 2016, effective May 30, 2016) [hereinafter Opinions on Joint Incentive and Punishment] CLI.2.272126(EN) (Lawinfrochina) ("In the course of handling administrative permits, facilitation service measures such as 'green channels' and 'permissive acceptance' [acceptance despite defects in materials] may be used for administrative counterparts who are models of honesty, or who have not had any negative credit information recorded for three consecutive years. For eligible administrative counterparts, where some of the declaration materials are incomplete, if a written assurance is given that they will be provided within a given time, they should be accepted to expedite the progress of handling, except where laws or regulations require their provision.").

[156] Phone call with State Intellectual Property Administration, to author (Nov. 1, 2023) (+86 010-6235-6655).

[157] *Cf*. Ben-Shahar & Porat, *supra* note 32, at 5 (defining crude personalization).

[158] Credit Management Regulations, *supra* note 7, at art. 9 ("The State Intellectual Property Administration implements the following management measures against dishonest entities: (1) Strictly review and approve applications for fiscal projects; (2) Strictly review and approve preferential policies and facilitation measures such as reduction of patent and trademark related fees and priority examination. . . . ").

[159] Credit Management Regulations, *supra* note 7, at art. 9.

recognition as a "National Intellectual Property Demonstration and Advantage Enterprise" and from receiving the "China Patent Award."[160] The third provides for intensified regulatory oversight, such as more frequent inspections.[161] The fourth revokes the privilege of utilizing the "credit commitment system," which simplifies administrative procedures for entities with a positive credit standing.[162] Importantly, while Article 9 states these measures explicitly, it also allows for the imposition of other measures according to the relevant laws, administrative regulations, and policies of the Central Committee of the Communist Party and the State Council.[163]

The restrictions for "Seriously Illegal and Untrustworthy Entities" are broader and more critical than those for "Untrustworthy Entities," especially with respect to basic operational and market participation permissions. Similar to "Untrustworthy Entities," "Seriously Illegal and Untrustworthy Entities" receive more regulatory oversight, with more frequent inspections and strict monitoring.[164] These entities lose the opportunity to utilize the notice and pledge system,[165] which streamlines the processing of administrative matters.[166] In addition, entities in this category face up to 38 punitive measures implemented by multiple government departments.[167] These 38 measures include restrictions on stock market financing, internet information services, and participation in public

[160] Credit Management Regulations, *supra* note 7, at art. 9.

[161] Credit Management Regulations, *supra* note 7, at art. 9.

[162] Credit Management Regulations, *supra* note 7, at art. 9.

[163] Credit Management Regulations, *supra* note 7, at art. 9. ("Article 9 The National Intellectual Property Administration shall implement the following management measures against untrustworthy entities. . . . (7) Other management measures that should be taken according to laws, administrative regulations, and policy documents of the Central Committee of the Communist Party and the State Council.").

[164] Credit Management Regulations, *supra* note 7, at art. 9.

[165] Credit Management Regulations, *supra* note 7, at art. 9.

[166] *Say Goodbye to Proof! The Notification Commitment System Begins Piloting!*, GOV.CN, (May 17, 2019), https://www.gov.cn/fuwu/2019-05/17/content_5392564.htm [https://perma.cc/4VGQ-2KEK].

[167] Guanyu Dui Zhishi Chanquan (Zhuanli) Lingyu Yanzhong Shixin Zhuti Kaizhan Lianhe Chengjie De Hezuo Beiwanglu (关于对知识产权（专利）领域严重失信主体开展联合惩戒的合作备忘录) [Memorandum of Cooperation on Joint Punishment Against Seriously Dishonest Entities in the Field of Intellectual Property (Patents)] (promulgated by the Dev. and Reform Comm'n et al., Nov. 21, 2018, effective Nov. 21, 2018) [hereinafter Memorandum of Cooperation], https://www.gov.cn/zhengce/zhengceku/2018-12/31/5434249/files/f238d9b0f3584cfc9b17b7db1de9b28a.pdf [https://perma.cc/QU8F-RA4M].

resource transactions—all significantly limiting the commercial activities and operations of relevant entities.[168]

In contrast to these punitive measures, "Entities with Good Credit for Three Consecutive Years" receive a set of beneficial personalized rules.[169] However, such benefits are not guaranteed, as administrative authorities retain discretion in awarding them.[170] According to Article 20 of the *Credit Management Regulations*, there are four categories of benefits: first, prioritization in the administrative approval processes, such as expedited processing; second, greater ease in securing government grants; third, right of access to expedited patent examination processes; and fourth, fewer inspections.[171] Administrative authorities can implement other incentive measures as well.[172] However, the scope of benefits for entities in this category is limited to the purview and services of the departments and units of the State Intellectual Property Administration,[173] which might not be attractive to entities whose business substantially relies on matters other than IP.

3. Communication Rules

In the current framework of China's Reward and Punishment Mechanism, administrative agencies do not generate personalized rules in real time. Instead, they pre-formulate them. The *Credit Management Regulations* and the *Untrustworthy Entities Management Methods* detail the relevant rules and make them publicly accessible, as they do for statutory laws.[174] Though this approach provides a complete set of personalized rules, these rules possess inherent informational gaps, as evidenced by administrative bodies' open-ended listings

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[168] *Id.*

[169] Credit Management Regulations, *supra* note 7, at art. 20 ("Departments and units of the National Intellectual Property Administration may, depending on the situation, adopt the following incentive measures for Entities with Good Credit for Three Consecutive Years. . . . ").

[170] Credit Management Regulations, *supra* note 7, at art. 20.

[171] Credit Management Regulations, *supra* note 7, at art. 20.

[172] Credit Management Regulations, *supra* note 7, at art. 20.

[173] Credit Management Regulations, *supra* note 7, at art. 20.

[174] The Credit Management Regulations and the Untrustworthy Entities Management Methods were publicly announced by the State Intellectual Property Administration and the Market Supervision Administration in January 2022 and July 2021, respectively. *Id.*; Untrustworthy Entities Management Methods, *supra* note 8. Multiple departments, including the National Development and Reform Commission and the People's Bank of China, issued the memorandum detailing joint punitive measures in November 2018. Memorandum of Cooperation, *supra* note 167.

and discretionary enforcement.[175] For instance, an entity has no guarantee that it will receive the benefits for "Entities with Good Credit for Three Consecutive Years," as these are subject to the agencies' discretion.[176] Therefore, even with access to the rules, it is difficult for individual entities to grasp the full extent and legal consequences of their personalized rules.

Although it should precede an entity's action, the communication of these rules is not instant. Unlike the theoretical, immediate relay of personalized speed limits, there is no temporal proximity between an agency's rule communication and the relevant entity's subsequent actions. Additionally, when an entity qualifies for this "good credit" category, there is no direct communication with the entity itself currently. The lack of communication means that entities must instead rely on their knowledge to determine that they qualify for benefits. In contrast, for "Untrustworthy Entities," public announcements act as the notification mechanism, and the IP Protection Department publishes the list of untrustworthy entities on the State Intellectual Property Administration's website.[177] The system for "Seriously Illegal and Untrustworthy Entities" involves two layers of communication: preliminary notification of the basis for the decision basis before an entity's inclusion on the list,[178] and then public disclosure on government websites and the national enterprise credit information system.[179]

The public disclosure of "Untrustworthy Entities" and "Seriously Illegal and Untrustworthy Entities" lists is a form of public shaming that affects the entities' reputation and potentially disrupts their social and commercial interactions.[180] This public portrayal can diminish the confidence of their clients, partners, and investors, limiting their business opportunities and their ability to establish financial relationships.[181] Therefore, the communication about disclosure on

[175] *See* Credit Management Regulations, *supra* note 7, at arts. 9 (7), 20 (5); Untrustworthy Entities Management Methods, *supra* note 7, at art. 15(5).
[176] Credit Management Regulations, *supra* note 7, at art. 20.
[177] Credit Management Regulations, *supra* note 7, at art. 10.
[178] Untrustworthy Entities Management Methods, *supra* note 7, at arts. 13, 25.
[179] Credit Management Regulations, *supra* note 7, at art. 18.
[180] Alexander Trauth-Goik & Chuncheng Liu, *Black or Fifty Shades of Grey? The Power and Limits of the Social Credit Blacklist System in China*, 32 J. CONTEMP. CHINA 1017, 1019–21 (2023).
[181] *Id*. at 1017.

government websites can be insufficient to correct behavior, as entities' reputations will already be tarnished.[182]

4. Adjustment Rules

In the existing structure of China's Reward and Punishment Mechanism, adjustment rules are critical for protecting the rights of those labeled as "Untrustworthy Entities" or "Seriously Illegal and Untrustworthy Entities." These adjustment rules are twofold: duration regulations and error correction protocols.

Regarding duration, the punitive measures applied to "Untrustworthy Entities" and "Seriously Illegal and Untrustworthy Entities" have specific time limits.[183] Measures against "Untrustworthy Entities" typically last for one year, but can be extended by up to three years if the IP Protection Department discovers new data about the entity's untrustworthy conduct.[184] "Untrustworthy Entities" can also apply for "credit restoration" after six months if they can show that they have rectified their untrustworthy behaviors.[185] In contrast, sanctions for "Seriously Illegal and Untrustworthy Entities" generally last for three years.[186] After one year, these entities must have fulfilled their obligations under administrative penalty decisions, rectified adverse impacts, and avoided receiving additional penalties if they are to be eligible to improve their profiles.[187]

Regarding error correction, the current system only addresses operational errors in rules enforcement; it does not adjust unreasonable rules in the personalized law system. Currently, the IP Protection Department's categorization of an entity as "Untrustworthy" must be based on administrative adjudications or similar processes.[188] Entities can challenge this decision through administrative

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[182] *See generally id.* (associating the use of negative profiles of the relevant entities with the concept of "relational punishment," where states bring the deviant's social relations into the punishment regime to reinforce and extend social control, either by applying punishment to the deviant's social relations or by mobilizing these relations as a channel for punishment); Dai, *supra* note 12, at 140 (highlighting the punitive nature of the publication of negative profiles of the relevant entities).

[183] Credit Management Regulations, *supra* note 7, at art. 10.

[184] Credit Management Regulations, *supra* note 7, at art. 11.

[185] Credit Management Regulations, *supra* note 7, at art. 13.

[186] Credit Management Regulations, *supra* note 7, at art. 17; Untrustworthy Entities Management Methods, *supra* note 7, at art. 21.

[187] Untrustworthy Entities Management Methods, *supra* note 7, at art. 16.

[188] Credit Management Regulations, *supra* note 7, at art. 8.

review and litigation processes, which offer entities a chance to overturn these decisions, or to have them declared illegal or invalid.[189] If the administrative decision is overturned, Article 12 of the *Credit Management Regulations* allows the affected entity to petition the IP Protection Department to amend its profile.[190] Theoretically, though, this correction should be automatic, as the regulations require any department whose decision is reversed to report the reversal to the IP Protection Department within five working days.[191] Upon receiving this notification, the IP Protection Department must coordinate with relevant departments, cease public announcements, and remove punitive measures within five working days.[192] This process leads to the removal of negative publicity and sanctions typically within ten working days. If the IP Protection Department refuses to amend the profile, then the entity can contest this decision through administrative review and litigation.[193]

Similarly, an entity labeled as "Seriously Illegal and Untrustworthy" can challenge its profile via administrative review or litigation.[194] If the administrative penalty that led to the negative profile is overturned or declared illegal, the public announcement of its status and the revocation of sanctions should occur within three working days.[195]

C. The Tiered Regulation Mechanism

The Tiered Regulation Mechanism—another significant aspect of China's integration of social credit data with patent law—targets patent-related market entities. Initiated after the Reward and Punishment Mechanism, the Tiered

[189] See Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa (中华人民共和国行政复议法) [Administrative Review Law of the People's Republic of China] (promulgated by the Standing Comm. St. People's Cong., Sep. 1, 2023, effective Jan. 1, 2024), at art. 11, https://www.gov.cn/yaowen/liebiao/202309/content_6901584.htm [https://perma.cc/8J5H-4FZP]; Zhonghua Renmin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Standing Comm. of the St. People's Cong., Jun. 27, 2017, effective Jul. 1, 2017) at art. 12, [hereinafter Administrative Litigation Law], http://www.yueyang.gov.cn/amr/55964/65082/content_1924387.html [archival link omitted].

[190] Credit Management Regulations, *supra* note 7, at art. 12.

[191] Credit Management Regulations, *supra* note 7, at art. 12.

[192] Credit Management Regulations, *supra* note 7, at art. 12.

[193] Opinions on Joint Incentive and Punishment, *supra* note 153 (emphasizing that the parties in dispute are encouraged to seek redress through administrative review or litigation to protect their legal rights).

[194] Untrustworthy Entities Management Methods, *supra* note 7, at art. 23.

[195] Untrustworthy Entities Management Methods, *supra* note 7, at art. 19.

Regulation Mechanism currently regulates patent agencies and patent attorneys at the national level.[196] The broader regulation of other market entities remains experimental in various regions across the country.[197] This section focuses on the national aspect of the mechanism. The *Patent Agency Credit Evaluation Management Measures (Trial)* ("*Credit Evaluation Measures*") effective from May 1, 2023, uses social credit scores to regulate patent agencies and patent attorneys.[198] The following diagram helps to illustrate this mechanism's structure and functionality.

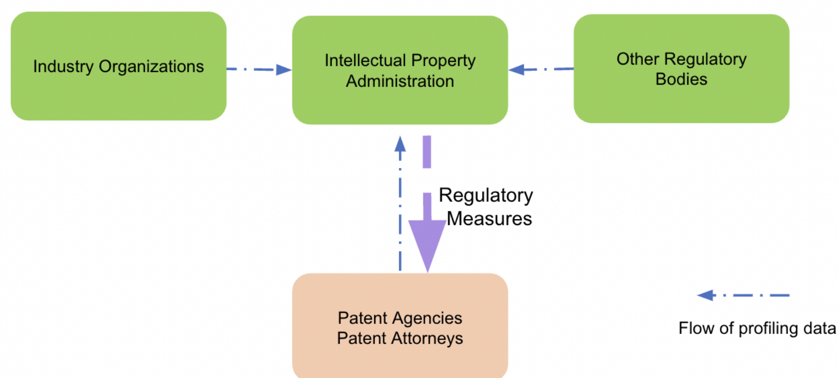

Figure 2. The Tired Regulation Mechanism (National Level)

[196] Credit Evaluation Measures, *supra* note 9.

[197] There are currently two groups of regions participating in the trial. The first group of 12 pilot areas includes Beijing, Shanghai, Jiangsu Province, and other provinces or cities; the second, also 12 pilot areas, includes Liaoning, Shandong, Chongqing, Guangzhou, and other provinces or cities. See Guojia Zhishi Chanquan Ju Bangongshi Guanyu Di Yi Pi Yi Xinyong Wei Jichu De Fenji Fenlei Jianguan Shidian Yanshou Qingkuang De Tongbao (国家知识产权局办公室关于第一批以信用为基础的分级分类监管试点验收情况的通报) [Notice of the Office of the State Intellectual Property Administration on the Acceptance of the First Batch of Pilot Projects for Graded and Classified Supervision Based on Credit] (promulgated by the Office of the St. Intell. Prop. Admin., May 7, 2022), https://www.cnipa.gov.cn/art/2022/5/7/art_2433_175891.html [https://perma.cc/8J2R-RN99]; Guojia Zhishi Chanquan Ju Bangongshi Guanyu Di Er Pi Yi Xinyong Wei Jichu De Fenji Fenlei Jianguan Shidian Yanshou Qingkuang De Tongbao (国家知识产权局办公室关于第二批以信用为基础的分级分类监管试点验收情况的通报) [Notice of the Office of the National Intellectual Property Administration on the Acceptance of the Second Batch of Pilot Projects for Graded and Classified Supervision Based on Credit] (promulgated by the Office of the St. Intell. Prop. Admin., Apr. 25, 2023), https://www.cnipa.gov.cn/art/2023/4/25/art_75_184623.html [https://perma.cc/Q5UU-56SN].

[198] Credit Evaluation Measures, *supra* note 9.

Figure 2 illustrates the structure and key components of the Tiered Regulation Mechanism at the national level. The Patent Agency Management System, created and operated by the National Intellectual Property Administration, serves as the central hub for collecting and integrating diverse data sources, including administrative and regulatory information from national and local intellectual property departments, input from patent agency industry organizations, data from other industry regulatory bodies and industry organizations, and self-reported data from the patent agencies and attorneys themselves.[199] Using this data, the Patent Agency Management System categorizes entities into one of five tiers based on their accrued credit points. The credit points are determined by the *Credit Evaluation Indicators System and Evaluation Rules for Patent Attorneys* and the *Credit Evaluation Indicators System and Evaluation Rules for Patent Agencies*. Based on their tier, patent agencies and attorneys are subject to corresponding regulatory measures, ranging from rewards and preferential treatment for those in the higher tiers to increased scrutiny and restrictions for those in the lower tiers.

1. Profiling Rules

Prior to the Tiered Regulation Mechanism's inception, the regulation of patent agencies and attorneys already occurred under existing patent laws.[200] This earlier form of regulation facilitated the establishment of each entity's initial profile. Specifically, before providing patent-related services, patent agencies were required to secure approval from the State Council's patent administration department,[201] whereas attorneys had to pass a qualification exam and register with provincial patent departments.[202] These procedures enabled the documentation of the basic information of these entities, which could then be used for profiling.

The Tiered Regulation Mechanism builds on this foundation by imposing an informational component that evaluates and scores these entities based on the relevant data gathered by the Patent Agency Management System.[203] Specifically, the system transforms this pre-existing mechanism for documentation into a

[199] Credit Evaluation Measures, *supra* note 9, at art. 7.
[200] Zhuanli Dai Li Tiaoli (专利代理条例) [Patent Agency Regulations] (promulgated by the St. Council, Nov. 6, 2018, effective Mar. 1, 2019), CLI.2.326347(EN) (Lawinfochina).
[201] *Id*. at art. 9.
[202] *Id*. at arts. 10, 12.
[203] *See* PATENT AGENCY MGMT. SYS., https://dlgl.cnipa.gov.cn/ [https://perma.cc/K7RS-JWR9].

dynamic scoring framework. According to the *Credit Evaluation Measures*, the Patent Agency Management System categorizes the entities into one of five tiers based on their accrued credit points.[204] These tiers are "A+" (over 100 credit points), "A" (90 to 100 credit points), "B" (80 to 89 credit points), "C" (60 to 79 credit points), and "D" (below 60 credit points).[205] The initial base score for each entity is 100 points, which the system grants automatically.[206] Subsequent data added to the system can increase scores and potentially upgrade them or can lead to score reduction and potential downgrades.[207]

The process of adding or deducting points simplifies multi-dimensional matters (such as various behaviors, punishments, and honors) into a single measurement standard: the score. The basis for scoring the entities currently follows the *Credit Evaluation Indicators System and Evaluation Rules for Patent Attorneys* and the *Credit Evaluation Indicators System and Evaluation Rules for Patent Agencies*.[208] Both sets of rules set out similar scoring schemes. Positive data typically adds 1 to 3 points to a patent attorney's score.[209] This can include records of provincial or higher-level government accolades, serving as industry integrity volunteers, providing information about others' misconduct, etc. [210]The criteria for awarding points to patent agencies largely overlap with those for attorneys. Agencies also earn points for awards, volunteer work, and providing information about misconduct by others.[211]

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[204] Credit Evaluation Measures, *supra* note 9, at art. 5.
[205] Credit Evaluation Measures, *supra* note 9, at art. 5.
[206] Credit Evaluation Measures, *supra* note 9, at art. 7.
[207] Credit Evaluation Measures, *supra* note 9, at art. 7.
[208] Zhuanli Dai Lishi Xinyong Pingjia Zhibiao Tixi Ji Pingjia Guize (专利代理师信用评价指标体系及评价规则) [Credit Evaluation Indicators System and Evaluation Rules for Patent Attorneys] (promulgated by the St. Intell. Prop. Admin. on Mar. 31, 2023, effective May 1, 2023) [hereinafter Credit Evaluation Indicators for Patent Attorneys], https://www.gov.cn/zhengce/zhengceku/2023-04/17/5751863/files/fe9bb500153943388467001ddfb5477f.xlsx [https://perma.cc/VYX9-BNT8]; Zhuanli Dai Li Jigou Xinyong Pingjia Zhibiao Tixi Ji Pingjia Guize (专利代理机构信用评价指标体系及评价规则) [Credit Evaluation Indicators System and Evaluation Rules for Patent Agencies] (promulgated by the National Intellectual Property Administration on Mar. 31, 2023, effective May 1, 2023) [hereinafter Credit Evaluation Indicators for Patent Agencies], https://www.gov.cn/zhengce/zhengceku/2023-04/17/5751863/files/0736a2d2c4fb4bd481416ff418b55f16.xlsx [https://perma.cc/NX7T-HWS2]. For a simplified version of both of the indicator systems, see Appendix Table 1 and Table 2.
[209] *See* Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[210] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[211] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.

Conversely, data relating to negative matters lowers the score. Eighteen items, categorized into three groups—"unprofessional behavior," "penalty," and "sanctions by industry association"—can lead to deductions for patent attorneys.[212] The most significant deductions, amounting to 100 points, are imposed for criminal penalties related to patent agency violations and revocation of the patent attorney's license.[213] The smallest deduction, 15 points, results from a warning from the industry association.[214] Other items leading to deductions include refusing to execute administrative penalty decisions (a 20-point deduction), receiving a warning as an administrative penalty (30 points), engaging in speculative patent applications (40 points), or being part of an agency whose license is revoked (60 points).[215]

Likewise, patent agencies are subject to 25 deduction items, arranged into categories of "unprofessional management," "operational anomalies," "penalties," and "sanctions by industry associations."[216] Deductions range from 10 to 100 points, with the highest penalties imposed for criminal violations or license revocation affecting agencies or their senior executives.[217] The lowest deduction (10 points) applies to administrative issues like delayed annual reporting.[218] Other penalties fall between 15 to 60 points for various operational anomalies.[219]

2. *Personalized Rules*

The government applies personalized rules to the patent agencies and patent attorneys based on their credit tier, which ranges from "A+" to "D." For entities rated "A+" and "A," the *Credit Evaluation Measures* provide a series of preferential treatments to reward their good standing.[220] These privileges include fewer routine inspections, streamlined administrative approval processes, and prioritization in applications and reviews for fiscal fund projects.[221] Entities rated

[212] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[213] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[214] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[215] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[216] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[217] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[218] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[219] Credit Evaluation Indicators for Patent Attorneys, *supra* note 208.
[220] Credit Evaluation Measures, *supra* note 9, at art. 14.
[221] Credit Evaluation Measures, *supra* note 9, at art. 14.

"B" receive relatively neutral measures under the *Credit Evaluation Measures*.[222] This indicates that these patent agencies and attorneys face standard business supervision and receive necessary business guidance when required.[223]

In contrast, the system subjects entities with "C" and "D" ratings to more stringent, even punitive, governance strategies. "C" entities receive heightened scrutiny, including increased inspection frequency, targeted business guidance, and policy education.[224] This category of entities undergoes a rigorous review process for applications involving fiscal funds and formal records of facilitation measures, such as expedited patent examination requests.[225] Entities rated "D," the lowest credit tier, encounter the most severe restrictions.[226] Designated as primary targets for regulatory oversight, these entities face frequent inspections, strict legal supervision, and limitations on the use of administrative facilitation measures like the notification commitment system.[227] Moreover, their access to preferential policies, fiscal fund projects, facilitation measure records, and participation in various intellectual property activities, including evaluations, awards, and expert recommendations is significantly curtailed.[228]

3. Communication Rules

The communication of the personalized rules of the Tiered Regulation Mechanism echoes the approach of the Reward and Punishment Mechanism.[229] This involves the transmission of a complete set of rules to the regulated entities.[230] The authorities predetermine and officially declare the rules to the public through the *Credit Evaluation Measures*.[231] This document gives patent agencies and attorneys the opportunity to comprehend thoroughly the entire spectrum of personalized rules that it describes.

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[222] Credit Evaluation Measures, *supra* note 9, at art. 15.
[223] Credit Evaluation Measures, *supra* note 9, at art. 15.
[224] Credit Evaluation Measures, *supra* note 9, at art. 16.
[225] Credit Evaluation Measures, *supra* note 9, at art. 16.
[226] *See* Credit Evaluation Measures, *supra* note 9, at art. 17.
[227] Credit Evaluation Measures, *supra* note 9, at art. 17.
[228] Credit Evaluation Measures, *supra* note 9, at art. 17.
[229] *See* Credit Evaluation Measures, *supra* note 9, at arts. 14–17.
[230] Credit Evaluation Measures, *supra* note 9, at arts. 14–17.
[231] Zhuanli Daili Xinyong Pingjia Guanli Banfa (Shixing) (专利代理信用评价管理办法（试行）) [Patent Agency Credit Evaluation Management Measures (Trial)] (promulgated by the St. Intell. Prop. Admin., Mar. 31, 2023, effective May 1, 2023), CLI.4.5163809(EN) (Lawinfochina).

Also like the Reward and Punishment Mechanism, there is no immediate temporal connection between the communication of rules and the subsequent actions of the entities, such as engaging in volunteer activities or ceasing to submit speculative patent applications. But unlike the Reward and Punishment Mechanism, where an entity in the "Entities with Good Credit for Three Consecutive Years" category can only infer its profile, the entities in the Tiered Regulation Mechanism can figure out their profiles through the Patent Agency Management System.[232] Determining their tiers lets entities know which personalized rules they must follow. The Patent Agency Management System gives patent agencies and attorneys access to detailed information regarding their credit scoring.[233] Patent agencies can view their profiles, detailed scoring, and the profiles of patent attorneys associated with their organizations, while individual patent attorneys can read their personal profiles and scoring details.[234]

The public can also see the profiles of patent agencies and attorneys through the system, although scoring details remain confidential.[235] The public accessibility of these profiles creates a deterrent effect through public shaming of entities with negative profiles, affecting their reputational standing and commercial relations.[236] Simultaneously, it empowers clients and potential partners by giving them crucial information, which enables them to make informed decisions about which patent agencies and attorneys to work with.

4. *Adjustment Rules*

Both Mechanisms structure their adjustment rules to include both duration and error correction components. A distinct feature of the Tiered Regulation Mechanism is its emphasis on the time-bound effect of *collected data* on an entity's

[232] *Quanguo Zhuanli Daili Zinzi Gongshi Pingtai* (全国专利代理信息公示平台) [*State Patent Agency Information Disclosure Platform*], GUOJIA ZHISHI CHANQUAN JU (国家知识产权局) [ST. INTELL. PROP. OFFICE], https://dlgl.cnipa.gov.cn/txnqueryAgencyOrg.do [https://perma.cc/D9B4-2NS4] (for patent agencies' profiles); *Quanguo Zhuanli Daili Zinzi Gongshi Pingtai* (全国专利代理信息公示平台) [*State Patent Agency Information Disclosure Platform*], GUOJIA ZHISHI CHANQUAN JU (国家知识产权局) [ST. INTELL. PROP. OFFICE], https://dlgl.cnipa.gov.cn/txnqueryAgent.do [https://perma.cc/25VT-CBXU] (showing patent attorneys' profiles).

[233] Credit Evaluation Measures, *supra* note 9, at art. 9.

[234] Credit Evaluation Measures, *supra* note 9, at art. 9.

[235] *See State Patent Agency Information Disclosure Platform*, *supra* note 232.

[236] *See generally* Trauth-Goik & Liu, *supra* note 180, at 1017.

profile rather than on the regulatory measures.[237] Specifically, both positive and negative data affect an entity's profile for a duration of twelve months. After this period, the influence of this data is nullified; the data is effectively reset and no longer factors into the entity's credit score.[238]

Furthermore, the Tiered Regulation Mechanism incorporates a credit restoration process, which allows entities to recover from past misconduct.[239] Six months after the successful rectification and the fulfillment of the relevant obligations, entities may apply for credit restoration.[240] This process requires them to submit evidence of corrective actions and fulfilled obligations for review.[241] Approved applications result in the restoration of deducted credit points, facilitating an improvement in the entity's credit tier.[242] However, conditions apply to this process, such as the barring of entities that have already restored credit in the previous twelve months, that submit fraudulent applications, or that are prohibited from restoration due to legal or policy constraints.[243] This mirrors the duration regulations of the Reward and Punishment Mechanism, underscoring the compliance encouragement objective inherent in the social credit system.

Error correction in the Tiered Regulation Mechanism focuses on addressing the application of rules rather than on adjusting the rules themselves, mirroring the approach of the Reward and Punishment Mechanism. Article 10 of the *Credit Evaluation Measures* allows patent agencies and attorneys to challenge their credit scores or profiles.[244] They can submit their objections, with supporting evidence, through the Patent Agency Management System, for verification by the relevant patent management departments.[245] By law, these departments must complete the verification within fifteen working days and communicate the outcomes to the

[237] *See* Credit Evaluation Measures, *supra* note 9, at art. 8.
[238] Credit Evaluation Measures, *supra* note 9, at art. 8.
[239] Credit Evaluation Measures, *supra* note 9, at art. 11.
[240] Credit Evaluation Measures, *supra* note 9, at art. 11.
[241] Credit Evaluation Measures, *supra* note 9, at art. 11.
[242] Credit Evaluation Measures, *supra* note 9, at art. 11.
[243] Credit Evaluation Measures, *supra* note 9, at art. 11.
[244] Credit Evaluation Measures, *supra* note 9, at art. 10.
[245] Credit Evaluation Measures, *supra* note 9, at art. 10.

applicants.[246] If they validate the objections, then they adjust the entity's credit score and tier accordingly.[247]

D. Assessment of the Two Mechanisms

1. Profiling Rules

In the Reward and Punishment Mechanism, the scope of data collection is relatively narrow, focusing primarily on the compliance records that governmental entities generate. This limited range of data, while possibly restricting the granularity of entity profiles, has its advantages. It reduces the costs of data collection, as these records are produced and gathered during routine administrative operations, and it guarantees the authenticity of the data, which stems from formal administrative decisions.[248] In contrast, the Tiered Regulation Mechanism adopts a more expansive data collection approach, incorporating a wider array of data from administrative, industrial, and self-reported sources.[249] This comprehensive method, although more elaborate, introduces the challenges of ensuring the trustworthiness of data, especially the self-reported information from regulated entities. Such data necessitates stringent verification processes to confirm its authenticity and to manage the risk of misinformation effectively.

2. Personalized Rules

The personalized rules of both the Reward and Punishment Mechanism and the Tiered Regulation Mechanism mark an advancement of the rules in China's patent system towards precise regulation by tailoring legal rules based on the nuances of individual entities.[250] The targeted approach of the Reward and Punishment Mechanism enhances the disincentives to infringers and entities that engage in speculative patent filings, while it improves the incentives to entities exhibiting consistent compliance. The differential treatment of the Tiered Regulation Mechanism makes the incentives more targeted and boosts the efficiency of resource allocation among administrative authorities, as it ensures

[246] Credit Evaluation Measures, *supra* note 9, at art. 10.
[247] Credit Evaluation Measures, *supra* note 9, at art. 10.
[248] *See* Credit Management Regulations, *supra* note 7, at arts. 8, 10.
[249] *See* Credit Evaluation Measures, *supra* note 9, at art. 7.
[250] *Cf.* Coglianese, *supra* note 1, at 2 ("To take account of relevant particularities, rules are sometimes made complex so that they can fit better the complexities found in the world.").

that compliant entities are not over-regulated while focusing on managing frequent violators. By shifting from uniform, one-size-fits-all rules to a more nuanced, data-driven approach, these mechanisms counteract both the over-inclusiveness and the under-inclusiveness of the conventional patent system.

However, the personalized rules of both mechanisms are not without their limitations. First, due to their nature as crude personalization models, the legal content remains relatively static, which limits the system's ability to respond dynamically to real-time changes in entities' behaviors or circumstances, potentially reducing its effectiveness. Second, both the Reward and Punishment Mechanism and the Tiered Regulation Mechanism have a transparency issue. The specific reasoning behind punitive measures, rewards, preferential treatments, or stricter treatments remains undisclosed, leading to a lack of clarity that can hinder stakeholders' comprehension and challenge the legitimacy of these regulatory frameworks.[251] Third, they raise concerns regarding the proportionality and appropriateness of the measures.[252] For instance, the Reward and Punishment Mechanism enacts up to 38 joint punitive actions across various governmental departments for "Seriously Illegal and Untrustworthy Entities," which can lead to excessively harsh sanctions that potentially stifle their operations and exceed the mechanism's deterrent intent. Similarly, the rewards for "Entities with Good Credit for Three Consecutive Years" are predominantly offered by departments dealing

[251] These personalized rules are pre-set rather than dynamically changing based on circumstances, making them static. Transmission of these rules and the related lack of transparency creates clarity and notice issues, leading to a potential loss of legitimacy. *See* Casey & Niblett, *supra* note 96, at 343 ("[O]ne might question the legitimacy of a law whose purpose cannot be identified."); *cf*. Lauren Henry Scholz, *Two Cheers for Cyborgs Personalized Law*, U. CHI. L. REV. ONLINE, Mar. 9, 2022, at 9 ("Can we really get humans out of the loop at all, or are we just fooling ourselves, or worse, obscuring and legitimating human choices under the cloak of automation?").

[252] Acknowledging these concerns, Chinese scholars have focused on legal doctrines to forestall potential SCS abuses. *See* Cheung & Chen, *supra* note 7, at 1154 (discussing the disproportionate combined punishments under the SCS); Shen, *supra* note 20, at 41–42 (arguing that the approach of "one instance of untrustworthiness leading to restrictions everywhere" should be firmly rejected as it risks making the joint punishment for untrustworthiness lose appropriate boundaries, contradicting principles like respect for human rightsand the principle of proportionality); Wang Xixin (王锡锌) & Huang Zhijie (黄智杰), *Lun Shixin Yueshu Zhidu De Fazhi Yueshu* (论失信约束制度的法治约束) [*On the Legal Constraints of the Breach of Trust Constraint System*], 1 ZHONGGUO FALU PINGLUN [CHINA L. REV.] 96, 98 (2021) (noting that in the implementation of measures constraining untrustworthy conduct and dishonest behavior, a series of issues such as the absence of due process, overly harsh punitive measures, and insufficient remedies have given rise to societal concerns about the improper use, or even abuse, of the SCS).

with intellectual property, suggesting a narrow scope of incentives that might not sufficiently motivate entities toward higher compliance levels.

3. Communication Rules

To disseminate information to regulated entities, the Reward and Punishment Mechanism and the Tiered Regulation Mechanism adopt an approach that resembles conventional laws. By publicly disclosing both the full contents of the personalized rules and the outcomes of profiling, these mechanisms ensure that all regulated entities are thoroughly informed about the regulatory framework in which they operate. It is generally beneficial to inform regulated entities about the content of law, as the knowledge of law is inherently valuable and essential for ensuring accountability.[253] Crucially, this method of conveying rules upholds the "value of shared experience in interpreting and following laws."[254] The collective understanding and application of these rules fosters a sense of communal participation in the legal process that mitigates the risk of alienation or fragmentation within the community. Moreover, public shaming, an outcome of disclosing the profiles of regulated entities, serves as a potent deterrent against non-compliance—creating another mechanism from which entities can be fully informed of the regulatory framework and relevant dropdown effects, such as the effect of associating with the named entity.[255] This public awareness strategy allows the general population to avoid interactions with unreliable entities, as non-compliance is indicative of irresponsibility.

However, the mechanisms' communication strategies also have shortcomings. The informational gaps inherent in the disclosed rules represent a significant concern. For instance, the Reward and Punishment Mechanism does not explicitly guarantee the benefits that "Entities with Good Credit for Three Consecutive Years"

[253] Verstein, *supra* note 91, at 563 ("There are usually good reasons to let legal subjects know the content of the law. Legal knowledge is intrinsically valuable and instrumentally a precondition to accountability.").

[254] Mayson, *supra* note 32, at 10–11 (noting that one of the costs of the personalization of law is compromising the collective legal experience crucial to a cohesive political community). As both regulations set out broad categories for entity behavior, the approach of both mechanisms of personalized patent law in China would seem not to cause substantial disruption to such a collective legal experience.

[255] *See generally* Marianne von Blomberg & Haixu Yu, *Shaming the Untrustworthy and Paths to Relief in China's Social Credit System*, 49 MODERN CHINA 744, 748–50 (2023).

stand to gain,[256] which can lead to inconsistent application. Similarly, phrases in the personalized rules section of the Tiered Regulation Mechanism like "*may* reduce," "*relevant* administrative approvals," "providing business guidance *when appropriate*," and "implement *corresponding* incentives and tiered regulatory measures"[257] leave room for discretion, introducing uncertainty for regulated entities. In addition, the fact that the authorities neither communicate nor explicitly acknowledge the positive profiles of "Entities with Good Credit for Three Consecutive Years," might undermine an entity's motivation to attain and maintain this status. These challenges underscore the need for more direct communication of the profiles, and for providing personalized rules in a clearer manner.

4. Adjustment Rules

The adjustment rules of both mechanisms are critical for fostering a balanced regulatory environment that allows for rehabilitation and redress. Notably, the duration regulations prevent indefinite sanctions. Allowing credit restoration is instrumental in ensuring that entities are not perennially tarnished by their past misdeeds, and to encourage them to reform promptly. The error correction protocols that give entities the right to challenge inaccuracies in the implementation of rules ensure alignment with the principles of due process and fairness.[258] By facilitating administrative review and litigation, the mechanisms empower entities to seek to correct their profiles, letting them safeguard themselves against the unwarranted harm that punitive measures and stricter regulation can cause.

However, these adjustment rules have notable limitations. They focus primarily on addressing operational errors in the application of rules and overlook the substance of the rules themselves. This narrow focus might lead to scenarios in which the rules, despite being applied correctly, are inherently unreasonable or overly punitive.

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[256] Credit Management Regulations, *supra* note 7, at art. 20 (emphasis added) ("All departments and units of the State Intellectual Property Office *may* take the following incentive measures *as appropriate* for entities that have good trustworthiness for three consecutive years. . . . ").

[257] Credit Evaluation Measures, *supra* note 9, at arts. 14, 15 (emphasis added).

[258] *Cf.* Catalina Goanta, *The Ancient Alien: Good Faith as the Facilitator of Personalized Law Personalized Law*, U. CHI. L. REV. ONLINE, Mar. 9, 2022, at 5–7 ("[P]ersonalized law cannot exist in the absence of comprehensive procedures that facilitate its purpose and ensure transparency and accountability in an attempt to improve and respect digital footprints, as opposed to causing more harms to the individual behind them.").

III
IMPLICATIONS

This section, based on the analysis of the Reward and Punishment Mechanism and the Tiered Regulation Mechanism in China's patent system, discusses two potential implications of personalization of law. The first is institutional: legal personalization may increase administrative bodies' control of the legal environment. The second is functional: legal personalization could lead to an expansion of the functions of law, raising important questions about the theoretical justifications and normative principles underlying these new roles.

A. The Redistribution and Rebalancing of Powers

Professor Hans Christoph Grigoleit posits that the movement toward personalized law "will bring about major changes to the structure of power distribution in the judicial system,"[259] with major implications for legislative, judicial, and procedural dynamics.[260] At the legislative level, personalized law introduces complexities and reduces transparency, potentially increasing expert influence and shifting power either to administrative bodies or private actors.[261] This raises concerns about diminishing public control and democratic discourse in lawmaking.[262] For the judiciary, more specific legislative commands lead to a reduction in decision-making power, as the courts have less leeway in interpretation.[263] Additionally, high-degree personalization could lead to decisions based on nontransparent algorithms, potentially dehumanizing the decision-making process and affecting the acceptability of outcomes.[264]

Grigoleit's concerns are particularly relevant when examining the Reward and Punishment Mechanism and the Tiered Regulation Mechanism of China's patent system. Although these mechanisms demonstrate a rudimentary form of personalization, rather than an advanced stage primarily driven by Big

[259] Grigoleit, *supra* note 97, at 9.
[260] Grigoleit, *supra* note 97, at 10–11.
[261] Grigoleit, *supra* note 97, at 10–11; *see also* Casey & Niblett, *supra* note 77, at 1404 (noting that it is realistic that administrative agents will be responsible for implementing technology which translates legislative standards into microdirectives, highlighting the shift in rule-making from lawmakers to specialized regulatory bodies).
[262] Grigoleit, *supra* note 97, at 10.
[263] Grigoleit, *supra* note 97, at 10.
[264] Grigoleit, *supra* note 97, at 10.

Data and algorithmic analysis, they signify a growing tendency toward a more administratively controlled legal environment. Notably, it is administrative bodies that formulate these personalization mechanisms in the patent system, not the national legislative authorities—the National People's Congress and its Standing Committee. Cheung and Chen note that this pattern is not confined to the realm of patent law. They observe the establishment of various standards in the SCS without formal legislative procedures.[265] Although there is no overt reduction in judicial discretion, it is predominantly administrative agencies, rather than the courts, that enforce these personalization mechanisms. Additionally, the lack of transparency regarding the underlying rationale obscures these mechanisms from public scrutiny, limiting the public's capacity to influence or challenge these laws and their implementations through legislative and judicial avenues.

This paper posits that as the administrative bodies' role in shaping and executing personalized law expands, a rebalancing of state powers is imperative in order to prevent abuses and the risk of the infringement of individual rights. In China, legislative and judicial oversight of the administrative agencies' creation of such personalized laws is generally confined to the setting of broad guidelines and principles, while detailed monitoring of administrative regulations is outside the direct scope of the National People's Congress and its Standing Committee. The *Legislation Law* delegates this oversight to the State Council, an administrative entity.[266] Specifically, Article 109 of the *Legislation Law* requires the administrative bodies that make departmental regulations to file their regulations with the State Council, an administrative body, rather than submitting them for legislative review.[267] On the judicial front, the scope of review of administrative actions does not typically extend to assessing the constitutionality or legality of the administrative rules themselves.[268] Courts focus on the compliance of administrative actions with established laws and regulations, which leaves a gap

[265] Cheung & Chen, *supra* note 7, at 1152.
[266] Zhonghua Renmin Gongheguo Lifafa (中华人民共和国立法法) [Legislation Law of the People's Republic of China] (promulgated by the Standing Comm. St. People's Cong., Mar. 15, 2000, effective July 1, 2000) at art. 109 § 3, CLI.1.26942(EN) (Lawinfochina).
[267] *Id*.
[268] Administrative Litigation Law, *supra* note 189, at art. 12.

in oversight, particularly in evaluating the fairness and reasonableness of these administrative regulations.[269]

One solution to this problem could be to expand the role of the legislative branch. This would involve the creation of a specialized legislative committee, equipped not only with legal experts but also with data scientists and public representatives, responsible for comprehensively reviewing administratively-made personalized laws to ensure that they align with overarching laws and legal principles. As these personalized laws continue to evolve, this committee would engage in periodic audits to identify potential misalignments and unintended consequences.[270] Making the outcomes of audits publicly available would enhance transparency and facilitate public trust and acceptance of these laws.

Judicial oversight could be expanded to include a substantive review of the legality and constitutionality of the administrative agencies' personalized laws. While integrating these reforms into China's current legal structure presents challenges, as this development could require substantive amendments to the existing legal framework,[271] it is a feasible endeavor that addresses the evolving needs of data-driven administrative law. Recognizing the complexities of data-driven legal systems, courts should have access to technical resources, such as data analysis experts to evaluate the rules' intricacies.[272] While making this resource available to courts might not seem urgent in the current stage of crude

[269] Administrative Litigation Law, *supra* note 189, at art. 13 ("People's Courts shall not accept lawsuits filed by citizens, legal persons, or other organizations regarding the following matters ... (2) Administrative regulations, rules, or decisions and orders with general binding force formulated and promulgated by administrative organs.").

[270] *See generally* Ben-Shahar & Porat, *supra* note 32, at 4 (contending that for maintaining the soundness of personalization, "[the] personalization regime is to make its goals transparent, interpretable, and explainable; to have its methods regularly audited; and to identify and correct unintended effects"); Busch, *supra* note 83, at 330 (suggesting that for personalized regulations to work effectively and align with legal objectives, it is essential to conduct regular algorithm "audits"); Casey & Niblett, *supra* note 96, at 352 ("[W]e can audit the effectiveness of big data personalization by auditing its outcomes just the same way that the legal academy audits the old personalization of law by human judges.").

[271] For example, adjudicating administrative regulations might involve deep intervention in administrative powers, which could be a sensitive issue within China's political and social context. Consequently, there might be political resistance.

[272] *Cf.* Burk, *supra* note 1, at 301 (emphasizing that technical expertise is needed to understand the working of laws driven by algorithm).

personalization, it becomes indispensable as the system advances to a more sophisticated stage involving algorithmic personalized law.

Public oversight is also important. In the rudimentary stage of personalized law, transparency in administrative agencies' rationales vis-a-vis the four categories of rules is paramount to enable public scrutiny.[273] Beyond error correction, such public scrutiny fortifies the democratic legitimacy of personalized law.[274] The government can bolster this process by incorporating public engagement into the formulation of the system. This could manifest itself through public hearings and open forums for commenting on proposed regulations. These steps would clarify the decision-making process and offer a platform for diverse stakeholder input. As personalized law reaches more advanced stages, disclosure and public participation will continue to be pivotal.[275] However, the focus on disclosure and scrutiny would shift toward the design of the algorithms and the data that the administrative agencies and their algorithms consider. Given the increasing complexity of algorithmic systems and the potential for opacity in their decision-making processes, ensuring meaningful public participation and oversight may become increasingly challenging. To address this, governments and administrative agencies will need to develop and implement strategies for explaining the functioning of these algorithmic systems in an accessible manner, such as the use of simplified models, visualizations, or case studies that illustrate how the algorithms operate and make decisions. Additionally, there may be a need for independent audits and assessments of these systems to ensure their fairness, accountability, and adherence to legal and ethical standards. While providing tailored introductions and explanations to the public is important, it is equally crucial to recognize and proactively address the inherent difficulties in achieving full transparency and understanding of complex algorithmic systems.

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[273] *Cf.* Casey & Niblett, *supra* note 96, at 355 (stressing the imperative for algorithms to be "transparent in their reasoning" to ensure they are used responsibly).

[274] *Cf.* Klass, *supra* note 35, at 9 (emphasizing the importance of transparency and public accessibility in the legislative processes, underscoring their role in ensuring democracy).

[275] *See* Goanta, *supra* note 258, at 6 ("Given its practical dimension, personalized law equally cannot exist in the absence of comprehensive procedures that facilitate its purpose and ensure transparency and accountability in an attempt to improve the respect for digital footprints, as opposed to causing more harms to the individual behind them.").

B. The Expansion of the Function of Law

The data-driven personalization of laws invites a critical examination of the expanding function of legal systems. Consider, for example, the nuanced personalization of traffic laws.[276] This approach factors in a driver's risk level, incorporating data ranging from driving experience and current fatigue to credit scores.[277] While using credit scores in traffic law personalization might enhance road safety by assigning more accurate speed limits—a primary goal of traffic regulation—it might also inadvertently influence drivers' financial behavior. Drivers motivated to attain higher speed limits might engage in timely loan repayments and maintain minimal debt. The use of credit scores to personalized speed limits extends traffic regulation's function beyond road safety to influencing financial conduct.

Similarly, the expanded functionality of law is evident in the personalization of China's patent law. The Reward and Punishment Mechanism and the Tiered Regulation Mechanism in China's patent framework go beyond the traditional focus on innovation promotion to reflect broader policy objectives, including social and ethical considerations. The legal texts of these two mechanisms include the goals of "fostering a fair and honest market and social environment,"[278] "promoting self-discipline and honesty,"[279] and "strengthening industry self-discipline."[280] Such a blend of objectives demonstrates how the integration of diverse data sets, in this

[276] Ben-Shahar & Porat, *supra* note 31, at 19–20.

[277] Ben-Shahar & Porat, *supra* note 31, at 19–20.

[278] Credit Management Regulations, *supra* note 8, at art. 1 (citing Guowuyuan Bangong Ting Guanyu Jinyibu Wanshan Shixin Yueshu Zhidu Goujian Chengxin Jianshe Chang Xiao Jizhi De Zhidao Yijian (国务院办公厅关于进一步完善失信约束制度构建诚信建设长效机制的指导意见) [Guiding Opinions on Establishing a Long-term Mechanism for Building Integrity] (promulgated by the Gen. Off. of the St. Council, Dec. 7, 2020, effective Dec. 18, 2020), https://www.gov.cn/zhengce/content/2020-12/18/content_5570954.htm [https://perma.cc/54LD-A9RZ]) (stating that the mechanism is established to implement policies including the "Guiding Opinions on Establishing a Long-term Mechanism for Building Integrity," the stated goal of the policy is "to foster a fair and honest market and social environment").

[279] Untrustworthy Entities Management Methods, *supra* note 8, at art. 1.

[280] Article 1 of the *Credit Evaluation Measures* states that the mechanism is established to implement policies including the 14th Five-Year Plan for National Intellectual Property Protection and Application, "which pursues goals including 'strengthening industry self-discipline' to combat unauthorized patent agency activities." Credit Evaluation Measures, *supra* note 9, at art. 1 (stating that the mechanism is established to implement policies including the 14th Five-Year Plan for State Intellectual Property Protection and Application, "which pursues goals including 'strengthening industry self-discipline' to combat unauthorized patent agency activities"). The 14th Five-Year IP Plan, *supra* note 94, at art. 2.

case social credit data largely based on compliance records,[281] into the patent law framework contributes to the expansion of its function.

The structure of these mechanisms also reflects this expansion. For example, the Reward and Punishment Mechanism confers advantages, such as priority in patent examination, to entities with a "Good Credit for Three Consecutive Years" status. Priority patent examination and approval could lead to earlier patent grant and, consequently, earlier enforcement rights. In many jurisdictions, including China, while a patent application is pending, the applicant may have provisional rights to monetary compensation.[282] However, full enforcement rights are only available once the patent is granted. Although patent protection terms are primarily intended to encourage innovation, giving an entity with good compliance records the opportunity for expedited patent grant and enforcement also encourages compliant behavior across a broad spectrum.

The expansion of the function of law in data-driven personalization introduces two significant challenges. The first is the issue of theoretical justification. Traditional patent law rests on the incentive theory and the disclosure theory, which encourage innovation and the sharing of knowledge.[283] However, when this temporal protection is extended to promote compliance behaviors, it introduces a new dimension that established theoretical frameworks do not currently support. This discrepancy is particularly evident as the text of the fundamental legal document of China's patent system—the *Patent Law*—does not list the objectives of fostering fair markets and promoting self-discipline in the personalized patent

[281] *See* Wu Guoping (吴国平) & Tang Jun (唐), *Zhishi Chanquan Shixin Xingwei De Falu Guizhi Yanjiu* (知识产权失信行为的法律规制研究) [*Research on the Legal Regulation of Intellectual Property Dishonesty*], 9 Zhishi Chanquan [Intell. Prop.] 28, 28 (2011) (emphasis added) (defining "untrustworthy conducts involving intellectual property" as "conduct within the realm of intellectual property that violate the provisions of intellectual property law, deviate from the legislative purpose of intellectual property law *and* the principles of honesty and integrity, thereby damaging the credibility and integrity of the intellectual property system").

[282] Patent Law, *supra* note 54, at art. 13. In the U.S., for example, the provisional right of patent grants the patent applicant a temporary right to obtain reasonable royalties from anyone who makes, uses, offers for sale, or sells the invention claimed in the published patent application, starting from the publication date until the patent is granted. 35 U.S.C. § 154 (2018).

[283] *E.g.*, Patent Law, *supra* note 54, at art. 1.

mechanisms. Instead, the *Patent Law* still emphasizes the traditional goals of promoting innovation and sharing and implementing knowledge.[284]

Second, there is a complexity in the cumulative effects of nudges across multiple legal domains. For example, in the case of Ben-Shahar and Porat's personalized traffic laws, if a credit score is used to personalize laws across various domains, then the use of such data nudges a person's financial behavior across each of those domains, rather than individualizing the behavior to each instance or legal domain. This integration of data for law personalization could lead to intricate patterns within the legal system, potentially leading to "unintended consequences."[285] The criticisms of China's application of social credit data in law personalization highlight these concerns, as multiple legal areas combine to produce disproportionate penalties,[286] exemplifying the pitfalls of expanded functions and cumulative nudge effects.

In response to these challenges, scholars and policymakers must undertake two pivotal tasks. First, they must work toward creating intricate and comprehensive normative frameworks that can evaluate the law's expanded functions, integrating its traditional objectives with the new considerations that arise from incorporating diverse data sets.[287] This updated normative theory should guide rule generation and enhance the public understanding of the rationale behind personalized laws. Second, and perhaps more challenging, is the development of precise descriptive models to analyze and assess the cumulative effects of nudges. These models would help to identify unintended consequences and find

[284] Patent Law, *supra* note 54, art. 1 ("In order to protect the legitimate rights and interests of patentees, encourage invention and creation, promote the application of inventions and creations, improve innovation capabilities, and promote scientific and technological progress and socio-economic development.").

[285] Dan L. Burk, *Algorithmic Legal Metrics*, 96 NOTRE DAME L. REV. 1147, 1151 ("Legal determinations such as tort liability or criminal culpability that carry their own moral weight are likely to produce unintended consequences when associated with morally charged algorithmic metrics."); *accord* Jordan M. Barry, John William Hatfield & Scott Duke Kominers, *To Thine Own Self Be True? Incentive Problems in Personalized Law*, 62 WM. & MARY L. REV. 723, 724 (2021) ("Concerns about unintended consequences may further lower regulators' willingness to personalize law.").

[286] *See, e.g.*, Wang & Huang, *supra* note 252, at 97 (pointing out that the application of the social credit system has led to concerns and criticism from various quarters due to instances of disproportionate punitive measures and the generalized application of joint punishments).

[287] *Cf.* Mayson, *supra* note 32, at 10 (noting that while the personalization of law can correct inequalities, it is essential to establish a clear and normative theory that defines the substantive entitlements people should receive, prioritizing the reduction of structural inequalities in legal objectives).

interventions to mitigate them, perhaps by calibrating the combined effects of multiple personalized legal domains. Overall, the personalization of law offers the opportunity to shape legal systems that are technologically advanced and contextually relevant while also presenting the challenge of ensuring that this new legal form remains ethically grounded and operationally sound.

Conclusion

The analysis of the Reward and Punishment Mechanism and the Tiered Regulation Mechanism in China's patent law framework demonstrates the significant impact of integrating social credit data into legal systems. These mechanisms represent a shift towards personalized law, marking a departure from traditional, uniform legal frameworks and moving towards a more nuanced, data-driven approach to regulation.

The Reward and Punishment Mechanism, which categorizes entities into "Untrustworthy Entities," "Seriously Illegal and Untrustworthy Entities," and "Entities with Good Credit for Three Consecutive Years," applies corresponding incentives or sanctions based on these profiles. This targeted approach enhances disincentives for infringers and entities engaging in speculative patent filings while improving incentives for consistently compliant entities. Similarly, the Tiered Regulation Mechanism assigns patent agencies and attorneys to one of five tiers based on their social credit scores, subjecting them to differentiated regulatory measures. This approach optimizes resource allocation among administrative authorities, ensuring compliant entities are not over-regulated while focusing on managing frequent violators.

The evaluation of these mechanisms highlights the potential of personalized law to address the limitations of one-size-fits-all legal frameworks. However, it also reveals challenges, such as the lack of transparency in the reasoning behind punitive measures and rewards, concerns about the proportionality of sanctions, and the need for more direct communication of profiles and personalized rules.

The implications of this shift are profound. Institutionally, the growing prominence of administrative agencies in the enforcement of personalized laws signals a reconfiguration of power dynamics within the legal system. This development necessitates a reassessment of the roles and responsibilities of both legislative and judicial bodies in order to ensure a balanced distribution of state powers and to protect individuals' rights within this new legal landscape.

Functionally, the expansion of the patent law's function, from encouraging innovation to fostering a compliant and disciplined market environment, challenges the traditional theoretical basis of patent law. This expanded scope calls for a comprehensive theoretical reevaluation to ensure that the laws are not only effective in their new roles but also remain grounded in normative principles and avoid unintended consequences.

In addition to the broader implications for legal systems and governance, this paper's analysis offers critical insights for innovative enterprises, both domestic and foreign, operating within the Chinese market. The integration of social credit data into China's patent law provides a unique regulatory environment that they must navigate. For transnational businesses, adapting to this data-driven legal landscape means reevaluating their operational and compliance strategies to align with the nuanced requirements and opportunities presented by China's evolving patent system. Moreover, the insights gleaned from China's experience can serve as a valuable lesson for transnational companies as they prepare for the potential adoption of similar data-driven legal frameworks in other jurisdictions.

Some describe personalized law as "incredibly timely, even visionary" and believe that it will "dramatically change the law."[288] China's patent law, personalized through social credit data, exemplifies the development of legal systems in the digital age. It underscores the need for scholars, policymakers, and legal practitioners to navigate the challenges and harness the opportunities that data-driven law presents. The resulting dialogue will be crucial, not only for China, but also for the global legal community.

[288] Netta Barak-Corren, *Personalization and the Constitution Personalized Law*, U. CHI. L. REV. ONLINE, Mar. 9, 2022, at 1.

Appendix

Table 1

Credit Evaluation Indicators System and Evaluation Rules for Patent Attorneys (Simplified Version)	
Base Score (100 points)	
Positive Information (10 additional points maximum)	• Recognition awards from provincial-level or higher government departments: +3 • Individual as a volunteer for patent agency industry ethics: +1 • Fulfillment of duties as an industry ethics volunteer: +3 • Personal provision of tips on illegal activities within the industry: +3
Negative Information (points reduction)	• Summoned for a disciplinary meeting and required to rectify by the National Intellectual Property Administration: -15 • Summoned for a disciplinary meeting and required to rectify by the local government department managing patent work: -10 • Significantly higher than average workload per practicing patent agent: -15 • Representation of abnormal patent applications: -40 • Submission of false materials or concealment of important facts when applying for administrative confirmation: -20 • Listed on the blacklist for illegal and rule-breaking activities in the patent and trademark agency industry: -40 • Other non-standard professional behaviors causing significant adverse impact: -40 • Warning: -30 • Warning with a fine: -40 • Ordered to stop accepting new patent agency business for 6 to 12 months: -60 • Revocation of the patent attorney's qualification certificate: -100 • Criminal penalties received for patent agency illegal activities: -100 • Refusal to comply with or evasion of execution of administrative penalty decisions: -20 • Agency ordered to suspend business for 6 to 12 months: -30 • Agency's practice license revoked: -60 • Warned by the industry association: -15 • Criticized by the industry association: -20 • Expelled by the industry association: -30

Table 2

Credit Evaluation Indicators System and Evaluation Rules for Patent Agencies (Simplified Version)	
Base Score (100 points)	
Positive Information (10 additional points maximum)	• Recognition and awards from provincial-level or higher government departments: +3 • Patent agency as a volunteer organization: +1 • Number of practicing patent agents within the agency who are volunteers (persons): +1 • Fulfillment of professional volunteer responsibilities: +3 • Provision of industry illegal activity tips: +2
Negative Information (points reduction)	• Summoned for a disciplinary meeting by the National Intellectual Property Administration and required to rectify: -15 • Summoned for a disciplinary meeting by local government departments managing patent work and required to rectify: -10 • Discovery of untruthful promises or false commitments: -20 • Abnormally high agent workload per practicing patent agent: -15 • Representation of abnormal patent applications: -40 • Submission of false materials or concealment of important facts in administrative confirmation applications: -20 • Listed on the blacklist for illegal and irregular activities in patent and trademark agency industry: -40 • Agency involved in other non-standard business operations, causing significant adverse effects: -40 • Failure to submit annual report within the prescribed period: -20/-10 • Providing false information when obtaining a patent agency practice license or submitting annual report: -20 • Unauthorized changes to name, office location, managing partners, legal representatives, partners, or shareholders: -20 • Failure to complete the filing procedures for the establishment, change, or cancellation of branch offices: -20 • No longer meets the conditions for a practice license and is ordered by the provincial-level patent work management department to rectify, but still does not meet the conditions upon expiration of the deadline: -20 • Publicly disclosed information of the patent agency is inconsistent with its registration information at market supervision and administration or judicial administration departments: -20 • Unable to contact through the registered place of business: -20 • Listed on the business abnormality list for three years without fulfilling related obligations: -40 • Warning: -30

(Table 2 continued from previous page)	
Negative Information (points reduction)	• Warning and fine: -40 • Ordered to stop accepting new patent agency business for 6 to 12 months: -60 • Revocation or cancellation of practice license: -100 • Agency or agency executives (directors, supervisors, executives) subjected to criminal penalties for patent agency violations: -100 • Refusal to fulfill, evasion of execution of administrative penalty decisions: -20 • Warned by industry association: -15 • Criticized by industry association: -20 • Membership cancelled by industry association: -30

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PURSE, PAINTING, NFT: THE CRISIS OF THE OBJECT IN TRADEMARK LAW

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Art historian Hal Foster and his colleagues write of the accelerating convergence between fine art and consumer goods: "artistic and commercial, high and low, rare and mass, expensive and cheap, and so on. There is little tension, and not much insight, now that these pairs have imploded—just a giddy delight, a weary despair, or a manic-depressive cocktail of the two."[1] Nowhere is this messy collision more evident than the arena of non-fungible tokens (NFTs), where artists and fashion designers compete in their aspirations to lay claim to the medium for their works.

This article uses the recent litigation between luxury fashion house Hermès and artist Mason Rothschild over a series of so-called "MetaBirkin" NFTs to examine whether the test developed in Rogers v. Grimaldi *can effectively resolve disputes over trademark infringement by expressive works. The non-dimensionality of the NFT challenges the premise that paintings and purses are all that different and exposes the broader "crisis of the object" that inspires art and plagues trademark law. As contemporary art has increasingly used the medium of the artwork to challenge its capitalist context, the* Rogers *inquiry has grown ineffectual at delineating the boundaries between infringing and non-infringing expressive works at the intersection of art and fashion.*

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[1] HAL FOSTER ET AL., ART SINCE 1900 803 (3d ed. 2016).

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Introduction

In the case of luxury French fashion house Hermès, its renown for high-quality handbags may lack worthy competition; style critics compare the brand's "handwork" manufacturing process to the "tradition of Europe's medieval craft guilds" and laud the results as "perfect."[2] The iconic Birkin bag (Fig. 1)[3] is the fruit of a famous encounter on an Air France flight between actress Jane Birkin and the executive chairman of Hermès at the time, Jean-Louis Dumas, in 1984.[4] Now each handbag typically sells for between four- and six-figures, whether consigned or brand-new, depending on the rarity of the model.[5] In December of 2021, artist Mason Rothschild sold the rights to individual non-fungible tokens ("NFTs") as part of a series entitled the "MetaBirkins," with each NFT representing an image

[2] Nancy Hass, *Hermès's Refusal to Change Is Its Most Radical Gesture Yet*, N.Y. Times Style Mag. (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/t-magazine/hermes.html [https://perma.cc/FR5Q-UKUB].

[3] Hannah Malach, *Most Expensive Hermès Birkin Bags in the World: The Exotic Skins, Diamond Hardware and More Luxe Details*, Women's Wear Daily (Dec. 4, 2023, 12:31 PM), https://wwd.com/feature/most-expensive-hermes-birkin-bags-1235926390/ [https://perma.cc/MX9N-Z44T].

[4] Lindsay Talbot, *The Birkin Bag Gets an Update*, N.Y. Times Style Mag. (Oct. 15, 2021), https://www.nytimes.com/2021/10/15/t-magazine/birkin-bag-hermes.html [https://perma.cc/54KT-PEGN]; Marisa Meltzer, *Your Pristine Hermès Bag, to Some, Looks Tacky*, N.Y. Times (Mar. 4, 2023), https://www.nytimes.com/2023/03/04/style/hermes-bags-resale-used.html [https://perma.cc/4F8S-6RE5].

[5] Meltzer, *supra* note 4; Sophia Kercher, *A Birkin Bag in the Box Is Worth a Lifetime of Debt*, N.Y. Times (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/fashion/new-york-upscale-pawnshop-hermes-birkin-bag.html [https://perma.cc/35SG-5D2N].

of a Birkin bag covered in fur (Fig. 2)[6].[7] Rothschild explained that he wanted to, in his words, "create that same kind of illusion that [the Hermès Birkin bag] has in real life as a digital commodity."[8] Rothschild and his team earned $1.1 million from the one hundred MetaBirkins sold between December of 2021 and June of 2022.[9]

(Fig. 1) Hermès Birkin Bags

[6] Zachary Small, *Hermès Wins MetaBirkins Lawsuit; Jurors Not Convinced NFTs Are Art*, N.Y. TIMES (Feb. 8, 2023), https://www.nytimes.com/2023/02/08/arts/hermes-metabirkins-lawsuit-verdict.html [https://perma.cc/7F93-4GND].

[7] Hermès Int'l v. Rothschild, 654 F. Supp. 3d 268, 273 (S.D.N.Y. 2023). Rothschild sold the rights to the individual NFTs prior to minting the NFTs and placing them on the blockchain, when each NFT was connected to a digital image of a white cloth covering an item in the shape of a handbag. *Id.* at 274. The following day, Rothschild used the "smart contract" associated with each NFT to swap the veiled object in the image for a "unique" MetaBirkin, which was an image of a Birkin bag covered in fur. *Id.*

[8] Redacted Memorandum of Law in Opp'n to Def.'s Mot. for Summ. J. 10, ECF No. 91. Hermès Int'l v. Rothschild, No. 22-CV-00384-JSR (S.D.N.Y. Oct. 22, 2022). *NFT Artist: 'MetaBirkins' Project Aims to Create 'Same Kind of Illusion that it Has in Real Life'*, YAHOO NEWS (Dec. 6, 2021), https://news.yahoo.com/nft-artist-metabirkins-project-aims-200930209.html [https://perma.cc/SVK3-CRFH].

[9] *Rothschild*, 654 F. Supp. 3d at 274.

(Fig. 2) Mason Rothschild – *MetaBirkins*

Trademark law helps consumers to distinguish among goods on the basis of their source and thereby incentivizes producers to build up a brand-name reputation for their products.[10] The threshold question for any trademark suit, then, is whether the copied mark has earned a sufficiently distinct reputation such that it deserves the protection of the law in the first place.[11] Given the global renown of Birkin handbags, it comes as no surprise that courts have opted to protect the trade dress of the distinctive Hermès bag against counterfeiters in the past.[12] To succeed in an action for trade dress infringement under Section 43(a) of the Lanham Act, the plaintiff must first prove "that the mark is distinctive as to the source of the good" by demonstrating that the mark either is inherently distinctive or has *acquired* distinctiveness, also known as secondary meaning.[13] In the case of product design, such as the distinctive silhouette of a Birkin bag, the Supreme Court has held that it can only achieve protection under Section 43(a) with a showing of secondary meaning.[14] For example, the U.S. District Court for the Southern District of New York found in 2004 that the unique shape of Cartier's Tank and Panthère watches

[10] Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995).

[11] Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, 696 F.3d 206, 216 (2d Cir. 2012).

[12] *See, e.g.*, Hermès Int'l v. Kiernan, No. CV-06-3605(LDW)(WDW), 2008 WL 4163208 (E.D.N.Y. Aug. 28, 2008).

[13] Cartier, Inc. v. Four Star Jewelry Creations, Inc., 348 F. Supp. 2d 217, 240 (S.D.N.Y. 2004).

[14] Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 212–13 (2000). The Court struggled to provide a definitive distinction between product packaging and product design, instead offering instructive examples: a Tide detergent container represents product packaging, whereas a penguin-shaped cocktail shaker is product

possessed secondary meaning, meaning that "in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself," on the basis of a consideration of factors including "advertising expenditures, consumer studies, sales, competitors' attempts to plagiarize the mark, and the length and exclusivity of the mark's use."[15] While courts have generally opted to reflexively presume that Hermès Birkin bags represent a protectable mark without elaboration,[16] this close analogue in the luxury space demonstrates the rationale behind finding that the trade dress of the Birkin bag has acquired secondary meaning.

The weighty concerns in favor of strong trademark enforcement must account for the constitutional protection of freedom of expression. Trademark law once adopted a "no alternative avenues" of communication test, such that "where adequate alternative avenues of communication" exist, the infringing expressive message is not protected by the First Amendment.[17] In the landmark 1989 case *Rogers v. Grimaldi*, however, the Second Circuit overturned this standard and developed a novel test for balancing trademark rights with freedom of expression:[18]

> We believe that in general the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression. In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic

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design. *See* Mark A. Lemley & Mark P. McKenna, *Trademark Spaces and Trademark Law's Secret Step Zero*, 75 STAN. L. REV. 1, 20 (2023).

[15] *Cartier*, 348 F. Supp. 2d at 241.

[16] *Kiernan*, 2008 WL 4163208; *see* Hermès Int'l v. Lederer de Paris Fifth Ave., Inc., 219 F.3d 104, 107 (2d Cir. 2000) ("Although the district court did not address whether or not Hermès' designs are protectable as trademarks or trade dress, in viewing the record in the light most favorable to the non-movant below, Hermès, this court presumes that the designs are protected.").

[17] Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402 (8th Cir. 1987); *see also* Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979) ("Plaintiff's trademark is in the nature of a property right . . . and as such it need not 'yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.'") (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972)).

[18] Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

relevance, unless the title explicitly misleads as to the source or the content of the work.[19]

In the Second Circuit, the *Rogers* test applies where the "unauthorized use of another's mark is part of a communicative message and not a source identifier,"[20] particularly to "commentary, … news reporting or criticism."[21] The *Rogers* test distills the policy tension between trademark law and freedom of expression to a dual-pronged test. *Rogers* shields trademark use in expressive works under the Lanham Act where the "defendant's use of the mark or other identifying material is (1) 'artistically relevant' to the work and (2) not 'explicitly misleading' as to the source of content of the work."[22] Whether the *Rogers* test protects Rothschild's MetaBirkins at all depends on whether his work is "part of a communicative message and not a source identifier"—in other words, whether it is art or just a knock-off Birkin.

Hermès brought the trademark action at hand against Rothschild in January of 2022 and presented four sets of allegations in its Amended Complaint, claiming in part that "the MetaBirkins NFTs infringe Hermès' trademarks in the word 'Birkin' and in the design and iconography of the handbag" and that "Rothschild's alleged appropriation of the 'Birkin' mark diluted and damaged the distinctive quality and goodwill associated with the mark."[23] Hermès asserted that the MetaBirkins did not qualify as artistically expressive and therefore did not deserve protection under the First Amendment, because Rothschild released the MetaBirkins NFTs with the intention of "[p]rofit, [n]ot [e]xpression" by minting a "digital brand."[24] Rothschild described himself as "a marketing king" who was "sitting on a gold mine" and proposed minting a similar set of watch NFTs entitled "MetaPateks" after the luxury watch brand Patek Philippe.[25] Hermès capitalized on Rothschild's own statements to media outlets in the wake of his release of the MetaBirkins to

[19] *Id.*

[20] Champion v. Moda Operandi, Inc., 561 F. Supp. 3d 419, 434 (S.D.N.Y. 2021) (citing Yankee Publ'g Inc. v. News Am. Publ'g Inc., 809 F. Supp. 267, 275–76 (S.D.N.Y. 1992)).

[21] *Id.* at 434 (citing Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., 886 F.2d 490, 495 (2d Cir. 1989); United We Stand Am. Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 93 (2d Cir. 1997)).

[22] *Id.* (citing *Rogers*, 875 F.2d at 999).

[23] *Rothschild*, 654 F. Supp. 3d at 275.

[24] Redacted Memorandum of Law in Opp' to Def.'s Motion for Summ. J. at 3-5, ECF No. 91, Hermès Int'l v. Rothschild, No. 22-CV-00384-JSR (S.D.N.Y. Oct. 22, 2022).

[25] *Rothschild*, 654 F. Supp. 3d at 274.

suggest that his work represented a meaningless, yet lucrative, "digital commodity" as opposed to a work of artistic expression.

The seminal *Rogers* test fails to provide an adequate path that allocates ownership to either designer brands or contemporary artists over the arena of NFTs, and this particular "crisis of the object" forebodes broader difficulties in distinguishing between infringing and non-infringing expression. In addition to collaborating more co-extensively in recent years, luxury fashion and contemporary art also compete to conquer the NFT space. The MetaBirkins series of NFTs at issue in *Hermès International v. Rothschild* exemplifies the difficulties posed at this borderland between First Amendment and trademark law.

I

What are NFTs?

NFTs are non-interchangeable digital assets that creators can sell on a blockchain via "smart contracts" which self-execute.[26] NFTs "point to things," and "[w]hile NFTs can point to anything, one of the first applications of NFT technology was in the realm of digital art."[27] The modern art establishment that has long traded in Picassos has welcomed NFT artworks with open arms. The Guggenheim Museum has accepted a significant contribution from an electronics company and accordingly dedicated those resources toward digital artwork and "the Metaverse."[28] Turkish artist Refik Anadol used an artificial intelligence model to transform the hundreds of thousands of pieces of content from the archive of the Museum of Modern Art ("MOMA") into dizzying video displays where masterpieces morph into each other in rapid sequence, and the MOMA earned a

[26] Daniel T. Stabile, Kimberly A. Prior & Andrew M. Hinkes, Digital Assets and Blockchain Technology 25 (2020); Amy Whitaker & Nora Burnett Abrams, The Story of NFTs: Artists, Technology, and Democracy 40 (2023).

[27] Amy Adler, *Artificial Authenticity*, 98 N.Y.U. L. Rev. 706, 760 (2023).

[28] Zachary Small, *Even as NFTs Plummet, Digital Artists Find Museums Are Calling*, N.Y. Times (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/arts/design/nfts-moma-refik-anadol-digital.html [https://perma.cc/N2CL-FQLD].

fraction of the sales revenue for each NFT the artist sold.[29] Cryptocurrency experts assert that NFTs "are more akin to objects of art or collectibles than currencies."[30]

Yet the myriad potential classifications of NFTs implicate the case at hand. NFTs could fall under existing regulation for commodities due to the close resemblance of certain digital currency transactions to derivative financial instruments, including "futures, options, [and] swaps" that "derive their value from something else, including, for example, a benchmark rate, a physical commodity such as oil or wheat, or digital asset commodities."[31] In 2023, the Commodity Futures Trading Commission successfully filed in the U.S. District Court for the Northern District of Illinois for a consent order and permanent injunction of the cryptocurrency platform Binance according to the theory that the platform "offer[ed] digital asset derivative products" classified as commodities under federal law, although the order did not clarify the status of NFTs in particular as opposed to the other cryptocurrency transactions at issue in the consent order.[32]

Alternatively, NFTs could be classified as investment contracts. The U.S. District Court for the Southern District of New York held in *Friel v. Dapper Labs, Inc.* that NFTs called "Moments"—depicting notable moments of NBA players—could constitute securities in February of 2023.[33] The court made this determination that the Moments could represent an investment contract by establishing that the NFTs met the three prongs of the so-called *Howey* test, established by the Supreme Court in *SEC v. W.J. Howey Co.*: "(1) an investment of money (2) in a common enterprise (3) with the expectation of profit from the essential entrepreneurial or managerial efforts of others."[34] That said, the court noted that whether the Moments were securities "toes [the] line intimately" and

[29] *Id.*; Refik Anadol, *Unsupervised – Machine Hallucinations – MoMA*, Feral File, https://feralfile.com/artworks/unsupervised-machine-hallucinations-moma-kxq?fromExhibition=unsupervised-sla [archival link omitted] (last visited May 17, 2023).

[30] Daniel T. Stabile, Kimberly A. Prior & Andrew M. Hinkes, Digital Assets and Blockchain Technology 25 (2020).

[31] Complaint for Injunctive and Other Equitable Relief and Civil Monetary Penalties Under the Commodity Exchange Act and Commission Regulations at 9, C.F.T.C. v. Zhao, No. 23-CV-01887 (N.D. Ill. Mar. 27, 2023).

[32] Consent Order for Permanent Injunction, Civil Monetary Penalty, and Other Equitable Relief Against Defendants Changpeng Zhao, Binance Holdings Limited, Binance Holdings (IE) Limited, and Binance (Services) Holdings Limited at 7, C.F.T.C. v. Zhao, No. 23-CV-01887 (N.D. Ill. Dec. 14, 2023).

[33] Friel v. Dapper Labs, Inc., 657 F. Supp. 3d 422, 449-50 (S.D.N.Y. 2023).

[34] *Id.* at 433 (citing SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946)).

characterized its ruling as "narrow," clarifying that "[n]ot all NFTs offered or sold by any company will constitute a security, and each scheme must be assessed on a case-by-case basis."[35] The Securities and Exchange Commission likewise successfully charged Stoner Cats 2 LLC with unregistered offering and sale of "crypto asset securities" for its sale of so-called "Stoner Cats" NFTs, for which the company consented to a cease-and-desist order and payment of a civil penalty.[36]

By virtue of their disputed legal status and their shared qualities with various financial instruments, the MetaBirkins carry the reputation of NFTs and cryptocurrencies at large as "a risky and speculative market that has been plagued by grifters."[37] The Supreme Court determined in *Brown v. Entertainment Merchants Association* that video games constituted expressive works because they "communicate[d] ideas" and "social messages … through features distinctive to the medium (such as the player's interaction with the virtual world)."[38] If the MetaBirkins are works of art, they communicate "through features distinctive to the medium" of the NFT. Any artistic message that the MetaBirkins may express is necessarily filtered through the viewer's perception of the NFT as a speculative financial instrument. The NFT sits uncomfortably at the intersection of commodity, security, and provocative artistic medium.

II
Threshold Inquiry to the *Rogers* Test

A. *From "Is This Art?" to "Is This a Mark?"*

At the time of the *Hermès* trial, the threshold question under the *Rogers* test was whether the work qualified as expressive. Presided over by Judge Jed Rakoff, the court noted in its order denying the parties' cross-motions for summary judgment that neither *Rogers* nor its progeny in the Second Circuit had thoroughly

[35] *Id.* at 433, 450.

[36] Press Release No. 2023-178, Sec. and Exch. Comm'n, SEC Charges Creator of Stoner Cats Web Series for Unregistered Offerings of NFTs (Sept. 13, 2023), https://www.sec.gov/news/press-release/2023-178 [https://perma.cc/KRA2-F4PR].

[37] Ryan Faughnder, *Et Tu, Larry? Why so many celebrities are shilling for crypto*, L.A. Times (Feb. 13, 2022, 8:30 PM), https://www.latimes.com/entertainment-arts/business/story/2022-02-13/why-larry-david-and-lebron-james-super-bowl-ads-are-the-tip-of-hollywoods-crypto-iceberg [https://perma.cc/4R8X-DBHY].

[38] Brown v. Elec. Arts, Inc., 724 F.3d 1235, 1241 (9th Cir. 2013) (citing Brown v. Ent. Merchants Ass'n 54 U.S. 786, 790 (2011)).

delineated a clear understanding of what exactly comprises "artistic expression" within the *Rogers* framework.[39] A clearer standard emerged from the Ninth Circuit that is particularly relevant to digital media. Citing *Brown*, the Ninth Circuit held that even though the video game in question was not necessarily "the expressive equal of *Anna Karenina* or *Citizen Kane*," it nonetheless fell under the *Rogers* test because it was "expressive."[40] Likewise, in *Gordon v. Drape*, the Ninth Circuit determined that a set of greeting cards qualified for application of the *Rogers* test because "greeting cards are expressive works protected under the First Amendment" and cited the expressive element as "[a]n intent to convey a particularized message, … and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[41] The Ninth Circuit articulated a standard whereby works that the First Amendment protects as expressive pass the initial threshold of the *Rogers* test, and the courts define "expressive" broadly using language akin to the Supreme Court in *Brown v. Entertainment Merchants* to encompass works that express "ideas" and "messages" using "features distinctive to the medium."

In 2023, the Supreme Court pushed for a shift in emphasis away from the expressive qualities of the work and toward the function of source identification because the latter is the "primary mission" of trademark law.[42] The dispute centered between Tennessee whiskey brand Jack Daniel's and a dog-toy company which released a line of so-called "Bad Spaniels" and "Silly Squeakers" dog toys in the distinctive shape of the Jack Daniel's whiskey bottle.[43] Justice Elena Kagan delivered the Opinion of the Court and held the *Rogers* test does not apply where an infringer is "trading on the good will of the trademark owner to market its own goods"—that is, the infringer is using the infringed-upon mark for the purpose of "source identification."[44] Stated differently, *Rogers* "does not apply if the defendant uses the similar mark as a mark,"[45] as opposed to the Ninth Circuit standard

[39] *Rothschild*, 654 F. Supp. 3d at 276 (S.D.N.Y. Feb. 2, 2023).
[40] *Elec. Arts, Inc.*, 724 F.3d at 1241–42.
[41] Gordon v. Drape Creative, Inc., 909 F.3d 257, 268 (9th Cir. 2018) (citing Hilton v. Hallmark Cards, 599 F.3d 894, 904 (9th Cir. 2010)).
[42] Jack Daniel's Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140, 156 (2023).
[43] *Id.* at 148–50.
[44] *Id.* at 156. *See also* Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F. 4th 125, 128 (2d Cir. 2023).
[45] *Jack Daniel's*, 599 U.S. at 148.

"that *Rogers* applied to all 'expressive work[s].'"[46] As any critical visitor to a contemporary art museum knows, artists of the early twentieth-century relentlessly challenged the older, narrower conception of what is "art," and consequently, our own popular conception of expressive works has grown more expansive with ill-defined boundaries.[47] It is no surprise, then, that under the former threshold inquiry into the expressive qualities of the work, courts overwhelmingly tended to find expressive qualities in otherwise infringing works and granted *Rogers* protection.[48]

Jack Daniel's effectively replaced this pre-existing, "defendant-friendly" inquiry into expressive value with an alternative inquiry into the source-identifying function of the infringement, tipping the balance toward finding the work infringing and against finding the work eligible for *Rogers* deference.[49] Accordingly, when the sneaker company Vans filed suit against an art collective known as MSCHF, which sold a line of sneakers that distorted the trade dress and trademarks of the iconic Vans sneaker to produce a "Wavy Baby" line of sneakers (Fig. 3)[50], the Second Circuit found that MSCHF was using the trademarks and trade dress of the Vans sneaker as a "source identifier" for its own sneakers in a similar fashion to the "Bad Spaniels" use of the Jack Daniel's marks.[51] The court asserted that the "black and white color scheme, the side stripe, the perforated sole, the logo on the heel, the logo on the footbed, and the packaging" of the MSCHF sneaker evoked the Vans Old Skool sneaker in a way that would "brand its own products."[52] Where the courts once asked, "Is this art?," they now ask, "Is this a mark?" Both inquiries are broad and easy to answer in the affirmative.

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[46] *Vans, Inc.*, 88 F. 4th at 137 (citing *Jack Daniel's*, 599 U.S. at 154).

[47] ARTHUR DANTO, *Preface to* WHAT ART IS xii (2013); ARTHUR DANTO, WHAT ART IS 2, 38 (2013).

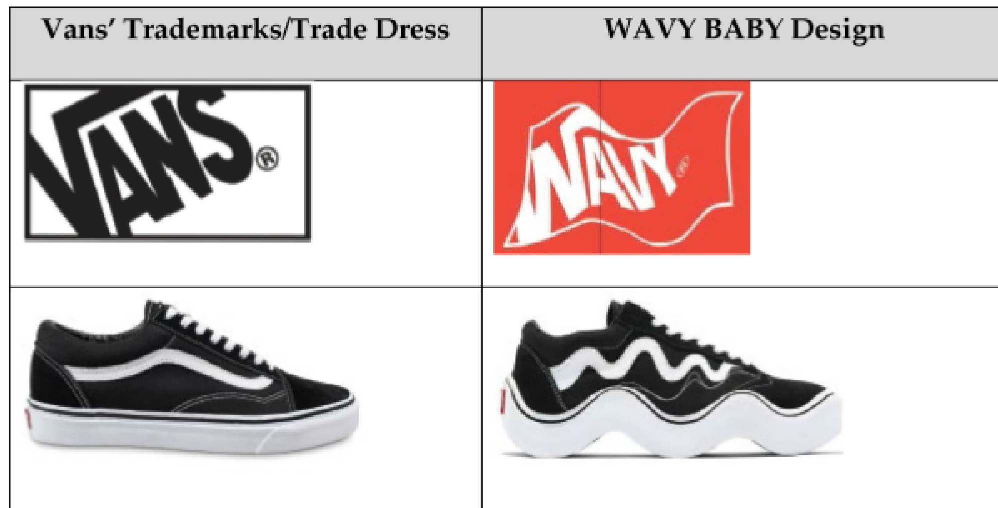
[48] *See* Barton Beebe, *What Trademark Law Is Learning from the Right of Publicity*, 42 COLUM. J. L. & ARTS 389, 395 (2019) ("In *Gordon*, Judge Bybee needed to find some limit on the *Rogers* test. (And who can blame him? The test is probably too defendant-friendly.)").

[49] *Id.*

[50] *Id.* at 130–31.

[51] *See Vans, Inc.*, 88 F. 4th at 137–38.

[52] *Id.* at 138–39.



(Fig. 3) Vans Sneakers Juxtaposed against MSCHF "Wavy Baby" Design

B. Art as Branding

Contrary to both the old and new threshold inquiries for *Rogers* deference, the boundary between artwork and branding proves fuzzy under scrutiny. Beginning in 1891, art dealer Paul Durand-Ruel exhibited multiple series of paintings by Claude Monet such as *Haystacks, Poplars, Rouen Cathedral* (Figs. 4-5)[53][54], *Views of the Thames*, and the artist's famous *Water Lilies*.[55] These series were, in the words of art auctioneer Philip Hook, "a dealer's dream, visually stupendous treatments of the same subjects under the varying light conditions of different times of day. Ten or twenty at a time, they flowed into his gallery for exhibition and sale with the paint barely dry on them."[56] Durand-Ruel needed to go to great lengths to sway the press and customers that Monet's series had an artist's touch and did not reduce his artistic brilliance to a mere "painting factory," all while the dealer himself participated proactively in "[t]he active branding of artists as commodities" and the "manipulat[ion of] the performance of their works at auction."[57] Monet also

[53] Claude Monet, *Rouen Cathedral, West Façade, Sunlight* (oil on canvas, 100cmx65cm), *in* National Gallery of Art (1894), https://www.nga.gov/collection/art-object-page.46654.html [https://perma.cc/9N7N-7JXR].

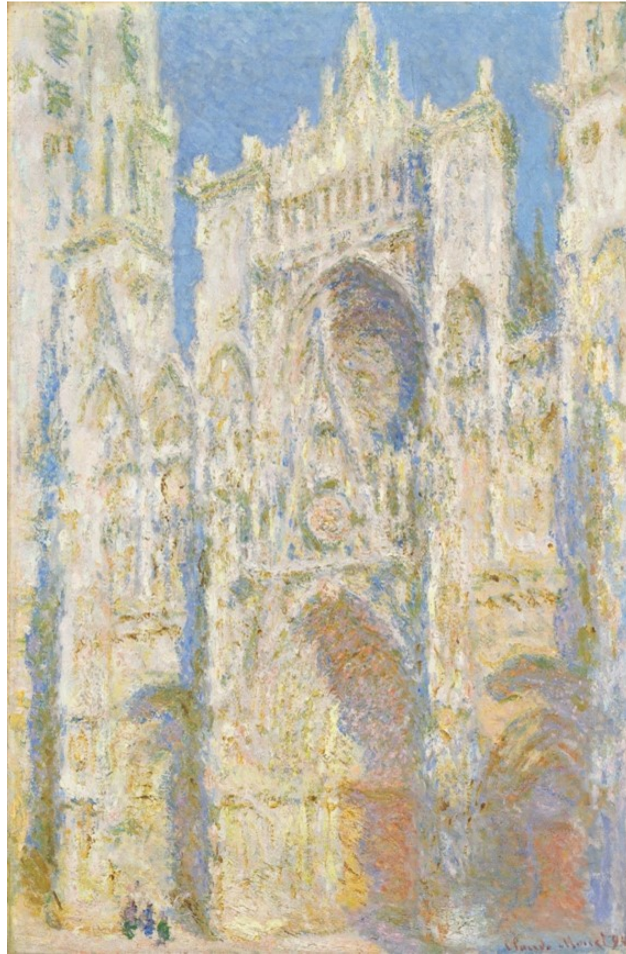
[54] Claude Monet, *Rouen Cathedral, West Façade* (oil on canvas, 100.1 x 65.9 cm), *in* National Gallery of Art (1894), https://www.nga.gov/collection/art-object-page.46524.html [https://perma.cc/44R4-GR4Q].

[55] Philip Hook, Rogues' Gallery 97 (2017).

[56] *Id.*

[57] *Id.* at 92.

once wrote to Durand-Ruel to ask that he work with a rival dealer named Georges Petit whose artists seemed to be immune from public criticism because, in Monet's words, their "paintings are mounted advantageously" and "because of the luxury of the room."[58] Hook writes that Petit's strategy represented "the first stage in the reinvention of the Impressionist painting as luxury object."[59]



(Fig. 4) Claude Monet, *Rouen Cathedral, West Façade, Sunlight*, 1894

[58] *Id.* at 95.
[59] *Id.*

(Fig. 5) Claude Monet, *Rouen Cathedral, West Façade*, 1894

Monet's series share a common structure with MetaBirkins—a set of depictions of the same subject with slight color alterations, packaged all together yet sold individually. Moreover, as Hook illustrates through his comparison of art dealer Petit's strategy to the sale of luxury objects, the commodity-like quality that characterizes the MetaBirkins is just as much of a feature of luxury handbags and modern art. The serial nature of Rothschild's work particularly evokes the factory-like process for the manufacture of both Monet cathedrals and Birkin bags. The MetaBirkins harness the serial, commodified, and speculative qualities of NFTs to skewer both luxury handbags and fine art and emphasize their own status as, in Rothschild's words, "digital commodities."

C. Rogers' Artificial Distinction between "Art" and "Mark"

The court in *Hermès* ultimately determined that *Rogers* nonetheless governed the case at hand because "using NFTs … does not make the image a commodity without First Amendment protection any more than selling numbered copies of physical paintings would make the paintings commodities for purposes of *Rogers*."[60] To establish that the MetaBirkins series represented an expressive work rather than a commodity, the court needed to draw an artificial distinction between commodities and artworks. Historic works of modern art such as Monet's cathedrals already elided such a dichotomy, and the novel generation of NFT artworks similarly cannot be neatly divided into these two categories. As *Dapper Labs*, the C.F.T.C. stance against Binance, and the art world's cozy reception to NFTs altogether demonstrate, NFTs do not fall cleanly into traditional categories of artistic expression deserving of *Rogers* deference.

Yet Kagan's inquiry is equally ill-adapted to the contemporary art environment. As discussed above, artists have been crafting "marks" for themselves in the form of visual motifs since at least the Impressionist movement. According to Foster, "This serial ordering … oriented Pop [art] to the everyday world of serial commodities more systematically than any previous art" and forged a direct connection between consumer culture and the brand of the artist.[61] Artist Andy Warhol's well-known, mass-produced silkscreens of Campbell's soup cans (Fig. 6)[62] particularly evoke the serial quality of Monet's cathedrals while calling attention to consumer objects, albeit household items of a more pedestrian quality than Birkin bags.[63] These soup cans have come to "brand" Warhol's artistic image to the extent that many art museum visitors can immediately identify

[60] Hermes Int'l v. Rothschild, 603 F. Supp. 3d 98, 104 (S.D.N.Y. 2022).

[61] FOSTER, *supra* note 1, at 702.

[62] Andy Warhol, *Campbell's Soup Cans* (acrylic with metallic enamel paint on canvas, 20x16), *in* MUSEUM OF MODERN ART, NEW YORK (1962), https://www.moma.org/collection/works/79809 [https://perma.cc/YGH2-9PM7].

[63] Moreover, the similarities between Warhol's Soup Cans and the MetaBirkins did not escape the attorneys in the case at hand. Hermès' motion to exclude analogies to the Campbell's soup cans was denied at trial, and Warhol's works were referred to repeatedly at trial by Rothschild's counsel, albeit with their admissibility continuously contested by Hermès' counsel. *See* Transcript of Record at 3, Hermès Int'l v. Rothschild, 22 Civ. 384 (JSR) (Hermès motion to exclude analogies to Warhol's Campbell's soup cans denied); *see e.g., id.* at 51, 53, 138, 294, 571–76 (the soup cans were referred to repeatedly at trial, albeit with admissibility contested by Hermès counsel).

Warhol as the source of a silkscreen-printed image of a Campbell’s soup can. Under Kagan’s inquiry, Warhol’s soup cans could evidently serve the purpose of source identification, whether that was Warhol’s intention or not. Using the indicia of consumer brands to critique consumerism has become an archetypal strategy for contemporary art, from Warhol’s use of Campbell’s soup cans through Rothschild’s MetaBirkins. As artists imitate capitalist branding in their artwork, they increasingly blur the separation between artwork and branding that the new *Rogers* threshold test relies upon.

(Fig. 6) Andy Warhol, *Campbell’s Soup Cans*, 1962

The old inquiry asked, “Is this art,” while the new inquiry asks, “Is this a mark?” While both investigations are sensible and important ones to make in this context, they also both prove inherently tautological. The questions they ask are philosophical, and neither inquiry provides any guardrails for how to resolve them. Kagan appears somewhat knowledgeable of the nebulous quality of this investigation into art-versus-mark when she suggests that the standard “likelihood-of-confusion inquiry does enough work to account for the interest in free expression.”[64] As I will discuss below, such an assurance is misplaced in the context of contemporary art.

[64] *Jack Daniel’s*, 599 U.S. at 159.

III
First Prong of *Rogers*: Artistic Relevance

After passing the initial threshold inquiry, the first prong under *Rogers* is whether the "defendant's use of the mark [is] … 'artistically relevant' to the work."[65] As the court in *Hermès* expounds with citation to *Rogers*, "[t]he threshold for 'artistic relevance' is intended to be low and will be satisfied unless the use 'has no artistic relevance to the underlying work whatsoever.'"[66] According to the Ninth Circuit, "the level of relevance merely must be above zero."[67] An illustrative example lies in *Louis Vuitton Mallatier S.A. v. Warner Bros. Entertainment Inc.*, whereby Louis Vuitton contended that Warner Bros. featured knock-off bags that infringed upon the Louis Vuitton mark in the film *The Hangover: Part II*.[68] In a scene at the airport before a flight to Thailand, one character remarks to another of his bag, "Careful … that [bag] is a Lewis Vuitton."[69] The U.S. District Court for the Southern District of New York determined that the character's comment "comes across as snobbish only because the public signifies Louis Vuitton … with luxury and a high society lifestyle" as well as "ironic because he cannot correctly pronounce the brand name of one of his expensive possessions, adding to the image of Alan as a socially inept and comically misinformed character."[70] Upon these grounds, the court concluded that the use of the Louis Vuitton mark in the film met the "artistically relevant" prong of *Rogers*.[71] This inquiry of *Rogers* separates expression that incorporates a famous mark to provide social commentary from expression that intends to profit off of the goodwill of the mark, and in *The Hangover: Part II*, the Louis Vuitton reference serves to satirize Louis Vuitton in the form of social commentary.

In a similar fashion to the *Hangover* character who mispronounces Louis Vuitton, the Birkin bag is "artistically relevant" to the work insofar as it connotes luxury to skewer its meaninglessness. The medium of the NFT is essential to that process because, as the mediator between the content and the viewer, it filters

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[65] *Rogers*, 875 F.2d at 999.
[66] *Rothschild*, 603 F.Supp. 3d. at 105 (citing *Rogers*, 875 F.2d at 999).
[67] E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1100 (9th Cir. 2008).
[68] Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc., 868 F. Supp. 2d 172, 174–76 (S.D.N.Y. 2012).
[69] *Id.* at 175.
[70] *Id.* at 178.
[71] *Id.*

our vision of the Birkin bag *through* the cultural reputation of NFTs. Rothschild provokes the popular view of NFTs as vacuous "digital commodities" and compares them to the similarly empty, speculative nature shared by both luxury handbags and modern art. In *Hermès*, the court determined that "there is a genuine factual dispute" as to whether the use of the Birkin mark bears any artistic relevance to the MetaBirkin project and left this determination to the jury.[72] The court in *Hermès* framed this inquiry into artistic relevance as an investigation into "whether Rothschild's decision to center his work around the Birkin bag stemmed from genuine artistic expression or, rather, from an unlawful intent to cash in on a highly exclusive and uniquely valuable brand name."[73]

The dichotomy between "genuine artistic expression" and "an unlawful intent to cash in" does not map well onto the art world, which has long had an ambivalent relationship with "cashing in." Seventeenth-century Netherlands represented the "greatest concentration of wealth on the planet until the emergence of Wall Street."[74] By virtue of their status as international sea-faring merchants, the Dutch had access to fantastic foreign objects that could serve as attractive status symbols.[75] Since the Dutch were Calvinists, riches demonstrated a merchant's status as a member of "the elect," a clear sign of God's favor.[76] Yet Calvinists also espoused the eschewal of the delights of this world to hold out for the ecstasy of Heaven.[77] To align their desire to display God's favor with their antipathy toward sinful earthly pleasures, the Dutch developed a "compromise," one that scholar Julie Berger Hochstrasser calls "window shopping."[78] Rather than display the physical possessions themselves, the Dutch instead depicted them in still-life paintings known as *vanitas*, which positioned the luxury objects alongside symbols

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[72] Hermès Int'l v. Rothschild, 654 F. Supp. 3d 268, 280 (S.D.N.Y. 2023).

[73] *Id.*

[74] Wayne M. Martin, *Bubbles and Skulls: the Phenomenology of Self-Consciousness in Dutch Still-Life Painting*, *in* A COMPANION TO PHENOMENOLOGY AND EXISTENTIALISM 559, 561 (H.L. Dreyfus & M.A. Wrathall eds., 2006).

[75] Miya Tokomitsu, *The Currencies of Naturalism in Dutch 'Pronk' Still-Life Painting: Luxury, Craft, Envisioned Affluence*, 41 CAN. ART REV. 30, 37–39 n.2 (2016).

[76] *Id.* at 43.

[77] Martin, *supra* note 74, at 561.

[78] Julie Berger Hochstrasser, *Imag(in)ing Prosperity: Painting and Material Culture in the 17th-century Dutch Household*, 51 NETH. YEARBOOK FOR HIST. ART 194, 225 (2000).

of death and rebirth to indicate that earthly goods could not distract the Dutch from their heavenly aspirations.[79]

The MetaBirkins thematically closely align with the Dutch *vanitas*. In Willem Claesz Heda's *Vanitas (Still Life)* (Fig. 7)[80], painted between 1633 and 1635, a gold figurine and gold goblet dazzle in the foreground.[81] The New World was home to the vast majority of global silver mining in the seventeenth century, so Heda's depiction of a silver *tazza* particularly evokes exotic luxury.[82] Heda pairs these symbols of mercantile success with an extinguished candle, a skull, and a celestial globe to allude to the transience of mortal time, the imminence of death, and the rapture of the heavens.[83] The trio of luxuries paired with the trio of symbols of mortality suggest that the owner of this still-life has not forgotten the fleeting nature of earthly pleasures in his pursuit of riches. Both Heda's painting and the MetaBirkins use their own respective medium to impose a distance between the consumer and the luxury object, transforming the item from something tangible into a two-dimensional depiction. Without being able to touch the skin of a Birkin bag or the cold metal of the *tazza*, these objects lose their tactile qualities and their utility as containers and instead become meaningless investment items. This flattening of the object forces the viewer to examine its luxury in a critical fashion.

[79] Martin, *supra* note 74, at 564.

[80] Willem Claesz Heda, *Vanitas (Still Life), with globe, skull, candle, tazza, and covered cup (painting)*, *in* UNIV. MICH. LIBR. DIGIT. COLLECTIONS (1633-1635), http://quod.lib.umich.edu/m/musart/x-1965-sl-2.55/1965_2.55.jpg [https://perma.cc/SJ37-7J5Q].

[81] *Id.*

[82] Byron Ellsworth Hamann, *The Mirrors of Las Meninas: Cochineal, Silver, and Clay*, 92 ART BULL. 6, 17 n.1/2 (2010). A *tazza* is a "shallow ornamental wine cup or vase, *especially* one mounted on a foot." *Tazza*, Oxford Reference, https://www.oxfordreference.com/display/10.1093/acref/9780199891573.001.0001/acref-9780199891573-e-7008 [https://perma.cc/3QYN-8NGQ].

[83] Willem Claesz Heda, *Banquet Piece with Mince Pie* (painting), *in Dutch Paintings of the Seventeenth Century*, NAT'L GALLERY OF ART https://www.nga.gov/collection/art-object-page.72869.html#overview [https://perma.cc/SE4M-52VK]; JOHN RUPERT MARTIN, BAROQUE 14 (1977); Heda, *supra* note 80; Martin, *supra* note 74, at 565.

(Fig. 7) Willem Claesz Heda, *Vanitas*, 1633-35

The artist's self-consciousness of his own mercenary aims later became the obsessive focus of contemporary art in the mid- to late twentieth century,[84] and the artistic relevance of the MetaBirkins lies in their placement within this longstanding thematic tradition. Andy Warhol quipped in 1975: "Business art is the step that comes after Art."[85] Art critic Blake Gopnik asserted that Rothschild's mercenary aims should not disqualify him from the protection of the First Amendment, noting that "Leonardo da Vinci and Andy Warhol both loved making a buck."[86] Gopnik also asserted that he "couldn't see any real difference between Rothschild and the many artists, good and bad, who made art about our

[84] Foster, *supra* note 1, at 802-03.

[85] Foster, *supra* note 1, at 798.

[86] Blake Gopnik, Opinion, *A Misguided Jury Failed to See the Art in Mason Rothschild's MetaBirkins*, Wash. Post (Feb. 24, 2023), https://www.washingtonpost.com/opinions/2023/02/24/mason-rothschild-metabirkins-art-bad-jury-verdict/ [https://perma.cc/M6AD-NMUP].

culture's commerce, often by including trademarked goods," including Warhol's "Campbell's Soups, Coca-Colas and Brillo Boxes."[87] In this era of business art, a critique of the Birkin bag as a vacuous status symbol continues the lineage of artistic targeting of capitalism from Dutch *vanitas* through Warhol.

The *Rogers* analysis for artistic relevance does not effectively account for NFTs that feature famous marks. If the NFT medium itself instills the work with an ironic commentary on consumer culture by virtue of the NFT's status at the crosshairs of art, commodity, and investment contract, then an artist could support incorporating *any* famous mark into his NFT artwork with the justification that it represents a commentary on consumerism. In the face of this dilemma, the courts have instead crafted an alternative false dichotomy that juxtaposes "genuine artistic expression" and "an unlawful intent to cash in" when, in the context of contemporary art, "genuine artistic expression" is entirely concomitant with an "intent to cash in";[88] as Gopnik noted, all artists work for compensation, going back to the Renaissance. This impossible binary could ensnare any NFT artwork that incorporates a famous mark.[89]

The artistic obsession with the relationship between art and commodity—seeping into still-life from the wealthiest pockets of seventeenth-century Europe and emerging to the surface amidst the boom of speculative financial interests that characterized the 1980s—has come to characterize contemporary art at large and particularly defines Rothschild's stated purpose for the MetaBirkins as "digital commodities."[90] This gradual merger of commodity and art over the course of the past few decades, which arguably were never actually separate to begin with, renders the judicial distinction between "genuine artistic expression" and "an unlawful intent to cash in" inapposite for the examination of artistic expression. This dichotomy between art and cash categorized the MetaBirkins just as poorly as it did the art that led up to them. Moreover, the general inquiry by *Rogers* into "artistic relevance" proves excessively reductive in the face of NFTs by virtue of their status at the intersection of commodities

[87] *Id.* Unlike Hermès' unsuccessful motion to exclude all references to Campbell's soup cans, Hermès' motion to exclude testimony by art critic Blake Gopnik was granted at trial. Transcript of Record at 3, Hermès Int'l v. Rothschild, 654 F. Supp. 3d 268 (No. 22-cv-384 (JSR)).

[88] *Rothschild*, 654 F. Supp. 3d 286 passim

[89] Gopnik, *supra* note 86.

[90] Foster, *supra* note 1, at 802–03.

and fine art. NFTs confound attempts by jurists to define the artistic relevance of their images because the NFT itself is already so heavily laden with symbolism by virtue of its medium to the point where it may not even seem to many observers like a work of art at all, particularly in the wake of *Dapper Labs*. The MetaBirkins are the natural culmination of the artist's self-interested conception of his artwork as a luxury good and trading commodity, beginning with Dutch *vanitas* paintings and continuing through Monet's cathedrals and Warhol's soup cans. The medium of the NFT, in its interstitial status between commodity, security, and work of art, brings this tension between art and the market to the surface.

IV
Second Prong of *Rogers*: Explicitly Misleading

The second prong of *Rogers* is whether the "defendant's use of the mark or other identifying material is … 'explicitly misleading' as to the source of content of the work."[91] In the Southern District of New York, the extent to which a mark explicitly misleads is evaluated under the *Polaroid* factors, as enumerated in *Polaroid Corp. v. Polarad Electronics Corp*.[92] As applied in *Hermès*, the factors were:

> (1) the strength of Hermès' mark, with a stronger mark being entitled to more protection; (2) the similarity between Hermès' "Birkin" mark and the "MetaBirkins" mark; (3) whether the public exhibited actual confusion about Hermès' affiliation with Rothschild's MetaBirkins collection; (4) the likelihood that Hermès will "bridge the gap" by moving into the NFT space; (5) the competitive proximity of the products in the marketplace; (6) whether Rothschild exhibited bad faith in using Hermès' mark; (7) the respective quality of the MetaBirkin and Birkin marks; and, finally, (8) the sophistication of the relevant consumers. [93]

While the *Polaroid* factors are used in the typical test for assessing likelihood of confusion in cases of trademark infringement, as the *Hermès* court explains, "the most important difference between the *Rogers* consumer confusion inquiry and the classic consumer confusion test is that consumer confusion under *Rogers*

[91] Champion v. Moda Operandi, Inc., 561 F. Supp. 3d 419, 434 (S.D.N.Y. 2021) (citing *Rogers*, 875 F.2d at 999).

[92] 287 F.2d 492 (2d Cir. 1961).

[93] *Rothschild*, 654 F. Supp. 3d at 281 (citing *Polaroid Corp.*, 287 F.2d at 492).

must be clear and unambiguous to override the weighty First Amendment interests at stake."[94] In such "classic" consumer confusion cases, plaintiffs in the Second Circuit have a harder time surpassing this test as compared to plaintiffs in other circuits.[95] Under *Rogers*, the plaintiff bears an even heavier burden to demonstrate that the defendant's infringement justifies overriding the right to freedom of artistic expression.

A. Sleight-of-Hand: Similarity and Actual Consumer Confusion

The second *Polaroid* factor considers the similarity between the expressive work and the mark it infringes, while the third factor looks to the actual confusion experienced by potential consumers about whether Hermès was the source of the MetaBirkins project. The similarity between the "Birkin" and "MetaBirkins" marks is substantial, both in terms of the words and the associated goods—Birkin bags and images of furry MetaBirkin bags. As to the third factor of actual consumer confusion, as the court noted, Hermès presented mixed evidence of consumers experiencing actual confusion.[96] Both factors serve as benchmarks for the propensity of the expressive work to confuse potential consumers, yet they also function as key mechanisms by which the artwork is able to express insightful social commentary about a famous brand at all.

The inquiry into confusion cuts to the sleight-of-hand by which the contemporary artist plays with the viewer's association with the brand. Artist Marcel Duchamp was the principal founder of the Dada movement, which transformed "ready-made" objects into novel works of art, such as flipping a urinal on its back to create a so-called "*Fountain*."[97] Critic Lucy Lippard writes of the

[94] *Id.* at (citing Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1379 (2d Cir. 1993)).

[95] Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1597 n.6 (2006). In typical cases of consumer confusion, the "core factors" that the courts look to most are the strength of the mark, the similarity between the marks, actual consumer confusion, the competitive proximity of the products, and the intent of the defendant. *Id.* at 1612.

[96] Hermès introduced "anecdotal evidence of social media users and the media that allegedly shows actual confusion over the fashion company's role in the project." *Rothschild*, 654 F. Supp. 3d at 282. However, Hermès' own study found "18.7% net confusion rate among potential consumers of NFTs." *Id.* This finding of only 18.7% net confusion falls below the standard range between twenty-five and fifty percent usually accepted as support for grounds for a finding of likelihood of confusion. *See* 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:188 (5th ed. 2022).

[97] *Marcel Duchamp, Fountain*, TATE, https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573 [https://perma.cc/TYV8-GPYG]; Lucy Lippard, *Foreword* to Marchel Duchamp, MARCHAND DU SEL;

artist, "His fine French hand can be discerned in the evolution of everything from pop art to earthworks."[98] In 1936, writer André Breton in his seminal essay "Crisis of the Object" explained the significance of Duchamp's innovation: "Objects thus reassembled have in common the fact that they derive from, and succeed in differing from the objects which surround us, by simple *change of role*."[99] Breton wrote his essay to accompany his exhibition by Surrealist artists that included Salvador Dalí and Joan Miró alongside a now little-known artist named Meret Oppenheim.[100]

One year prior, Oppenheim had bumped into Pablo Picasso and Dora Maar at a Paris café.[101] As the two of them examined the fur-covered bracelet that Oppenheim wore as a prototype for jewelry that she was designing for fashion icon Schiaparelli, Picasso commented that "anything could be covered with fur," to which Oppenheim replied, "Even this cup and saucer?"[102] Oppenheim would transform this banter into a work of art for Breton's exhibition (Fig. 8)[103], buying "a large cup, saucer, and spoon at a cut-rate department store and cover[ing] its glazed white surfaces with the pelt of a Chinese gazelle."[104] The resulting "*Object*," as it was named,[105] appears strikingly similar to the MetaBirkins: it is a readymade object covered in fur. Both also invert the ready-made in a similar fashion, by rendering a once-useful object thoroughly inoperable. Breton describes Oppenheim's work as a successful iteration of the Surrealist imperative to "hound the mad beast of function."[106] The furry tea-cup can no longer serve tea, because it both is covered in fur *and* now serves principally as an artwork in a museum, and the MetaBirkin is just as useless, corrupting the carry-all purpose of the Birkin bag by covering its leather skin with fur as well as flattening its form to a digital image.

ECRITS DE MARCEL DUCHAMP [SALT MERCHANT; WRITINGS OF MARCEL DUCHAMP], *reprinted in* SURREALISTS ON ART 111 (Margaret I. Lippard & Gabriel Bennett trans., Lucy Lippard ed., 1970).

[98] Lippard, *supra* note 97, at 111.

[99] André Breton, CRISE DE L'OBJET [CRISIS OF THE OBJECT], reprinted in SURREALISTS ON ART 54–55 (emphasis added) (Lucy Lippard trans., Lucy Lippard ed., 1970). Christina Rudosky, *Surrealist Objects*, in SURREALISM 151, 170 (Natalya Lusty ed., 2021).

[100] Rudosky, *supra* note 99, at 151.

[101] CAROLYN LANCHNER, MUSEUM OF MODERN ART, OPPENHEIM OBJECT 2 (2017).

[102] *Id.*

[103] *Meret Oppenheim, Object. Paris, 1936*, MUSEUM OF MODERN ART, https://www.moma.org/collection/works/80997 [https://perma.cc/P4LV-8AA6].

[104] LANCHNER, *supra* note 101, at 2, 5.

[105] LANCHNER, *supra* note 101, at 3.

[106] LANCHNER, *supra* note 101, at 5.

(Fig. 8) Meret Oppenheim, *Object*, 1936

Most importantly, both works find their shock value in the initial confusion exhibited by the viewer, and the similarity of the shapes of the silhouettes of the bags and the corresponding name of MetaBirkins are what facilitate this sleight-of-hand. Upon seeing the furry tea-cup, the viewer instantly imagines the taste of fur in one's mouth because the artwork intends to confound the viewer with his immediate association with the image. Likewise, the MetaBirkin viewer instantly associates the image with the prestige of Hermès because Rothschild wanted to "create that same kind of illusion that [the Birkin bag] has in real life as a digital commodity."[107] The viewer may understand the gimmick within seconds or minutes of investigation, as Hermès' paltry finding of only 18.7% consumer confusion demonstrates;[108] yet the allure of the item does not fade even as the illusion does. The contemporary artist brings the buyer in on the cool irony that he is not *actually* acquiring a Birkin bag by purchasing an NFT of one, nor does he

[107] Redacted Memorandum of Law in Opp'n to Def.'s Mot. for Summ. J. at 12, Hermès Int'l v. Rothschild, No. 1:22-CV-00384-JSR (S.D.N.Y. Oct. 22, 2022).

[108] *Rothschild*, 654 F. Supp. 3d at 282.

obtain a Campbell's soup can by purchasing a silkscreen of one. Invoking the mark using similar references in order to pique consumer confusion is not only a bedrock example of trademark infringement but also the *raison d'etre* for the appeal of what Warhol describes as "business art," including the MetaBirkins. The NFT represents the vehicle that accomplishes this illusion, because it is the medium of the NFT that accomplishes Breton's "change of role" from handbag to digital artwork.

B. Convergence: Competitive Proximity and Bridging the Gap

The shared intuition behind the fourth and fifth prongs of the *Polaroid* test lies in the notion that, if the plaintiff and defendant generally sell the same types of products, it is more likely that the consumer will be confused and assume that the infringing product is connected with the plaintiff.[109] The fifth prong of the *Polaroid* test considers the propensity for luxury fashion brands to "'bridge the gap' by moving into the NFT space." It is prescient that the inspiration for Oppenheim's tea-cup was a fur bracelet that she had crafted for an apparel designer, because as fine art has gravitated toward the consumer object, consumer brands have reciprocated in kind. The three other artists in Oppenheim and Breton's serendipitous tale—Picasso, Dalí, and Miró—all helped to design wine branding in their own day, and the pop artist Jeff Koons followed in their footsteps by collaborating more recently with the champagne brand Dom Pérignon.[110] Koons shares with Warhol a "factory-like studio" to create his works alongside a similar fascination with consumer brands.[111] Louis Vuitton collaborated with Koons to put out a "Masters" collection that adapted the works of instrumental modern artists such as Van Gogh to the exterior of handbags and featured Koons' own signature "bunny" as the shape for the bags' accompanying leather bag fobs.[112] Contemporary artist Yayoi Kusama has similarly worked with both Lancôme to design lip gloss and Louis Vuitton to decorate storefronts and produce fashion accessories, including handbags, which feature the same polka dot and pumpkins

[109] For the evolution of the policy aims behind these two prongs of the *Polaroid* test, *see* Robert G. Bone, *Taking the Confusion out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 Nw. U. L. Rev. 1307, 1340–41 (2012).
[110] John Armitage, Luxury and Visual Culture 75 (2019).
[111] *Id.* at 72–75.
[112] *Id.* at 77.

that distinguish her artistic repertoire.[113] In light of these collaborations which thematically traverse the same consumerism-focused arena as contemporary art and feature motifs used by the artists in their fine art, fine art and designer fashion have competitively grown quite proximate according to the fifth prong of the *Polaroid* test.[114]

The fourth prong of the *Polaroid* test examines the "competitive proximity of the products in the marketplace."[115] Given the incentive for luxury brands to associate themselves with fine artists "to enhance their high-class products even further through their association with art and exclusivity irrespective of the substance of the art,"[116] it only makes sense that luxury fashion brands would expand into NFTs. As discussed above, the MOMA has welcomed NFTs with an art exhibit that drew visitors to the museum and by participating in an NFT-collaboration with the same artist that featured digitally manipulated graphics of fine art in their museum collections. In turn, luxury brands have entered the NFT space in full-force, including Adidas, Prada, Gucci, Louis Vuitton, Nike, Burberry, Rebecca Minkoff, and Tiffany & Co.[117] Unsurprisingly, then, Hermès alleged that "Rothschild's project has disrupted their efforts to enter the NFT market and hindered its ability to profit in that space from the Birkin bag's well-known reputation."[118] The more that art and fashion co-occupy the world of NFTs, the harder that it becomes for either party to lay claim to that territory. The broad convergence of art and fashion, in particular within the realm of NFTs, render the

[113] *Id.* at 76; Jake Silbert, *Louis Vuitton X Yayoi Kusama is Peak Luxury Collab. Is That a Good Thing?*, HIGHSNOBIETY BLOG (Jan. 2023), https://www.highsnobiety.com/p/louis-vuitton-yayoi-kusama-review/ [https://perma.cc/AW49-GF9X]; William Van Meter, *Connecting the Dots: A Decade Later, Yayoi Kusama Returns for a Second Louis Vuitton Collaboration*, ARTNET (Jan. 6, 2023), news.artnet.com/style/yayoi-kusama-louis-vuitton-collaboration-2238734 [https://perma.cc/J6CV-68Q9].

[114] This notion that art and fashion have converged, of course, would not surprise any recent witness of the annual Met Gala, where celebrities don designer clothing to attend a fundraiser for the Metropolitan Museum of Art's Constitute Institute organized by the Editor-in-Chief of *Vogue* Magazine, Anna Wintour. Charlie Teather, *What is the Met Gala and why is everyone so obsessed with it?*, VOGUE (Apr. 18, 2023), https://www.glamourmagazine.co.uk/article/what-is-the-met-gala [https://perma.cc/HP5Y-Q9S6].

[115] *Rothschild*, 654 F. Supp. 3d at 281.

[116] Giulia Zaniol, *Brand Art Sensation: From High Art to Luxury Branding*, 12 CULTURAL POL. 49, 50 (2016).

[117] Madeleine Schulz, *2022: A Year of Fashion NFTs*, VOGUE BUS. (Dec. 20, 2022), https://www.voguebusiness.com/gallery/2022-a-year-of-fashion-nfts [https://perma.cc/N5B9-YZVQ].

[118] Hermès Int'l v. Rothschild, No. 22-cv-384 (JSR), 654 F. Supp. 3d 268, 274–75 (S.D.N.Y. Feb. 2, 2023).

fourth and fifth prongs of the *Polaroid* test ill-equipped to separate knock-offs from fine art.

C. Choosing a Target: Strength, Sophistication, and Respective Quality

The first *Polaroid* prong evaluates the strength of the mark, as stronger marks merit greater protection. The seventh *Polaroid* prong considers the relative quality of the two marks, and the eighth *Polaroid* prong considers the sophistication of the consumers. As aforementioned, Hermès is a strong mark deserving greater protection. The MetaBirkin, which is new and unestablished, clearly riffs off the highly renowned quality of the older and historic Birkin mark; hence, the Birkin bag would likely be considered of greater "respective quality" than the MetaBirkin mark. In the framework of a conventional trademark infringement case, the first and seventh factors would strongly favor Hermès, for they would suggest that Rothschild has intended to profit off the goodwill of the senior brand. Perhaps the eighth *Polaroid* prong for the sophistication of the relevant consumers could cut in Rothschild's favor on the basis of two assumptions: first, NFTs and Birkin bags are somewhat specialized, niche products, and second, anyone willing to spend thousands of dollars on either an NFT depicting a Birkin bag or a Birkin bag itself is likely knowledgeable of the cultural connotation of the object and the significance of the brand.

Moreover, for the highly sophisticated consumer of art and fashion, the layers of irony and commentary on commercialism evident in the MetaBirkin constitute the central appeal for acquiring such a costly digital object devoid of practical utility. When an artist such as Rothschild selects his target, he must choose an item with popular resonance and distort it in a way that will evoke the cool capitalist satire of Warhol's soup cans. Consequently, he selected a product with widespread brand recognition—or a strong mark, the first *Polaroid* factor. Likewise, he chose an item of substantial respective quality to render his deflation of the item's practical utility particularly biting—the seventh *Polaroid* factor. When artists borrow fashion influences for creative fodder, they necessarily must evoke well-known brands of high quality to ensure that the highly sophisticated consumers of their artwork will "get the joke," so to speak.

As one MSCHF executive explained, "'The Wavy Baby concept started with a Vans Old Skool sneaker' because no other shoe embodies the dichotomies between 'niche and mass taste, functional and trendy, utilitarian and frivolous' as perfectly

as the Old Skool."[119] To ensure that the satire of the Wavy Baby sneaker resonated with the consuming public, MSCHF needed to evoke a brand that itself held powerful connotations within the sneaker market. The *Polaroid* factors of strength of the mark and the respective quality of the marks demonstrate that the test for likelihood of confusion would ensnare virtually any work that invokes a famous brand to comment on consumerism; and yet, such a critique of a popular brand by the artist is exactly the reason why a sophisticated consumer would choose to acquire the item in the first place. In other words, if the infringed-upon mark is weak, if there is no difference in respective quality between the spin-off and the original, and if the consumers are unsophisticated, then the artistic message cannot land with the desired audience. As the courts have articulated in the context of the parody defense to trademark infringement claims, "the strength of a famous mark allows consumers immediately to perceive the target of the parody, while simultaneously allowing them to recognize the changes to the mark that make the parody funny or biting."[120] However nakedly mercenary his motivations were, Rothschild needed to comment on a strong brand like Hermès to sell a product that was of lower respective quality to a field of sophisticated consumers in order to make a successful artistic statement at all.

D. Bad Faith

The final *Polaroid* factor to consider is "whether Rothschild exhibited bad faith in using Hermès' mark."[121] This factor seems to have been the most salient one to Judge Rakoff. In the court's application of the first prong of *Rogers*, the court characterized the test for artistic relevance as depending in part upon an "unlawful intent to cash in."[122] Likewise, in the instructions that Judge Rakoff ultimately provided to the jury:

> It must be clear to you by now that the parties disagree about the degree to which MetaBirkins NFTs are works of artistic expression . . . It is undisputed, however, that the MetaBirkins NFTs, including the associated images, are in at least some respects works of artistic expression, such as, for example, in their addition of a total fur covering

[119] Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F. 4th 125, 130 (2d Cir. 2023) (internal citations omitted).
[120] Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 261 (4th Cir. 2007).
[121] *Rothschild*, 654 F. Supp. 3d at 281.
[122] *Id.* at 280.

> to the Birkin bag images. Given that, Mr. Rothschild is protected from liability on any of Hermès' claims unless Hermès proves by a preponderance of the evidence that Mr. Rothschild's use of the Birkin mark was not just likely to confuse potential consumers but was intentionally designed to mislead potential consumers into believing that Hermès was associated with Mr. Rothschild's MetaBirkins project. In other words, if Hermès proves that Mr. Rothschild actually intended to confuse potential consumers, he has waived any First Amendment protection.[123]

At trial, Judge Rakoff offered the following explanation for a preliminary version of his jury instructions:

> Because while both *Rogers* and the related cases speak in, frankly, less than clear terms like "explicitly misleading" or "artistically relevant" and the like, the real question here, so far is the defense is concerned, is did Mr. Rothschild intend to mislead? In which case, of course, he has no First Amendment protection, any more than a con man has First Amendment protection from telling lies to the public to make money. Or did he not intend to mislead, in which case I think there can be no question that there was at least some artistic aspect to what he was offering.[124]

Rather than bad faith representing one of the eight factors in the second prong of a two-pronged test, the court in *Hermès* transformed bad faith into the focal point of the inquiry when determining whether Rothschild's work merited First Amendment protection. As Judge Rakoff explained, his suggestion derives more generally from First Amendment doctrine and represents a more straightforward test that connects with other practices of law that focus on intent. It also falls in line with the Second Circuit's longstanding posture that the factor of bad faith intent holds "great weight,"[125] although the court in *Hermès* deviated from this precedent as well by using this factor to avoid marching through the *Polaroid* factors entirely.

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[123] The Court's Instructions of Law to the Jury at 21, Hermès Int'l v. Rothschild, 22 Civ. 384 (JSR).

[124] Transcript of Record at 898, Hermès Int'l v. Rothschild, 22 Civ. 384 (JSR) (articulating rationale behind jury instructions given by Judge Rakoff).

[125] Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 Cal. L. Rev. 1581, 1626 (2006).

While Judge Rakoff correctly noted that the tests for artistic relevance and explicitly misleading prove fruitless where the entire purpose of the art form is to comment on consumer culture in a way that tricks the viewer, his line of inquiry falls into the same trap. Artists have moved between styles from archaic Greek *kouros* figures (Fig. 9)[126] to Renaissance paintings to Jackson Pollock's abstract expressionism (Fig. 10)[127]. These styles vacillate widely in how they depict what they see, or how they communicate "truth" to the viewer, by manipulating the subject of the image into a form that differs from how it is perceived in a photograph. Art depicts truth by bending it to the point of deceit. Dalí's paintings bend time and space; he described this process as the "paralyzing tricks of eye-fooling . . . to systematize confusion and thus to help discredit completely the world of reality."[128] Rakoff's "inten[t] to confuse potential consumers" cuts to the entire purpose of modern art, and the NFT is simply the latest iteration of this trajectory. As aforementioned, Rothschild intended to use the NFT to "create that same kind of illusion that [the Birkin bag] has in real life as a digital commodity."[129] The NFT constitutes the cornerstone to accomplish this sleight-of-hand—by offering up a flat digital commodity in lieu of a tactile physical good, in the same vein as the Dutch *vanitas*, it invariably represents the "con man" whom Rakoff wishes to outlaw.

[126] Getty Museum, *Archaic Greek Kouros Figure (Photograph)*, https://www.getty.edu/art/collection/object/103VNP [https://perma.cc/WW78-2PJG].

[127] Jackson Pollock, Number 18, *in* GUGGENHEIM (1950), https://www.guggenheim.org/artwork/3484 [https://perma.cc/L6UH-9KT7].

[128] Salvador Dalí, The Persistence of Memory, *in* MUSEUM OF MODERN ART (1931), https://www.moma.org/collection/works/79018 [https://perma.cc/X748-UYLK].

[129] Redacted Memorandum of Law in Opp'n to Def.'s Mot. for Summ. J. at10, Hermès Int'l v. Rothschild, No. 1:22-CV-00384-JSR (S.D.N.Y. Oct. 22, 2022).

(Fig. 9) Archaic Greek *Kouros* Figure, circa 530 B.C.E

(Fig. 10) Jackson Pollock, *Number 18*, 1950

Conclusion

To understand the unique challenge that the MetaBirkins pose to trademark enforcement as opposed to Warhol's soup cans, we can distill two interrelated central issues of the works of art themselves. The first is content—where the chosen subject matter implicates the indicia of a famous brand, the artwork has the potential to infringe. The second is medium, which has the potential to either limit or exacerbate the likelihood that the consumer will experience confusion. The physical formulation of the Campbell's soup cans as silk-screens on a wall in a museum limits the likelihood of consumer confusion because the viewer will immediately assume that two-dimensional images hung in art museums are works of art, whereas the MSCHF Wavy Baby sneaker collection exacerbates the potential for consumer confusion because consumers would assume that a sneaker bearing the trade dress of Vans sneakers is, in fact, a Vans-produced sneaker.[130] The MetaBirkins fall somewhere in between these two poles, as both artists and

[130] Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F. 4th 125, 140 (2d Cir. 2023) ("[T]he Wavy Baby features a combination of elements (*e.g.*, a three-tiered appearance, textured toe box, visible stitching, and red tags on the back), which are placed relative to one another such that the Wavy Baby's appearance evokes Vans' Old Skool sneaker.").

fashion designers have attempted to claim the territory of the NFT as a medium for their craft.

The current *Rogers* balancing test attempts to account for both concerns: the "artistic relevance" prong considers the relevance of the trademark to the content of the artist's message, while the "explicitly misleading" prong primarily evaluates whether the medium and its contextualization of the trademark facilitate the consumer's understanding that this is an expressive work that riffs off the trademark, as opposed to the mark serving as an indicator of source. Unfortunately, the test ultimately fails to account for either and forces courts to answer a philosophical question of "art versus mark" at the outset with a reductive threshold inquiry; if anything, this note demonstrates that the art and fashion industries have rendered such a determination impossible because these two creative arenas see each other as entirely symbiotic and co-extensive. Preventing artists from using trademarks in their artwork would have a far-reaching chilling effect on free expression; imagine, for example, if magazine cartoon artists were cowed from making cartoons that featured famous trademarks when commenting on corporations' activities.[131] As opposed to regulating the content of expressive works, trademark law could simply allocate a safe-harbor for works of certain mediums that are more "traditional" to the art industry, such as paintings, sculptures, and films, and force others to answer to more stringent scrutiny.

The question of what constitutes art is an ancient one. The ancient Greeks classified all artwork as *techne*, meaning "craftsmanship."[132] Despite the current locus of the Greek pot behind glass in a museum and our modern appreciation for its beauty, it was originally a humble utilitarian object to store water, wine, or oil.[133] The arbiters of the culture of ancient Greece applied the term *techne* with little discrimination between these household items and the statues artists carved carefully by hand.[134] Our own distinctions between fine art, such as Heda's

[131] A so-called "Anti-Cartoon" bill was unsuccessfully floated in the New York state assembly in 1897; a similar bill was enacted into law in California in 1899 but was quickly repealed in 1915. Jennifer E. Rothman, The Right of Publicity 18–19 (2018).

[132] Brian A. Sparkes, The Red and the Black 64 (1996).

[133] Department of Greek and Roman Art, *Athenian Vase Painting: Black- and Red-Figure Techniques*, Metropolitan Museum of Art (Oct. 2002), https://www.metmuseum.org/toah/hd/vase/hd_vase.htm [https://perma.cc/E5BQ-WXSK].

[134] *See* Sparkes, *supra* note 132, at 35–36

Vanitas still-life, as opposed to decorative art, which could encompass anything from a visually attractive napkin-holder to a hand-painted mug, derive from the Latin *ars*.[135] According to classical archaeologist Brian Sparkes, "The Roman elite, who collected so much Greek sculpture, seems not to have shown an equal interest in pottery."[136] The protections for trademarks rely on the artificial distinction between fine and decorative art that the Romans crafted to assert their subjective art-collecting preference for sculpture over pottery. The artistic lineage of the past century has explicitly challenged this separation, from Dalí's advertising for consumer products to the Koons and Kusama handbag collections. This more contemporary strain of art history delights in the playground of the convergence of art and consumerism and propounds the notion that anything can be art.

To avoid evaluating the artistic merits of the content of a work—a subjective endeavor that would endanger free expression—the courts can opt to create a presumption that a distinction lies between fine art and craftsmanship as its threshold inquiry. As philosopher Kwame Anthony Appiah explains, our "ideas about art … were not part of the cultural baggage of the people who made the objects" that he viewed on display at an exhibition of African art.[137] Appiah explains that the objects in this exhibit "had primary functions that were, by our standards, non-aesthetic, and would have been assessed, first and foremost, by their ability to achieve those functions."[138] Such an investigation, which evaluates the artistic nature of the object by examining its medium, could function as an alternative threshold inquiry for the application of the *Rogers* test and would clarify much of the confusion about where fashion begins and art ends. The courts now pretend to abide by the ethos of the contemporary art movement that, in Warhol's words, "art is what you can get away with" when they broadly define artwork to include new forms of media so long as the work "communicate[s] ideas" and "social messages … through features distinctive to the medium (such as the player's interaction with the virtual world)."[139] Yet in practice, they classify "[m]ovies,

[135] *See* SPARKES, *supra* note 132, at 64.
[136] *See* SPARKES, *supra* note 132, at 36.
[137] Kwame Anthony Appiah, *The Arts of Africa*, THE NEW YORK REVIEW OF BOOKS (Apr. 24, 1997), https://www.nybooks.com/articles/1997/04/24/the-arts-of-africa/ [https://perma.cc/4KL4-2MMC].
[138] *Id.*
[139] For Warhol quotation, *see Licensing*, ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, https://warholfoundation.org/warhol/licensing/ [https://perma.cc/3SUF-L88H]. Brown v. Elec. Arts, Inc., 724 F.3d 1235, 1241 (9th Cir. 2013) (citing Brown v. Entertainment Merchants Ass'n, 654 U.S. 786, 790 (2011)).

plays, books, and songs" as "indisputabl[e] works of artistic expression [that] deserve protection" and relegate knock-off sneakers to infringement.[140] An explicit consideration of medium—and in particular, in the words of Appiah, whether the object is one that would be "assessed, first and foremost," by its "primary . . . non-aesthetic" function—would allow courts to side-step such convoluted reasoning. Such a solution would grant artists greater certainty in predicting the legal consequences of their artwork as opposed to forcing them to gamble on the courts' unpredictable interpretation of *Rogers* as it stands today.

Despite the increasingly close affinity between the art and fashion industries, the case of the MetaBirkins demonstrates that the battle between strong trademark protection and the promotion of free expression is zero-sum. The pre-*Jack Daniel's* threshold inquiry into expressiveness tilted the balance in favor of artists, and the new threshold inquiry simply tips the scales in the opposite direction. Neither of these threshold inquiries, nor the actual *Rogers* test itself, properly account for the needs of both artists and consumer product brands. While the new threshold inquiry crafted by Kagan appears to fit into the commonsense ethos behind trademark law, it will also likely disqualify large swathes of expressive works that are considered quintessential examples of contemporary art, such as Warhol's soup cans. If the Roman conceptualization of *ars* reveals anything, it is that classifying certain frontier objects as fashion rather than art would uphold the principles of art history rather than betray them. Regardless of whether a safe-harbor for works of certain mediums proves a viable solution, artists require a more predictable understanding of whether their work is protected under the First Amendment or subject to trademark infringement scrutiny to practice their craft.

The collision of art and fashion has rendered any attempt to separate art from marks exceptionally messy, and in crafting a solution, we must choose from the best of a number of destructive options, any of which would cede territory from one industry and grant it to the other. Evaluation of medium might prove highly suppressive to large swathes of creativity in the art world and force a rupture between art and fashion that neither industry desires; it could force the

[140] Rogers v. Grimaldi, 875 F.2d 994, 997 (2d Cir. 1989) ("Movies, plays, books, and songs are all indisputably works of artistic expression and deserve protection. Nonetheless, they are also sold in the commercial marketplace like other more utilitarian products, making the danger of consumer deception a legitimate concern that warrants some government regulation."); *see also* Vans, Inc. v. MSCHF Prod. Studio, Inc., 88 F. 4th 125, 142 (2d Cir. 2023) (discussing relegating sneakers to infringement).

courts to craft somewhat fuzzy distinctions between, for example, a mug that serves as merchandise and a ceramic work of fine art. Alternatively, perhaps an explicit consideration of medium would change almost nothing about the actual outcomes of trademark-infringement lawsuits, as courts quietly use the medium to smooth over their application of the *Rogers* test even today. The *Polaroid* factor for the "similarity" between the products evidently considers medium, albeit under the guise of evaluating similarities in the trade dress between the items; for example, the *MSCHF* court belabored the similarities between the toe box and other shared elements of the Wavy Baby and Vans sneakers.[141] Likewise, when courts consider the "competitive proximity" and the likelihood of the plaintiffs "bridging the gap," they essentially ask whether the plaintiffs produce the same type of product[142]—goods that express not merely the same message but also the same message through the same medium. For example, the U.S. District Court for the Central District of California recently considered a line of NFTs that copied elements of an infamous rival set of NFTs called the "Bored Ape Yacht Club" collection and concluded that the shared NFT medium between the two goods weighed in favor of a finding of infringement.[143]

A stronger and more predictable standard for separating artwork from consumer goods, such as classification by medium, would likewise serve the core purpose of trademark law. Trademark expert Barton Beebe frames trademark law as an exercise in semiotics and explains the three constitutive elements of "the triadic structure" as follows:

> First, the trademark must take the form of a "tangible symbol." This "word, name, symbol or device or any combination thereof" constitutes

[141] *Vans, Inc.*, 88 F. 4th at 140 ("the Wavy Baby features a combination of elements (*e.g.*, a three-tiered appearance, textured toe box, visible stitching, and red tags on the back), which are placed relative to one another such that the Wavy Baby's appearance evokes Vans' Old Skool sneaker.").

[142] *See e.g.*, Morningside Grp. Ltd. v. Morningside Capital Grp., 182 F.3d 133, 140 (2d Cir. 1999) (quoting Cadbury Beverages, Inc. v. Cott Corp., 73 F.3d 474, 480 (2d Cir. 1996)) ("In considering competitive proximity, we are concerned with 'whether and to what extent the two products compete with each other' and 'the nature of the products themselves and the structure of the relevant market.'"); *Vans, Inc.*, 88 F. 4th at 140 (2d Cir. 2023) ("Among the considerations germane to the structure of the market are the class of customers to whom the goods are sold, the manner in which the products are advertised, and the channels through which the goods are sold.").

[143] Artist Ryder Ripps crafted a copycat version of the original and highly popular "Bored Ape Yacht Club" series of NFTs by Yuga Labs; Yuga filed suit for trademark infringement among other claims. Yuga Labs, Inc. v. Ripps, No. CV 22-4355-JFW(JEMX), 2023 WL 3316748, at *1–8 (C.D. Cal. Apr. 21, 2023).

> the trademark's signifier … Second, the trademark must be used in commerce to refer to goods or services. These goods or services constitute the trademark's referent … Third and finally, the trademark must "identify and distinguish" its referent. Typically, it does so by identifying the referent with a specific source and that source's goodwill. This source and its goodwill constitute the trademark's signified. Thus, in the case of a trademark such as NIKE, the signifier is the word "nike," the signified is the goodwill of Nike, Inc., and the referent is the shoes or other athletic gear to which the "nike" signifier is attached … To maintain the structural integrity of the mark, the law does not merely enforce *linkages* among the mark's three elements. It also enforces *separations* among them. The mark's elements must be related, but they may not be identical.[144]

To adapt Beebe's language to the case of *Hermès*, the signifier is the word "Birkin," the signified is the goodwill toward Hermès and the Birkin brand, and the referent is the particular handbag to which the signifier "Birkin" is attached. Each of these elements is connected, but they are not identical to each other. The MetaBirkin erodes the connection between the "signified" and the "referent" because the NFT offers only the goodwill of the Birkin brand without the bag itself. Luxury brands, though, are also responsible for this breakdown. When the realms of fine art and fashion commingle freely in the space of NFTs and the referent for the word "Birkin" expands from handbags to include NFTs and products equipped for the metaverse, the vital separations between the signifier, the signified, and the referent that "maintain the structural integrity of the mark" disintegrate. To allow artists and fashion brands alike to function, the jurisprudence must craft clear boundaries between artworks and consumer products.

On February 8, 2023, the jury in *Hermès* ultimately found Rothschild liable for trademark infringement and determined that the NFTs did not constitute protected artistic expression under the First Amendment. Subsequently, the court in *Hermès* awarded $133,000 in damages to Hermès;[145] Rothschild has appealed the

[144] Barton Beebe, *Semiotic Analysis of Trademark Law*, 51 U.C.L.A. L. Rev. 621, 646–48 (2004).

[145] Zachary Small, *Hermès Wins MetaBirkins Lawsuit; Jurors Not Convinced NFTs Are Art*, N.Y. Times (Feb. 8, 2023), https://www.nytimes.com/2023/02/08/arts/hermes-metabirkins-lawsuit-verdict.html [https://perma.cc/KK2H-299H]; Hermes Int'l v. Rothschild, No. 22-CV-384 (JSR), 2023 WL 9118724, at *1 (S.D.N.Y. Dec. 29, 2023).

judgment.[146] As it stands, the jury's determination in *Hermès* poses concerning ramifications for freedom of artistic expression and the entire realm of Warhol's "business art," and the convergence of luxury fashion and fine art does not bode well for the future of trademark doctrine. Kagan's tautological inquiry into whether the mark is acting like a mark accomplishes little by way of clarifying this distinction; it simply tips the balance in favor of finding infringement as opposed to artistic expression.

The lineage of art preceding the MetaBirkins, including Dutch *vanitas*, Monet's cathedrals, Oppenheim's furry teacup, and Warhol's soup cans—in tandem with collaborations between luxury fashion brands and contemporary artists—demonstrate that the growing interest among artists in their own status as market participants rendered this collision between art and fashion inevitable. That NFTs were born already occupying this space between art, commodity, and investment contract rendered them the ideal situs of the battleground between contemporary art and luxury fashion. As luxury brands and fine art converge more broadly, NFTs will likely represent only one of many arenas in which the *Rogers* test will need to weigh the more substantial interest between the property rights of fashion brands' goodwill and freedom of expression for artists. The inability of the *Rogers* test to cut to Breton's "Crisis of the Object" that underlies both the MetaBirkins and the general trajectory of contemporary art forebodes the future challenges at the intersection of art and fashion that the test will surely face as the two industries continue to converge.

[146] Maghan McDowell, *Hermès Wins Case Against Metabirkins over Digital NFTs, Rothschild to Appeal*, VOGUE BUS. (Feb. 8, 2023), https://www.voguebusiness.com/technology/hermes-wins-case-against-metabirkins-over-digital-nfts-rothschild-to-appeal [https://perma.cc/YC3G-J3YQ]; *Hermes Int'l*, 2023 WL 9118724, at *1.

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GET REAL: THE TENSION BETWEEN STARDOM AND JUSTICE FOR REALITY TELEVISION PARTICIPANTS

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Reality television has become embedded in our cultural zeitgeist. These unscripted shows have entertained countless households since their inception—resulting in fandoms, memes, and fantasy leagues. However, behind the scenes, there have been accusations of workplace harassment, inadequate pay, and producer manipulation. Previously, reality television participants have been silent about their mistreatment, but recently, several reality stars have spoken out both publicly and via the legal system about their negative experiences on the shows that made them famous. Yet not all recent criticism has resulted in a legal win, and it is not clear whether other reality television participants will heed the call to express their grievances through legal action. This note points to both social and legal reasons why reality television participants have been—and still are—hesitant to bring legal claims against their shows' production companies. This note also suggests new legal arguments and policy solutions that advocates may pursue to eventually improve the industry.

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Introduction

In Season 1 of *Love is Blind*,[1] the world watched as Lauren Speed and Cameron Hamilton fell in love before ever setting eyes on each other. The couple became a fan favorite and are still together five years later. Lauren Speed-Hamilton is now a "Creative," "Entrepreneur," "Author," and "TV Personality."[2] Cameron Hamilton kept his job as a scientist, but has co-written a book with Lauren and is represented by Creative Artists Agency (CAA).[3] The couple walked away from the show married and with an ongoing public presence that allows them to post advertisements on their Instagram pages—with an average pay of $1,800 per post—to their millions of followers.[4]

[1] Netflix describes *Love is Blind* as a "social experiment where single men and women look for love and get engaged, all before meeting in person." *Love is Blind*, Netflix, https://www.netflix.com/title/80996601 [https://perma.cc/YLQ9-45JN].

[2] Lauren Speed-Hamilton (@need4lspeed), Instagram, https://www.instagram.com/need4lspeed/ [https://perma.cc/2SB7-HGJJ].

[3] *See* Cameron Hamilton (@cameronreidhamilton), Instagram (July 11, 2022), https://www.instagram.com/p/Cf4VD_aOZ38/?utm_source=ig_embed&ig_rid=f5c57187-e362-45ef-8ccc-14bfc6e16f3e [https://perma.cc/W42N-M5G8].

[4] Jennifer Dublino, *Social Media Stars: How Much Do They Really Make?*, Business.com, https://www.business.com/articles/social-media-stars-how-much-do-they-really-make/ [https://perma.cc/EKT9-6F6H]

In Season 2 of *Love is Blind*, Jeremy Hartwell stepped into the pods with the hope of finding love. His edit on the show lasted 30 seconds, and he walked away without a partner or the adoration of fans.[5] On June 29, 2022, Hartwell filed a lawsuit in California state court, alleging that the production company—Kinetic Content—restricted food and drink options, did not provide adequate meal breaks, and paid the cast below California's minimum wage, among other labor-related causes of action.[6] Hartwell and other cast members of the second season claim that the producers kept them imprisoned, overworked, and malnourished.[7]

These types of accusations against reality television (TV) shows are not new,[8] and *Love is Blind* is now on its sixth season, seemingly with the same structure as in previous seasons.[9] This begs the question: if there have been public accusations of unsafe working conditions, mistreatment by producers, and other tortious claims, why don't more former participants sue? If Jeremy Hartwell's allegations are true, then Cameron Hamilton and Lauren Speed-Hamilton would have experienced the same treatment. So why don't reality TV celebrities with seemingly nothing to lose sue the production companies?

This note argues that there are both legal and social reasons reality TV participants often do not seek public legal action against production companies. Part I discusses the history of reality TV. Part II outlines the accusations that

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("Macro-influencers have over 1 million followers and earn about $1,804 per post.") (last updated Apr. 10, 2024).

[5] Sara Donnellan, *Who Is Jeremy Hartwell? 5 Things to Know About the 'Love Is Blind' Contestant Suing the Show*, US MAGAZINE (July 13, 2022), https://www.usmagazine.com/entertainment/pictures/who-is-jeremy-hartwell-what-to-know-amid-love-is-blind-lawsuit/ [https://perma.cc/NU46-7X2L].

[6] Compl. ¶¶ 23-57, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

[7] Mariah Espada, *Why It's So Hard For Reality Stars to Get Protection From Exploitation*, TIME (Sept. 18, 2023, 4:29 PM), https://time.com/6314118/reality-tv-unions-protection/ [https://perma.cc/KZ7P-9FEA].

[8] *See infra*, Part II.

[9] Interestingly, following Hartwell's lawsuit, subsequent seasons of *Love is Blind* conspicuously display large amounts of food being consumed and made by the participants. Most recently, during the Season 6 reunion, in what seemed like a coordinated rebuke of the lawsuit, co-host Vanessa Lachey asked former cast members what they missed about being on the show. One answered, "I miss the food," which was followed by a comment from co-host Nick Lachey saying, "you cannot believe everything you read out there." Immediately after that conversation, the cast of the season—for the first time ever—hovered around a full course meal on the reunion set (although the cast was not shown eating any of the food). *See Love is Blind*, Season 6, Episode 13, at 01:35:13-01:36:46, NETFLIX (Mar. 13, 2024), https://www.netflix.com/watch/81741342?trackId=255824129 [archival link omitted] (last visited May 15, 2024).

have plagued the industry for years. Part III identifies the reasons there are so few lawsuits against production companies. Lastly, Part IV suggests potential legal and policy steps forward.

I
THE MOST DRAMATIC SEASON EVER: A BRIEF HISTORY OF REALITY TELEVISION

Anyone can access reality TV, or any television show for that matter, at the tip of their Roku remote. *Love Island UK*—described as a "dating show that saw swimwear-clad twentysomethings spend several weeks in a luxury villa attempting to find their romantic match for a £50,000 ($64,467) prize"[10]—is one example of how people can catapult into fame simply through their personality or looks. The *Love Island* franchise has expanded to multiple countries, raking in millions of viewers,[11] and similar shows have since been released.[12] But reality TV did not always exist or look anything like *Love Island*. The following describes a brief history of how the genre became so popular.

Academics note the different "generations" of reality TV. While some explain that "[r]ight from the earliest days of radio and television, 'ordinary people' have been an essential ingredient of broadcasting,"[13] others point to a distinct pre-reality television generation of shows that broadcasted everyday life. Two shows epitomized this era: *Candid Camera*, which captured ordinary people with hidden cameras reacting to obscure situations; and *An American Family*, which followed the Loud family—a California upper-middle class family—in a fly-on-the-wall style format for seven months of their lives.[14] Both shows were originally filmed with non-traditional, smaller cameras, and in a format distinct from the "traditional fiction film and the didactic narration of conventional documentaries."[15] They

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[10] Lucy Handley, *Hit TV show 'Love Island' is coming to America. CNBC explains why CBS wanted the reality series*, CNBC (Aug. 9, 2018, 10:56 AM), https://www.cnbc.com/2018/08/09/what-is-love-island-cnbc-explains.html [https://perma.cc/84NF-EWA4].

[11] *Id.* ("TV ratings have steadily increased since the first season aired in 2015. The final episode that year drew 800,000 viewers, increasing to 1.4 million in 2016 and 2.6 million in 2017.").

[12] For example, in 2020, Netflix released *Too Hot to Handle*, where "gorgeous singles meet and mingle. But there's a twist. To win an enticing grand prize, they'll have to give up sex." *Too Hot to Handle*, NETFLIX, https://www.netflix.com/title/80241027 [archival link omitted] (last visited May 21, 2024).

[13] DAVID GILES, TWENTY-FIRST CENTURY CELEBRITY: FAME IN DIGITAL CULTURE 60 (2018).

[14] MISHA KAVKA, REALITY TV 13-45 (2012).

[15] *Id.* at 14.

were the first shows to place "ordinary people under observation in a mediated situation,"[16] and audiences craved this new form of entertainment. Although "[n]o one could quite figure out what they were watching, … everyone tuned in to watch."[17]

The peek into everyday behavior left viewers craving more, but it was not until the late 1980s and early 1990s that reality TV started to form into its own genre.[18] The "camcorder" generation is considered the first distinct generation of reality TV.[19] In the United States, this form of television exploded for two main reasons. First, deregulation during the Reagan administration "made it easier for competitors of network television to enter the broadcasting market."[20] The number of viewers remained the same, but their views splintered among different networks, forcing executives to formulate new types of shows.[21] Second, the 1988 Writers Guild of America (WGA) strike forced production companies to develop low-budget shows that did not involve union labor.[22] "Casting regular people—not actors—wasn't just the appeal of reality TV, it was key to the productions' bottom lines."[23]

This combination, along with a rising law-and-order culture, allowed shows such as Cops and *America's Most Wanted (AMW)* to prosper.[24] *AMW* premiered in 1988 and remains on air today.[25] It is a series that "uses dramatic reconstruction of crimes in combination with CCTV footage, interviews with police, victims

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[16] *Id*. at 43.

[17] *Id*. at 31.

[18] *Id*. at 46.

[19] *See id*. at 46-74.

[20] *Id*. at 47.

[21] *Id*.

[22] Jonathan Mandell, *Recalling 1988 Strike*, CBS News (Nov. 2, 2007, 5:38 PM), https://www.cbsnews.com/news/recalling-1988-strike/ [https://perma.cc/B6CZ-ENHJ] (describing networks during the 1988 strike as wanting to "fill the hours with something other than repeats" and "look[ing] to what was then alternative programming," such as "reality television").

[23] Kathleen Walsh, *Reality TV Stars Aren't Paid Like Employees, and That's Practically Fraud*, InStyle (Mar. 10, 2020, 7:30 PM), https://www.instyle.com/reviews-coverage/tv-shows/reality-tv-stars-paid-salary [https://perma.cc/9WDH-CHUP].

[24] Kavka, *supra* note 14, at 46-47.

[25] *See* Peter White, *'America's Most Wanted' Revival Returns To Fox For Season 2; John Walsh & Son Callahan To Host – Update*, Deadline (Dec. 13, 2023, 9:00 AM), https://deadline.com/2023/12/americas-most-wanted-revival-fox-season-2-1235633148/ [https://perma.cc/8FL4-7QLC] (noting the revival of *AMW* after a 10 year hiatus).

and families, and direct appeals to TV viewers for information and tip-offs."[26] Similarly, *Cops*—which follows police officers during their patrol and other police duties in a "ride along" format[27]—premiered in the spring of 1989 and is still produced today.[28] The success of *Cops* led to many spin-offs with similar formats.[29] "By the mid-1990s, 'reality TV' had become synonymous with reality crime programming, which in turn was understood on the model of *Cops*."[30]

The next generation, beginning at the turn of the 21st century, is the "surveillance and competition" generation.[31] The rise of global discourse around the social dynamics and eliminations of each weekly episode distinguished this era.[32] *Big Brother* and *Survivor* are the two shows that marked the "evolutionary leap that repositioned reality television as a high-rating component of prime time programming."[33] Taking inspiration from *The Real World*, which aired from 1994 to 2007 and followed seven different strangers each season in a fly-on-the-wall format,[34] *Big Brother* and *Survivor* creators put a competitive twist into their shows.[35] *Big Brother* features contestants called "houseguests" who live together "in a house outfitted with 94 HD cameras and 113 microphones, recording their every move 24/7."[36] Every week, one houseguest is "evicted" from the home through a vote.[37] *Survivor* involves a group of strangers congregated on an isolated island where they must provide food and shelter for themselves. Every week there is a "Tribal Council" where someone is voted off by the other islanders.[38]

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[26] KAVKA, *supra* note 14, at 53.
[27] *Id*. at 54.
[28] *See Cops*, IMDb, https://www.imdb.com/title/tt0096563/ [https://perma.cc/4MPU-CZLE].
[29] KAVKA, *supra* note 14, at 54 (listing spin-offs).
[30] *Id*. at 54-55.
[31] *Id*. at 75.
[32] KAVKA, *supra* note 14, at 76.
[33] *Id*.
[34] *Id*. at 78-79.
[35] *See id*. at 78 ("In order to understand the legacies inherited by *Big Brother* and *Survivor* . . . we need to start by backing up – to *The Real World*, an MTV precursor that is often credited . . . with 'usher[ing] in the age of reality television.'").
[36] *Big Brother*, CBS, https://www.cbs.com/shows/big_brother/ [https://perma.cc/9R8Z-FJAU].
[37] Amanda Mitchell, *The Official Rules Behind Big Brother's Legendary Competitions, Explained*, OPRAH DAILY (May 22, 2019, 1:40 PM), https://www.oprahdaily.com/entertainment/tv-movies/a27545437/big-brother-competition-rules/ [https://perma.cc/HW6E-VYLH].
[38] *Tribal Council*, SURVIVOR WIKI, https://survivor.fandom.com/wiki/Tribal_Council [https://perma.cc/27HW-ENUY].

Unlike the first generation of *Cops* and *AMW*, *Big Brother* and *Survivor* embedded themselves into the public discourse with the introduction of surveilled competition and weekly "voting off" ceremonies.[39] Additionally, compared to the classic game-show formats of *Jeopardy* and *Who Wants to be a Millionaire?*, *Big Brother* and *Survivor* followed ordinary people *constantly*.[40] Contestants were no longer judged just on their trivia skills. Instead, they were judged under 24-7 surveillance by their fellow castmates—and the global audience—on who they were as whole, "real" people. The popularity of this competitive format of reality TV has led to a myriad of programs that revolve around winning a prize. *The Bachelor*, for example, is a dating show that ideally helps two people fall in love.[41] However, viewers are drawn to the show because they want to find out who "wins" the heart of the bachelor of the season.[42] Ultimately, *Survivor* and *Big Brother* led to a surge of reality shows and with that, reality subgenres. What connects all these shows is "a combination of four elements: *ordinary* people in a *contrived* situation facing some kind of *challenge* surrounded by *cameras*."[43]

The third generation is the "celebrity" generation, where "the primary goal of the show [becomes] the production of celebrity itself."[44] This genre includes reality programs that attempt to reignite the celebrity of former famous people, such as *Keeping Up With The Kardashians* and *The Osbournes*.[45] As one academic explained, "[r]eality television has … become a site where the celebrity-making logics of representation, desire and commodification meld."[46] This generation overlaps with the prior, competition-style one. Now, the fame that is acquired from

[39] Kavka, *supra* note 14, at 76.

[40] *Id*.

[41] Shivani Gonzalez, *'The Bachelor' Promises True Love. So Why Does It Rarely Work Out?*, N.Y. Times (May 13, 2024), https://www.nytimes.com/2024/05/13/arts/television/bachelor-bachelorette-breakups-reality-tv.html [https://perma.cc/253E-FCKL] ("Unlike other popular reality dating shows, the [Bachelor] franchise markets itself as a genuine chance to find love without any other incentives like cash prizes.").

[42] Fans of *The Bachelor* and the spinoff *The Bachelorette* can take part in Fantasy Leagues while the seasons air. Madeline Berg, *Betting On Love: Inside Competitive 'Bachelor' Fantasy Leagues*, Forbes Media (Jan. 16, 2017, 9:30 AM), https://www.forbes.com/sites/maddieberg/2017/01/16/betting-on-love-inside-competitive-bachelor-fantasy-leagues/?sh=605850ab2c3e [https://perma.cc/P4NZ-UV57].

[43] Kavka, *supra* note 14, at 110.

[44] Giles, *supra* note 13, at 63-64.

[45] *Id*.

[46] Kavka, *supra* note 14, at 147.

being "ordinary" on reality TV shows can lead to opportunities to join other shows. For example, Harry Jowsey—a reality TV celebrity who appeared on the first season of *Too Hot to Handle*[47]—was on the most recent season of *Dancing with the Stars*. Despite the lackluster description of his fame being summarized as: "Harry Jowsey is a reality TV star. He appeared in Season One of Netflix's 'Too Hot to Handle' and currently has over 4 million followers on Instagram,"[48] his casting on *Dancing with the Stars* signals that he has been elevated to the level of "star" to the general public.

Shows like *The Real Housewives* series, *Jersey Shore*, and *Selling Sunset* follow similar formats as *An American Family* and *The Real World*—with a fly-on-the-wall format, where viewers watch groups of people interact in their everyday (but admittedly heavily edited) environments. Purposefully or not, these shows propel its cast members into celebrity for qualities other than their merit. And their celebrity seems longer lasting than those from older reality TV shows, mainly because the celebrity economy has evolved to cater to this type of fame. Many reality TV stars are "[d]istributed carefully across various media, . . . with clothing and cosmetic ranges, apps, nightclubs, and modelling contracts."[49]

Like the 1988 WGA strike, the WGA strike in 2007-2008 drew producers and viewers to reality TV to fill the "gaps popular sitcoms and dramas left behind."[50] Reality TV has drastically expanded and evolved since its early days of the 1980s, and it is here to stay.

II
Mention It All: The Dark Side of Reality Television

There is no doubt that reality TV has become popular amongst generations of viewers. There is seemingly a genre for everyone to enjoy. And production costs are notoriously low, which, as mentioned earlier, helps explain the proliferation of

[47] *See* Netflix, *supra* note 12.

[48] Lindsay Lowe & Joyann Jeffrey, *Jamie Lynn Spears, Charity Lawson and Ariana Madix: 'DWTS' Season 32 Cast*, TODAY (Sept. 13, 2023, 10:18 AM), https://www.today.com/popculture/tv/dancing-with-the-stars-season-32-cast-rcna104606 [https://perma.cc/S228-PE25].

[49] Giles, *supra* note 13, at 67.

[50] Ree Hines, *Reality TV To The Rescue? Amid Writers' Strike, ABC And Fox Lean On Unscripted Shows*, Forbes Media (May 17, 2023, 6:18 PM), https://forbes.com/sites/reehines/2023/05/17/reality-tv-to-the-rescue-amid-writers-strike-abc-and-fox-lean-on-unscripted-shows/?sh=4c292f9e7916 [https://perma.cc/VQK4-54EF].

reality TV shows.[51] What comes with cost-cutting, however, is a slew of complaints and allegations against producers and production companies. These complaints mainly focus on inadequate pay, unsafe work conditions, and sexual misconduct.

In 2022, Variety reported that the Kardashian family "split a massive 9-figure salary" for their move from E! to Hulu.[52] Of course, this large a salary for an unscripted show is a rarity in the industry. Instead, for most reality TV shows, the participants "are not considered employees of either the shows on which they appear nor the production companies in charge of filming."[53] Some are considered independent contractors and receive a stipend, which varies per cast member based on their popularity.[54] Other participants of reality TV shows receive no compensation at all.[55] While some expenses are covered during production, one producer admitted that "[n]inety-nine percent of the people on reality TV … [receive] maybe a daily stipend of $20 or $30, but that's it."[56] On *Love is Blind*, participants are paid $1,000 per week, but often work up to 20 hours per day, seven days a week. As Jeremy Hartwell alleged in his lawsuit against *Love is Blind*'s production company, the cast members were paid "effectively as little [as] $7.14 per hour which is less than half of the applicable minimum wage rate of $15.00 per hour … pursuant to the applicable Los Angeles City and County minimum wage ordinances."[57] The more popular or famous a reality star is determines the amount they are paid. But most of the participants are not famous to begin with. Thus, the majority are often underpaid and have little leverage because their lack of fame makes them easily replaceable.

Another frequent complaint among those both in front of and behind the camera is the unsafe working conditions on reality TV sets. This criticism

[51] Jethro Nededog, *Here's How Reality TV Shows Get Away With Paying People Nothing*, Bus. Insider (June 7, 2016, 2:10 PM), https://www.businessinsider.com/reality-tv-shows-pay-nothing-2016-6 [https://perma.cc/FUZ8-G4MQ] ("Reality shows were designed from the beginning to be cheap television. They're a break from the huge budgets that scripted TV needs, and they give networks more bang for their buck.").

[52] Emily Longeretta, *Kardashian-Jenner Family Will Split a Massive 9-Figure Salary for New Hulu Reality Series*, Variety (Mar. 10, 2022, 7:30 PM), https://variety.com/2022/tv/features/kardashians-jenners-salary-hulu-reality-show-1235201104/ [https://perma.cc/E2AB-WTFR].

[53] Walsh, *supra* note 23.

[54] *Id*.

[55] *Id*.

[56] Nededog, *supra* note 51.

[57] Compl. ¶ 6, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

ranges from a lack of adequate nutrition to intentional infliction of emotional distress. One crew member who worked on a home renovation show said that "[t]here were no safety precautions taken and we were working in homes that were completely dilapidated. People went through the floor regularly, things were constantly falling and if you complained you were fired."[58] Another noted that they had "worked on shoots in very dangerous situations (prison settings, massive crowds, mountaineering) with no security or emergency contingency plans or staff in place."[59]

Despite a proclaimed priority of creating a safe and respected work environment, production companies have faced an onslaught of complaints saying just the opposite. Some participants claim that producers control when they eat and sleep, but that alcohol is always available. Jeremy Hartwell, for example "could not access food and water, but alcohol was available–and even encouraged on an empty stomach."[60] Braunwyn Windham-Burke from *The Real Housewives of Orange County* has echoed that producers place implicit pressure on cast members to drink. "Whenever you're filming, they have alcohol there. They ask you before you go on a trip, what kind do you like? They get to know what your favorites are."[61] And while producers "'don't force you to drink,' alcoholic beverages were 'readily available' and that sometimes during scenes, castmembers were discouraged from eating."[62]

Of course, some shows have components to them that are inherently stressful. *Fear Factor*, for example, is infamously known for its grueling challenges, which include eating tarantulas, jumping out of helicopters, and diving "into a

[58] Lowell Peterson, *Shooting Reality TV Dhows is Unhealthy and Unsafe, and Most Networks Just Don't Care*, WASH. POST (Sept. 10, 2014, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2014/09/10/shooting-reality-tv-shows-is-unhealthy-and-unsafe-and-most-networks-just-dont-care/ [https://perma.cc/9RLN-4JQA].

[59] *Id*.

[60] Marianne Garvey, *'Love Is Blind' Contestants Forced to Film Drunk, Hungry and Sleep-Deprived, Lawsuit Claims*, CNN (July 16, 2022, 9:43 AM), https://edition.cnn.com/2022/07/16/entertainment/love-is-blind-lawsuit/index.html [https://perma.cc/N8WH-QVM3].

[61] Marianne Garvey, *The Challenge of Becoming (and Staying) Sober On Reality TV*, CNN (Apr. 3, 2022, 10:54 PM), https://www.cnn.com/2022/04/01/entertainment/reality-tv-sober-alcohol/index.html [https://perma.cc/3ENV-YJQL].

[62] *Id*.

blood aquarium and retriev[ing] cow hearts with their mouths."[63] But even then, contestants who participate may not really know what they are signing up for. After watching *Fear Factor* for years, Anthony Bell participated in the show with his son and commented that he "'was totally caught off guard' by the intensity of the challenges. . . . The hardest portion of the production, he said, was the meal: live scorpions. He had expected that he would have to eat something dead, not alive."[64]

Producers of challenge-based shows have admitted that they intentionally exploit contestants' phobias to make better TV.[65] Even non-challenge-based program participants have experienced stress associated with their shows. While there are sometimes clinical psychologists on-set who help with mental-health screenings and prepare contestants for how they may be portrayed on TV, one psychologist said that when it "comes to twists or particular production issues that could affect a contestant's mental health, he's rarely consulted."[66] Another clinical psychologist who works with contestants after their shows end explained that the assistance to participants is limited to three-follow up sessions.[67] After that, "contestants are on their own to seek help."[68]

There have also been reports of sexual misconduct on these programs. After allegedly goading participants with endless supplies of alcohol, producers have allowed interactions between participants to play out to the point of sexual assault. On the fourth season of *Bachelor in Paradise*—a spin-off of *The Bachelor*, where former contestants have a second chance at finding love—production temporarily stopped due to allegations of "misconduct."[69] After two contestants drank heavily throughout the day, a sexual encounter between them was filmed and production

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[63] Brian Stelter, *It's Back, and Even More Disgusting*, N.Y. Times (Dec. 11, 2011), https://www.nytimes.com/2011/12/12/arts/television/fear-factor-returns-to-nbc-on-monday-night.html [https://perma.cc/7ZY9-EXYB].

[64] *Id*.

[65] Amber Dowling, *How Reality TV Handles Therapy Needs for Contestants*, Variety (June 13, 2019, 11:00 AM), https://variety.com/2019/tv/features/reality-tv-challenge-big-brother-contestants-therapy-1203239481/ [https://perma.cc/5T55-KMV3].

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] Tierney Bricker, *Bachelor in Paradise Shocking Scandal: Everything We Know*, E! News (June 20, 2017, 1:12 PM), https://www.eonline.com/news/860463/bachelor-in-paradise-shocking-scandal-everything-we-know [https://perma.cc/W5Y7-K79K].

was then halted to investigate what had taken place.[70] Warner Bros. conducted an internal investigation and concluded that no wrongdoing had taken place.[71] The fourth season subsequently continued production without the two contestants involved in the initial incident.[72]

More recently, on *Below Deck Down Under*—a show that follows crew members of a super-yacht during a six-week charter season in Australia[73]—two crew members were immediately fired from the season after one tried to get into bed naked with another crew member and the other made comments blaming the victim.[74] While the producers were praised for the swift intervention,[75] other members of production and the cast have claimed that when they experienced and witnessed sexual misconduct on set, their complaints had fallen on deaf ears. Samantha Suarez, a former makeup artist for *Below Deck Sailing Yacht*—another spin-off of the *Below Deck* franchise—accused a cast member, Gary King, of trying to force himself on her during production of the show's fourth season.[76] King was also accused of touching other members of production and his fellow castmates without their consent.[77] Specifically, he was witnessed grabbing a "female cast

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[70] Joyce Chen, *'Bachelor in Paradise' Scandal: What We Know and Why It Matters*, ROLLING STONE (June 14, 2017), https://www.rollingstone.com/tv-movies/tv-movie-news/bachelor-in-paradise-scandal-what-we-know-and-why-it-matters-203866/ [https://perma.cc/G8WD-KB98].

[71] Bricker, *supra* note 69.

[72] Jodi Guglielmi, *DeMario Jackson: Two Women Accuse Controversial 'Bachelor in Paradise' Star of Rape*, ROLLING STONE (Sept. 28, 2022, 11:37 AM), https://www.rollingstone.com/tv-movies/tv-movie-news/bachelor-in-paradise-demario-jackson-rape-1234596955/ [https://perma.cc/C2WB-UBZP].

[73] "Captain Jason and Chief Stew Aesha reunite for an unforgettable, full-throttle charter season with a lively new crew and wild guests in the stunning waters of Cairns, Australia – the gateway to the Great Barrier Reef." *Below Deck Down Under*, BRAVO https://www.bravotv.com/below-deck-down-under [https://perma.cc/5D4K-GEVD].

[74] Armando Tinoco, *'Below Deck Down Under' Crew Members Fired After Non-Consensual Sexual Advances Caught On Camera*, DEADLINE (Aug. 12, 2023, 6:33 PM), https://deadline.com/2023/08/below-deck-down-under-crew-members-fired-non-consensual-sexual-advances-1235461340/ [https://perma.cc/L8NJ-7AB7].

[75] Krystie Lee Yandoli, *'Below Deck's' Captain Jason and Aesha Talk Handling Sexual Misconduct at BravoCon*, ROLLING STONE (Nov. 4, 2023), https://www.rollingstone.com/tv-movies/tv-movie-features/below-deck-down-under-captain-jason-chambers-aesha-scott-bravocon-sexual-misconduct-luke-jones-1234870569/ [https://perma.cc/Y3BV-KA5B].

[76] Krystie Lee Yandoli, *'Below Deck' Accused of Covering Up Gary King's Sexual Misconduct*, ROLLING STONE (Aug. 24, 2023, 9:30 AM), https://www.rollingstone.com/tv-movies/tv-movie-features/below-deck-bravo-gary-king-sexual-misconduct-cover-up-1234811442/ [https://perma.cc/JC2N-7K2D].

[77] *Id*.

member's butt and continu[ing] to touch her inappropriately even though she said, 'No,' and told him to stop."[78] These incidents were reported to either HR or members of the production crew, yet King remained on the show and is still a public figure supported by the network.[79]

III
Worth Playing For?: Why Reality Television Participants Avoid Legal Action

The question then becomes, why don't legitimate complaints by reality show participants about low pay, dangerous working conditions, and sexual misconduct lead to more legal actions against the producers, the production company, or the TV network? The stars of these shows—while clearly not minding certain fame—seem to not want to be the whistleblowers to take down reality TV. This section offers two potential theories: social and legal.

A. The Social Theory: Hunger for Fame

Once someone has tasted their 15 minutes of fame, it is hard not to crave more. Psychologists have hypothesized that fame is addicting.[80] There are also many people who hope to attain the mass adoration of strangers even before they have experienced that dopamine rush.[81] And reality TV has provided the opportunity to be famous without the requisite talent. Now, some celebrities today "are famous for being famous."[82]

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[78] *Id.*

[79] *Id.* ("On Aug. 18, King announced in an Instagram post that he'd be attending BravoCon, Bravo's annual convention for fans and stars of the network's extensive slate of reality shows.").

[80] *See, e.g.*, Donna L. Roberts, *The Psychology of Fame: Unraveling the Mental Impact of Stardom*, Medium (July 14, 2023), https://medium.com/psych-pstuff/the-psychology-of-fame-unraveling-the-mental-impact-of-stardom-9a95a2e647b1#:~:text=Many%20famous%20individuals%20develop%20a,a%20profound%20sense%20of%20loss [https://perma.cc/8UVG-36L4] ("Many famous individuals develop a psychological dependence on fame. Like any addiction, they become reliant on the adoration and validation of the masses. If and when the fame fades, these individuals can experience withdrawal-like symptoms, which include depression, anxiety, and a profound sense of loss.").

[81] Jake Halpern, Fame Junkies: The Hidden Truths Behind America's Favorite Addiction 3 (2008) ("Looking for aspiring celebrities in America is a little like looking for dehydrated nomads at a desert encampment—they are everywhere, and their thirst is so intense it's almost palpable.").

[82] Chong Ju Choi & Ron Berger, *Ethics of Celebrities and Their Increasing Influence in 21st Century Society*, 91 J. Bus. Ethics 313, 314 (2010); *see also supra* notes 44-49 and accompanying text (explaining the "celebrity" generation of reality TV).

Unlike older shows such as *The Real World*, where the association with the show often lasted only as long as the season aired,[83] the new generation of reality celebrities seem to find consistent fame through their participation on the show. Of course, sometimes reality TV participants want to distance themselves from their on-air reputations. For example, Nick Thompson from *Love is Blind* has mentioned that he cannot secure a job in his prior field (software) and is bordering on homelessness.[84]

However, now more than ever, reality participants are hopeful that they will leave their shows with notoriety, positive or negative. It is commonly acknowledged and accepted that reality TV is a way to become a social media influencer, which is often accompanied by brand deals and a steady income.[85] Some previous participants have even made a career out of reality TV consulting by helping hopeful applicants put their best foot forward in the reality TV casting process.[86] Others have monetized their experience simply by speaking about their time on the show.[87]

This desire for fame leads to the desire to not rock any boats. If reality stars have complaints about their shows—with either how they are treated during

[83] For example, Sean Duffy, a cast member on *The Real World: Boston*, which aired in 1997, was able to distance himself as a reality TV personality and served as a U.S. Congressman from 2011 to 2019. Similarly, the other seven cast members have all taken their careers off camera (although one of them—Jason Cornwell—works behind the scenes for reality TV networks). Pooja Sharma, *The Real World Season 6 (Boston): Where Are They Now?*, TheCinemaholic (Sept. 23, 2023), https://thecinemaholic.com/the-real-world-season-6-boston-where-are-they-now/ [https://perma.cc/5XUQ-AXFU].

[84] Morgan Hines, *'Love is Blind' Star Nick Thompson Says He Could Become 'Homeless,' Blames Netflix*, USA Today (Aug. 2, 2023), https://www.usatoday.com/story/entertainment/celebrities/2023/08/02/netflix-love-is-blind-nick-thompson-homeless-danielle-ruhl/70511611007/ [https://perma.cc/5PCH-UKZ8].

[85] Walsh, *supra* note 23 ("That contestants today use *The Bachelor* to launch careers as social media influencers is more or less tacitly acknowledged by all, even though it contradicts the show's central conceit [sic] — that everyone is there for the right reasons.").

[86] Daryl Austin, *Reality TV Attracts More Applicants Than Ever. For Reality-TV Coaches, It's a Gold Rush*, Wall St. J. (Feb. 24, 2023), https://www.wsj.com/articles/reality-tv-casting-coaches-survivor-amazing-race-bbd52bd6 [https://perma.cc/6FY9-PS8P] ("Adam Klein, a former 'Survivor' contestant who won the show's 33rd season, is now a full-time reality-television consultant.").

[87] *See, e.g.*, Emily Nussbaum, *Is "Love Is Blind" a Toxic Workplace?*, The New Yorker (May 20, 2024), https://www.newyorker.com/magazine/2024/05/27/is-love-is-blind-a-toxic-workplace [https://perma.cc/G8WD-KB98] (identifying former *Love is Blind* contestants Deepti Vempati and Natalie Lee as taking this approach through Vempati's memoir and the duo's joint podcast "Out of the Pods").

production, or how they are portrayed post-production—there is a hesitancy to speak out. Most people are not on these shows to make money as a cast member; they are on them for exposure. As one agent noted, "It's about promoting your ancillary businesses, whether it's endorsements or your own products."[88] If they want to continue making content, create an image for themselves, and ultimately *be famous*, former participants may not want to ruin their chances by filing a lawsuit against the company that hired them.

While becoming a social media influencer arguably gives reality stars more autonomy and control over their brand, their image suffers when they have less exposure. Many reality TV shows across all genres have spin-offs that former cast members are invited back for, such as *Bachelor in Paradise*; *Below Deck Mediterranean*, *Sailing Yacht*, and *Down Under*; *The Challenge*; and *The Real Housewives Ultimate Girls Trip*. Even without direct spin-offs, reality TV stars can move across networks. For example, Tom Sandoval—a main cast member of *Vanderpump Rules*[89]—has broadened his exposure by participating in talent- and challenge-based reality shows such as *The Masked Singer*[90] and *Special Forces: World's Toughest Test*.[91]

But most reality TV participants—especially the more unknown and less popular ones—are replaceable. Unfortunately, "those at the margins; the unknowns … are most likely to get a bad deal."[92] They also have the most to lose. Compared to reality TV stars who already have a large following, others who call "attention to the mistreatment cast members often face means they will likely never return to reality TV."[93] Former reality stars are hesitant to risk their financial

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[88] Nededog, *supra* note 51.

[89] *Vanderpump Rules* is a show that follows the lives of current and former servers of SUR, a Los Angeles-based restaurant owned by former *Real Housewives of Beverly Hills* star Lisa Vanderpump. Talia Ergas, *What Is Vanderpump Rules? Everything to Know About the Bravo Series*, BRAVO (Dec. 12, 2023, 1:02 PM), https://www.bravotv.com/the-daily-dish/what-is-vanderpump-rules-explainer [https://perma.cc/8ER3-ULVQ].

[90] *The Masked Singer* "is a top-secret singing competition in which celebrities face off against one another while shrouded from head to toe in an elaborate costume, concealing his or her identity." *The Masked Singer*, FOX, https://www.fox.com/the-masked-singer/ [https://perma.cc/CEZ7-3RM5].

[91] *Special Forces* is a show where "[c]elebrities from all genres take on – and try to survive – demanding training exercises led by directing staff agents, an elite team of ex-Special Forces operatives." *Special Forces: World's Toughest Test*, FOX, https://www.fox.com/special-forces-worlds-toughest-test/ [https://perma.cc/G848-KPKV].

[92] Walsh, *supra* note 23.

[93] Espada, *supra* note 7.

gains "by publicly coming forward in support of unionizing or talking about their poor treatment out of fear of not being asked back to potential future seasons or spinoffs."[94] Therefore, one reason we do not see more legal cases play out in public is because the potential plaintiffs would rather stay quiet than risk their careers.

B. The Legal Theory: Losses and Settlements

While there is a social argument that reality TV participants do not sue because they will lose the opportunity to be famous, there are also two overarching legal reasons for the lack of lawsuits. First, the very nature of the contracts signed by reality TV participants often precludes them from pursuing their claims in court; and second, those who have valid claims typically settle out of court, thus preventing any precedent on this legal subject from emerging.

1. The Lawsuits May Lack Legal Merit

The difference in bargaining power between unknown talent and major TV networks is astronomical. Furthermore, the more people who sign unfair deals, and the longer those agreements are in place, the more difficult it is to challenge the contracts on a case-by-case basis. Kalpana Kotagal, Commissioner of the EEOC and co-creator of the inclusion rider in entertainment industry contracts, has stated that "Over time, if a contractual provision is put in place distinguishing a 'participant' from a 'performer,' for example, and that distinction is not challenged in court, or is held up in court, it becomes the norm on which other contracts are based."[95]

Many, if not all, contracts between production companies and talent contain a binding arbitration clause.[96] While arbitration could result in a victory for the individual plaintiff, talent attorneys have expressed concern that arbitrators are biased in favor of studios.[97] In fact, some talent-side attorneys "believe that the

[94] *Id*.

[95] Walsh, *supra* note 23 ("Contestants must agree to appearing as 'participants' in a contest, not 'performers,' which would be a class of employee that deserves, well, some rights and protections in the eyes of the law.").

[96] *See, e.g.* Ronald J. Nessim & Scott Goldman, *Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement*, 22 UCLA Ent. L. Rev. 233, passim (2015) (discussing the effects of an increase in arbitration clauses in contracts between major television studios and talent).

[97] *Id*. at 235 ("Transactional lawyers and litigators who represent talent have become increasingly concerned about repeat provider/player bias in talent versus major studio arbitrations.").

choice of arbitrating versus litigating in a public courtroom is the single most important factor—perhaps even more important than the merits—in determining the outcome."[98] This belief stems from the fact that arbitrators, unlike judges, are often selected by the parties to determine the case.[99] Although arbitrators are supposed to be neutral, there is a fear that even the most honest arbitrators are still "subconsciously . . . aware that if he or she rules against a major studio, particularly in a large dollar value case, he or she will not be picked by at least that major studio in the future."[100]

Thus, one possible reason there are so few lawsuits is because the mandatory arbitration clause in talent agreements precludes claims from being brought to court, and talent may not want to argue their claims in arbitration. To combat the binding arbitration clause within their signed contracts, participants have attempted to argue that the arbitration clauses are unconscionable. This section looks at why that legal argument has failed.

As noted in the seminal case *Williams v. Walker-Thomas Furniture*, "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[101] In other words, to hold that a portion of a contract is unconscionable, courts must find that the contract is both procedurally and substantively unconscionable.[102]

Procedural unconscionability relates to the fairness of the bargaining process. Courts consider whether there was an opportunity to understand the terms, whether there was a gross inequality of bargaining power, and whether there was a market alternative.[103] Substantive unconscionability "looks at whether the results 'shock the conscience' because they are 'overly harsh' or 'one-sided.'"[104] Some state

[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] 350 F.2d 445, 449 (D.C. Cir. 1965).
[102] Arthur Allen Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).
[103] *Williams*, 350 F.2d at 449-50.
[104] Kaufman v. Sony Pictures TV, Inc., No. 16-12027-LTS, 2017 U.S. Dist. LEXIS 112938, at *12 (D. Mass. July 19, 2017) (quoting Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669, 689 (Cal. 2000)).

courts, including California and New York, view unconscionability on a sliding scale: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required … and vice versa."[105] Ultimately, "[i]n determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made."[106]

Admittedly not much legal doctrine has been established regarding the unconscionability of reality TV contracts, but one student note has argued that the contracts are not substantively unconscionable because the terms do not meet the "shock the conscience" standard.[107] When looking at the "terms of the contract considered in light of the circumstances existing when the contract was made,"[108] reality TV contracts are arguably not as manipulative as some may think. Specifically, "[i]n the entertainment industry, contracts tend to be over-inclusive and favor production companies because they are assuming the majority of the financial risk."[109] Additionally, because there is an opportunity for contestants to make it big and contestants never *have* to participate in the show, their unfairness arguments about the contracts may be weak.

That said, it is undeniable that these participants, who are almost always unknown before the show, have little bargaining power. Kelly Scott, an employment attorney, explained that participants are "anxious to have this happen for them, and they're willing to sign over a lot. As long as the contract isn't egregious, [production companies] get away with it. Few people have been successful in

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[105] Bielski v. Coinbase, Inc., 87 F.4th 1003, 1013 (9th Cir. 2023) (quoting Sanchez v. Valencia Holding Co., 353 P.3d 741, 748 (Cal. 2015)); *see also* De Jesus v. Gregorys Coffee Mgmt., LLC, No. 20-cv-6305, 2021 WL 5591026, at *7 (E.D.N.Y. Nov. 29, 2021) ("Courts consider procedural and substantive unconscionability on a 'sliding scale,' meaning that 'the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa.'") (quoting Simar Holding Corp. v. GSC, 87 A.D.3d 688, 928 N.Y.S.2d 592, 595 (2011)).

[106] *Williams*, 350 F.2d at 450.

[107] Catherine Riley, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 N.Y.U. J. Intell. Prop. & Ent. L. 106, 108-09 (2014) ("While a lay reader may view the language of the agreements as extreme and unwarranted in isolation, when considered in the larger economic and industry framework of reality television, the terms are not unconscionable.").

[108] *Williams*, 350 F.2d at 450.

[109] Riley, *supra* note 107, at 135.

breaking them."[110] Thus, participants who are willing to throw their hat into the legal ring may find their strongest argument under the procedural unconscionability prong. Specifically, they could argue that because their replaceability significantly weakens their bargaining power, and because there is no market alternative in the reality TV landscape, there is "no real negotiation and an absence of meaningful choice."[111]

Ultimately, however, it may be difficult to convince a court to set such a large precedent against these contracts because "[m]ost courts 'have shown restraint in examining contracts or clauses for unconscionability' to avoid encroaching on the parties' freedom of contract."[112] Additionally, as stated above, even using a sliding scale approach, a contract is unconscionable only if it is both procedurally and substantively unconscionable.[113] Further, the few courts that have addressed whether portions of reality TV contracts are unconscionable have generally ruled in favor of the production companies.

For example, in *Ledwell v. Ravenel*, the Fourth Circuit rejected that the arbitration clause in a reality TV contract was unconscionable.[114] There, during the production of *Southern Charm*,[115] Dawn Ledwell was allegedly assaulted by one of the main cast members of the show.[116] "Dissatisfied with the network's response to the incident, Ledwell filed suit in state court" alleging defamation, negligence, and unfair trade practices.[117] She argued that the contract she signed, which required the parties "to arbitrate any disputes arising out of the show's production," were invalid in part for unconscionability.[118] The court, without much analysis, concluded that "even assuming that Ledwell could establish that she had

[110] Breeanna Hare, *The 'Real World' of Reality Show Contracts*, CNN (Dec. 30, 2009), https://www.cnn.com/2009/SHOWBIZ/TV/12/30/legal.reality.contracts/index.html [https://perma.cc/957Q-ZUHC].

[111] *Bielski*, 87 F.4th at 1013 (quoting Grand Prospect Partners v. Ross Dress for Less, Inc., 182 Cal. Rptr. 3d 235, 248 (Ct. App. 2015)).

[112] Riley, *supra* note 107, at 117 (quoting Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 Hastings L.J. 459, 461-62 (1999)).

[113] *See supra* notes 101-106 and accompanying text.

[114] 843 F. App'x 506, 507 (4th Cir. 2021) (per curiam).

[115] "New relationships are forged alongside new resentments, but old habits die hard as these southern socialites grapple with shocking allegations that could fracture what were thought to be unbreakable bonds." *Southern Charm*, Bravo, https://www.bravotv.com/southern-charm [https://perma.cc/23H5-K6GZ].

[116] *Ledwell*, 843 F. App'x at 507.

[117] *Id.*

[118] *Id.*

no choice but to sign the releases, she identifies nothing in the agreements that rises to the level of substantive unconscionability."[119]

Similarly, in *Abruzzo v. Bravo Media Productions LLC*, the Court of Appeals of South Carolina ruled that the arbitration agreement between the two parties was enforceable and therefore plaintiff's claims could not be brought to court.[120] In that case, Joseph Abruzzo, a former boyfriend of one of the main cast members on *Southern Charm*, sued NBC Universal Media and its other entities, arguing that the producers went back on their promise that he would be portrayed in a positive light and that "he was under pressure to sign the agreement because he and [his then-girlfriend] had gone through hair and makeup and were sitting down for dinner, the film crew was ready to begin, and 'bright lights' were shining on him."[121] The court severed the analysis between the validity of the arbitration agreement and Abruzzo's claim that the contract as a whole was invalid.[122] The court then ruled that because Abruzzo did not explicitly argue that the arbitration clause was unenforceable, his other claims *must* go to arbitration.[123]

Most recently, another *Love is Blind* cast member initiated litigation against the show's production company, in part related to the enforceability of the arbitration clause in her contract. In 2023, Renee Poche, a Season 5 contestant of *Love is Blind*, publicly described her negative experience on the show. She claimed that producers forced her to spend large stretches of time alone with her "showmance" partner, Carter Wall, who was abusive both on and off camera.[124]

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[119] *Id*. at 508.

[120] 892 S.E.2d 527 (S.C. Ct. App. 2023).

[121] *Id*. at 529.

[122] *Id*. at 531.

[123] *Id*. at 531-32 ("[Abruzzo's] allegations do not specifically pertain to the arbitration clause; rather, they address how he felt about signing the entire agreement to both appear on the show and arbitrate any disputes. Therefore, Abruzzo has failed to specifically challenge the arbitration agreement independently from the rest of the agreement as required under Prima Paint and Buckeye. Accordingly, we ... remand for an order compelling arbitration.").

[124] Tatiana Siegel, *Drugs, Abuse, Imprisonment: A Secret 'Love Is Blind' Legal Battle Spills Out Into Public View*, VARIETY (Jan. 3, 2024), https://variety.com/2024/tv/news/love-is-blind-lawsuit-renee-poche-1235860564/ [https://perma.cc/V6U4-4MSW] ("'My experience on 'Love is Blind' was traumatic' Poche tells *Variety*. 'I felt like a prisoner and had no support when I let Delirium know that I didn't feel safe.'"); *see also* Out of the Pods, *30. The Lost Stories of Love is Blind: Season 5's Renee Poche*, YOUTUBE (Oct. 19, 2023), https://www.youtube.com/watch?v=rLIASlJh6Nc [https://perma.cc/8T6Z-EYXY].

In response, one of the show's production companies (Delirium TV) initiated arbitration against Poche, seeking $4 million for violating the non-disclosure provision within her talent agreement.[125] Poche and her attorneys then filed a lawsuit in California state court on January 2, 2024, alleging, among other things, that the arbitration clause in the agreement was unlawful and therefore unenforceable.[126] In other words, Poche sought to halt the arbitration filed by Delirium TV against her while the court determined whether the contract's non-disclosure agreement was enforceable in the first place. On March 22, 2024, following the briefing of Delirium TV's motion to compel arbitration,[127] Judge Bruce G. Iwasaki granted the motion in favor of the production company.[128] Although the judge acknowledged that he did not "like those kinds of clauses," he ruled the arbitration provision was not substantively unconscionable and that Poche's arguments related to the enforceability of the contract must be made to an arbitrator, not to the court.[129] Poche's attorneys stated they would appeal the court's ruling.[130]

Departing from the norm, the Superior Court of California in *Higgins v. Superior Court* (*Higgins I*) found that the arbitration clause in a contract between the parties was unconscionable and therefore unenforceable.[131] *Higgins I* involved five recently orphaned siblings who appeared on *Extreme Makeover: Home Edition*.[132] The siblings had been taken in by the Leomiti Family, who were subsequently chosen to participate in the reality show for their kindness towards

[125] Compl. ¶ 30, Poche v. Delirium TV, LLC, No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024) ("On November 1, 2023, Delirium initiated arbitration against Poche, alleging four violations of the nondisclosure provisions of the [talent agreement signed by both parties], each carrying liquidated penalties of $1 million.").

[126] *Id.* ¶¶ 53, 83.

[127] *See* Poche v. Delirium TV, LLC, No. 24STCV00088: Defs. Mot. to Compel (Cal. Super. Ct. Feb. 5, 2024); Pls. Opp. to Mot. to Compel (Cal. Super. Ct. Mar. 11, 2024); Defs. Reply ISO Mot. to Compel (Cal. Super. Ct. Mar. 15, 2024).

[128] Maria Spoto, *'Love Is Blind' Contestant Contract Suit Sent to Arbitrator (1)*, Bloomberg Law (Mar. 22, 2024, 1:18 PM) https://news.bloomberglaw.com/litigation/love-is-blind-contestants-contract-claims-sent-to-arbitrator [https://perma.cc/64JD-TCMM].

[129] *Id.* ("'You can argue the release is vague, overbroad, doesn't apply, is against public policy,' Iwasaki said, but those arguments, according to Poche's contract, should be made in front of an arbitrator.").

[130] *Id.* ("'I think it went phenomenally,' [Poche's attorney] said to reporters after the hearing. 'I think the Court of Appeals will absolutely enjoy the argument here.'").

[131] 45 Cal. Rptr. 3d 293 (Cal. Ct. App. 2006).

[132] *Id.* at 295-96.

the Higgins siblings.[133] The Leomitis received a new home, but only weeks after the camera crews left, the Leomitis evicted the Higgins siblings.[134] The siblings then sued the show's production company and related entities "alleging that they had been promised a home where they could live permanently and that they were never told that they had no ownership interest in the Leomitis' renovated home, or that the Leomitis retained the right to evict them."[135] The Higgins siblings argued that their claims should be decided by a court, not an arbitrator, because the arbitration clause that they had signed was unconscionable.[136] The court agreed, noting that the arbitration agreement was both procedurally and substantively unconscionable. Procedurally, the siblings—at the time aged 21, 19, 17, 16, and 14—were young, unsophisticated, and under pressure to review the arbitration provision.[137] Substantively, the terms of the arbitration provision were so one-sided that they shocked the conscience.[138]

The Higgins siblings may have won the battle, but they did not win the war. When the merits of the case eventually went through the court system, the court ultimately found that the other provisions in the contract terms were not unconscionable. In an unpublished opinion, the Court of Appeals of California in *Higgins v. Disney/ABC Int'l Television, Inc.* (*Higgins II*)[139] assumed that the contract was procedurally unconscionable, but concluded that the provisions at issue—"those releasing respondents for tort liability for matters arising in connection with the show, including claims for invasion of privacy and appropriation of likeness"—were not substantively unconscionable.[140]

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[133] *Id.*

[134] *Id.* at 298

[135] Higgins v. Disney/ABC International Television, Inc. (Higgins II), No. BC B200885, 2009 WL 692701, at *2 (Cal. Ct. App. Mar. 18, 2009).

[136] *Higgins I*, 45 Cal. Rptr. 3d at 295.

[137] *Id.* at 303-05.

[138] *Id.* at 299, 304-05.

[139] 2009 WL 692701.

[140] *Id.* at *12 (agreeing with the trial court that "allowing appellants to appear on the show and receive its benefits in exchange for giving up their publicity rights and limiting respondents' liability for torts occurring in connection with the show ... were not surprising or unexpected and, when viewed in the context of the agreement's primary purpose, were not unconscionable").

Although there has been an occasional win for reality TV plaintiffs,[141] it may ultimately be difficult to secure a victory on the merits when the standard for unconscionability is so stringent and the questionable terms of the contracts have become boilerplate and widespread.

2. There is a Tendency to Settle

The second legal explanation for the lack of lawsuits is that the claims that would result in the most damage to production companies—both monetarily and reputationally—settle out of court. For example, in 2012, MTV Network settled a lawsuit brought by Tonya Cooley, a former cast member of *The Real World* and *Road Rules Challenge*. Cooley claimed that she was sexually abused by fellow castmates throughout her time on the show and that the producers not only encouraged the behavior by supplying unlimited alcohol, but they also retaliated against her for complaining by sending her home early.[142] Although Viacom Media Networks, MTV's parent company, answered Cooley's complaint by arguing that she failed to use the internal complaint procedures and that her own behavior on the show contributed to her circumstances, the two parties eventually settled for an undisclosed amount.[143]

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[141] Recently, another Season 5 contestant of *Love is Blind*, Tran Dang, received a favorable ruling from a Texas state court judge regarding arbitration. Dang is suing two *Love is Blind* production companies (Delirium TV and Kinetic Content) related to an alleged sexual assault by her then-fiancé. Joelle Goldstein, *Love Is Blind Creator Speaks Out After Participant Sues for Sexual Assault, False Imprisonment*, PEOPLE (Oct. 6, 2023, 2:02 PM), https://people.com/love-is-blind-creator-speaks-out-season-5-participant-tran-dang-sues-sexual-assault-lawsuit-exclusive-8348174 [https://perma.cc/VCM4-J85V]. After Delirium TV attempted to compel arbitration, Dang's attorney successfully argued that the Ending Forced Arbitration Act (EFAA) precluded arbitration. *See* Delirium TV, LLC v. Dang, No. 01-23-00383-CV, 2024 WL 1513878, at *4-7 (Tex. App. Apr. 9, 2024). The EFAA eliminates pre-dispute mandatory arbitration clauses "involving a nonconsensual sexual act or sexual contact," 9 U.S.C. §401(3), which Dang is basing her claims on. *See generally* Appellee Brief at 4, Dang v. Delirium TV, LLC, No. 01-23-00383-CV (Tex. App. Sept. 14, 2023). Subsequently, on May 9, 2024, a Texas appellate court ruled that Dang could not pursue her civil assault claim against Kinetic Content because the alleged assault took place in Mexico, meaning the trial court lacked specific jurisdiction over the company. Kinetic Content, LLC v. Tran Dang, No. 01-23-00444-CV, 2024 WL 2061593, at *8-10 (Tex. App. May 9, 2024). However, the court also held that Kinetic could not escape liability under Dang's false imprisonment and negligence claims. *Kinetic Content*, 2024 WL 2061593, at *10-12.

[142] Eriq Gardner, *MTV Settles Lawsuit With 'Real World' Cast Member Who Alleged Rape*, THE HOLLYWOOD REPORTER (Oct. 24, 2012), https://www.hollywoodreporter.com/business/business-news/real-world-rape-mtv-tanya-382809/ [https://perma.cc/YQ7P-T95X].

[143] *Id.*

Similarly, during the first season of *Survivor: All-Stars*, one cast member, Susan Hawk, claimed that another participant, Richard Hatch, "sexually violated" her while they completed a challenge.[144] Subsequently, Hawk quit the game and considered filing a lawsuit against CBS.[145] However, she later appeared with Hatch on *The Early*, stating she opted out of legal action because CBS had helped her "deal with the situation."[146] Most recently, on May 8, 2024, Jeremy Hartwell's attorneys filed a motion for preliminary approval of the class action settlement.[147] Based on the settlement, Kinetic Content has agreed to pay almost $1.4 million, divided between approximately 144 class members.[148] A hearing on the settlement is scheduled for July 2024.[149] There are numerous other examples and articles about settlements between reality TV participants and production companies.[150]

Settlements make sense for both parties involved in this type of dispute—both cut the costs of litigating, the production companies can avoid invasive discovery, and the plaintiff can avoid public attention and scrutiny. Unfortunately, potential future plaintiffs are harmed by these settlements because they do not have any precedent to rely on in future litigation. If few courts have had the chance to decide on these issues, then plaintiffs—likely with less resources than production companies—are left without a clear path forward on how to litigate their claims.

IV
Quite the Scandal, Actually: How Reality Television Participants Can Fight Back

There have not been many legal victories for reality TV participants, and the strongest claims with the potential to bring negative publicity to production

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[144] Rome Neal, *Hawk And Hatch: Getting Past It*, CBS News (Mar. 4, 2004), https://www.cbsnews.com/news/hawk-and-hatch-getting-past-it/ [https://perma.cc/99GV-B5Z4].

[145] *Id*.

[146] *Id*.

[147] *See generally* Mot. for Preliminary Approval of Class Action Settlement, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. May 8, 2024).

[148] *Id*. at 25.

[149] Hillel Aron, *'Love Is Blind' Cast Member Reaches $1.4 Million Settlement With Netflix in Class Action Over Unpaid Wages*, Courthouse News Service (May 10, 2024), https://www.courthousenews.com/love-is-blind-cast-member-reaches-1-4-million-settlement-with-netflix-in-class-action-over-unpaid-wages/ [https://perma.cc/EH3M-DTJT].

[150] *See, e.g.*, Espada, *supra* note 7 (A former contestant of *Big Brother* in France, Morgan Enselme, publicly criticized the production company for restricting her access to her prescribed antihistamines, which led to PTSD. "Enselme had sued the company and reached a legal settlement in 2016.").

companies are settled out of court. As such, reality TV participants willing to risk their career may need to either make new legal arguments to have any hope of succeeding in courts or turn to political advocacy. The following addresses an innovative legal argument brought in Jeremy Hartwell's almost-settled lawsuit and policy suggestions.

A. Independent Contractors or Employees?: A Case Study of Love Is Blind Participants

One novel legal claim that has yet to be rejected by courts is whether reality TV participants are employees or independent contractors. This argument has been raised in Jeremy Hartwell's *Love is Blind* class action lawsuit against Kinetic Content (Kinetic), the show's production company. Hartwell alleged not only that he and the other cast members have been misclassified as independent contractors, but that as employees they were paid drastically below the California minimum wage standards.[151] Generally, if someone is classified as an independent contractor, the employer is not required to comply with minimum wage and overtime laws.[152] If an employer is found to have misclassified its employees as independent contractors, they face a plethora of legal consequences.[153]

State and federal laws use different factors to determine whether someone is an employee or independent contractor. However, one commonality between these laws is that each employment relationship necessitates its own factual inquiry. How a company classifies a worker is irrelevant—what matters is each individual relationship between the worker and their hiring entity.[154] The following looks

[151] Compl. ¶¶ 3-4, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

[152] Morgan E. Hedley & Michael A. Gamboli, *U.S. DOL Issues New Rule on Independent Contractor Classification, Returning to More Employee-Friendly Analysis*, Partridge Snow & Hahn (Jan. 22, 2024), https://www.psh.com/u-s-dept-labor-new-rule-on-independent-contractor-classification-under-flsa/ [https://perma.cc/89TR-3JPX].

[153] *Id.* ("As many employers know, a finding of misclassification can result in expensive penalties, such as unpaid overtime and minimum wage, liquidated damages and attorneys' fees. If the IRS suspects an employer intentionally misclassified its employees, it can levy additional penalties for the misclassification, including criminal charges.").

[154] *Myths About Misclassification: Myth #5*, U.S. Department of Labor, https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail#5 [https://perma.cc/X54E-V9DZ]; Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 962 (2018) ("It is well established, under all of the varied standards . . . that a business cannot unilaterally determine a worker's status simply by assigning the worker the label

to Hartwell's *Love is Blind* lawsuit as a case study of how arguments about the employment status of reality TV participants may play out under both California law and federal law.[155]

1. California Labor Law

Hartwell's lawsuit claims that under California law, *Love is Blind*'s production company, Kinetic, misclassified him and other class members as independent contractors.[156] Because of the recent settlement announcement,[157] the public may never know whether the California Superior Court (or an arbitrator[158]) would have found merit to his claim; however, based on California's Assembly Bill 5 (AB5), Hartwell likely had a strong argument against Kinetic.

AB5, passed in 2019, codified a strict approach to employee classification, established in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018).[159] In *Dynamex*, the California Supreme Court adopted the "ABC test" which presumes that workers are employees, unless the hiring entity can satisfy *all three* conditions:

> a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently

'independent contractor' or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor.").

[155] The employment status of unscripted television participants could be its own note. As described above, the format and casting of reality TV shows vary greatly. *See generally supra* Part I. Each type of show and each type of participant deserves its own factual analysis. For the purposes of this note, the analysis is limited to potential arguments that participants from *Love is Blind* and their production company may use in litigation.

[156] Compl. ¶¶ 23-31, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022).

[157] *See supra* notes 147-149 and accompanying text.

[158] Hartwell would likely have needed to survive a motion to compel arbitration in order to bring his wage and hour claim to court. *See* Joint Initial Status Conf. Statement at 3, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. Sept. 9, 2022). If the court ultimately compelled the parties to arbitrate, an arbitrator would have decided the issue of whether Hartwell and the class were misclassified as independent contractors.

[159] Cal. A.B. 5, ch. 296, Leg. Counsel's Digest (2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 [https://perma.cc/2V3V-DGCX].

established trade, occupation, or business of the same nature as that involved in the work performed.[160]

AB5 requires that California employers and courts apply the ABC test to determine "whether workers in California are employees or independent contractors for purposes of the Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission (IWC) wage orders."[161] The law shifts the burden to the employer to prove that their worker is an independent contractor.[162] In 2020, the California state legislature enacted two new statutes—Assembly Bills 170 and 2257 (AB 170 and AB 2257)—that established numerous exemptions to the application of the ABC test.[163] If a worker is exempted, the hiring entity-worker relationship is instead "governed by the multifactor test previously adopted in" *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (the *Borello* test).[164] The *Borello* test does not immediately absolve the hiring entity from liability, but it is less predictable than the ABC test because no one factor is determinative of the outcome.[165] Under the *Borello* test, employers and courts must consider "all potentially relevant factors on a case-by-case basis in light of the nature of the work, the overall arrangement between the parties and the purpose of the law."[166] That said, neither AB 170 nor AB 2257 exempts reality TV

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160 *Dynamex*, 4 Cal. 5th at 955-56 (emphasis in original).

161 *Independent contractor versus employee*, State of California Department of Industrial Relations, https://www.dir.ca.gov/dlse/faq_independentcontractor.htm [https://perma.cc/2LSV-SM28].

162 The previous law placed the burden on the worker to show that they were an employee of the hiring entity. *See* S. G. Borello & Sons, Inc. v. Dep't of Indust. Relations, 48 Cal.3d 341 (Cal. 1989).

163 *See* Quinn v. LPL Fin. LLC, 91 Cal. App. 5th 370, 375-76 (Cal. 2023) (referencing Assembly Bills 170 and 2257).

164 Cal. A.B. 2257, ch. 38, Leg. Counsel's Digest (2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257 [https://perma.cc/8KQT-36M3] (referencing *S. G. Borello & Sons*, 48 Cal.3d at 341). For detailed information about the *Borello* test, see State of California Department of Industrial Relations, *supra* note 161 (Question 5: What is the Borello Test?).

165 *See* Apalla U. Chopra, et al., *California Supreme Court Adopts ABC Employee Classification Test*, O'Melveny & Myers LLP (May 3, 2018), https://www.omm.com/insights/alerts-publications/california-supreme-court-adopts-abc-employee-classification-test/ [https://perma.cc/8FAX-SL9E] (describing the ABC test set out in *Dynamex* as "more rigid and employee-friendly than the multi-factor test developed in [*Borello*]," which had been "the common law method for determining employee status in California for nearly 30 years").

166 State of California Department of Industrial Relations, *supra* note 161 (Question 6: How does the ABC test compare to the Borello test?). Some *Borello* factors include:

1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;

show participants from the ABC test.[167] AB 2257, for example, creates exemptions for certain entertainment industry occupations such as recording artists, vocalists, managers of recording artists, independent radio promoters, and others.[168] There is, however, no exemption for participants in reality TV.[169] Therefore, the relevant inquiry for analyzing whether reality TV cast members are independent contractors or employees is the more rigid ABC test. Under that test, *Love is Blind* participants would likely qualify as employees of the show's production company.

The first condition of the test is whether the worker is free from the control of the hiring entity.[170] Kinetic would argue that participants are free to leave the show whenever they please. *Love is Blind* is framed as a "social experiment," in which contestants find out whether love is, in fact, blind. Many participants choose to leave when they have not found a person to propose to.[171] Even participants who find their match are free to leave the show and stop filming.[172]

2. Whether the work is a regular or integral part of the employer's business;
3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;
5. Whether the service provided requires a special skill.

Id. (Question 5: What is the Borello Test?).

[167] *See* Cal. A.B. 2257, ch. 38, Leg. Counsel's Digest (2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257 [https://perma.cc/8KQT-36M3] (codified at Cal. Lab. Code §2775 *et seq*.).

[168] *See* Cal. Lab. Code §2780(a)(1) (listing occupations exempted from the ABC test).

[169] *See generally* Cal. Lab. Code §2780. AB 2257 explicitly notes that "[f]ilm and television unit production crews . . . working on live or recorded performances for audiovisual works are *not* exempted from application of the ABC test." Cal. Lab. Code §2780(a)(2)(A).

[170] Cal. Lab. Code §2775(b)(1)(A).

[171] Charlotte Walsh, *No, There Aren't Any Bathrooms in the Love Is Blind Pods*, TUDUM BY NETFLIX (Feb. 9, 2024), https://www.netflix.com/tudum/articles/love-is-blind-pods [https://perma.cc/RZ2M-EBT2] ("Producers will let singles know if someone's really interested in them, but it's ultimately up to the contestants if they'd like to pursue the relationship."); Goldstein, *supra* note 141 ("[The show's creator said] participants are always free to walk away from the show, like what has been done in the past with previous cast members.").

[172] In season six, two out of the five couples decided to end their relationships and not finish filming the season. *See* Monica Mercuri, *Which Couples Got Married In 'Love Is Blind' Season 6? Here's Who's Still Together*, FORBES MEDIA (Mar. 6, 2024, 10:33 AM), https://www.forbes.com/sites/monicamercuri/2024/03/06/which-couples-got-married-in-love-is-blind-season-6-heres-whos-still-together/?sh=156ece382f83 [https://perma.cc/LU85-9KLC].

However, this argument is unlikely to succeed because of the producers' high level of involvement with the contestants. For example, the producers allegedly shuffle participants between hotel rooms and the set of the show for the first portion of the season.[173] Throughout their time in the pods,[174] former participants have noted that producers take their passport, keys, wallet, and cellphone.[175] To continue filming the show and potentially find a love-interest, participants are not free from the control and direction of the production company. If anything, they are often pressured to stay and film with the threat of legal action.[176] Participants also do not have control over the prices they set for themselves because they do not negotiate with Kinetic and they are bound to the consideration within the contract they sign.[177] Additionally, even after filming ends, Kinetic requires contestants to follow certain conditions before the show airs. For example, if a couple ultimately marries on the show, they are not allowed to wear their wedding rings until the show finishes airing.[178] Or if a couple marries on the show but seeks to divorce, they must wait a specific time period before publicly filing any divorce documents.[179] The control Kinetic has over its participants lasts many months after filming.

Kinetic would also likely fail the second condition of the ABC test. The second condition requires that the worker perform work outside the usual course

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[173] Sarah Hearon, *'Love Is Blind' Rules: How Dates Are Set Up in the Pods, Wedding Budgets and More*, Us Weekly (Apr. 14, 2023), https://www.usmagazine.com/entertainment/pictures/love-is-blind-rules-of-the-pods-weddings-and-more/ [https://perma.cc/5545-L2E2].

[174] Pods are "fairly small rooms, each outfitted with a couch, a rug and a shimmering blue wall that's shared with another pod. Contestants can hear, but not see, one another as they fall in love." Walsh, *supra* note 23.

[175] Compl. ¶ 25, Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022); Compl. ¶ 17, Poche v. Delirium TV, LLC, et al., No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024).

[176] *See* Poche Aff. ¶¶ 7, 9, Poche v. Delirium TV, LLC, et al., No. 24STCV00088 (Cal. Super. Ct. Jan. 16, 2024) ("Delirium also made it clear that I would subject myself to legal action if I discontinued my participation in the Program or otherwise refused to move forward with the engagement.").

[177] *Id.* ¶ 5.

[178] *See* Poche Compl. Ex. A (Talent Agreement) ¶ 37(d), Poche v. Delirium TV, LLC, et al., No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024) ("[I]n the event that my Partner and I marry, then continuing through the initial broadcast of the last episode in which I appear, I will not wear my wedding ring on my wedding finger and shall maintain confidentiality regarding our relationship status, to stay married or to divorce.").

[179] *See id.* ("[I]f I and/or my fiancé/Partner marry and then elect to divorce, I agree that I will not file, initiate or otherwise start any divorce proceedings or any other legal proceedings against my Partner concerning the termination of or validity of, our marriage, until the initial broadcast of the last episode in which I appear, or eleven (11) months following the wedding date, whichever is later.").

of the hiring entity's business.[180] The goal of this condition is "to bring within the 'employee' category all individuals … who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor."[181] In *Dynamex*, the Court compared a retail store that "hires an outside plumber to repair a leak" on the premises to "a clothing manufacturing company [that] hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company."[182] The former scenario involved an independent contractor—a plumber who has her own independent business that is separate from the retail store; the latter involved employees—seamstresses who were intimately entangled with the clothing business.[183] *Love is Blind* participants (and likely most, if not all, reality show participants) are *essential* to the production company's business. Kinetic's usual course of business is making and producing reality TV shows. Without participants there would be no show to produce. The participants' work is thus completely intertwined with the company's usual course of business. Their work as participants in determining whether love is truly blind is just as necessary and involved as a seamstress's work making dresses for a clothing company using the fabric provided by the company.

As to the third condition, the hiring entity has the burden to establish that the worker is customarily engaged in an independently established trade, occupation, or business.[184] Kinetic would have to demonstrate that being a reality TV participant is something that cast members do on their own, without the show. This argument, however, would likely fail. It would be nearly impossible for Kinetic to argue that first-time reality TV cast members, such as Jeremy Hartwell, are independently established reality TV stars. The premise of the show asks whether typical, single people can find love blindly. In fact, as part of the publicity for each season, participants are introduced with their occupations, which are clearly separate from their participation on the show.[185] Additionally, the show's co-

[180] Cal. Lab. Code §2775(b)(1)(B).

[181] *Dynamex*, 4 Cal. 5th at 959.

[182] *Id*. at 959-60.

[183] *Id*.

[184] Cal. Lab. Code §2775(b)(1)(C).

[185] Cole Delbyck, *The Love Is Blind Season 6 Cast: Meet Your New Pod Squad*, TUDUM BY NETFLIX (Mar. 6, 2024), https://www.netflix.com/tudum/articles/love-is-blind-season-6-cast-instagrams [https://perma.cc/U83W-ZVMH].

hosts have condemned the idea that cast members should find fame through their participation.[186] In other words, *Love is Blind* does *not* want its participants to have independent careers rooted in reality TV.

All three conditions of the ABC test will likely pose difficult hurdles for Kinetic. And as explained, the hiring entity must satisfy all three conditions to successfully classify a worker as an independent contractor. Of course, the ABC test is a fact-specific inquiry and each reality TV show and cast member would require its own analysis. However, if Hartwell had successfully demonstrated that *Love is Blind* participants are employees, his class action lawsuit could have set the stage for a dramatic wave of legal actions. While some people do not want to risk their careers as influencers, if there is a legal theory that works, it is possible that other discontented participants will want a bite of that apple.

2. Federal Labor Law

In January 2024, the United States Department of Labor (DOL) published a final rule that defined an "independent contractor" under the Fair Labor Standards Act (FLSA).[187] The rule calls for the "economic realities test" to assess employment status.[188] The FLSA aims to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[189] The Act requires that covered employers maintain certain records regarding employees and pay their nonexempt employees "at least the Federal minimum wage for all hours worked and at least one and one-half times the employee's regular rate of pay for every hour worked over 40 in a workweek."[190] However, similar to California law, not all workers are considered employees for purposes of the FLSA. Instead, "work must take place

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[186] *See Love is Blind*, Season 6, Episode 13, 0:38:41-0:39:22, NETFLIX (Mar. 13, 2024) https://www.netflix.com/watch/81741342?trackId=255824129 [archival link omitted] (last visited May 15, 2024). (Co-host Nick Lachey explaining: "We do not want people to come here motivated by fame. That's not what this is about.").

[187] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1638 (Jan. 10, 2024) (codified at 29 C.F.R. pts. 780, 788, 795).

[188] *Id*.

[189] 29 U.S.C. §202(a).

[190] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1638.

within an employment relationship."[191] The FLSA does not define what constitutes an employment relationship. The DOL rule adopts a six-factor test to fill that gap:

> [1] opportunity for profit or loss depending on managerial skill, [2] investments by the worker and the potential employer, [3] the degree of permanence of the work relationship, [4] the nature and degree of control, [5] the extent to which the work performed is an integral part of the potential employer's business, and [6] skill and initiative. … [A]dditional factors may also be considered if they are relevant to the overall question of economic dependence.[192]

The rule looks to the totality of the circumstances.[193] Factors two, three, four, and five, are most related to the reality TV employment dynamic, and depending on the show and participant, a court may weigh these factors differently. In connection with *Love is Blind*, while the inquiry is less certain than California's ABC test because different factors favor each side, most factors still favor employee status for *Love is Blind* participants. Below is a high-level analysis of arguments that both Kinetic and Hartwell could make regarding the relevant factors.[194]

Starting with factor two, Hartwell has the stronger argument that he is an employee. According to the DOL regulations, this factor considers whether "investments by a worker are capital or entrepreneurial in nature."[195] Additionally, "the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently."[196] Hartwell could argue that he never contributed capitol or entrepreneurial investments in his endeavor to appear on the show. Kinetic, he could point out, naturally invests heavily in the recruitment and editing of the cast members. Kinetic provides the

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[191] Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA's Child Labor Provisions and Children on Reality Television*, 17 UCLA L. Rev. 39, 51 (2010) (citing Goldberg v. Whitaker House Coop., 366 U.S. 33 (1961)).

[192] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1640.

[193] *Id*.

[194] Although Hartwell did not allege that Kinetic violated the FLSA in his complaint, see generally Compl., Hartwell v. Kinetic Content, LLC, et al., No. 22STCV21223 (Cal. Super. Ct. June 29, 2022), this note still provides an analysis of federal law regarding whether *Love is Blind* participants are considered employees.

[195] 29 C.F.R. §795.110(b)(2).

[196] *Id*.

initial set for the pods; the cameras used for shooting; and the "wrangler" who ensures that the contestants do not talk to others.[197] The only investment that contestants of *Love is Blind* are required to make relate to their travel expenses within their hometown.[198] Gas money is far from the type of capital investment the Rule calls for.[199]

Factor three—the degree of permanence of the work relationship—likely weighs in favor of Kinetic and would be its strongest argument. The DOL rule explains that "general characteristics historically identified by courts and the Department . . . indicate employee status where there is a longer-term, continuous, or indefinite work relationship, and independent contractor status where the work is definite in duration, nonexclusive, project-based, or sporadic due to the worker being in business for themself."[200]

Kinetic would argue that the participants are independent contractors because their work is temporary in nature. The show rotates its cast every year and seeks new people for each season. The company hires participants for the one season that they are on, making the relationship temporary. The work is definite in duration because the contract makes clear the length of time participants are filmed is eight weeks.[201] Kinetic would also argue that the work is non-exclusive because filming *Love is Blind* does not preclude participants from working in their day job. On the show, once remaining engaged participants are out of the pod setting, they go back home to experience what life would be like with their partner.[202] During this time,

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[197] *See* Poche Aff. ¶ 6, Poche v. Delirium TV, LLC, et al., No. 24STCV00088 (Cal. Super. Ct. Jan. 16, 2024).

[198] *See id.* ¶ 7.

[199] *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *supra* note 187, at 1681 (quoting Acosta v. Paragon Contractors Corp., 884 F.3d 1225, 1236 (10th Cir. 2018) ("[T]he relevant 'investment' is 'the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.'")).

[200] *Id*.

[201] *See* Poche Compl. Ex. A (Talent Agreement) ¶ 1(g), Poche v. Delirium TV, LLC, et al., No. 24STCV00088 (Cal. Super. Ct. Jan. 2, 2024) ("I will be available for the Program's production dates, tentatively scheduled to last for a total of approximately eight (8) weeks at times to be determined at a later date by Producer in its sole discretion[.]").

[202] Meredith Woerner, *How Netflix's New Reality Series 'Love Is Blind' Works*, VARIETY (Feb. 14, 2020, 6:16 PM), https://variety.com/2020/tv/news/netflix-love-is-blind-pods-rules-1203504741/ [https://perma.cc/X6UK-U52F].

they go about their typical day, which includes going to work.[203] Additionally, Kinetic could argue that at the very least, the contestants who leave the show early due to a lack of connection are independent contractors because they are filming for an even briefer amount of time than the contestants who make it to the end of the show.[204]

Hartwell could counter that the Rule qualifies this permanence factor by stating that where the "operational characteristics … are unique or intrinsic" to the business, the factor does not necessarily weigh in favor of independent contractor status, "unless the worker is exercising their own independent business initiative."[205] In other words, the temporary nature of *Love is Blind* is intrinsic to Kinetic's business, and therefore a court should look only to whether the participants are "exercising their own independent business initiative."

Factor four touches on the nature and degree of control, which aligns with the first condition of California's ABC test.[206] As explained above, this factor likely favors Hartwell and other *Love is Blind* participants as being employees because of the immense control that production has over contestants' time both during and after filming.[207]

Finally, factor five looks to whether the work performed "is critical, necessary, or central to the potential employer's principal business."[208] This factor likely weighs in favor of employee status for Hartwell because the work performed by the contestants is essential to Kinetic's goals as a business. Production companies

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[203] The *Love is Blind* participants often refer to working when they are home with their partner. *See, e.g.*, *Love is Blind*, Season 6, Episode 8, at 00:17:47-00:17:59, NETFLIX (Feb. 21, 2024), https://www.netflix.com/watch/81692465?trackId=200257859 [archival link omitted] (last visited May 24, 2024) ("My boss told me that I was irreplaceable today.").

[204] Hartwell, for example, filmed for four days. Emily Longeretta, *'Love Is Blind' Creator Confronts Cast Members' Allegations, From Ignoring Mental Health to Lack of Food and Water on Set*, VARIETY (Sept. 27, 2023, 11:45 AM), https://variety.com/2023/tv/news/love-is-blind-lawsuit-allegations-danielle-ruhl-interview-1235734836/ [https://perma.cc/8JPY-HG3B].

[205] 29 C.F.R. §795.110(b)(3).

[206] *See Dynamex*, 4 Cal. 5th at 955 ("(a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact.").

[207] *See supra* notes 170-179 and accompanying text (outlining the arguments for the first factor of California's ABC test).

[208] 29 C.F.R. §795.110(b)(5).

are tasked with creating, filming, and airing shows that viewers want to watch. Without the reality TV participants, there is no show to film, to air, or to watch.

The DOL rule went into effect March 11, 2024.[209] It is yet to be seen first, how reality TV employers respond to the new rule, if at all; and second, how courts will balance these factors. Hartwell's lawsuit does not raise FLSA issues, and there are no other wage-related reality TV lawsuits currently in litigation. If courts ultimately interpret the rule more favorably towards hiring entities generally, reality TV cast members may be even less likely to bring a lawsuit given their hesitancy to initiate litigation in the first place. On the other hand, if courts interpret the rule favoring employee status, production companies may feel the need to reevaluate their payment structure.

B. Taking Matters Out of the Courtroom: Potential Legislative Initiatives

As of now, courts have not provided adequate redress for the unique issues that impact reality TV participants. Besides direct legal action, another solution is to advocate for policy changes at the state and federal levels. Activists—whether it be former reality TV participants, producers, or the average viewer—could push for laws that provide better protection for reality TV stars related to their pay and legal rights generally.

Regarding wages, at the federal level, activists could push for a federal version of California's AB5. Although the current recognized test—the economic realities test—is more employee-friendly than the previous DOL rule,[210] a federal law that mimics AB5 could solidify that outcome. The FLSA is silent on the definition of employee.[211] Congress could amend the FLSA to ensure that its definition of employees and employers is no longer circular. It could codify the ABC test, and place the burden on the hiring entity to prove that their workers are independent contractors. Activists could also push for labor laws like AB5 at the state and local

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[209] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *supra* note 187.

[210] *See* Hedley & Gamboli, *supra* note 152 ("In January 2021, under the Trump Administration, the DOL finalized a formal rule (the '2021 Rule') for the first time. This rule consisted of a more employer-friendly five-factor test, focusing on two 'core' factors: the principal's right to control and the worker's opportunity for profit or loss.").

[211] *See* Fair Labor Standards Act of 1938 (29 U.S.C. §201 *et seq.*); Hedley & Gamboli, *supra* note 152 ("[T]he FLSA itself is silent on how to distinguish an employee from an independent contractor and, until 2021, the DOL had not defined 'independent contractor' by regulation.").

level, so that participants have increased protection from production companies not based in California.

Another policy focus could center around changing the mandatory arbitration clauses within the contracts. Since 2011, members of Congress have introduced legislation that eliminates pre-dispute mandatory arbitration clauses in employment, consumer, and civil rights cases.[212] The most recent attempt was in 2023, when Congressman Hank Johnson and Senator Richard Blumenthal introduced The Forced Arbitration Injustice Repeal Act, "the FAIR Act" in Congress.[213] The bill has yet to make it through committee.[214] Previous attempts have failed mainly because of lobbying efforts from a variety of big businesses.[215] It seems to be an uphill battle to eliminate pre-dispute arbitration, but reality TV participants can be another set of voices to rally behind the next iteration of the FAIR Act.

Conclusion

The legal and social landscape of reality TV leaves participants who have suffered from low pay, unsafe working conditions, or sexual harassment, without much legal recourse. It is difficult to point to one societal or legal reason that can explain why we do not see many court cases from reality TV participants, but the difference in power between the behemoth production companies and the semi-anonymous cast members seems to be the common denominator.

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[212] *See* Nessim & Goldman, *supra* note 96, at 252 ("Senator Al Franken introduced a bill in 2011 and 2013 that would prohibit all pre-dispute arbitration agreements 'if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.'") (quoting Arbitration Fairness Act of 2013, S.878, 113th Cong. (2013)). The most recent iteration of the proposed law includes independent contractors as falling under the "employment" category. *See* Forced Arbitration Injustice Repeal Act, S.1376, 118th Cong. §501(4)(A) (2023).

[213] *See* Forced Arbitration Injustice Repeal Act, S.1376, 118th Cong. §501(4)(A) (2023); Mark J. Levin & Alan S. Kaplinsky, *Arbitration "Fair Act" reintroduced in Congress*, Ballard Spahr LLP (May 11, 2023), https://www.consumerfinancemonitor.com/2023/05/11/arbitration-fair-act-reintroduced-in-congress/ [https://perma.cc/66TC-NMH2].

[214] According to govtrack.us, the law has a 5% chance of being enacted. Govtrack.us, https://www.govtrack.us/congress/bills/118/s1376 [https://perma.cc/Y8TG-9MZP].

[215] Nessim & Goldman, *supra* note 96, at 253 ("Business interests, such as the wireless trade group CTIA and the Financial Services Roundtable, an advocacy organization for the U.S. financial services industry, oppose the bill as 'a misguided effort to overturn a well-reasoned U.S. Supreme Court decision.'").

While individually it may be difficult to secure a legal win, there is strength in numbers. *Love is Blind* alums Jeremy Hartwell and Nick Thompson, who have both spoken critically of the show as discussed above, launched the Unscripted Cast Advocacy Network—an "organization that provides mental and legal support to past, present and future reality TV stars with the help of volunteer lawyers and psychologists."[216] They have heard from at least fifty participants from a variety of reality shows interested in joining the network.[217] And in the wake of the WGA and SAG-AFTRA strikes in 2023, Bethenny Frankel—a major reality TV personality who got her start on *The Real Housewives of New York*—has become a vocal proponent for unionizing reality TV participants.[218] What Frankel has dubbed as the "reality reckoning"[219] has gained traction. Frankel's attorneys, Bryan Freedman and Mark Geragos, sent a litigation hold letter to NBCUniversal in 2023 accusing the company of having a "pattern and practice of grotesque and depraved mistreatment of the reality stars and crewmembers."[220] Those same attorneys have gathered a reality TV cohort as their clients, representing participants from *Love is Blind*, *Vanderpump Rules*, and *The Real Housewives of Beverly Hills*.[221]

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[216] *Espada*, *supra* note 7.

[217] *Id.*

[218] *Id.*

[219] *See* Bethenny Frankel (@bethennyfrankel), INSTAGRAM (July 21, 2023), https://www.instagram.com/p/Cu-BiXZJO_w/ [archival link omitted] (last visited May 28, 2024).

[220] Ashley Cullins, *NBCUniversal Accused of "Grotesque and Depraved Mistreatment" on Reality TV Series*, THE HOLLYWOOD REPORTER (Aug. 4, 2023 11:02AM), https://www.hollywoodreporter.com/tv/tv-news/nbcuniversal-grotesque-depraved-mistreatment-reality-tv-lawyer-letter-1235551194/ [https://perma.cc/94MS-L64V].

[221] *See* Siegel, *supra* note 124 ("[*Love is Blind*'s Renee] Poche is fighting back with the help of Hollywood power lawyers Bryan Freedman and Mark Geragos and has filed an explosive suit against Netflix and Delirium."); Dominic Patten, *"Cesspool": 'Vanderpump Rules' Vet Faith Stowers Sues NBCUniversal, Bravo & Producers For Racist Harassment & Retaliation*, DEADLINE (Apr. 5, 2024 11:17AM), https://deadline.com/2024/04/vanderpump-rules-faith-stowers-lawsuit-bravo-1235876900/ [https://perma.cc/2AYC-CGFE] ("[*Vanderpump Rules*' Faith] Stowers' legal action is being helmed by attorneys Bryan Freedman and Mark Geragos."); Eileen Reslen, *Brandi Glanville's Lawyers Blast Andy Cohen's Claim that 'Sexual Harassment' Video Was a 'Joke'*, PAGESIX (Feb. 23, 2024, 3:11PM), https://pagesix.com/2024/02/23/entertainment/brandi-glanvilles-lawyer-blasts-andy-cohens-claim-that-sexual-harassment-video-was-a-joke/ [https://perma.cc/UDQ3-WF6L] ("[*The Real Housewives of Beverly Hills*' Brandi] Glanville has not yet filed her own lawsuit against network executives, but her attorneys [Geragos and Freedman] mentioned . . . that they are considering pursuing legal action" against NBCUniversal).

As more voices within the industry speak out, the more production companies may feel pressured to make changes. Frankel, Hartwell, and Thompson could be the white knights that reality TV participants have needed—but that is still to be seen.