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UPLOAD COMPLETE: AN INTRODUCTION TO CREATOR ECONOMY LAW

FRANKLIN GRAVES*

ABSTRACT

Individuals have been creating and sharing creative works online since the dawn of the World Wide Web. However, only in the last decade and a half have the platform monetization, business, and audience factors reached the necessary levels to provide the foundation of a fully functioning, sometimes self-sustaining, creator economy. To understand the creator economy, it is important to contextualize it with the evolution of the web, the rise of Web 2.0, the on-going development of web3, and the shift from a consumer economy to a creator economy. The democratization of the web and technological advancements have made it possible for anyone with an internet connection to become a creator.

The creator economy has also introduced a new set of legal challenges and opportunities, including issues related to intellectual property, contract law, privacy, and content regulation. Courts and policymakers are still grappling with how to deal with these issues in a way that recognizes, respects, and protects the rights of creators, brands, platforms, and consumers.

Divided into three parts, this article aims to accelerate the conversation around an emerging area the author proposes to label as "Creator Economy Law" while simultaneously offering a survey of how, for nearly the past two decades, governments, regulators, and courts have been shaping the well-established creator economy.

Part I introduces the creator economy, defining "creators" and providing a brief history of creativity on the internet across the concepts of Web 2.0 and web3. The article then discusses the explosion of the creator economy in recent years, driven by the shift from a producer-

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consumer economy to an attention-driven creator economy. Part II examines a selection of laws that affect creators, from copyright and trademark to privacy and advertising. The article also discusses the evolving relationship between brands and influencers, the rebirth of remix culture, the liability of platforms for content posted by creators and brands, and the self-regulation and moderation of content by platforms. Part III discusses the future opportunities and challenges facing creators in the digital age, including the potential impact of decentralized platforms and communities, the proliferation of generative artificial intelligence technologies, and future law and policy considerations.

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I. Introduction

Individuals creating and releasing creative works online have been around since the dawn of the World Wide Web. However, only in the last decade and a half[1] have the platform monetization, business, and audience factors reached the necessary levels to provide the foundations of establishing a fully functioning, sometimes self-sustaining, creator economy. This growth, however, has brought significant legal complexities.

Creators, brands, and platforms serve as a captivating subject matter for exploring a wide range of the legal field, including intellectual property, business, and technology. For example, copyright law faces challenges in adapting to the rise of a remix culture and rapid and frequent content release schedules that define modern online creativity.

Creators and platforms also provide one of the most tangible and practical perspectives for learners as nearly everyone on the planet (and off the planet[2]) with access to the internet has created or engaged with online content in some form or fashion, whether as a social media post or blog writing, and whether anonymously, pseudonymously, or as their in real-life ("IRL") self. Along with such a deep permeation throughout society across the globe, developments in law and policy, oversight through new and existing regulations, and advances in technology contribute to the shaping of the creator economy.

This article introduces the concept of "Creator Economy Law" as a distinct field that synthesizes these intersecting legal issues. The author aims to advance the conversation around opportunities afforded by exploring this emerging area in much the same way as Professor Eric Goldman did with Cyberlaw in the early

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[1] The YouTube Partner Program (YPP), often considered one of the most well-known revenue-sharing models between a platform and its creators, launched in May 2007 following Google's purchase of YouTube in October 2006. YPP allows content creators on the platform to join Google's AdSense program to share in the advertising revenue generated on the platform once a creator gains 1,000 subscribers and either 4,000 public watch hours or, in the case of YouTube Shorts, 10 million public Shorts views, in the last 12 months. In 2022 and 2023, non-ad share revenue tools (such as fan funding and shopping) were made available for creators with at least 500 subscribers, 3 uploads within the last 12 months, and either 3 million public views (for Shorts) or 3,000 watch hours in the last 12 months. *See Overview of the expanded YouTube Partner Program*, YOUTUBE HELP (Mar. 7, 2024), https://support.google.com/youtube/answer/13429240.

[2] In 2013, Canadian Astronaut Chris Hadfield recorded a cover version of David Bowie's "Space Oddity," as well as filmed the first music video in space, during the final days of his voyage aboard the International Space Station. It was subsequently released online by Hadfield, but sparked a debate around copyright licensing for outer space. *See* Wendi Maloney, *Extraterrestrial Copyright: It's Complicated*, U.S. COPYRIGHT OFF. (May/June 2016), https://www.copyright.gov/history/lore/pdfs/201605%20CLore_MayJune2016.pdf.

2000s.[3] Prof. Goldman wrote in 2008 of teaching Cyberlaw, "From a pedagogical standpoint, specialty courses like Cyberlaw may reinforce basic legal principles for students and provide new insights into these principles, helping students deepen their understanding of the law."[4]

In order to accelerate the conversation around Creator Economy Law, this article offers a foundational survey of how, for nearly the past two decades, governments, regulators, and courts have been shaping the well-established creator economy. It is divided into three main parts.

Part I introduces the creator economy, defines "creators" and provides a brief history of creativity on the internet. It then discusses the explosion of the creator economy in recent years, driven by the shift from a producer-consumer economy to an attention-driven creator economy.

Part II examines a selection of laws that affect creators, including copyright law, trademark law, privacy and publicity laws, and contract law. It also discusses the evolving relationship between brands and influencers, the liability of platforms for content posted by creators, and the self-regulation and moderation of content by platforms.

Part III discusses the future opportunities and challenges facing creators in the digital age, including the potential impact of decentralized platforms and communities, the evolution of remix culture, and the proliferation of generative artificial intelligence (AI) tools.

And now… upload complete. Share, comment, and consider citing if you enjoy this introduction to Creator Economy Law!

II. Enter the Creator Economy

A majority of people worldwide engage with—and create—digital content, often without giving it much thought.[5] Every person reading this article has likely engaged in some manner with the internet. Whether through a personal computer, a mobile device, or a virtual reality (VR) headset, the ability to connect with others

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[3] Eric Goldman, *Teaching Cyberlaw*, 52 ST. LOUIS UNIV. L.J. 749 (2008).

[4] *Id.* at 750.

[5] *See Digital 2025 – Global Overview Report*, WE ARE SOC. (Feb. 2025), https://wearesocial.com/us/blog/2025/02/digital-2025/ (According to research from We Are Social and Meltwater, there are 5.24 billion social media user identities which amounts to 63.9% of the total global population); *see also* Bart Valkhof, Eleni Kemene & Justin Stark, *Data volume is soaring. Here's how the ICT sector can sustainably handle the surge*, WORLD ECON. F. (May 22, 2024), https://www.weforum.org/stories/2024/05/data-growth-drives-ict-energy-innovation/ ("One hundred and eighty-one zettabytes. That's the amount of data expected to be created, captured, copied and consumed globally in 2025 – nearly three times as much as in 2020.").

worldwide and share information has transformed society. The internet has proven to be an unprecedented tool in which anyone, anywhere can create and publish content available for consumption by just one person or potentially millions of people through digital platforms. Additionally, internet platforms allow for an audience to respond synchronously or asynchronously in the form of a 'like' or written comments within a discussion tool that accompanies the content. Alongside the rapid development of internet publishing technologies and platforms, creators organically began their rise to influence and economic importance within the media and entertainment industry. Platforms, armed with content from users, could leverage an advertising-driven economic model to bring brand and other marketing spend[6] to a fresh, often specifically targeted, set of captivated consumers.

At its core, the term "creator economy" refers to the multiparty ecosystem in which independent creators produce, distribute, and monetize content, products, or services using internet technologies that prioritize audience engagement, such as social media platforms or similar content distribution services.[7] This ecosystem is financially sustained through a combination of adtech integrations and direct audience monetization models (e.g., subscriptions, tipping, and crowdfunding).[8] The creator economy encompasses a vast and rapidly evolving ecosystem that includes not only creators, platforms, and brands, but also talent agencies and other professional representatives, rights management organizations, payment processors, and a host of third-party services such as analytics, content management, and marketing tools.[9]

This Section sets forth a foundational definition for who is considered a creator (Section IA) before taking a walk through the histories of the internet (Section IB), creativity on the internet (Section IC) and the explosion of the creator economy (Section ID).

A. The Ecosystem: Defining 'Creator,' Identifying Brands, and Establishing Platforms

For purposes of the creator economy, the term "creators" refers to individuals, such as personalities, artists, writers, entertainers, or educators, who create content and distribute it

[6] Author's Note: The term "marketing spend" generally refers to costs related to activities designed to publicize or advertise a product, service, or brand, spanning a comprehensive array of promotional methods and associated expenditures.

[7] *See* Richard Florida, *The Creator Economy is the Future of the Economy*, FAST CO. (Nov. 18, 2022), http://fastcompany.com/90812387/the-creator-economy-is-the-future-of-the-economy.

[8] *See id.*

[9] Zoe Soon, *Creator Economy and Ecosystem Mindmap*, INTERACTIVE ADVERT. BUREAU (Dec. 16, 2024), https://www.iab.com/insights/creator-economy-ecosystem-mindmap/.

through internet platforms.[10] Creators are the backbone of the creator economy. Without creators, there would be no content for the creator economy—not to mention platforms reliant on such content to attract and retain a user base. Creators have no corporate or media conglomerate backing, at least not initially. They may also go by a variety of additional names or classifications, some based on the platform from which they originate or the type of content they create. Examples include (i) internet creators; (ii) content creators; (iii) influencers (creators that use their influence within an existing network or their own community to promote products and services); (iv) YouTubers, or Vtubers;[11] (v) streamers (creators that focus on live streaming of video games, events, or even just eating food);[12] (vi) podcasters; (v) bloggers; (vi) vloggers (creators that release video blog diaries of their real life or a fictional version of it); and (vii) educators or course creators.

While a creator can be an entertainer, author, actor, musician, or fall within other traditional categories for talent within the entertainment industry, a distinction is drawn because of the unique nature in which the *internet* creator has risen within the context of the creator economy and with reliance on non-traditional revenue streams that, for example, copyright law may have historically enabled.[13] A creator can also be a sports figure—like an Olympic or collegiate athlete—pursuing additional revenue streams outside of their work on the court or field. Entire families can be a

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[10] *See also* Stuart Cunningham & David Craig, *Creator Governance in Social Media Entertainment*, 5 SOC. MEDIA + SOC'Y (2019) 1, 1 (defining creators as "[…] cultural entrepreneurs securing some form of remuneration on the major social media platforms.").

[11] As explained by creator MatPat during the inaugural episode of YouTube's "Like & Describe" podcast, the "boring definition of VTuber is that they're computer animated characters brought to life through motion tracking software that follows the movements of a real human being." *See* Like & Describe Podcast, *The Rise of the Vtubers*, *Episode 1*, YOUTUBE (Nov. 30, 2022), https://www.youtube.com/watch?v=8_igTYoM_VI&t=11s.

[12] Starting as a trend in South Korea, 'mukbang' videos feature a person eating with high-quality microphones to capture every sonic detail of both the food and the mouth of the person consuming it. *See* Jasmin Barmore, *Bethany Gaskin Is the Queen of Eating Shellfish Online*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/style/youtube-mukbang-bloveslife-bethany-gaskin.html.

[13] Copyright law's registration requirement often leaves out practical options for creators that are producing high volumes of content that do not fit within or meet traditional categories of—and requirements for—registration. For example, it wasn't until October 2020 that the Copyright Office released a new application form, the Group Registration for Short Online Literary Works (GRTX), that covered the text of blogs, social media posts, and other short form digital articles. *See Group Registration for Short Outline Literary Works*, COPYRIGHT.GOV, https://www.copyright.gov/grtx/ (last visited Apr. 12, 2025).

creator group, often referred to as "family influencers."[14] But family influencers are not to be confused with the "creator house," popularized through platforms like Instagram and TikTok and which feature anywhere from half-a-dozen or more (typically Gen Z) influencers living in the same space and producing massive amounts of content individually and collectively.[15]

It's estimated that, as of 2021, there are over 51 million internet creators, with roughly 2 million considered full-time content creators.[16] That number jumps to 303 million based on a 2022 survey conducted by Adobe across nine countries, which also found that 52% of creators began posting content in 2020.[17] According to Goldman Sachs, the creator economy is estimated to have a total addressable market size worth $250 billion in 2023 and is projected to reach $480 billion by 2027.[18] It comes as no surprise that traditional media labor unions, such as SAG-AFTRA, are expanding to the creator economy with targeted programs for influencers and the brands working with them.[19] Industry groups are also taking note. The Interactive Advertising Bureau (IAB), an organization focused on standards development, research, and law and policy for the digital advertising industry, has recently expanded with an extensive focus on the creator economy.[20] In 2021, the Children's Advertising Review Unit (CARU) of BBB National Programs updated its advertising guidelines to advise brands and influencers on best practices with endorsements on social media platforms.[21] The Consumer Technology Association's annual Consumer Electronic Show, or CES, launched the inaugural CES Creator Space during its 2025 event and leveraged the audience

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[14] *See* Crystal Abidin, *#familygoals: Family Influencers, Calibrated Amateurism, and Justifying Young Digital Labor*, SOC. MEDIA + SOC'Y 1 (2017).

[15] Jacinda Santora, *What is a Content House?*, INFLUENCER MKTG. HUB (May 28, 2024), https://influencermarketinghub.com/what-is-a-content-house/.

[16] Yuanling Yuan & Josh Costine, *SignalFire's Creator Economy Market Map*, SIGNALFIRE (Nov. 29, 2020), https://signalfire.com/blog/creator-economy/.

[17] *Adobe "Future of Creativity" Study: 165M+ Creators Joined Creator Economy Since 2020*, ADOBE (Aug. 25, 2022, 9:00 AM), https://news.adobe.com/news/news-details/2022/adobe-future-of-creativity-study-165m-creators-joined-creator-economy-since-2020.

[18] *The creator economy could approach half-a-trillion dollars by 2027*, GOLDMAN SACHS (Apr. 19, 2023), https://www.goldmansachs.com/intelligence/pages/the-creator-economy-could-approach-half-a-trillion-dollars-by-2027.html.

[19] *Influencer Resources*, SAG AFTRA, https://www.sagaftra.org/get-involved/ads-go-union/influencer-resources (last visited Apr. 12, 2023).

[20] *See IAB Releases First-of-Its-Kind Research Report on the Creator Economy Advertising Opportunity*, IAB PRESS RELEASE (Dec. 3, 2023), https://www.iab.com/news/creator-economy-advertising-opportunity-research/.

[21] Rashida Gordon, *For Brands and Influencers: Get to Know the CARU Advertising Guidelines*, BBB NAT'L PROGRAMS (Sept. 21, 2021), https://www.lexology.com/library/detail.aspx?g=3c19b3ef-3b90-4b3b-ab76-a510c1a09649.

reach of creators invited to participate and share content from the event.[22]

It can be difficult to draw a distinct and clear line between social media users and creators. The inherent nature of social networks, such as Facebook, LinkedIn, or X, is that the users are simultaneously the product, the customer, and the content for consumption. These casual social media users can be referred to as "Users Generating Content," a play on the term user-generated content. Distinguishing influencers, creators, and brands is an equally difficult, but important, task.

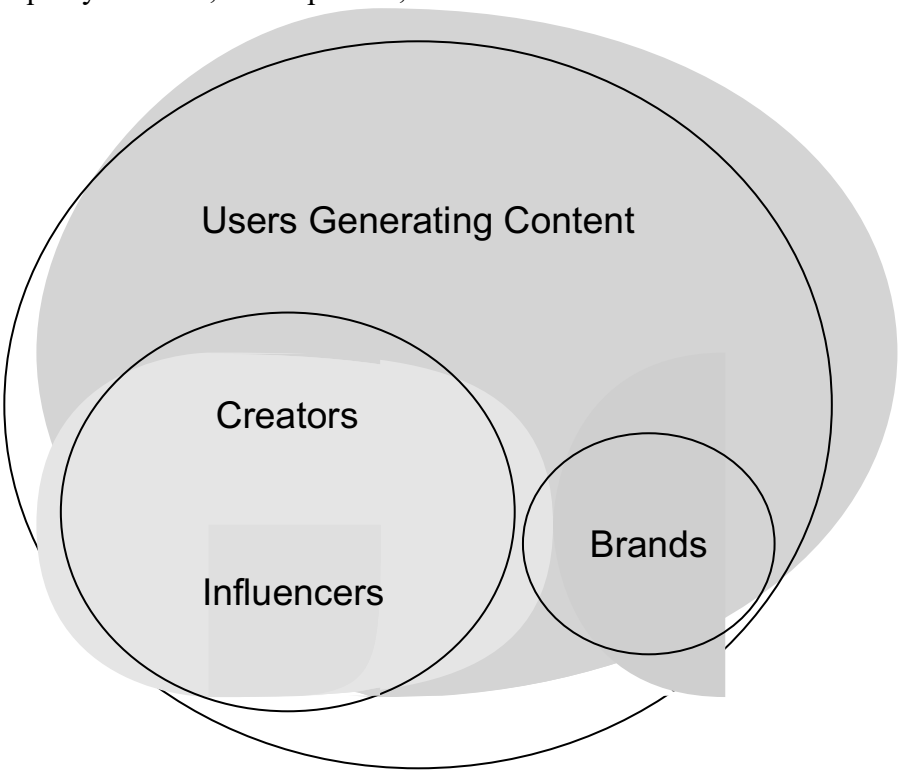


Diagram 1.1 - *Distinguishing Users Generating Content, Creators, Influencers, and Brands*.

Starting around 2011, YouTube popularized the term 'creators' as a way to recognize the growing importance of users generating quality, advertiser-friendly content on its platform.[23] This creator-first branding move, the result of a series of strategic

[22] *See CES 2025 Reveals Dedicated Hub for Creators*, PUBLISH PRESS, https://www.thepublishpress.com/ces-creator-space (last visited Apr. 4, 2025); s*ee also* Lia Haberman, *Inside CES's First-Ever Creator Space*, ICYMI (Jan. 10, 2025), https://liahaberman.substack.com/p/icymi-inside-cess-first-ever-creator.

[23] Taylor Lorenz, *The Real Difference Between Creators and Influencers*, ATLANTIC (May 31, 2019), https://www.theatlantic.com/technology/archive/2019/05/how-creators-became-influencers/590725/.

acquisitions over the years,[24] elevated its dominance in the user-generated content platform space by developing a robust partner program and sharing a portion of the advertising profits back with the user uploading the content. Numerous scholars across the fields of communication studies as well as digital culture and media explore the nuances of the relationships between creators and platforms, including relational labor[25] and unpaid labor practices.[26] The term 'creator' also took on a similar meaning in the video game industry in which it refers to world and community building tools.[27] With regards to the creator economy, *intentions* behind the content being distributed can often serve as a helpful mechanism to distinguish between users generating content, creators, influencers, and brands.[28]

A subset of creators, influencers are creating sponsored content or content that will drive sales of some kind and for which they may receive a cut of the profits. SAG-AFTRA defines 'influencer' within the context of the advertising industry as "an individual engaged to create Influencer-produced sponsored content and who creates and appears in Influencer-produced sponsored content."[29]

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[24] *Id.*

[25] *See* Nancy K. Baym, *Connect with your audience! The relational labor of connection*, 18.1 COMM'N REV. 1, 14-22 (2015) (defining relational labor as "regular, ongoing communication with audiences over time to build social relationships that foster paid work.").

[26] *See* Erin Brooke Duffy, *(Not) getting paid to do what you love: Gender, social media, and aspirational work,* YALE UNIV. PRESS (2017) (critiquing the role of social media in motivating women to undertake aspirational yet unpaid labor that predominantly serves corporate marketing goals).

[27] *See* Olli Sotamaa, *FCJ-109 Play, Create, Share? Console Gaming, Player Production and Agency*, FIBRECULTURE J. (2010), http://sixteen.fibreculturejournal.org/play-create-share-console-gaming-player-production-and-agency/; s*ee also* Jay Peters, *Fortnite's generous new creator economy has an Epic catch*, VERGE (Mar. 28, 2023, 6:00 AM), https://www.theverge.com/2023/3/28/23659492/fortnite-creator-economy-2-0-epic-games-catch (explaining that in March 2023, Epic Games launched what it dubbed "Creator Economy 2.0" where it would begin sharing with map creators a portion of the 40% revenue the company generates).

[28] An increasing number of platforms offer tools that enable explicit disclosures (such as a sponsored post or paid advertising) that assist with conveying the intentions behind the content. *See Add paid product placements, sponsorships & endorsements*, YOUTUBE HELP, https://support.google.com/youtube/answer/154235?hl=en#zippy=%2Cwhat-happens-when-i-check-the-my-video-contains-paid-promotion-like-a-product-placement-sponsorship-or-endorsement-box (last visited Mar. 24, 2025); s*ee also How to use the paid partnership label to tag organic branded content on Instagram*, INSTAGRAM HELP, https://help.instagram.com/1109894795810258 (last visited Mar. 24, 2025).

[29] *Influencer Resources*, SAG AFTRA, https://www.sagaftra.org/get-involved/ads-go-union/influencer-resources (last visited Apr. 12, 2023).

However, simply selling something is not enough. Influencers work to build a relationship and level of trust with their audiences and community, which then turns into having a meaningful impact from both a sales and brand recognition standpoint. It's fair to acknowledge that creators can release content that puts them within the category of being an influencer, while simultaneously releasing content that is not driven by paid advertising and marketing or sales opportunities.[30] The distinctions between creator and influencer are much like how a traditional actor can maintain their run as a recurring character on a show, while also appearing in advertisements or signing brand endorsement deals.

Examining the content itself can also be useful in distinguishing creator content and more traditional, studio-produced content. In making this distinction, the IAB defines "creator-driven content" as "less scripted content published by anyone, from full-time creators with a staff of editors and producers to people experimenting with video for the first time."[31]

Despite a rich history of seminal cases across numerous areas of law dealing with one-off technologies or businesses that drive the creator economy, the term "creator economy" itself did not appear in a court decision until October 2023 as part of District Judge David Carter's decision in *McCandless Grp., LLC v. Coy Collective, Inc.*[32] Judge Carter pulls an explanation of the "creator economy" provided by the defendants in the case, which is as follows: "The 'creator economy' consists of independent content creators—e.g., influencers, models, podcasters, and streamers—who distribute and monetize content on the internet."[33] As explained throughout this article, the definition provided in *McCandless* is an arguably narrow view that only takes into account one part of the larger ecosystem, leaving out the importance of brands and platforms. As of publication, the term "creator economy" has not

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[30] Antoinette Siu, *Why the ad industry is redefining what it means to be a creator vs. influencer*, DIGIDAY (Nov. 7, 2024), https://digiday.com/marketing/why-the-ad-industry-is-redefining-what-it-means-to-be-a-creator-vs-influencer/ ("Some also believe the term 'influencer' is becoming outdated as many creators build businesses beyond making social media content.").

[31] *The Creator Economy Opportunity: Where Authenticity Meets Impact*, INTERACTIVE ADVERT. BUREAU AND TALK SHOPPE (Dec. 2023), https://www.iab.com/wp-content/uploads/2023/12/IAB-TalkShoppe-Creator-Economy-Report-2023.pdf.

[32] McCandless Grp., LLC v. Coy Collective, Inc., No. LACV2102069DOCKES, 2023 WL 8351526 (C.D. Cal. Oct. 23, 2023). The case centered around a trade secret dispute between competing start-up social media platforms aiming to replicate the success of established subscription-only content platforms like OnlyFans. *Id.*

[33] *Id.* at *1.

substantively[34] appeared in any additional published court decisions despite a heavy amount of regulatory and judicial focus on individual facets of the creator economy, such as copyright law, platforms and liability, or regulation of speech, as each are explored later in this article.

Brands and businesses are also publishing content both natively (typically referred to as "organic" content) and through paid advertising campaigns. Brand accounts can be managed internally by employees within a company's marketing, communication, or customer service departments,[35] or externally by agencies that specialize in managing a brand's digital reputation and image.[36] For years, brand engagement on social media platforms brought newsworthy headlines, such as feuds between fast food chains;[37] however, recent trends have shown a potential shift in strategy based on generational and platform-specific expectations for what brand engagement looks like online.[38]

Platforms (also referred to as online platforms, service providers, interactive computer services, or social media platforms) are the most commonly defined party to the creator economy under various statutes in the U.S. and worldwide. Under Section 512 of the Digital Millennium Copyright Act, the term service provider is defined, in part, as "[...] a provider of online services or network access, or the operator of facilities therefor[.]"[39] The European Union's Digital Services Act broadly defines an online platform as:

> *a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public*, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons,

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[34] The term appears in *Invisible Narratives v. Next Level Apps Tech.-Fzco* as part of a quote from a deposition in which the term is referenced in describing a business. No. 25-cv-01644-NW, 2025 WL 551866, at *1-2 (N.D. Cal. Feb. 19, 2025).

[35] *See What is social media management? Everything you need to know*, SPROUT SOC. (Mar. 12, 2025), https://sproutsocial.com/insights/social-media-management/#team-member-management.

[36] *See* Adelina, *Internal Marketing VS External Marketing: What to Choose*, SOCIALBEE (July 22, 2021), https://socialbee.com/blog/internal-marketing/.

[37] Kaitlin Menza, *When Did Food Companies' Social Media Get So...Weird?*, DELISH (Oct. 31, 2019), https://www.delish.com/food/a29438999/food-company-social-media-best-weird-tweets-instagram.

[38] *See* Sopan Deb*, If Every Brand Is Funny Online, Is Anything Funny?*, N.Y. TIMES (Oct. 10, 2023), https://www.nytimes.com/2023/10/10/business/media/brands-social-media-tiktok-twitter.html.

[39] 17 U.S.C. § 512(k)(1).

> cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation[.][40]

This article uses the terms platforms, service providers, and online service providers interchangeably.

Revenue streams in the creator economy largely flow through platforms. The platforms often receive a cut of the money at one (or more) points along the way and in a variety of forms, most commonly as advertising revenues. Additional revenue streams for platforms can come from partnerships, third-party developers, and subscriptions.[41] Platform-driven subscriptions have expanded in recent years to include ad-free experiences, premium original content offerings from creators or the platforms themselves, premium features like unique items or verified accounts, and premium licensed content like music, podcasts, and audiobook subscriptions.[42]

In an increasingly disruptive environment of platform mergers, deprecations, and acquisitions,[43] many creators are turning

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[40] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277), 43 (emphasis added).

[41] Greg McFarlane, *How Facebook (Meta), X Corp (Twitter), Social Media Make Money From You*, INVESTOPEDIA (Dec. 2, 2022), https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx.

[42] Ivan Mehta, *Here's how every social media company is adopting subscriptions*, TECHCRUNCH (Feb. 27, 2023, 8:56 AM), https://techcrunch.com/2023/02/27/social-media-apps-adopting-subscription-models/.

[43] Notable examples include: Xanga (a blog site started in 1999 and eventually shut down in 2013 due to lack of funding), Traci Oshiro, *So long, Xanga*, NBC NEWS (June 3, 2013, 3:50 PM), https://www.nbcnews.com/id/wbna52087128; Friendster (a social network launched in 2003 and shut down in 2015 due to a lack of a strong user base); *Friendster*, Buildd, https://buildd.co/startup/failure-stories/what-happened-to-friendster (last visited Apr. 22, 2025); Google+ (a social network launched by Google in 2011 and shut down in 2019 after failing to become widely used and facing security vulnerabilities), Kimberly Perez, *Remebering Google+: The Social Network That Couldn't Compete*, 9METERS (Apr. 20, 2025), https://9meters.com/entertainment/social-media/latest-about-what-is-google-plus#:~:text=Google%2B%20was%20a%20social%20network,to%20close%20the%20platform%20entirely; Vine (a 6-second video sharing service launched in 2012 and acquired by Twitter within four months, but shut down in 2016), Chris Fox, *Twitter axes Vine video service*, BBC NEWS (Oct. 27, 2016), https://www.bbc.com/news/technology-37788052; Musical.ly (a lip-syncing short-form video sharing mobile app launched in 2014, acquired by ByteDance in 2017 and merged into TikTok in 2018), Todd Spangler, *Musical.ly Is Going Away: Users to Be Shifted to Bytedance's TikTok Video App*, VARIETY (Aug. 2, 2018, 3:32 PM), https://variety.com/2018/digital/news/musically-shutdown-

themselves into platform operators to retain control and decrease the level of volatility in their business that is reliant on audience reach.[44] Creator economy startups, such as online course and community platform Kajabi[45] or email marketing platform Kit,[46] are offering niche technology platforms that turn creators into service providers by leveraging their own platform, building a direct connection with an audience that the creators, not a third-party platform operator, will manage and control. This growing trend within the creator economy, specifically for creators, is commonly referred to as audience ownership.[47] However, by effectively becoming a service provider, many creators are taking on a much larger scale of liability as business owners and operators than ever before.

B. A (Brief) History of Creativity on the Internet

The internet has not only revolutionized the way we access and consume information, but it has also profoundly transformed the nature of creativity itself. What once was a static information highway has evolved into a dynamic infrastructure for content creation and sharing, enabling creators to express themselves in myriad ways and connect with others who share their passions. There are three generally accepted epochs marking critical shifts throughout the history of the internet: web 1.0, web 2.0, and web3.[48]

1. The Early Web (Web 1.0)

The early version of the World Wide Web (or web, for short) is best described as a static information highway where websites

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tiktok-bytedance-1202893205/; and Meerkat (a live streaming mobile app that launched in 2015 and shut down in 2016 after its developers launched a similar app called Houseparty, which was acquired by Epic Games in 2019 but shut down in 2021), *Houseparty*, FAILORY, https://www.failory.com/cemetery/houseparty (last visited Apr. 22, 2025).

[44] *See Bluesky's CEO on the Future of Social Media*, YOUTUBE, uploaded by SXSW (Mar. 10, 2025), https://www.youtube.com/live/B7OwcXCE5Rg.

[45] *See* Lauren Forristal, *Online course platform Kajabi allows creators to build their own branded apps*, TECHCRUNCH (May 2, 2024, 8:00 AM), https://techcrunch.com/2024/05/02/online-course-platform-kajabi-allows-creators-to-build-their-own-branded-apps/.

[46] *See ConvertKit Rebrands to Kit, Pioneering a New Era for the Creator Economy and Email*, KIT PRESS RELEASE (Oct. 1, 2024), https://www.businesswire.com/news/home/20241001564521/en/ConvertKit-Rebrands-to-Kit-Pioneering-a-New-Era-for-the-Creator-Economy-and-Email.

[47] Adam Ayers, *Why Creators Are Scrambling to Own Their Own Audience*, ROLLING STONE (Mar. 11, 2025), https://www.rollingstone.com/culture-council/articles/why-creators-are-scrambling-own-their-own-audience-1235292703/.

[48] Keshab Nath, Sourish Dhar & Subhash Basishtha, *Web 1.0 to Web 3.0-Evolution of the Web and its various challenges*, INT'L CONF. ON RELIABILITY OPTIMIZATION & INFO. TECH. (ICROIT) IEEE (2014), https://ieeexplore.ieee.org/abstract/document/6798297.

existed solely to provide information in a one-directional manner.[49] The web 1.0 era, primarily spanning the early-to-mid 1990s, was pioneered by Tim Berners-Lee, who developed foundational technologies like HTML, HTTP, and URL in 1990.[50]

Early internet creation involved publishing websites using HTML code and similar web programming languages. Publishing a website required a hosting provider and a domain name (or subdomain), initially obtained through services such as Network Solutions, the first domain name registrar,[51] and later arrivals like GoDaddy. Websites could also be hosted on free website building platforms such as Geocities and Angelfire.[52] The early web offered technologically inclined individuals the opportunity to take advantage of the freedom to self-publish content, but presented a tough barrier to entry for non-technological creators. Eary signs of digital communities—and user-generated content—existed in the form of platforms like USENET, bulletin board systems (BBSes), and email lists.

Eventually, in the late 1990s and early 2000s, personal blogging and digital publishing became more widespread as Web 1.0 transitioned into Web 2.0, characterized by greater interactivity, collaboration, and user-generated content. Content management systems—WordPress and Drupal, for example—grew due to their availability as open source software that built upon standards and key functionalities, such as support for RSS feeds and interactive features like comments.[53] This push into a two-way conversation was the beginning stages of the transition into the Web 2.0 era.

2. Web 2.0 and the Rise of Platforms

Web 2.0 is distinguished by the shift in internet technologies focused on mixing the information consumption model with an information production and reaction model[54] driven by a proliferation of "the platform," which is commonly referred to by a

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[49] *Id.*

[50] *Id.*

[51] *See* Davey Winder, *The World's First Internet Domain Name Provider Confirms Data Breach*, FORBES (Oct. 31, 2019, 8:22 AM), https://www.forbes.com/sites/daveywinder/2019/10/31/the-worlds-first-internet-domain-name-provider-confirms-data-breach/.

[52] Kathy E. Gill, *How can we measure the influence of the blogosphere*, WWW 2004 (2004), https://pdodds.w3.uvm.edu/files/papers/others/2004/gill2004a.pdf ("Personal publishing got a boost with the advent of GeoCities, which eliminated the need to know HTML or understand FTP.").

[53] *See* Jose-Manuel Martinez-Caro, Antonio-Jose Aledo-Hernandez, Antonio Guillen-Perez, Ramon Sanchez-Iborra & Maria-Dolores Cano, *A comparative study of web content management systems*, 9 INFO. 2 (2018).

[54] Keshab Nath, Sourish Dhar & Subhash Basishtha, *Web 1.0 to Web 3.0-Evolution of the Web and its various challenges*, INT'L CONF. ON RELIABILITY & OPTIMIZATION INFO. TECH. (ICROIT) IEEE (2014), https://ieeexplore.ieee.org/abstract/document/6798297.

number of other names including: internet service providers (ISPs),[55] interactive computer services (ICSs),[56] social media networks, and content distribution platforms.

The advent of Web 2.0 marked a significant turning point in the evolution of creativity on the internet. Interactive platforms such as social media, blogs, and video-sharing websites transformed the internet into a dynamic, participatory space. Users were no longer mere consumers of content, but active participants in its creation and dissemination. Web 2.0 democratized creativity, empowering individuals to share their ideas, talents, and experiences with a global audience. Mobile devices, such as Apple's iPhone and devices powered by Google's Android operating system, further revolutionized the way in which consumers became creators, and platforms and brands could engage with consumers and creators.

More recently, small, niche communities have become more important for creators and brands who use communication tools such as private chat groups on platforms, for example Discord, to directly engage with an audience.[57] This shift allows creators to establish a stronger connection without relying on algorithms controlled by major online service providers.

3. Web3

The promise of web3 focuses on two prongs: interoperability and decentralization. The move is creating a cultural shift from centralized platforms controlling algorithms, content hosting, and content distribution, and into a federated and decentralized system.

Decentralized platforms, powered by emerging technologies such as blockchain or open standards like ActivityPub, aim to offer a more transparent and equitable environment for creators.[58] Intermediaries of the Web 2.0 era are no longer necessary as federated platforms allow users creating and consuming content to maintain more granular controls over their experiences.

The full realization of web3 is likely years away, but the continued adoption of standards and protocols that support interoperability and decentralization, coupled with regulatory

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[55] *See Internet Service Provider (ISP)*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/internet_service_provider_(isp) (July 2020). Author's Note: In addition to meaning internet access providers, the term ISP is broadly used to refer to a range of internet services, including websites and platforms.

[56] 47 U.S.C. § 230(f)(2).

[57] *See* Lauren Goode, *Private Messages Are the New (Old) Social Network*, WIRED (Jan. 27, 2019, 7:00 AM), https://www.wired.com/story/private-messages-new-social-networks/.

[58] *See* David Pierce, *Can ActivityPub save the internet?*, VERGE (Apr. 20, 2023, 9:30 AM), https://www.theverge.com/2023/4/20/23689570/activitypub-protocol-standard-social-network.

obligations,[59] and growing end user discontentment with and fractionalization by legacy social media network operators will continue to fast-track progress into a decentralized internet experience. Luckily, each epoch has expanded access and reduced barriers, culminating in the rapidly expanding, adapting, and thriving creator economy we see today.

C. The Creator Economy Explosion

Futurist Paul Saffo is one of, if not the first, person to coin the term "creator economy" as early as 2008.[60] Identifying a starting point at the Great Recession, Saffo proposes a transition from the consumer economy into the creator economy. His focus is largely on the broader concept of "creator" being any and all data-driven creation from the proliferation of internet-powered free services and subsidized devices to a more recent switch towards subscription-based recurring revenue models.

For purposes of this article, the creator economy will more narrowly focus on creators (as defined above), brands, platforms, and the legal analysis applied to the economies that surround them. However, it's important to recognize broader economic shifts on which today's creator economy builds.

1. Producer and Consumer Economies

The 20th century is divided into the producer economy starting in the 1900s and the consumer economy starting in the 1950s.[61] The producer economy, primarily characterized by the early stages of the Industrial Revolution, prioritized the efficient production of goods, with industries and labor systems optimized for maximum output.[62] Manufacturing, raw materials extraction, and agriculture were emphasized during the producer economy.[63]

In contrast, the consumer economy emerged when production capabilities exceeded basic needs, shifting the focus to consumption, branding, and market differentiation.[64] Goods and services were designed and marketed based on consumer preferences, needs, and lifestyle choices.[65]

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[59] Edward Cullen, *Web3 in Europe: A Roadmap for True Digital Sovereignty?*, ENTREPRENEUR U.K. (Oct. 17, 2023), https://www.entrepreneur.com/en-gb/science-technology/web3-in-europe-a-roadmap-for-true-digital-sovereignty/463226.

[60] Paul Saffo, *Get ready for a new economic era*, 26 MCKINSEY Q. 1, 128-29 (2009).

[61] *Id.* at 128.

[62] Saffo, *supra* note 60, at 128.

[63] Saffo, *supra* note 60, at 128.

[64] Saffo, *supra* note 60, at 128.

[65] Saffo, *supra* note 60, at 128.

2. An Attention-Driven Creator Economy

The creator economy began to boom due to the democratization of the web coupled with the decreased cost and dramatic increase in quality of consumer electronics—namely the iPhone and similar smartphones.[66] GoPro cameras made it possible for athletes across all sports, including extreme sports, to capture moments that were practically guaranteed to go viral in some capacity.[67] Additionally, the attention economy grew out of viral videos that furthered the rise of internet-driven pop culture. The ecosystem relied on creators uploading content to technology platforms that could continue to engage with users of the platform with the corporate goal of serving programmatic, or data-driven, advertising which resulted in massive revenue gains for the technology platforms.

Over time, creators began to earn a share of the advertising revenue that platforms were retaining. Revenue share across platforms varies greatly. YouTube pays creators 55% of the advertising revenues earned on their long-form content while YouTube retains 45%.[68] YouTube is an outlier. Twitch offers a tiered "incentive" program for creators who run ads, set as either a 30% share of net ad revenue, or a 55% share of net ad revenue if more ads are shown.[69] Meta's Facebook and Instagram, TikTok, and Snapchat have offered varying types of programs that either shared ad revenues with creators, established a set amount of money, such

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[66] *See* Jayant Bhargava & Alice Klat, *Content democratization-How the Internet is fueling the growth of creative economies*, STRATEGY & PRICE WATERHOUSE COOPER 1, 24 (2016), https://www.strategyand.pwc.com/gx/en/insights/archive/content-democratization/content-democratization.pdf ("The Internet has allowed independent artists and small and medium-sized enterprises to build direct relationships with consumers and get closer to the revenue stream. The low costs of digital content production—sometimes requiring little more than a smartphone—and the proliferation of distribution platforms have opened up real opportunities for individual and small-scale content creators to experiment with original offerings, showcase their work, and instantaneously reach a critical mass of people.").

[67] *See* Holly Thorpe, *Action Sports, Social Media, and New Technologies: Towards a Research Agenda,* 5 INT'L ASS'N COMMC'N & SPORTS 1 (2016).

[68] *See* Amrita Khalid, *A quarter of YouTube's paid creators are earning money with Shorts*, VERGE (Mar. 28, 2024, 8:06 AM), https://www.theverge.com/2024/3/28/24114031/youtube-shorts-partner-program-ad-sharing-revenu.

[69] *A More Flexible Ad Incentive Program, Coming in April,* TWITCH (Mar. 9, 2023), https://blog.twitch.tv/en/2023/03/09/a-more-flexible-ads-incentive-program-coming-in-april/.

as TikTok's Creator Fund,[70] that eligible creators could earn for posting content, or offered no revenue share program.[71]

Platforms such as YouTube and Twitch offer creators additional monetization features that enable audiences to participate for a price, such as paid chat enhancements or channel-specific memberships and subscription offerings. Additionally, online services such as Patreon,[72] Buy Me a Coffee,[73] and Ko-fi,[74] enable so-called "off-platform" monetization options for creators. Online shopping livestreams, a growing area of the industry referred to as social commerce, have also unlocked additional opportunities for creators, platforms, and brands to expand the scope of the creator economy through shoppable experiences.[75] According to research by Deloitte, 72% of consumers indicated a willingness to buy directly within social media platforms.[76]

Efforts to take the digital world into the physical have proven successful for creator economy events like VidCon. When John and Hank Green launched VidCon in 2010, they were already popular from their YouTube channel, Vlogbrothers, and wanted to create a space for the emerging creator community to gather and build new revenue opportunities beyond online ads.[77] VidCon's purchase by Viacom, a division of Paramount, in 2018 seemed like a sign that mainstream media finally saw creators as valuable entertainment figures.[78] But the sale of VidCon to the events-focused company

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[70] Mia Sato, *TikTok's $1 billion creator fund is shutting down*, VERGE (Nov. 6, 2023, 2:08 PM), https://www.theverge.com/2023/11/6/23949290/tiktok-creator-fund-discontinued-monetization-creativity-program.

[71] Kimeko McCoy, *Platform payouts: Creators reveal how much social media behemoths are willing to shell out*, DIGIDAY (Dec. 28, 2023), https://digiday.com/marketing/platform-payouts-creators-reveal-how-much-social-media-behemoths-are-willing-to-shell-out/.

[72] *See* Elise Blegen, *Sex, Drugs, and Rock & Roll: Effectively and Equitably Moderating Vice and Illegal Content Online*, 76 VAND. L. REV. 1265, 1286 (2023) ((("Patreon is an online platform that employs 'a subscription-style payment model' to enable fans, or patrons, to 'pay their favorite creators a monthly amount of their choice in exchange for exclusive access" to content.') (quoting *The Story of Patreon*, PATREON, https://www.patreon.com/about (last visited Apr. 21, 2025))).

[73] BUY ME A COFFEE, https://buymeacoffee.com/ (last visited Apr. 4, 2025).

[74] KO-FI, https://www.ko-fi.com/ (last visited Apr. 4, 2025).

[75] *Social Commerce and the Creator Economy*, DELOITTE, https://www2.deloitte.com/us/en/pages/chief-marketing-officer/articles/social-commerce-strategy.html (last visited Feb. 25, 2025).

[76] *Id.*

[77] Alex Pham, *Vidcon conference celebrates YouTube culture*, L.A. TIMES (July 10, 2010, 12:00 AM), https://www.latimes.com/archives/la-xpm-2010-jul-10-la-fi-ct-youtube-20100710-story.html.

[78] Todd Spangler, *Viacom Announces Acquisition of VidCon Internet-Video Conference*, VARIETY (Feb. 7, 2018, 6:53 AM), https://variety.com/2018/digital/news/viacom-acquires-vidcon-conference-official-1202690303/.

Informa in 2024[79] suggests Paramount struggled to connect the quickly evolving creator economy to its traditional entertainment model, or to expand VidCon beyond its annual flagship summer event.[80] VidCon's journey highlights both the potential and the challenges creators face when bridging their communities with established media businesses.

The creator economy is also witnessing a so-called "professionalization movement" in which traditional media concepts are beginning to creep into the ecosystem.[81] For example, the launch of the Creators Guild of America is seeking to avoid classification as a 'union' and instead operate as a non-profit that provides advocacy around fair pay and educational and networking opportunities to benefit creators.[82]

The future sustainability of the creator economy is being called into question. By its very nature, the creator economy is leading to creator burnout[83] and exit strategies for early internet creators, like YouTuber Matthew "MatPat" Patrick.[84] First, creators are often starting out with creating content online as part-time, side hustles with the hopes of building a business that reaches a revenue level that replaces a traditional career. Second, creators are fighting against platforms that have, by design, established algorithmic favorability towards accounts that post or livestream content frequently, elicit high engagement from consumers, and maintain advertiser friendly opportunities for marketing campaigns. Lastly, the attention-driven economics are being challenged by oversaturation across many areas of content creators, from lifestyle to reaction to comedy. Mental health of creators is quickly rising to the top of the list of concerns that could impact the future of the

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[79] Sharon Knolle, *Paramount Sells VidCon Creator Conference to UK Firm Informa*, WRAP (Sept. 2, 2024, 9:16 AM), https://www.thewrap.com/paramount-sells-vidcon-convention-informa/.

[80] James Hale, *VidCon Baltimore is cancelled, with VidCon saying it'll dedicate "full efforts and resources" to Anaheim event*, TUBEFILTER (July 17, 2024), https://www.tubefilter.com/2024/07/17/vidcon-baltimore-cancelled-2024/.

[81] Makena Binker Cosen, *A New Era in the Creator Economy Addressing Copyright Issues Between Content Creators on YouTube*, 48 COLUM. J. L. & ARTS 1, 22-23 (2024).

[82] Morgan Sung, *A new creator's guild aims to protect online content creators*, TECHCRUNCH (Aug. 28, 2023, 3:19 PM), https://techcrunch.com/2023/08/28/creators-guild-america-influencer-labor-rights-nonprofit/.

[83] Taylor Lorenz, *Young Creators Are Burning Out and Breaking Down*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/style/creator-burnout-social-media.html.

[84] Amanda Silberling, *MatPat, the first big YouTuber to successfully exit his company, is lobbying for creators on Capitol Hill*, TECHCRUNCH (July 28, 2024, 10:00 AM), https://techcrunch.com/2024/07/28/matpat-the-first-big-youtuber-to-successfully-exit-his-company-is-lobbying-for-creators-on-capitol-hill/.

creator economy.[85] Oversaturation,[86] algorithmic favoritism,[87] and the pressure to constantly produce content[88] have created significant barriers for emerging creators. These challenges underscore the potential need for legal and policy solutions to ensure the long-term viability of the creator economy.

III. The Laws of the Creator Economy

Entertainment law, sports law, and (new/digital) media law have long been recognized as standalone areas of the legal field sitting at the intersection of intellectual property, business, contracts, regulatory, technology, privacy, and a whole host of other areas of law (such as tax and immigration).[89] Similarly, Creator Economy Law touches upon all those areas largely because technological advancements have enabled anyone with an internet-connected device to create content that can be published online, effectively becoming their own media company (often of one). From social media networks such as Meta (Facebook, Instagram, and

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[85] Mental health and fair pay were listed as two of the "most pressing issues" to be discussed during the inaugural White House Creator Economy Conference, hosted by the White House's Office of Digital Strategy in August 2024. *The White House Creator Economy Conference*, WHITE HOUSE (Aug. 14, 2024), https://bidenwhitehouse.archives.gov/whcec/.

[86] *See generally* Brooke Erin Duffy et al., *The Nested Precarities of Platformized Creative Labor*, 7 SOC. MEDIA + SOC'Y 1 (2021).

[87] Also referred to as "platform paternalism, in which platforms unilaterally issue rules, pronouncements, and punishments that purport to be in the best interest of their user networks." Caitlin Petre et al., "*Gaming the system": Platform paternalism and the politics of algorithmic visibility*, 5 SOC. MEDIA + SOC'Y 1, 2 (2019).

[88] *See* Brooke Erin Duffy & Elizabeth Wissinger, *Mythologies of creative work in the social media age: Fun, free, and "just being me*," 11 INT'L J. COMMC'N 4652 (2017).

[89] "The definition of 'entertainment industry' is comparable to the definition of beauty—it's often in the eye of the beholder." Howard D. Fabrick, *Unique Aspects of Labor Law in the Entertainment Industry*, 31 ENT. & SPORTS L. 1, 1 (2014); *see also generally* Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 562 (2001) ("To suggest that entertainment law exists and has shaped laws of more general applicability, we must come to grip with the troubling truth that mere entertainment has the power to shape our culture and our laws. If entertainment law exists as more than a collection of industry regulations, it does so because entertainment often leads the public debate on fundamental notions of economic and moral justice."); Melvin Simensky, *Defining Entertainment Law*, 4 ENT. & SPORTS L. 13, 13 (1985) ("Therefore, in the world of entertainment law, business, not law, dominate."); Steve Greenfield, *Exploring Entertainment Law's Boundaries: Applying a Transdisciplinary Approach*, 20 ESLJ 1, 1 (2022) ("Defining what is within and what is outside the scope of Entertainment law has become increasingly problematic. The rise of new technologies, from the crucial landmarks of the Home Video Cassette Recorder and the Sony Walkman through to the development of Web 2.0 have dramatically reshaped the industry itself and the key relationships within it.").

WhatsApp), X (formerly Twitter), and LinkedIn to video-sharing platforms (that incorporate social interaction components) such as YouTube, Twitch, and TikTok,[90] content creators have a range of options for self-publishing and digital distribution of their content creations while simultaneously building a community of content consumers and fans.

This Section identifies a selection of key areas of law that comprise Creator Economy Law and offers a survey of each: copyright, trademark, privacy and publicity, children and privacy, brands and influencers, platforms, content regulation and moderation, and contract law.

A. Copyright Law

Seemingly as long as there has been the internet, there have been issues raised and opportunities afforded by copyright law. The Digital Millennium Copyright Act (DMCA) served as landmark legislation to enable innovation while protecting copyrightable works from mass infringement.[91] When it became law in 1998, Section 512 of the DMCA put guardrails in place for digital copying and distribution of works online that aimed to balance platform liability with rights holders' control over exploitation of creative works.

The early years of the creator economy brought about seminal copyright cases establishing the bounds of the DMCA's liability shield, such as *Mavrix Photographs, LLC v. LiveJournal, Inc.,*[92] *Viacom, Int'l, Inc. v. YouTube, Inc.,*[93] and *Lenz v. Universal*.[94] Rights holders across the music, film, and photography industries have been some of the driving challengers to how much of a liability shield online service providers have under the DMCA for the actions of their end users. Online service providers have also invested heavily in the development of technological tools, such as YouTube's Content ID, that assist with enabling content owners to protect their works while offering opportunities for revenue sharing.[95]

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[90] *See* LEE HUNTER, LETTER TO COMMITTEE SECRETARY, SELECT COMMITTEE ON FOREIGN INTERFERENCE THROUGH SOCIAL MEDIA (Sept. 18, 2020), https://www.aph.gov.au/DocumentStore.ashx?id=5d03a4b9-1844-43bb-b545-304e3734f424&subId=691923 ("On TikTok, creative ideas matter more than social connection and users are celebrated for being their authentic selves.").

[91] Digital Millennium Copyright Act (DMCA) Pub. L. No. 105-304, 112 Stat. 2860 (1998) (relevant portions codified at 17 U.S.C. § 512).

[92] Mavrix Photographs, LLC v. LiveJournal, Inc., 873 F.3d 1045 (9th Cir. 2017).

[93] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2nd Cir. 2012).

[94] Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015).

[95] *See How Content ID works*, YOUTUBE HELP, https://support.google.com/youtube/answer/2797370 (last visited Apr. 5, 2025); *see also Rights Manager*,

Music licensing issues have been a systemic problem for creators, brands, and service providers. Under copyright law, two licenses are typically necessary in connection with a musical work: (1) a synchronization license that covers the publishing rights; and (2) a master use license that covers the sound recording, except in certain circumstances such as a cover song performed by the creator which serves as an original master recording.[96] The nuances of music copyright law is often a challenging area of business operations for creators, with well-established corporate brands also running afoul of licensing requirements.

Stock music, or production music, is a helpful resource for many web-only productions because it offers relatively low-cost options to improve production value for creators and brands. However, stock website terms may have additional limitations, such as use on a specific platform, for a short period of time, up to a maximum view count, and no built-in options for additional distribution rights (e.g., broadcast or paid streaming platform use).[97] Additionally, using licensed music assets can result in a cut of platform royalties being paid to music publishers or labels, reducing the amount going to the creator who uploaded the content.[98]

Many social media platforms have secured direct licenses for music content that is offered in-platform, or in-product, through music libraries. This practice is commonly referred to as "pre-clearance."[99] However, the license terms may only cover specific uses–the most important being that a license typically does not transfer over to another platform. Before it was shut down in 2020, the Music Policies tool available to YouTube creators provided a searchable database of licenses the platform secured for sound recording and publishing rights.[100]

FACEBOOK, https://www.facebook.com/rights_manager (last visited Apr. 5, 2025).

[96] *See* 6 Nimmer on Copyright § 30.04.

[97] *See* Alex Bigman, *A field guide to stock image licenses (and how to protect yourself)*, 99DESIGNS (July 23, 2014), https://99designs.com/blog/tips/stock-image-licenses-vocabulary/; *see also Share revenue using Creator Music*, YOUTUBE HELP, https://support.google.com/youtube/answer/12657860 (last visited Mar. 25, 2025).

[98] *See Learn about Content ID claims*, YOUTUBE HELP (Mar. 25, 2025), https://support.google.com/youtube/answer/6013276 (explaining that YouTube offers rights holder the option to "[m]onetize the video by running ads on it, sometimes sharing revenue with the uploader.").

[99] *See* Taylar-Simone McCants, *Obtaining Permission Before Sampling Music*, FINDLAW (May 22, 2024), https://www.findlaw.com/smallbusiness/intellectual-property/obtaining-permission-before-sampling-music.html.

[100] Franklin Graves & Michael Lee, *The Law of YouTubers: The Next Generation of Creators and the Legal Issues They Face*, LANDSLIDE MAG. 1, 4. (May 11, 2017) ("Additionally, YouTube created a tool, called Music Policies, that allows YouTubers to research songs and find out whether a song's sound recording or publishing rights have been licensed or pre-cleared by the copyright owners for

Also, most legal terms between the platforms and rights holders for musical works limit the nature of the use, such as for personal or non-commercial use only, creating risks that use by an influencer, brand, or similar commercial business entity will not be covered by the platform's license. The same issue exists for content creation software tools such as Canva and Adobe Express, which incorporate licensed sound libraries that are pre-cleared for certain types of exploitation.[101] The product experience becomes complicated as music licenses secured by a platform—namely as a mechanism for pre-clearing music for their non-commercial users generating content—end up being used by creators, influencers, and brands for arguably commercial purposes.

It's unfortunately common in the entertainment industry—and now creator economy—for contracts to either be informal, such as vague or incomplete email, text, or direct message (DM) permissions, or verbal handshake agreements, and not well documented or tracked for future auditing.[102] The risk has become exponentially greater with the proliferation of automatic content recognition (ACR) systems that seek out instances of potential infringement.[103]

Automated methods of finding allegedly infringing, properly licensed, or fair uses of copyright works play an increasingly important role in the creator economy. ACR technology is an automated process that crawls the internet or a specific digital service, such as a streaming platform or social media site, for content.[104] This technology analyzes the content to assist copyright

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the YouTube platform. The Music Policies tool specifically helps YouTubers that upload cover songs to determine whether their uploads will be allowed or blocked in specific territories due to the underlying publishing rights."); *see also Music Policies*, WIKITUBIA, https://youtube.fandom.com/wiki/Music_Policies (last visited Aug. 4, 2024).

[101] *See* Todd Spangler, *Canva Inks Deals With Warner Music Group, Merlin to Let Users Incorporate Song Clips in Their Visual Designs*, VARIETY (June 29, 2023, 8:44 AM), https://variety.com/2023/digital/news/canva-song-clips-warner-music-group-merlin-1235657782/.

[102] *See* Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for Hard Markets*, 64 DUKE L.J. 605, 622-633 (2015).

[103] *See* Ultra Int'l Music Publ'g v. Phan, No. CV 14-5533-MMM (AGRx), 2015 U.S. Dist. LEXIS 200332 (C.D. Cal. Apr. 1, 2015); *see also* Eric Gardner, *YouTube Star Michelle Phan Settles Dispute With Dance Label Ultra Records*, HOLLYWOOD REP. (Aug. 13, 2015, 8:58 AM), https://www.hollywoodreporter.com/business/business-news/youtube-star-michelle-phan-settles-815153/.

[104] *Our core technology*, AUDIBLE MAGIC CORP., https://www.audiblemagic.com/technology/ (last visited Mar. 25, 2025); *see also What is Audible Magic and what do they do?*, SYMPHONIC DISTRIB. (Feb. 7, 2017, 12:39 PM), https://support.symdistro.com/hc/en-us/articles/115000700663-What-is-Audible-Magic-and-what-do-they-do.

holders in identifying, managing, and protecting their intellectual property.[105]

ACR technology uses various artificial intelligence and machine learning-powered methods to identify and analyze content, including audio and visual fingerprinting, image recognition, and text matching, which subsequently alerts the rights holder or their representative.[106] The audio and visual fingerprinting technique involves creating a unique digital fingerprint for each piece of audio or video content.[107] When a user uploads audio or video content to a digital service, the ACR technology compares the fingerprint of the uploaded content to the fingerprints of known copyrighted works.[108] The image recognition technique involves using computer vision to identify and analyze images, while the text matching technique analyzes and compares text content.[109]

Such image recognition technology in particular has significantly impacted the litigation landscape surrounding copyright infringement. This technology has streamlined and, in some instances, automated the notification process for allegations of infringement, such as sending cease and desist letters.[110] Companies like Pixsy and ImageRights specialize in using image recognition technology to identify and track down allegedly unauthorized uses of copyrighted images online.[111] In these instances, legal practitioners and professionals frequently operate on a contingency basis, meaning they only collect fees if they successfully recover compensation for their clients.[112] This contingency-based fee structure enables a high volume of generally low-value claims.[113] As a result, creators and brands need to be aware of the potential risk of litigation and the associated expenses, such as reasonable settlements or recognized fair use defenses.

Beginning in 2022, individual creators and creator economy businesses (such as brands and distributors) were able to use the

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[105] *Our core technology*, AUDIBLE MAGIC CORP., https://www.audiblemagic.com/technology/ (last visited Mar. 25, 2025).
[106] *See* U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 217: A REPORT OF THE REGISTER OF COPYRIGHTS 1, 54 n.283 (May 2020).
[107] *Id.* at 177-78.
[108] *Id.* at 177-78
[109] *See generally id.* at 54 n.283.
[110] Cory Doctorow, *A Bug in Early Creative Commons Licenses Has Enabled a New Breed of Superpredator*, MEDIUM (Jan. 24, 2024), https://doctorow.medium.com/a-bug-in-early-creative-commons-licenses-has-enabled-a-new-breed-of-superpredator-5f6360713299.
[111] *Id.*
[112] Michael Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 TEX. REV. ENT. & SPORTS L. 77, 88 (2020).
[113] *See id.*

Copyright Claims Board[114] (CCB) to bring copyright disputes without going to federal court. Creators have tried using the CCB as a means of escalating disputes over re-used content.[115] Additionally, rights holders have experimented with potential outcomes from the CCB process, with the first such final determination from the board resulting in an award of $1,000 in damages to a photographer claimant against a law firm website that used his photograph without a license.[116]

Creators continue to face significant copyright-related challenges through issues like reuploads, non-transformative reaction videos, and scene-by-scene recreations that can undermine copyright protections and income.[117] Economic barriers such as the cost and limited mechanisms available for registration and litigation disproportionately affect smaller creators, making enforcement impractical for many.[118] Without additional reforms that address copyright protections for the ways in which creators and others within the creator economy create and leverage copyrightable works, the importance of protections available under copyright law will continue to diminish as technology evolves.

1. Balancing Opportunities and Liabilities

Standard approaches to online service provider terms include a copyright license grant that is broadly drafted in favor of the platform to avoid issues with the downstream use of user-generated content, such as hosting, distribution, and related exploitation that takes place to provide the services.[119] The license

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[114] The CCB was established as a tribunal located in the Copyright Office in 2020 by the Copyright Alternative in Small-Claims Enforcement (CASE) Act. 17 U.S.C. §§ 1501 - 1511. The CCB serves as an alternative to federal court litigation for copyright infringement claims involving damages of $30,000 or less, excluding attorneys' fees and costs. *Id.* The CCB is designed to provide a more efficient and affordable way for copyright owners and accused infringers to resolve their disputes outside of federal court. *Id.*

[115] *See* Late Night Crew LLC v. Avington, No. 24-CCB-0156 (Copyright Claims Bd. May 21, 2024) (YouTuber DaShay Hall alleges that another creator, MONEYBOY TR3Y, used Hall's videos during a livestream which amounted to copyright infringement).

[116] Oppenheimer v. Prutton, No. 22-CCB-0045 (Copyright Claims Bd. July 7, 2022), https://dockets.ccb.gov/document/download/2220; *see also* Rachel Kim, *Lessons Creators Can Learn from the First CCB Decision*, COPYRIGHT ALL. (Mar. 14, 2023), https://copyrightalliance.org/lessons-creators-first-ccb-decision/.

[117] *See* Makena Binker Cosen, *Addressing Copyright Issues Between Content Creators on YouTube*, 48 COLUM. J. L. & ARTS 1 (2024).

[118] *See id.*

[119] *See* Isabela Palmieri & Amanda Reid, *Copyright and Shareability: A Contractual Solution to Embedding via Social Media*, 28 COMMC'N L. & POL'Y 152, 176 (2023) ("Many social media platforms have attempted to minimize their direct liability for copyright infringement by requiring users to grant express

grants are typically non-exclusive, royalty-free, worldwide, and cover a range of rights and permissions, including the right to copy, distribute, reproduce, create derivative works, sublicense, publicly display and perform, and translate.[120] Normally, ownership of copyright works is never transferred or assigned.[121] Online service providers additionally expect contractual obligations from users that may include, among other things: a representation and warranty regarding the user's ownership or right to upload the content; an indemnification of content-related claims;[122] and broad limitations on liability—such as uncapped liability for users and limited liability (typically $100) for platforms.[123]

For platforms, the DMCA provides an opportunity to avoid liability that could be associated with their hosting and distribution of allegedly infringing content. During the course of receiving claims, platforms aim to serve simply as an intermediary, and not take on the role of a judge or jury to adjudicate or decide on claims or apply the law, such as a fair use analysis. For the copyright owner, the goal is to have content taken down quickly, which means they are searching for an efficient means of submitting takedown notices and a method of review that enables platforms to be responsive to such notices, or take any necessary actions swiftly.

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intellectual property licenses to the platform via the user agreement, thereby effectively making the license grant a condition of service.").

[120] *Id.*

[121] For example, Section 3.3(1) of the Meta Terms of Service (effective January 1, 2025) states: "You retain ownership of the intellectual property rights (things like copyright or trademarks) in any such content that you create and share on Facebook and other Meta Company Products you use. Nothing in these Terms takes away the rights you have to your own content. You are free to share your content with anyone else, wherever you want." *Terms of Service,* META (Jan. 1, 2025), https://www.facebook.com/terms.

[122] For example, Section 7 of TikTok's Terms of Service contains a section covering "User-Generated Content" that includes the following warranty coupled with an indemnification: "You warrant that any such contribution does comply with those standards, and you will be liable to us and indemnify us for any breach of that warranty. This means you will be responsible for any loss or damage we suffer as a result of your breach of warranty." *Terms of Service,* TIKTOK INC. (Nov. 2023), https://www.tiktok.com/legal/page/us/terms-of-service/en#terms-us.

[123] For example, Section 4.3 of the Meta Terms of Service (effective Jan. 1, 2025) states: "Our aggregate liability arising out of or relating to these Terms or the Meta Products will not exceed the greater of $100 or the amount you have paid us in the past twelve months." *Terms of Service, supra* note 121. The language remains silent on user liability. *Terms of Service, supra* note 121; *see also* 1 PAUL D. MCGRADY JR., MCGRADY ON SOCIAL MEDIA AND THE METAVERSE § 37.05 (Matthew Bender ed., 2025) (explaining that while X does not require affirmative representations around ownership of user content, "[..] the Terms of Service states that any liability resulting from the posting of the content and even its redistribution by X's partners is the sole responsibility of the user who generated the content.").

Over the last two decades, YouTube has built an extensive program that enables its compliance with safe harbor protections. As explained above, ACR technologies power some aspects of YouTube's content management systems. Although YouTube must still receive and process takedowns sent under the DMCA's statutory process to maintain immunity, the company has built an equally complex system that operates both within the bounds of the DMCA and partially outside of the formalized process required by the DMCA.

The three tools within YouTube's Copyright Management Suite—the webform, Copyright Match Tool, and Content ID—offer a tiered approach to rights management for the general public, members of YouTuber's Partner Program, and rightsholders from large media companies.[124] The webform mirrors the typical DMCA takedown process and serves as a largely automated process to remove content.[125] The self-service Copyright Match Tool allows creators to manage duplicate content that appears on other channel uploads.[126] For large media companies, the content matching process is automated by Content ID.[127]

Most of the time, after a webform submission is received, the channel receiving the takedown can respond with a counternotice to have the video reinstated. Once a counternotice is filed, the person that sent in the takedown must either file in federal court (which requires a copyright registration) or begin proceedings through the CCB process. The CCB proceeding is put on hold until a copyright registration is obtained, or the other party can simply opt-out of the CCB proceeding and require a federal lawsuit be filed.[128]

Registration of copyrightable works is difficult, and a moving target, for creators and brands. An issue common within the creator economy is how to deal with copyright law's fixation requirement[129] when using product features that create ephemeral experiences where content is only available for a short window of

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[124] *YouTube Copyright Transparency Report*, GOOGLE, https://transparencyreport.google.com/youtube-copyright/intro (last visited Apr. 3, 2025).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *See Copyright Claims Board Handbook*, COPYRIGHT CLAIMS BD., https://ccb.gov/handbook/ (last visited Mar. 25, 2025).

[129] *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 6 (3d ed. 2021) ("To be copyrightable, a work of authorship must be 'fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or indirectly with the aid of a machine or device.' 17 U.S.C. § 102(a).").

time, often 24 hours, before "disappearing" forever.[130] A related issue for creators and brands is the publication requirement for copyright registration, which is an unclear point in time for works distributed on the internet under current interpretations of copyright law.[131]

YouTube's Content ID system, an ACR-focused technology, was built and implemented by YouTube starting in 2007, with earlier iterations powered by partnerships with the likes of Audible Magic.[132] Copyright owners decide what happens when Content ID tags copyrighted content within a user-uploaded video. In addition to the standard DMCA requirements for a valid notice, manual claims using YouTube's system require that a timestamp is provided that directly identifies where within a particular video the alleged infringement takes place. The practice goes beyond the requirements under the DMCA, but many platform-provided tools that technically fall outside of the statutory notice requirements can impose any such additional requirements on those reporting a claim.

Another issue that is a source of liability with sharing content from platforms arises around the concept of embedding. As explained by the 9th Circuit in *Hunley v. Instagram*, "[e]mbedding is a method that allows a third-party website (the embedding website) to incorporate content directly from the website where it originally appeared (the host website)."[133] For example, embedding enables news outlets to report on social media events and trends by providing the relevant content for a reader's reference inline with the article and without having to leave the news site or open a social media app. Some platforms allow users to control whether their content is available for embedding by third parties.[134]

However, the practice has become a legal and technical minefield for creators, brands, and content publishers like news outlets and self-published blogs.[135] There is currently a circuit split with some federal courts, such as the Second Circuit, holding that

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[130] *See* Michael M. Epstein, *Social Media and "Flash Infringement": Live Music Culture and Dying IP Protection*, 3 BELMONT L. REV. 1 (2016).
[131] *See* Deborah R. Gerhardt, *Copyright Publication on the Internet*, 60 IDEA: THE INTELL. PROP. L. REV. 1 (2020).
[132] Steve Chen, *The state of our video ID tools*, GOOGLE OFF. BLOG (June 14, 2007), https://googleblog.blogspot.com/2007/06/state-of-our-video-id-tools.html.
[133] 73 F.4th 1060, 1062 (9th Cir. 2023).
[134] *See Turn off embed settings on Instagram*, META, https://help.instagram.com/252460186989212 (last visited Mar. 29, 2025); *see also Restrict embedding*, GOOGLE, https://support.google.com/youtube/answer/6301625 (last visited Mar. 29, 2025).
[135] *See* Michael Goodyear, *The Server Test Quandary and Embedding Permission Culture*, 75 OKLA. L. REV. 263 (2023).

embedding constitutes an act of copyright infringement.[136] Therefore, embedding of social media content on third-party websites has become a liability risk for copyright infringement claims, the outcome of which can potentially change based on a particular jurisdiction's views on the server test, first adopted in *Perfect 10, Inc. v. Amazon.com, Inc.*[137] In *Hunley*, the 9th Circuit reaffirmed the application of the server test, but the matter still remains an issue in some jurisdictions.[138]

Platforms arguably face reduced liability when it comes to hosting and distributing user-generated content because they can rely on direct license grants if the users are the copyright owners, or the liability shield offered under the DMCA otherwise. Creators, brands, and others who engage with content made available via platforms can more easily run afoul of copyright law without a strong legal connection back to the user uploading the content.

2. Testing the Bounds of Fair Use

Internet memes have become a cultural touchstone of modern communication. A meme is "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media."[139] Memes, by their nature, typically start as an image or video taken in one context, and then expand to take on new meanings (often virally) as cultural conversations take place using the memes, often without much—if any—consideration of copyright law.[140] However, meme usage is largely non-commercial in nature and a result of the "right-click" or "copy and paste" nature of modern social media platforms and

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[136] Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 593 (S.D.N.Y. 2018); *see also* Tyler T. Ochoa, *Non-Fungible Tokens (NFTs) And Copyright Law*, 40 SANTA CLARA HIGH TECH. L. J. 1, 21 ("Many district courts in the Second Circuit, however, have distinguished the Perfect 10 case on the ground that it involved search engines, and that users had to click on a link to access the full-size images. Those courts have held that because providing an 'embedded' link automatically causes the user's browser to display the work, the provider of the link directly infringes the public display right, even if the 'copy' that is displayed resides on someone else's server.").

[137] *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1159-60 (9th Cir., 2007); Kai Falkenberg, *Settlement Of Suit Over Tom Brady Photo Leaves Major Online Copyright Issue Unresolved*, FORBES (May 29, 2019, 4:46 PM), https://www.forbes.com/sites/kaifalkenberg/2019/05/29/settlement-of-suit-over-tom-brady-photo-leaves-major-online-copyright-issue-unresolved/.

[138] *See* Eric Goldman, *Copyright Owners Are Still Suing Over Embedding*, TECH. & MKTG. L. BLOG (Jan. 18, 2025), https://blog.ericgoldman.org/archives/2025/01/copyright-owners-are-still-suing-over-embedding.htm.

[139] *Meme*, MERRIAM-WEBSTER INC., http://www.merriam-webster.com/dictionary/meme (last visited July 30, 2024).

[140] *See* Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453 (2022).

digital communication channels. Animated videos, in the digital image GIF format, have similarly become widely used as a means of expression in digital communication. Both memes and GIFs heavily rely on content of a third-party rights holder, ranging from a casual mobile phone user to major media companies.

Generally, courts routinely find there is no fair use of viral trends or memes that involve the re-use of third-party intellectual property in connection with a commercial purpose. As explained by the court in *Griner v. King*, "Memes used commercially in advertising or fundraising are subject to stricter copyright standards than memes used noncommercially, which are often fair use."[141] Courts have also rejected theories around an "implied license" or abandonment.[142]

Individuals, or the individuals that own the animals or other recognizable characters featured in memes, often secure agents to manage the increased fame that comes from being the subject of a meme.[143] Meme-focused licensing, and more recent trends of meme coins, have driven the value of viral content, but also increased the desire for brand recognition and long-lasting marketing impact well beyond traditional campaigns that typically have a short shelf-life.[144]

Another common internet trend that has tested the bounds of fair use is the genre of YouTube videos known as reaction videos. As noted by the court in *Hosseinzadeh v. Klein*, reaction videos "vary widely in terms of purpose, structure, and the extent to which they rely on potentially copyrighted material. Some reaction videos, like the Klein video, intersperse short segments of another's work with criticism and commentary, while others are more akin to a group viewing session without commentary."[145] For YouTubers Ethan and Hila Klein, their reaction video poking fun at fellow YouTuber Matt "Hoss" Hosseinzadeh provided an opportunity to test the bounds of a copyright infringement complaint to remove content from the video hosting platform, a tactic that has become known as the weaponization of copyright law.[146]

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[141] Griner v. King, 104 F.4th 1, 9 (8th Cir. 2024); *see also* Cathay Smith & Stacey Lantagne, *Copyright & Memes: The Fight for Success Kid*, 110 GEO. L. J. 1 (2021) (offering an exploration into the intersection of copyright and memes).
[142] *See generally* Smith & Lantagne, *supra* note 141, at 155-57.
[143] *See* Daniel Kuhn, *Meet the 'Meme Manager' Bringing the Legacy Web Into NFTs*, COINDESK (Mar. 6. 2023, 3:27 PM), https://www.coindesk.com/markets/2021/04/08/meet-the-meme-manager-bringing-the-legacy-web-into-nfts.
[144] *See* Jonathan Su, *Redirecting the Herd: Informing Cryptocurrency Regulations Through the Lens of Behavioral Science*, 14 HASTINGS SCI. & TECH. L. J. 123, 130 (2023).
[145] 276 F. Supp. 3d 34, 40 n.1 (S.D.N.Y. 2017).
[146] *See* Cathay Smith, *Weaponizing Copyright*, 35 HARV. J. L. & TECH. 193 (2022).

Following Hoss's use of the YouTube notice and takedown system, he filed a lawsuit alleging that the Kleins' use of three minutes and fifteen seconds of the overall five minutes and twenty-four second Hoss video amounted to infringement. New York District Court Judge Forrest wrote in the opinion that there is "no doubt that [the Klein video] constitutes critical commentary of the Hoss video; there is also no doubt that the Klein video is decidedly not a market substitute for the Hoss video."[147]

The creator economy continues to contribute to the expanding of fair use case law and will likely continue to bring about interesting fact patterns well into the future.

3. Remix Culture 2.0

Remix culture refers to the societal norms around the creation of derivative works through the combination or modification of preexisting materials, resulting in the generation of novel and creative products or works.[148] The concept of remix culture was first popularized in the late 2000s by Lawrence Lessig in the book *Remix: Making Art and Commerce Thrive in the Hybrid Economy*[149] and the release of the film *RiP! A Remix Manifesto*.[150] In 2016, the Department of Commerce even explored the concept of applying a compulsory license for remixes in the digital economy.[151] While Lessig and others in the early days of remix culture argued against technological innovation that would result in restrictions on non-commercial cultural remixing,[152] more recent developments on social media platforms have reignited the debate—this time with platforms, not just copyright law, holding the keys to creative freedom and financial compensation.[153]

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[147] *Hosseinzadeh*, 276 F. Supp. 3d at 40.

[148] *See* Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 UNIV. PA. L. REV. 1869, 1872 (2009) (offering clarification around the use of the word "derivative" in the context of remix culture and proposing that "remix works are created by taking digital snippets from various sources and combining them to create a new work.").

[149] LAWRENCE LESSIG, MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

[150] Brett Gaylor, RIP! A REMIX MANIFESTO (2008).

[151] *See* THE DEP'T OF COM. INTERNET POL'Y TASK FORCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 4 (2016), https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf ("The Task Force concludes that the record has not established a need to amend existing law to create a specific exception or a compulsory license for remix uses.").

[152] *See* Lawrence Lessig, *Free(ing) Culture for Remix*, UTAH L. REV. 961 (2004).

[153] *See* Carmit Soliman, *Remixing Sharing: Sharing Platforms as a Tool for Advancement of UGC Sharing*, 22 ALB. L. J. SCI. & TECH. 279 (2012) (critiquing the excessive licensing of user rights and inadequate education efforts,

Remix Culture 2.0 refers to the more recent developments around platforms like TikTok, Instagram, and YouTube, which have built-in tools for remixing content, fostering societal norms where digital moments are not only consumed but widely remixed and reinterpreted.[154] However, unlike Lessig's vision of remix culture fostering creativity with appropriate balance, this new era has largely benefited platforms rather than creators. By way of example, YouTube offers creators the option to upload videos under the Creative Commons Attribution 3.0 Unported license type (CC BY 3.0).[155] However, such a permissive license is at odds with the platform's Terms of Service which prohibit any activity, such as downloading or re-distributing, that would enable someone to take advantage of the CC license.[156]

TikTok, quickly followed by legacy platforms like Meta's Facebook and Instagram and Google's YouTube, emerged with a social media platform model heavily focused on giving users the tools for remixing and reusing content from both within the platform itself and uploaded from outside of the platform by users, which is distinct from users uploading their own recreations of viral challenges or dance routines.[157] The shift toward user reuse of—not just user engagement with—other user content has become a large part of society and cultural norms for online engagement. Most platforms offer an option for creators, brands, and traditional media distributors to opt-out of such remix functionalities.[158] While

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arguing for reforms that balance creative freedom and financial interests, making platforms as significant gatekeepers as copyright law itself).

[154] *See* Edward Lee, *Remixing Lessig (reviewing Lawrence Lessig, Remix (2008)),* 6 I/S: J. L. & POL'Y INFO. SOC'Y 41, 43 (2010) ("Commonly known in tech circles as the shift to Web 2.0, the Internet of today increasingly gives ordinary people the ability not just to consume content, but also to 'remix' it or interact with it in creations of their own.").

[155] *Creative Commons,* YOUTUBE HELP (Aug. 4, 2024), https://support.google.com/youtube/answer/2797468?hl=en. ("YouTube allows creators to mark their videos with a Creative Commons CC BY license. If you've marked your video with a CC BY license, you retain your copyright. Other creators get to reuse your work subject to the terms of the license.").

[156] In the "Your Use of the Service" part of YouTube's Terms of Service, the section "Permissions and Restrictions" restricts users to viewing or listening to content only for personal, non-commercial use. *See Terms of Service*, YOUTUBE (Dec. 15, 2023), https://www.youtube.com/t/terms. Users may not reproduce, distribute, modify, or otherwise use content unless explicitly authorized by YouTube or relevant rights holders. *Id.* Circumventing security measures or features designed to protect content or limit its use is prohibited. *Id.* Additionally, public screenings or commercial uses of YouTube content are not allowed. *Id.*

[157] *See* Ali Johnson, *Comment, Copyrighting TikTok Dances: Choreography in the Internet Age*, 96 WASH L. REV. 1225, 1227 (2021), https://digitalcommons.law.uw.edu/wlr/vol96/iss3/12.

[158] *See Create YouTube Shorts with remixed content – Learn more about remixing content,* YOUTUBE HELP (Apr. 10, 2024), https://support.google.com/youtube/answer/10623810?hl=en&co=GENIE.Platfo

platforms monetize views, ads, and engagement, many original creators and subsequent remixers face limited revenue-sharing models or legal protection. As mentioned above, there remains legislative opportunities for more traditional creative works, such as music, which benefit from statutory licensing mechanism that require different licensing and royalty treatment than that of content from creators.

For example, a new music market developed out of user-uploaded sound recording remix tracks, known as "nightcore," initially driven in large part by TikTok's capability that allows any user to upload their own audio tracks.[159] At first, nightcore tracks referred to user-created (read: unauthorized) slowed down or sped-up versions of popular sound recordings that were made available to other users through the platform's Sound Library. The community-based library of sounds allowed viral tracks to take off even more quickly than other more traditional platforms relying upon user-generated content and that don't have such remix culture features or tools. Later, record labels, noticing a boost to streams and sales of music catalogs, began releasing official slowed down and sped up, or pitched up, versions of popular songs and registering the sound recordings with the U.S. Copyright Office.[160]

Music rights continue to be a source of conflict for creators, brands, and platforms. YouTube, Facebook, Instagram, and similar services building upon TikTok's short-form, derivative content model have presented legal issues over the years. In one instance, video game developer Activision took proactive measures by filing a declaratory judgment in response to a cease-and-desist letter threatening a copyright infringement claim.[161] The letter came after

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rm%3DAndroid#zippy=%2Chow-do-i-restrict-the-use-of-my-content-in-others-shorts%2Cif-i-use-youtube-studio-content-manager-how-can-i-control-the-remixing-of-my-content ("Your content, including Shorts and long-form videos, is made available for remix by default. Allowing remixing of your content can inspire creation across YouTube and potentially expand your reach to new audiences. If you use YouTube Studio Content Manager, you can limit remixing of your content at any time.").

[159] Elias Leight, *Sped-Up Songs Are Taking Over TikTok and Driving Songs Up the Charts*, BILLBOARD (Nov. 10, 2022), https://www.billboard.com/pro/sped-up-songs-tiktok-streaming-charts/; *see also* Aiok Theip Dor, *What is nightcore music? How this TikTok trend is changing the way music is released*, ABC NEWS (Nov. 8, 2023), https://www.abc.net.au/news/2023-11-09/nightcore-music-trend-tiktok/103077116.

[160] For example, Universal Music Group has registered sped up versions of popular songs, including newer hits like "Happier" by Marshmello and Bastille and older hits like "Say It Right" by Nelly Furtado. MARSHMELLO & BASTILLE, HAPPIER (SPED UP) (Astralwerks 2022); NELLY FURTADO, SAY IT RIGHT (SPED UP REMIX) (UMG Recordings 2022).

[161] Franklin Graves, *Everyone Wants a Slice: In Lawsuit Against Creator Anthony Fantano, Activision Tests the Bounds of TikTok Remix Culture*, PASSIONFRUIT (July 26, 2023), https://passionfru.it/activision-anthony-fantano-7109/.

the company posted a promotional video for its "Crash Bandicoot" series utilizing audio from a video published by Tony Fantano, a TikTok creator.[162] The audio from Fantano's video was included in TikTok's Sound Library under a commercial license.[163] Activision and Fantano settled.[164] The case highlights the risks that come from potentially unlicensed content that finds its way into a community-driven content library, such as TikTok's Sound Library. Similarly, platform libraries may include music licensed from major and indie record labels, when influencers or brands exceed the scope of the non-commercial licenses that platforms often secure for non-corporate end users. It's worth noting that Fantano's reaction video was actually built off of another TikTok user's video recorded as a reaction video made while remixing another TikTok creator's video showing a pizza being cut into numerous pieces. And yes, that, in a nutshell, describes a vast amount of the content published on TikTok!

For creators, there are risks that come from not licensing third-party content. Creators that fail to secure licenses impact the future marketability for licensing content for distribution outside of their self-managed distribution channels. Creators are then faced with having to replace portions of their work due to clearance issues, or run the risk of exposure to copyright infringement or other third-party claims.

Copyright law is at the heart of the creator economy, but it hasn't fully kept pace with the speed of digital innovation. The rapid emergence of digital technologies, evolving platform ecosystems, and a Remix Culture 2.0 has reshaped traditional legal boundaries, creating both opportunities and challenges. Without meaningful updates to the law—ones that reflect how modern content is created, shared, and monetized—many small creators will continue to face barriers that limit their ability to grow and protect their work, leaving platforms and large rights holders with the upper hand.

B. Trademark Law and Rights of Publicity

Trademark law plays an important role in the creator economy as creators, brands, and platforms each seek to build businesses and protect their reputations with consumers and audiences. Additionally, each creator, brand, and platform benefits from the ability to engage with and build upon the recognition, reputation, and goodwill of others.

Protecting trademarks in the digital space is supported by established statutory provisions like the Anticybersquatting

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[162] *Id.*

[163] *Id.*

[164] Blake Brittain, *Activision drops lawsuit over viral TikTok audio clip*, REUTERS (Aug. 11, 2023, 11:56 AM), https://www.reuters.com/legal/litigation/activision-drops-lawsuit-over-viral-tiktok-audio-clip-2023-08-11/.

Consumer Protection Act (ACPA)[165] and ICANN's Uniform Dispute Resolution Policy (UDRP).[166] However, and as highlighted below, such protections have rather limited reach within the creator economy, where platforms often control usernames and other types of profile or page names that may relate to a protected mark or well-known public or political figure. The traditional significance of domain names appears diminished as users increasingly access content via search engines, generative AI experiences, and social media handles rather than direct URLs.

Within the creator economy, domain names remain pivotal for establishing legitimacy, securing brand protection, and exercising control over a digital presence and consumer experience. No policies equivalent to ACPA or UDRP exist for social media handles, which can create problems for username squatting or brand impersonation.[167] Instead, creators and brands are largely subject to rules and policies around impersonation and trademark disputes that vary from one platform to the next.[168] Meanwhile, platforms face a costly administrative burden when trying to manage username or related ownership issues.[169] One of the first cases involving a dispute over ownership of a Twitter account arose between an employer, mobile device news outlet PhoneDog, and a former employee, Noah Kravitz, who refused to hand over the login information for an account, @Phonedog_Noah, that he created and grew during his employment to 17,000 followers.[170] The case narrowed its focus on misappropriation of trade secrets, but concluded with a confidential settlement and Kravitz's continued use of the Twitter handle (later renamed to @noahkravtiz).[171]

Presently, courts remain split as to whether or not, and under which circumstances or test, an employee (current or former) or a corporation "owns" a social media account, and further, whether

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[165] 15 U.S.C. § 1125(d).

[166] ICANN is the Internet Corporation for Assigned Names and Numbers, a global group that, among other things, oversees the Domain Name System (DNS) which ensures the internet can function with a uniform manner of assigning domain name ownership. *See* ICANN, https://www.icann.org/ (last visited Apr 4, 2025). ICANN also manages the Uniform Domain-Name Dispute-Resolution Policy, or UDRP, which is the global process for managing disputes arising with domain names. *See Uniform Domian-Name Dispute-Resolution* Policy, ICANN, https://www.icann.org/resources/pages/help/dndr/udrp-en (last visited Apr. 4, 2025).

[167] *See* 1 MCGRADY ON SOCIAL MEDIA AND THE METAVERSE § 12.01 (2024).

[168] *Id.* § 12.03.

[169] *Id.*

[170] PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *12 (N.D. Cal. Nov. 8, 2011).

[171] Order Granting Stipulation for Dismissal After Settlement, PhoneDog, LLC v. Kravitz, 3:11cv3474 (Jan. 8, 2013); *see also* Jasmine McNealy, *Who Owns Your Friends?*, 39 RUTGERS UNIV. COMPUT. & TECH. L. J. 30, 31 (2013).

under a property interest consideration,[172] theory of misappropriation of identity or trade secret,[173] or contract law (including employment or contractor agreements, or online terms of service for a platform). As noted by the Court in *In re Vital Pharm.*, "[p]erhaps it is time for Congress or state legislatures to adopt a statutory framework to regulate social media, including determination of ownership rights."[174]

1. Platforms and Trademarks

Standard language included in Terms of Service by service providers, such as social media platform operators, covers a broad license grant from individuals, brands and other business owners that captures permission to use trademarks. For example, Meta's Terms of Service, which govern platforms such as Facebook and Instagram, includes a two-step approach for obtaining permissions from end users under a section titled, "The permissions you give us."[175] The first section, "Your content," expressly recognizes that end users retain *ownership* rights:

> You retain ownership of the intellectual property rights (things like copyright or trademarks) in any such content that you create and share on Facebook and other Meta Company Products you use. Nothing in these Terms takes away the rights you have to your own content. You are free to share your content with anyone else, wherever you want. However, to provide our services we need you to give us some legal permissions (known as a "license") to use this content. This is solely for the purposes of providing and improving our Products and services as described [...] above.[176]

The second section that follows, "Permission to use content you create and share," contains a broad license that grants a range of permissions to Meta, as follows:

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[172] JLM Couture, Inc. v. Gutman, 91 F.4th 91, 103 (2d Cir. 2024) (holding that traditional property law analysis applies to determining ownership of social media accounts).

[173] *See* In re Vital Pharm., 652 B.R. 392, 405 (Bankr. S.D. Fla. 2023) (rejecting claim that social media accounts marketed Vital and not the CEO's persona, holding "there is no genuine dispute of material fact and that Vital owns the rights to the CEO Accounts as a matter of law.").

[174] *Id.* at 398.

[175] *Meta Terms of Service*, FACEBOOK (Feb. 2, 2025), https://www.facebook.com/terms/.

[176] *Id.* at 3.3(1).

> Specifically, when you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). This means, for example, that if you share a photo on Facebook, you give us permission to store, copy, and share it with others (again, consistent with your settings) such as Meta Products or service providers that support those products and services. This license will end when your content is deleted from our systems.[177]

For brands and other businesses that are using a platform's services for commercial purposes, there are often additional business terms that apply as another layer on top of, and often not in lieu of, a platform's Terms of Service. For example, Meta's services for a business or commercial purpose are governed by the "Meta Commercial Terms" and other product-specific service terms that are offered to enterprise users.[178]

On the defensive side, most online service providers offer trademark takedown policies that allow trademark owners to report instances of infringement on the platforms.[179] These policies typically start with a process for submitting a takedown request by way of a webform, similar to that of the copyright reporting processes.[180] The webforms normally include a basic set of information fields that a mark owner (or their representative) provides, such as evidence of trademark ownership and identifying the infringing content, to identify the complaint of infringement to the platform.[181] Once a complaint is received by a platform, processes that are a mix of automated and manual, human-led review start.[182] While trademark related claims are carved out from

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[177] *Id.* at 3.3(2).

[178] *See Meta Commercial Terms ("Commercial Terms")*, FACEBOOK (Jan. 1, 2025), https://www.facebook.com/legal/commercial_terms.

[179] 1 MCGRADY ON SOCIAL MEDIA AND THE METAVERSE § 9.04.

[180] *Id.*

[181] *Id.* § 23.11.

[182] Parker Higgins, Corynne McSherry & Daniel Nazer, *Who Has Your Back?* (2014); *When Copyright and Trademark Bullies Threaten Free Speech*, ELEC. FRONTIER FOUND. (Oct. 27, 2014), https://www.eff.org/files/2014/10/27/who-has-your-back-2014-copyright-trademark_0.pdf. ("[T]hey can require trademark complaints to be complete and valid, can make sure that content is only taken down after human review and consideration, and can give users a chance to challenge those complaints.").

liability protection offered to platforms by Section 230 of the Communications Decency Act ("CDA"),[183] courts have routinely declined to hold platforms liable for claims of contributory trademark infringement provided they respond without significant delay.[184]

2. The Ownership Issue

Due to the inherent nature of how some platforms operate and consumer engagement takes place, some risks arise that can undercut building a business on a borrowed platform with borrowed users. A recent dispute between Reddit and the user that created a popular community provides a prime example of the issues that can arise from the platform-creator dynamic.

Jaime Rogozinski created the "r/WallStreetBets" subreddit in 2012 as a dedicated space on Reddit, a social media platform designed in a community forum style where users can join niche communities called subreddits to engage with content shared by other users.[185] Over the years, Rogozinski's high-risk stock trading subreddit grew rapidly, drawing a community of retail investors and achieving notoriety for content with a bold, often irreverent approach to investing.[186] By 2020, "r/WallStreetBets" grew to over a million subscribers, solidifying its place as a leading hub for financial discussions online.[187] Rogozinski, as the subreddit's founder and original moderator, took steps to build the brand, including designing a logo and building affiliated channels on platforms like IRC, Discord and Twitter.[188]

In March 2020, Rogozinski attempted to register "WALLSTREETBETS" as a trademark with the USPTO.[189] Shortly after, however, Reddit suspended his account for seven days, citing

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[183] *See* 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

[184] *See* Spy Phone Labs LLC v. Google Inc., No. 15-cv-03756-KAW, 2016 U.S. Dist. LEXIS 143530, at *21 (N.D. Cal. Oct. 14, 2016) (allowing contributory trademark claims against Google because it failed to promptly remove infringing apps once it was notified of ongoing infringement); *see also* Ripple Labs Inc. v. YouTube LLC, No. 20-cv-02747-LB, 2020 U.S. Dist. LEXIS 218207, at *15 (N.D. Cal. Nov. 20, 2020) (dismissing the contributory trademark claim over Plaintiff's failure to show enough evidence that YouTube failed to take action quickly enough).

[185] Rogozinski v. Reddit, Inc., No. 23-cv-00686-MMC, 2024 U.S. Dist. LEXIS 6969 (N.D. Cal. Jan. 12, 2024).

[186] *See* Emily Stewart, *The GameStop stock frenzy, explained*, VOX (May 13, 2024, 1:35 PM), https://www.vox.com/the-goods/22249458/gamestop-stock-wallstreetbets-reddit-citron.

[187] For a robust history of r/WallStreetBets, *see* John P. Anderosn, Jeremy Kidd & George A. Mocsary, Essay, *Social Media, Securities Markets, and the Phenomenon of Expressive Trading* 25 LEWIS & CLARK L. REV. 1223 (2022).

[188] *Rogozinski*, 2024 U.S. Dist. LEXIS6969, at *1.

[189] *Id*. at *2.

violations of its policy against monetizing subreddit communities.[190] The suspension effectively barred Rogozinski from moderating "r/WallStreetBets," leading him to file a lawsuit against Reddit.[191] He argued that he, not Reddit, owned the "WALLSTREETBETS" and "WSB" trademarks and accused Reddit of trademark infringement and unfair competition.[192]

Ultimately, the court held in favor of Reddit, dismissing all of Rogozinski's claims because he failed to adequately support a claim of first use in commerce as he did not publicly establish the marks in a commercial context before launching the subreddit on Reddit's platform.[193]

The holding emphasizes the importance for creators and brands to develop a protectable brand asset outside of its sole use and growth on a singular platform. The ruling reinforces that while creators can establish communities and brands within larger platforms, they may lack legal ownership of those brands if the platform's role as a publisher is substantial.

For brands and businesses operating on social media platforms, additional steps must be taken to ensure accounts are properly registered, set up with corporate controls, and maintained under established processes and procedures. Disputes over account ownership are common as businesses are left without access to social media accounts after employees depart.[194] It's equally important to note that platforms ultimately control, and own, the accounts that are on their platforms within the bounds of existing laws, such as trademarks, and are free to enforce their own editorial policies, so-called "house rules."[195]

Another trademark issue surfaced in early 2016 when Fine Brothers Entertainment (or FBE)—the original name of the channel and production company founded by two of the largest YouTube channel stars of the time—attempted to trademark the term "REACT" in connection with the popular reaction-style videos.[196] The filing class focused on "providing an on-going series of programs and webisodes via the Internet in the field of observing

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[190] *Id.*

[191] Rogozinski v. Reddit, Inc., No. 23-cv-00686-MMC, 2024 U.S. Dist. LEXIS 6969, at *2 (N.D. Cal. Jan. 12, 2024).

[192] *Id.*

[193] *Id.* at *17.

[194] *See generally* Jasmine McNealy, *Who Owns Your Friends?: Phonedog v. Kravitz and Business Claims of Trade Secret in Social Media Information*, 39 RUTGERS UNIV. COMP. AND TECH. L. J. 30 (2013).

[195] *See generally* Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021).

[196] *See* REACT, Serial No. 86689364. After filing an application in 2015, an attorney for FBE filed a Request for Express Abandonment, which was granted on February 4, 2016. *Id.*

and interviewing various groups of people."[197] Backlash over the registration spread quickly across the internet after the brothers posted a video explaining their efforts to protect their video brand.[198] In addition to significantly decreasing the number of subscribers to the FBE YouTube account and "becom[ing] the internet's greatest villains,"[199] the move sparked discussions around the ability to trademark everyday words, particularly ones adopted broadly across digital culture.[200] On the opposite end of the spectrum, public opinion can be supportive in protecting ownership rights of a viral phrase—such as "very demure, very mindful"—that clearly originates with a specific creator.[201]

3. Increasing Trademark Risks for Influencers

In a first of its kind decision, a court held in August 2021 that an influencer promoting a company's product could be held liable for direct trademark infringement if the company's product infringes upon the rights of a third party.[202] The decision came following a brand's decision to pursue litigation against not only another brand, but also the influencer attached to the brand.

The case involved supermodel Molly Sims and multilevel marketing beauty company Rodan + Fields.[203] Sims landed a sponsorship deal where she was paid to promote the company's "Brow Defining Boost" on her blog.[204] Petunia Products, Inc., which does business as Billion Dollar Brows, owns the registered trademark "Brow Boost" and sued both Rodan + Fields and Sims for direct trademark infringement.[205]

Sims attempted to dismiss the claim under an argument that her sponsored post does not create liability as a third-party to the

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[197] *Id.*

[198] Brian Ashcraft, *Popular YouTubers Try To Trademark 'React' [UPDATE]*, KOTAKU (Feb. 1, 2016), https://kotaku.com/popular-youtubers-try-to-trademark-react-1756331442.

[199] Alex Abad-Santos, *The Fine Brothers' reaction video controversy, explained*, VOX (Feb. 3, 2016m, 1:10 PM), https://www.vox.com/2016/2/3/10906032/fine-brothers-youtube-trademark.

[200] *See* Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion And Congestion*, 131 HARV. L. REV. 947, 950 (2018).

[201] Sarah Jeong, *A demure and mindful trademark investigation*, VERGE (Aug. 29, 2024, 10:33 AM), https://www.theverge.com/24230813/demure-mindful-trademark-uspto-explainer-jools-lebron (noting that public support rallied behind TikTok influencer Jools Lebron when someone filed an application to register the phrase she popularized and began signing endorsement deals around).

[202] Petunia Prods. v. Rodan & Fields, LLC*.,* No. 8:21-cv-00630-CJC-ADS, 2022 U.S. Dist. LEXIS 135324 (C.D. Cal. July 28, 2022).

[203] Complaint at 8, Petunia Prods. v. Rodan & Fields, LLC, No. 8:21-cv-00630-CJC-ADS, 2022 U.S. Dist. LEXIS 135324 (C.D. Cal. July 28, 2022).

[204] *Id*. at 9.

[205] *Id.* at 4.

trademark infringement claims between Rodan + Fields and Petunia Products.[206] Ultimately, Sims' post was deemed to be a paid advertisement and therefore commercial use, distinct from consumer commentary.[207] The court dismissed Petunia's claim for contributory trademark infringement, but denied Sims' request to dismiss the direct infringement claim.[208]

Influencer-owned brands have also landed in trademark disputes. In July 2024, the U.S. Olympic & Paralympic Committee (USOPC) filed a lawsuit against Prime Hydration, LLC, a viral beverage company founded by YouTubers and influencers Logan Paul and KSI.[209] The USOPC alleged that PRIME crossed the line with using the terms "OLYMPIC," "OLYMPIAN," "TEAM USA," and "GOING FOR GOLD" in connection with marketing campaigns and product packaging for a Kevin Durant-branded PRIME hydration drink.[210] The USOPC brought claims under the U.S. statute protecting the Olympic brand, as well as various trademark law and unfair competition laws in Colorado where the lawsuit was filed and the USOPC operates.[211]

A new frontier of influencer disputes came to light as part of two key recent litigation matters involving influencer aesthetics, turning on elements of trade dress protections and copyright originality. As part of a trademark infringement case, the teen music group OMG Girlz were awarded a $71 million verdict against MGA Entertainment.[212] This case hinged upon allegations that MGA's L.O.L. Surprise! OMG Dolls unlawfully appropriated the group's distinctive visual identity, hairstyles, and branded aesthetic.[213] The

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[206] Memorandum of Points and Authorities Supporting Defendant Molly Sims' Motion to Dismiss All Remaining Claims, Petunia Prods. v. Rodan & Fields, LLC, No. 8:21-cv-00630-CJC-ADS, 2022 U.S. Dist. LEXIS 135324 (C.D. Cal. July 28, 2022).

[207] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Petunia Prods. v. Rodan & Fields, LLC, No. 8:21-cv-00630-CJC-ADS, 2022 U.S. Dist. LEXIS 135324 (C.D. Cal. July 28, 2022).

[208] *Id.* On July 28, 2022, the parties entered into a joint stipulation of dismissal with prejudice after reaching an undisclosed settlement agreement. *See As Makeup Co., Molly Sims Settle Lawsuit, Uncertainty Over Influence Liability Remains*, FASHION L. (Aug. 2, 2022), https://www.thefashionlaw.com/as-makeup-co-molly-sims-settle-lawsuit-uncertainty-over-influencer-liability-remains/.

[209] Complaint, U.S. Olympic & Paralympic Comm. v. Prime Hydration, LLC, 1:24-CV-02001 (D. Colo. July 19, 2024).

[210] *Id.* at 8-9.

[211] *Id.* at 19-26.

[212] Aruni Soni & Isiah Poritz, *OMG Girlz Group Wins $71 Million Over Infringing Line of Dolls*, BL (Sept. 23, 2024, 8:01 PM), https://news.bloomberglaw.com/ip-law/omg-girlz-group-wins-71-million-over-infringing-line-of-dolls; *see also generally* MGA Ent., Inc. v. Harris, 2:20-cv-11548-JVS-AGR, 2023 WL 2628225 (C.D. Cal. Jan. 5, 2023).

[213] *Id.*

verdict, coupled with the U.S. Supreme Court's decision in *Jack Daniel's v. VIP Products,*[214] signals a judicial shift away from the historically flexible Rogers test, restricting First Amendment defenses previously available for third-party trademark use.[215] Influencers must now navigate heightened legal risks, as even stylistic elements integral to their online personas may be protectable, thus reshaping the intersection between artistic expression and intellectual property rights. A second litigation matter that, as of publication, remains unresolved, is the *Gifford v. Sheil* lawsuit.[216] The dispute highlights complexities within the influencer community regarding originality and the ownership of popularized aesthetics, specifically the minimalist "clean girl" style prevalent on social media. While Gifford alleges copyright infringement due to perceived stylistic copying,[217] Sheil counters that influencer content is inherently derivative, shaped by simultaneous product promotion campaigns and widespread adoption of trends.[218] This dispute illuminates broader concerns within the creator economy, emphasizing the increasingly blurred boundaries of originality, commercial branding, and creative influence.

The creator economy is forced to examine how these cases, and others, require both influencers and brand partners to adjust their approach to content creation and marketing collaborations, underscoring the need for legal review of aesthetic elements that might be assumed to be part of non-proprietary online culture.

4. Rights of Publicity

Beginning as common law in the 1950s and achieving state-level statutory recognition and acknowledgment by the U.S. Supreme Court during the 1970s,[219] the right of publicity has seen an explosion in attention over the last decade due largely in part because of expansive college athlete revenue streams and the rise of

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[214] Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140 (2023).
[215] Franklin Graves, *Can Influencers Really Own a Vibe? The Complicated Legal Battles Over Aesthetics and Content*, CREATOR ECON. L. (Oct. 18, 2024), https://creatoreconomylaw.com/can-influencers-really-own-a-vibe-the-complicated-legal-battles-over-aesthetics-and-content/.
[216] First Amended Complaint, Gifford v. Sheil, No. 1:24-cv-423-RP, 2024 WL 5077608 (W.D. Tex Dec. 10, 2024).
[217] *Id.*
[218] Defendants' Reply in Support of Partial Motion to Dismiss Counts 2, 3, 5, 6, 7, & 8 of Plaintiffs' Complaint at 6-8, No. 1:24-cv-423-RP, 2024 WL 5077608 (W.D. Tex Dec. 10, 2024).
[219] Mark Roesler & Garret Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, AM. BAR ASS'N LANDSLIDE MAG. (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/resources/landslide/archive/whats-name-likeness-image-case-federal-right-publicity-law/.

generative AI technologies. The right of publicity can be defined "by restating the definition of the right of publicity in its most concise form: the right of publicity 'is the inherent right of every human being to control the commercial use of his or her identity.'"[220] Laws around the right of publicity—also referred to as name, image, and likeness, or NIL—are largely found at the state level and cover a person's name, image, voice, signature, and likeness, in various degrees based on how the statute is drafted.[221] Following a change in rules by the National Collegiate Athletic Association (NCAA) in 2021, college athletes won the ability to exploit their own name, image, and likeness in a major shift away from the historical approach of the NCAA and schools maintaining the control and market over, and revenue from, such rights.[222] For creators and influencers, the right of publicity is one of the most important types of intellectual property to protect because it is directly tied to the ability to control, and commercialize, their personality, which is most often their largest brand asset and leveraged for sponsorship and endorsement deals.[223]

A commonly cited example of misuse of an individual's right of publicity is the dispute between a pop star and fast fashion label. In September 2019, singer Ariana Grande filed a lawsuit against clothing company Forever 21 for allegedly using a lookalike model to capitalize on Grande's name, image, and likeness and music in a series of social media posts after she had previously declined an endorsement deal offer from the company.[224] Later in the month, Forever 21 filed for bankruptcy,[225] causing the court to ultimately issue a stay and administratively close the case without prejudice.[226]

The issue became widely talked about because of the impact such activity by a brand can have on the market for influencers to

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[220] *Id.* (quoting J. Thomas McCarthy, 4 McCarthy on Trademarks and Unfair Competition § 28:1 (5th ed. 2025)).

[221] *NIL basics: What every student-athlete should know*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/sites/default/files/documents/NIL-basics-flyer.pdf (last visited June 28, 2024).

[222] *See generally* Scott Semaya, *Name, Image and Likeness: Giving College Athletes the Clearest Guidance to Best Profit Off Their NIL*, 41 CARDOZO ARTS & ENT. L. J. 659 (2023).

[223] Grace Green, *Instagram Lookalikes and Celebrity Influencers: Rethinking the Right to Publicity in the Social Media Age*, 168 UNIV. PA. L. REV. ONLINE 153, 156 (2020).

[224] Complaint, Grande-Butera v. Forever 21, Inc., No. 2:19-CV-07600 (C.D. Cal. Sept. 2, 2019).

[225] *Forever 21 Plans Hundreds of Store Closures in Second Bankruptcy,* BUS. FASHION (Feb. 19, 2025), https://www.businessoffashion.com/news/retail/forever-21-plans-hundreds-of-store-closures-in-second-bankruptcy/.

[226] Minutes of in Chambers - Order Staying the Action [Dkt. #21], Grande-Butera v. Forever 21, Inc., No. 2:19-CV-07600 (C.D. Cal. Sept. 2, 2019).

capitalize on their recognition with a broad audience.[227] Additionally, the case highlights a commonly used litigation tactic of bringing claims for both right of publicity violations under applicable state laws and a false endorsement claim under Section 43(a) of the federal Lanham Act.[228] The addition of the federal-level false endorsement claim centers on preventing consumer confusion by addressing whether the unauthorized use of a celebrity's identity falsely implies an endorsement or affiliation, causing consumer confusion.[229]

The rise of generative AI technologies has renewed interest in a federal-level protection for right of publicity because such tools often rely upon or exploit an individual's right of publicity.[230] For example, a prompt for a text-to-image generation tool can be used in a way that utilizes a specific well-known, and well-photographed, influencer or celebrity to achieve a specific look for an image output. One of the first disputes around copyrightability of generative AI outputs involved a graphic artist that used actress Zendaya's name to prompt the AI tool Midjourney to achieve a specific look for a character in their graphic novel.[231]

C. Children and Privacy

It's inevitable that the internet will change in a matter of years given tensions around, and attention on, the gaps left by a lack of comprehensive federal level privacy protections and updated protections for children and minors in a dramatically different digital and connected world. The creator economy, specifically brands and platforms, will feel the impact of stricter, more restrictive regulations around personal data, consumer protection, and treatment of children.

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[227] *See* Julia Jacobs, *Ariana Grande Sues Forever 21 Over 'Look-Alike Model' in Ads*, N.Y. TIMES (Sept. 3, 2019), https://www.nytimes.com/2019/09/03/arts/music/ariana-grande-forever-21.html; *see also* Johnathan Stempel, *Ariana Grande sues Forever 21 for $10 million over look-alike ad campaign*, REUTERS (Sept. 3, 2019, 8:25 PM), https://www.reuters.com/article/lifestyle/ariana-grande-sues-forever-21-for-10-million-over-look-alike-ad-campaign-idUSKCN1VO1JG/.

[228] Barry Benjamin, *Grand Implications: The Use of Celebrity Look- Alikes in Advertising and the Interplay Between State Right of Publicity and Federal False Endorsement (Trademark Infringement) Claims*, KILPATRICK TOWNSEND (Oct. 1, 2019), https://ktslaw.com/-/media/2019/Right-of-Publicity-Look-Alike-claims-Ariana-Grande-Forever-21.

[229] *Id.*

[230] *See generally Copyright and Artificial Intelligence Part 1: Digital Replicas*, U.S. COPYRIGHT OFF. (July 2024), https://copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf.

[231] Franklin Graves, *U.S. Copyright Office Backtracks on Registration of Partially AI-Generated Work*, IPWATCHDOG (Nov. 1, 2022, 12:15 PM), https://ipwatchdog.com/2022/11/01/us-copyright-office-backtracks-registration-partially-ai-generated-work/id=152451/.

1. Protecting Children Online

In the spirit of the Coogan Law,[232] numerous states have begun passing laws that aim to protect children from exploitative practices as both creators and influencers, often as part of family influencers or solo kid videos consisting of unedited, long-form content streams of unboxing and playing with toys. State-level legislative activities have been passed in California,[233] Illinois,[234] and Minnesota,[235] in an effort to offer long-term financial incentives and protections for minors who often have a parent or guardian collecting advertising and sponsorship revenue on their behalf. While efforts to protect children on the content delivery side of the screen have found success, other efforts to protect children on the content receiving end of the screen remains in a more fragile state.

The design decisions by platforms with respect to the delivery of content became a focus for California legislators with the passing of the California Age-Appropriate Design Code Act (CAADCA),[236] modeled from a similar law in the UK, in 2022.[237] Age verification is a set of methods used by online services to determine the age of their users, often through a practice commonly referred to as age-gating which restricts access to certain content or features based on the user's age. For decades, most websites have relied upon self-reporting methods (like providing a birthdate using a drop-down menu on a welcome screen before visiting an adult beverage website) or payment verification methods (like a credit card) to access adult content or services on a website or mobile app, such as online dating or gambling.

The concept of age-gating has gained national attention in recent years, often in connection with restricting access to

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[232] In the 1920s, child actor Jackie Coogan never saw his fortunes from working because parents owned the earnings of minors. *See Coogan Law*, SAG AFTRA, https://www.sagaftra.org/membership-benefits/young-performers/coogan-law (last visited Apr. 5, 2025). The California Child Actor's Bill, also called the Coogan Law, passed in 1939, and later updated in 2000, to make it clear that earnings were the property of the minor. *Id.*

[233] *Governor Newsom joins Demi Lovato to sign legislation to protect the financial security of child influencers*, GOVERNOR GAVIN NEWSOM (Sept. 26, 2024), https://www.gov.ca.gov/2024/09/26/governor-newsom-joins-demi-lovato-to-sign-legislation-to-protect-the-financial-security-of-child-influencers/.

[234] Franklin Graves, *Illinois Passes Game-Changing 'Kidfluencer' Law, First in the U.S.,* PASSIONFRUIT (Aug. 16, 2023), https://passionfru.it/kid-influencers-illinois-7825/.

[235] Tim Walker, *House passes bill to add protections for minors appearing in online media*, MINN. H.R. (May 1, 2024 4:51 PM), https://www.house.mn.gov/sessiondaily/Story/18352.

[236] *See* CAL. CIV. CODE § 1798.99.29.

[237] Elizabeth Denham & Steve Wood, *Children's privacy laws and freedom of expression: Lessons from the UK Age-Appropriate Design Code*, IAPP (Nov. 13, 2023), https://iapp.org/news/a/childrens-privacy-laws-and-freedom-of-expression-lessons-from-the-uk-age-appropriate-design-code.

pornography and other material deemed by state legislators as harmful or otherwise dangerous to minors. There have been multiple attempts to regulate age verification through legislation, particularly in the areas of social media and pornography.[238] In response, some services are now exploring or requiring additional steps like submitting a photo ID, using AI to verify age, or asking other users to confirm a user's age.[239] Similar to CAADCA, some laws mandate that websites implement age verification procedures to ensure users are above a certain age, while others—in Louisiana,[240] Mississippi,[241] Utah,[242] and Virginia[243]—include additional language to target businesses that provide material likely to be accessed by minors or that is harmful to minors.[244]

However, such practices have drawn criticism for potentially violating privacy rights of end users, failing to account for biases and transparency in automated systems, the First Amendment rights of platforms, and overall decreasing the ability to remain pseudonymous online.[245] Challenges under the First Amendment have focused on violations of the Free Speech Clause and whether such regulations are content-based, and subject to strict scrutiny, or content-neutral, and subject to intermediate scrutiny.[246] The analysis by courts will largely be focused on whether age verification laws effectively achieve their intended purpose, are too broad, and if there are less restrictive alternatives.[247] NetChoice, a trade association of online businesses, is leading many of the lawsuits against states enacting age verification laws.[248]

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[238] *See* Johnathan Mattise, *Court lets Tennessee porn site age verification law take effect as Texas law goes to Supreme Court*, ASSOCIATED PRESS (Jan. 14, 2025, 4:30 PM), https://apnews.com/article/tennessee-porn-age-verification-lawsuit-ae6a224a2f9ff2f05f37121f38bf9c94.

[239] *See* Eric Holmes, *Online Age Verification (Part I): Current Context*, CONG. RSCH. SERV. (Aug. 17, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB11020.

[240] *See Online Safety Laws in the U.S. – Louisiana*, ORRICK (Aug. 1, 2024), https://onlinesafety.orrick.com/louisiana/.

[241] *See Online Safety Laws in the U.S. – Mississippi*, ORRICK (July 1, 2024), https://onlinesafety.orrick.com/mississippi/.

[242] *See Online Safety Laws in the U.S. – Utah*, ORRICK (Oct. 1, 2024), https://onlinesafety.orrick.com/utah/.

[243] *See Online Safety Laws in the U.S. – Virginia*, ORRICK (Jan. 1, 2023), https://onlinesafety.orrick.com/virginia/.

[244] *Id.*

[245] For a collection of updates on these cases, *see generally NetChoice Cases: Digital Parenting*, NETCHOICE (Feb. 2, 2025), https://netchoice.org/issue_area/digital-parenting/; *NetChoice Cases: Content Moderation*, NETCHOICE (Feb. 2, 2025), https://netchoice.org/issue_area/content-moderation/ (filter by Category "NetChoice Cases").

[246] *Id.*

[247] *Id.*

[248] *Id.*

It's unsurprising that social media platforms came under more intense scrutiny following explosive testimony in 2021 from whistleblowers like Frances Haugen, who released evidence that Facebook knew about and intentionally designed its platforms and mobile apps in a manner that was harmful and addictive to children.[249] Additionally, class action lawsuits and federal agencies have added to the mix of state legislative activities.

The *Jones v. Google LLC* class action lawsuit offers a comprehensive survey of key considerations with respect to recent efforts to protect children online and digital privacy in an increasingly online world.[250] The lawsuit targeted Google and YouTube, as platform operators, and the use of targeted advertising to collect data and track the behavior of its users, who in this case were children consuming content on the video streaming platform.[251]

Notably, the lawsuit also named individual creators and brands including Dreamworks Animation, Hasbro, Mattel, Cartoon Network, Ryan's World,[252] pocket.watch (which has a partnership deal with Ryan's World), ChuChu TV Studios, and CookieSwirlC (an independent VTuber with over 21 million subscribers as of this writing).[253] The named class consisted of children, collectively represented by their parents and guardians.[254] The lawsuit focused on the use of targeted advertising, with particular attention to the utilization of persistent identifiers on the video platform where children watch videos.[255]

The plaintiffs alleged that YouTube, by virtue of its programming and content presentations, intentionally attracted a young audience.[256] A key issue was whether children could consent to the online terms of YouTube without violating the Children's Online Privacy Protection Act (COPPA), given their age and legal

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[249] Ryan Mac & Cecilia Kang, *Whistle-Blower Says Facebook 'Chooses Profits Over Safety'*, N.Y. TIMES (Oct. 3, 2021), https://www.nytimes.com/2021/10/03/technology/whistle-blower-facebook-frances-haugen.html.

[250] *See* 73 F.4th 636 (9th Cir. 2023).

[251] *Id.*

[252] *See id*. Ryan's World is a kidfluencer channel, formerly known as Ryan's ToysReview, featuring Ryan Kaji and his family. Kaji is often associated with the rise of children creators that frequently top the annual *Forbes* listings of highest-paid creators. *See* Madeline Berg, *How Nine-Year-Old Ryan Kaji, YouTube's $30 Million Man, Just Keeps Getting Riche*r, FORBES (Dec. 18, 2020, 6:30 AM), https://www.forbes.com/sites/maddieberg/2020/12/18/how-nine-year-old-ryan-kaji-youtubes-30-million-man-just-keeps-getting-richer/.

[253] Jones v. Google LLC*,* 73 F.4th 636, 636 (9th Cir. 2023).

[254] *Id.*

[255] *Id.* at 640.

[256] *Id.*

status.[257] Furthermore, YouTube collected viewer data and online behavior of children both within its platform and beyond.[258]

The significance of this case lies in its potential implications for individual creators and brands that have accounts on YouTube and release content targeted towards children. The lawsuit highlights the legal liabilities associated with sharing content online and the need for creators and brands to be aware of privacy laws and other regulations that apply to creating and releasing content online. It also raises questions about the responsibilities of platform providers in protecting the privacy of minors.

The dispute also brings to light the potential exposure of individual channel creators to legal action. In this instance, the lawsuit targeted not only brands with official channels, such as Mattel, Hasbro, and DreamWorks Animation, but also individual YouTubers, including Ryan's World and CookieSwirlC. The creators released content that blurred the lines between advertising and non-advertising content, such as featuring a child unboxing toys or using thumbnail images of recognizable cartoon characters to entice children to click on the videos.[259]

The lawsuit's broader implications extend beyond the specific case at hand. It draws attention to critics arguing for a comprehensive examination of privacy laws and regulations in the digital age, particularly concerning the use of targeted advertising and data collection practices.[260] Furthermore, it underscores the importance of platform providers taking proactive measures to protect the privacy of children and vulnerable users.

It's important to recognize the connection between this class action and the 2019 settlement between YouTube and the Federal Trade Commission (FTC).[261] As part of its 2019 settlement with YouTube, the FTC made it explicitly clear that channel owners could be held legally responsible for any violations of COPPA in the same manner as any other website or online service provider.[262]

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[257] *Id.*
[258] *Id.*
[259] Jones v. Google LLC*,* 73 F.4th 636, 640 (9th Cir. 2023).
[260] Brian Chen, *The Battle for Digital Privacy Is Reshaping the Internet,* N.Y. TIMES (June 23, 2023), https://www.nytimes.com/2021/09/16/technology/digital-privacy.html.
[261] Stipulated Order at 1, FTC v. Google LLC, 1:19-cv-02642 (D.D.C. Sept. 4, 2019). Prior to the FTC's action, Truth in Advertising filed a complaint with the FTC accusing Ryan ToysReview of deceptive practices that violated FTC law. *See* Tiffany Hsu, *Popular YouTube Toy Review Channel Accused of Blurring Lines for Ads*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/business/media/ryan-toysreview-youtube-ad-income.html.
[262] *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law*, FED. TRADE COMM'N (Sept. 4, 2019),

The FTC's 2019 complaint against YouTube specifically identified (but did not take action against) several of the defendants involved in the *Jones* class action, including CookieSwirlC—prior to the channel's April 2022 introduction of a virtual avatar and subsequent transition from unboxing videos to Let's Play content—as well as Mattel, for its operation of channels associated with its Barbie, Monster High, Hot Wheels, and Thomas & Friends brands.[263]

The FTC landed an additional, record-breaking settlement with Facebook in 2019.[264] The settlement stemmed from allegations that the company violated a 2012 FTC order by misleading consumers about its data privacy practices and inadequately protecting user information.[265] The settlement imposed new ongoing obligations on Facebook, including comprehensive privacy reforms overseen by independent bodies, a mandatory user consent mechanism, enhanced monitoring of third-party developers, and mandatory third-party audits every two years for twenty years.[266]

However, the deal landed with two FTC commissioners dissenting.[267] They argued that the penalties were too small and

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https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law.

[263] Stipulated Order at 17, FTC v. Google LLC, 1:19-cv-02642 (D.D.C. Sept. 10, 2019).

[264] In the Matter of Facebook, Inc., No. 19-cv-2184 (D.D.C. 2019); *see also FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook ("In a related, but separate development, the FTC also announced today separate law enforcement actions against data analytics company Cambridge Analytica, its former Chief Executive Officer Alexander Nix, and Aleksandr Kogan, an app developer who worked with the company, alleging they used false and deceptive tactics to harvest personal information from millions of Facebook users.").

[265] *See* In re Facebook, Inc., C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012); *see also FTC Sues Cambridge Analytica, Settles with Former CEO and App Developer*, FED. TRADE COMM'N (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-sues-cambridge-analytica-settles-former-ceo-app-developer.

[266] *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, FED. TRADE COMM'N. (July 24, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook.

[267] Rohit Chopra, *Dissenting Statement of Commissioner Rohit Chopra: In re Facebook, Inc., Commission File No. 1823109,* FED. TRADE COMM'N 1 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf; Rebecca Kelly Slaughter, *Dissenting Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of FTC vs. Facebook., Commission File No. 1823109,* FED. TRADE COMM'N 1 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf.

injunctive relief was insufficient, noting specifically that the settlement failed "to impose any substantive restrictions on Facebook's collection and use of data from or about users (and non-users)."[268] They further criticized the settlement's broad immunity granted to Facebook's executives, particularly Mark Zuckerberg, without adequate justification or accountability measures.[269] Commissioner Chopra emphasized that the settlement imposed no meaningful structural changes on Facebook's business model or its financial incentives, allowing the company considerable latitude to determine how it collects and utilizes user data.[270] Both dissenting commissioners also expressed disappointment that the $5 billion penalty, despite being unprecedented, was insufficient as a deterrent given Facebook's substantial financial gains from the practices that violated the order.[271]

2. Privacy in the Creator Economy

Privacy across the creator economy is a complex mix of laws that both pre-date the modern internet and continue to be enacted as the internet evolves. Most legislative and policy activities align with the goal of protecting consumers' personal information as devices and user activity continues to generate massive amounts of data, often sensitive in nature.

In the U.S., there is no federal consumer privacy right. Instead, a state-by-state approach has been adopted which creates different requirements as platforms provide online services to end users, and obligations for protecting consumer privacy as brands and creators engage in marketing and communication to their consumers and audiences.[272]

Pre-internet era laws have also continued to impact operations in a world where practically everything is digital. In 1988, the Video Privacy Protection Act (VPPA) was enacted as a means of protecting consumers' video rental data from being shared without consent.[273] The VPPA's applicability continues expanding to encompass online streaming services and social media platforms, leading to increased litigation over unauthorized collection and sharing of users' viewing histories.[274] Netflix and other streaming

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[268] Slaughter, *supra* note 267, at 13.
[269] Chopra, *supra* note 267, at 1; Slaughter, *supra* note 267, at 7, 14.
[270] Chopra, *supra* note 267, at 14-15.
[271] Chopra, *supra* note 267, at 15-17; Slaughter, *supra* note 267, at 8-11.
[272] *See U.S. State Privacy Legislation Tracker*, IAAP, https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ (Mar. 17, 2025).
[273] *See* 18 U.S.C. § 2710.
[274] Julie Bond, *A Round Peg in a Square Hole: How Ambiguity in the VPPA Hinders Its Applicability Amid Technological Advancements*, 20 RUTGERS BUS. L. REV. 126, 127 (2024) ("[S]hoehorning this old law into issues stemming from

video platforms successfully lobbied Congress to pass an amendment in 2013 that provided an option to collect user consent for sharing viewing histories on social media platforms.[275]

Brands, advertising agencies, and other marketers have obligations to protect consumer personal information under state-level privacy laws, such as the California Consumer Privacy Act of 2018 (CCPA), and globally under laws such as the General Data Protection Regulation (GDPR).[276] These laws generally involve obligations and requirements around notice at the point of collecting a consumer's personal data (such as a name, email address, or IP address) or placing tracking technologies (such as cookies or pixels)[277] and extend throughout the entire lifecycle of the consumer relationship, including permissions to transfer and requests for non-use and deletion. In addition to privacy laws, some jurisdictions have enacted additional requirements around commercial messaging, such as the CAN-SPAM Act.[278]

Operators of online services continue to face an increase of regulatory and agency actions around how they provide services to end users and collect and use personal data in the process. Website, mobile applications, and similar internet-based services typically include a privacy policy alongside, and sometimes expressly referenced and incorporated into, the terms of service. A privacy policy sets forth the expectations between a website visitor or end user and how the operator will handle personal data, or potentially all data, that is provided by the end user, or otherwise collected or generated from their use of the website or services.[279]

In addition to federal laws like COPPA, numerous state business laws require online service providers to include a privacy policy that details how they collect, manage, and use personal information.[280] However, whether the policy itself is a contractual agreement that creates binding obligations on a service provider

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modern technology, coupled with the ambiguity of the term 'subscriber,' results in uneven application and interpretation of the VPPA in modern contexts.").

[275] 18 U.S.C. § 2710(b)(2)(B); *see also* H.R.2471, 112th Cong. (201102012).

[276] California Consumer Privacy Act of 2018, Cal. SB 1221 (2018); General Data Protection Regulation, 2016 (L 119/1) (U.K.).

[277] Highly regulated industries, such as finance and healthcare, have seen an increase in class action litigation, federal agency oversight, and regulatory scrutiny around the use of tracking technologies that enable deep, often private, insights into behavior of internet users as they move from one website or mobile app to the next. *See* Alya Sulaiman & Ty Kayam, *Practical Considerations for the Use of Online Tracking Technologies in Healthcare*, 35 HEALTH L. 6 (2023).

[278] Effective since 2004, the FTC oversees enforcement of the CAN-SPAM Act, which regulates commercial email messages with violations resulting in penalties of up to $250 per email. 15 U.S.C. § 7706(f)(3).

[279] *See* Thorin Klosowski, *Here's What You're Actually Agreeing To When You Accept a Privacy Policy*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/wirecutter/blog/what-are-privacy-policies/.

[280] *See* DEL. CODE ANN. tit. 6 § 1205C; CAL. BUS. & PROF. CODE § 22575.

remains an evidentiary issue often litigated based on the language of incorporation into other legal agreements, such as the terms of service, between the end users and the platform.[281]

D. Brands and Influencers

The creator economy brought a shift from a one-directional, brand-controlled messaging environment for the advertising industry into a multi-directional, multi-origination messaging environment. Generally, there are two buckets into which content can be categorized for purposes of analysis: (1) advertising; and (2) user-generated content.[282] Advertising can include paid, on-platform advertising managed directly by brands[283] or through the use of agencies.[284] The advertising ecosystem is reliant on a mixture of third-party advertising networks and native ad tools provided by platforms.[285] Additionally, the rise of influencers, social trends, sponsored content, and affiliate marketing, coupled with the global COVID-19 pandemic, have unlocked additional opportunities for paid, earned, and organic audience reach.[286]

User-generated content brings about a new dimension to advertising as the ordinary consumer unlocks positive and negative reviews, including trends such as deinfluencing.[287] As a result,

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[281] *See* Ying Hu, *Mainstreaming Unjust Enrichment and Restitution in Data Security Law*, 13 U.C. IRVINE L. REV. 855, 857-58 (2023) ("In particular, multiple courts have held that promises contained in privacy policies are not contractually binding.") (internal citations omitted). One empirical study suggests that U.S. courts tend to treat privacy policies as contracts in the majority of cases. *See* Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 UNIV. CHI. L. REV. 7, 25-30 (2017). Other studies suggest otherwise. *See* Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REGUL. 45 (2019).

[282] *User-Generated Content for Marketing and Advertising: An IAB Buyer's Guide*, IAB (May 2019), https://www.iab.com/wp-content/uploads/2019/06/IAB-UGC-for-Marketing-and-Advertising-FINAL-May-2019-1.pdf ("[UGC] is content that is voluntarily created by individuals that has the potential to spark and/or drive conversation.").

[283] *Social Media Advertising*, ADROLL, https://www.adroll.com/digital-advertising/social-media-advertising (last visited Mar. 26, 2025).

[284] Jacqueline Zote, *The social media marketing agency and services guide*, SPROUTSOCIAL (Nov. 22, 2022), https://sproutsocial.com/insights/social-media-marketing-agency/.

[285] Natalie Klym & David Clark, *The Future of the Ad-Supported Internet Ecosystem*, MASS. INST. TECH. INTERNET POL'Y RSCH. INITIATIVE (2017), https://internetpolicy.mit.edu/wp-content/uploads/2019/03/publications-ipri-2019-01.pdf.

[286] Christine Moorman, Jana Soli & Michelle Seals, *How the Pandemic Changed Marketing Channels*, HARV. BUS. REV. (Aug. 1, 2023), https://hbr.org/2023/08/how-the-pandemic-changed-marketing-channels.

[287] Faith Karimi, *Forget the influencers. Here come the 'deinfluencers,'* CNN (June 11, 2023, 7:53 AM), https://www.cnn.com/2023/06/11/us/deinfluencing-tiktok-trend-explained-cec/index.html ("Deinfluencing is an emerging social

brands and agencies utilize social listening and monitoring tools to track, and sometimes respond to, engagement with their brand properties as an expanded hybrid role of customer service and brand management.[288] Additionally, lines are easily blurred online between sponsored or advertising content and user-generated content.

Responsibility across the creator economy comes into full view for advertising and sponsored content. Responsible parties include everyone involved in the ecosystem—creators, influencers, brands and agencies, media companies, and platforms. As explored below, government agencies generally treat all parties involved as potentially liable in some fashion when it comes to including proper disclosures, the use of consumer data, and deceptive, manipulative, or heavily regulated practices.

Influencers have to disclose material relationships with the products they endorse. Brands and agencies are responsible for endorsement disclosures, even if an influencer is posting. Media companies and platforms can also be held responsible for failure to convey proper disclosures to consumers or failing to ensure transparency.

The FTC regulates numerous aspects of the creator economy with its authority under Section 5 of the FTC Act.[289] The focus of Section 5 of the FTC Act is to protect consumers through a prohibition on deceptive advertising.[290] Over time, the FTC's authority has been exercised and provided guidance around marketing activities, specifically with regard to the creator economy in the context of endorsements and sponsorships.[291]

1. Focus on the Ad Tech Industry

Large technology companies, many of which are behind the platforms that power the creator economy, are undeniably key players across the ad tech industry, driven, in part, by events such as Google's 2018 acquisition of DoubleClick, Apple's dominance with its mobile device App Store for iOS apps, and Google's Google Play store which distributes Android mobile apps.[292] Consumer data collection practices, powered by the same large technologies

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media trend that discourages consumers from buying certain products that the deinfluencer has found to be indulgent, ineffective or not worth the money. . . .").

[288] *See What is social listening and why you need it*, ADOBE (Sept. 1, 2023), https://www.adobe.com/express/learn/blog/social-listening.

[289] *See* 15 U.S.C. § 45.

[290] *FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Aug. 5, 2024), https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking.

[291] *See id.*

[292] *See* Christos Makridis & Joel Thayer, *The Big Tech Antitrust Paradox: A Reevaluation of the Consumer Welfare Standard for Digital Markets*, 27 STAN. TECH. L. REV. 71, 84-89 (2024).

companies that operate digital platforms and ecosystems, inform advertising and marketing practices that enable targeted reach of consumers through websites and apps.[293]

The Department of Justice ("DOJ") filed an antitrust lawsuit against Google in January 2023 specifically targeting its alleged control over several key aspects of the ad tech ecosystem. The DOJ's schematic, below, offers a high-level view of the complex nature of the technical architecture that is behind the ad tech ecosystem.[294]

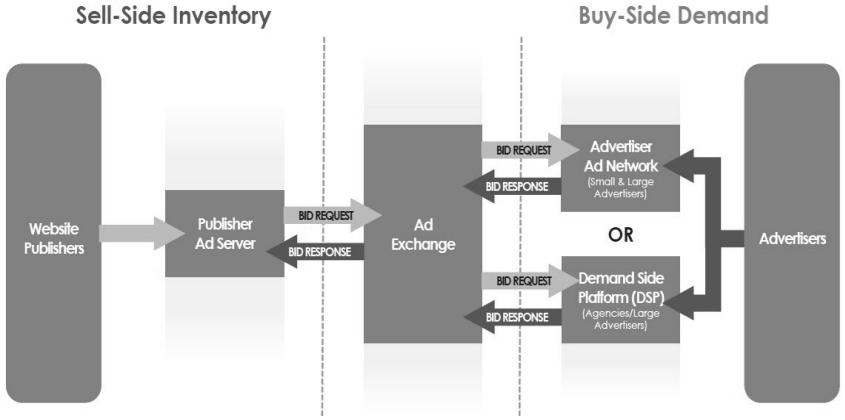


Diagram 2.1. Schematic depicting some of the ad tech tools used in online digital advertising. (Source: DOJ)

2. Influencers

In recent years, brands have begun to target more specific, niche audiences through influencers that traditionally would have been overlooked due to smaller audience reach. However, influencers are a significant, and growing, portion[295] of sponsored-content buys and offer higher engagement rates when compared to larger or celebrity influencers who may come off as inauthentic.[296]

As a result, classifications of influencers has taken shape based on audience size, often in the form of follower count focused on one platform across an influencer's entire social media presence. The categories are, from smallest to largest: (1) nano-influencers, who have a follower count of 1,000 to 10,000; (2) micro-influencers, who have a follower count of 10,000 to 100,000 followers; (3) macro-influencers, who have a follower count of 100,000 to

[293] Clare Cho, *How Consumer Data Affects Competition Through Digital Advertising*, CRS REPS. (Jan. 26, 2023), https://crsreports.congress.gov/product/pdf/IF/IF11448.
[294] Complaint at 16, United States v. Google LLC, 661 F. Supp. 3d 480 (E.D. Va. 2023) (No. 1:23-cv-00108).
[295] *See State of Influencer Marketing*, MELTWATER (Jan. 30, 2025), https://influencermarketinghub.com/influencer-marketing-benchmark-report/.
[296] *When to Work With Nano-, Micro- and Macro-Influencers*, IZEA (Feb. 25, 2022), https://izea.com/resources/nano-micro-macro-influencers/.

1,000,000 followers; and mega or celebrity influencers, who have a follower count of greater than 1,000,000 people.[297]

Clothing retailer Lord & Taylor came under scrutiny of the FTC when it failed to disclose paid posts, including 50 Instagram influencers and the online publication Nylon, that promoted a 2015 clothing collection.[298] *In the Matter of Lord & Taylor, LLC* ended as a settlement without financial penalties, but rather an affirmation of its obligations to ensure proper disclosures with future campaigns and a requirement that it be subject to future monitoring and review with similar campaigns.[299] The decision was notable because it was the first such investigation and action against a brand for native advertising activity, which was deemed to constitute "unfair or deceptive acts or practices or affecting commerce."[300]

In the Fall of 2017, *In the Matter of CSGOLotto, Inc.* became the first FTC settlement with individual social media influencers.[301] At the same time, the FTC updated its Endorsement Guidelines and sent a series of warning letters to Instagram influencers for failing to include proper disclosures for sponsored content.[302] The Endorsement Guidelines were updated again in 2023 to add clearer definitions of "clear and conspicuous" and "endorsements," and reinforce its position that everyone involved in delivering the content could be liable, including that "a platform's built-in disclosure tool might not be an adequate disclosure."[303]

The FTC is also just one of many in the alphabet soup of government agencies that could become interested in the activities of influencers and brands. In November 2018, DJ Khaled and Floyd Mayweather Jr. settled with the Securities and Exchange Commission ("SEC") over alleged violation of the anti-touting provision of the federal securities laws when promoting a

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[297] *Id.*

[298] *See* Decision and Order, In the Matter of Lord & Taylor, LLC, FTC Docket No. C-4576 (May 20, 2016).

[299] *Id.* at 4-5.

[300] Complaint at 3, In the Matter of Lord & Taylor, LLC, No. C-4576 (FTC May 20, 2016).

[301] Decision and Order, In the Matter of CSGOLotto, Trevor Martin, and Thomas Cassell, No. C-4632 (FTC Nov. 28, 2017); *see also CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM'N (Sept. 7, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers.

[302] *CSGO Lotto Owners Settle FTC's First-Ever Complaint*, *supra* note 301.

[303] *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE COMM'N (June 29, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements.

cryptocurrency company.[304] Then, in October 2022, Kim Kardashian agreed to settle charges brought against her for failing to disclose a $250,000 payment she received for promoting a cryptocurrency asset security offered and sold by EthereumMax, known as EMAX.[305] Kardashian's settlement included payment of a $1,000,000 penalty, disgorgement of the endorsement payment, and required cooperation with the SEC's investigation.[306]

For influencers, noncompliance with disclosure laws can impact future opportunities for brand partnerships, notably in the United Kingdom where a public listing is made of influencers that fail to follow the law.[307] Additionally, warning letters can often lead to unnecessary attention on an influencer, brand, or platform, as they may be publicly released or available by request.

E. Platform Liability in the EU and UK

In the European Union, the Digital Markets Act[308] (DMA) and the Digital Services Act[309] (DSA) were finalized by the European Parliament in March and July of 2022, respectively, marking a significant shift in the regulation of digital platforms.[310] Similar to the transformative impact of regulations like GDPR and CCPA on global privacy practices, the DMA and DSA continue to influence online platforms and digital business models globally,

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[304] *Two Celebrities Charged With Unlawfully Touting Coin Offerings*, U.S. SEC. & EXCH. COMM'N (Nov. 29, 2018), https://www.sec.gov/newsroom/press-releases/2018-268.

[305] *Id.*

[306] *Id.*

[307] In the United Kingdom, the Advertising Standards Authority ("ASA") maintains a list of influencers that it finds to be in non-compliance with disclosure rules it has published. *Non-compliant social media influencers*, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/codes-and-rulings/non-compliant-social-media-influencers.html (last visited Feb. 14, 2025). The ASA also maintains a list of non-compliant advertisers. *Non-compliant online advertisers*, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/codes-and-rulings/non-compliant-online-advertisers.html (last visited Feb. 14, 2025). Additionally, the United Kingdom Competition and Markets Authority ("CMA") published guidance, updated in November 2022, for content creators and social media endorsements. *Content creators and social media endorsements*, U.K. COMPETITION & MKT. AUTH. (Nov. 3, 2022), https://www.gov.uk/government/publications/social-media-endorsements-guide-for-influencers.

[308] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[309] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[310] Franklin Graves, *Here's how sweeping legal changes will affect content creators in 2023*, TUBEFILTER (Dec. 29, 2022), https://www.tubefilter.com/2022/12/29/content-creators-legal-effects-2023/.

regardless of whether those entities are physically located or operate within the EU.[311] Coupled with additional laws, such as Article 17 of the Directive on Copyright in the Digital Single Market,[312] the EU has rapidly expanded governance of online platforms, and online activity more generally, in the last half-decade.

The DMA targets major technology firms, including Google and Meta, designating them as "gatekeepers" subject to a series of affirmative obligations and prohibitions.[313] The regulation addresses key issues related to access, control, portability, and interoperability of data—including personal and advertising data—as well as system access governing app stores, communication tools, and digital services.[314] By constraining gatekeepers' ability to unfairly leverage their market power, the DMA aims to foster competition and mitigate anti-competitive behavior in digital markets.[315]

The DSA, on the other hand, imposes specific obligations on online platforms regarding the content they host and distribute, as well as the marketing and sale of goods and services within digital marketplaces.[316] Its provisions overhaul transparency standards, including requirements for platforms to disclose how algorithms are used in content moderation and the enforcement of intellectual property rights.[317] The DSA's intentions are to regulate platforms based on the types of services they provide, the size of their user base, and the potential to impact the entire online ecosystem.[318] However, the appropriateness of such an approach to classifications for service providers is debatable.[319] Crucially, the DSA's obligations extend beyond EU-based platforms, applying to any

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311 *See The Digital Services Act package*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (last visited Mar. 27, 2025).

312 *See* Paul Keller, *Article 17 - five years later*, WOLTERS KLUWER: KLUWER COPYRIGHT BLOG (June 7, 2024), https://copyrightblog.kluweriplaw.com/2024/06/07/article-17-five-years-later/ (finding that five years after its adoption, Article 17 has not produced the severe overblocking and censorship concerns initially feared, but it has enhanced user rights protections and driven broader harmonization of copyright exceptions across EU member states, while its effectiveness in addressing the "value gap" remains uncertain pending further data and evaluation).

313 *See generally* Digital Markets Act, *supra* note 308, at Art. 5-15

314 *The Digital Services Act package*, *supra* note 311.

315 *The Digital Services Act package*, *supra* note 311.

316 *The Digital Services Act package*, *supra* note 311.

317 *DSA: Very large online platforms and search engines,* EUR. COMM'N (Mar. 27, 2025), https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops.

318 *See The Digital Services Act*, EUR. COMM'N (Feb. 2, 2025), https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en.

319 *See* Rebecca Tushnet, *Three Sizes Fit Some: Why Content Regulation Needs Test Suites*, 38 BERKELEY TECH. L. J. 921 (2023).

digital service that reaches EU consumers, thereby influencing global content moderation practices.[320]

Together, the DMA and DSA form the Digital Services Package, a regulatory framework that has the potential to alter the once-protected ecosystems, or what some might view as monopolistic, siloed walled-gardens, where content distribution has traditionally taken place.[321] For content creators, this shift could grant greater autonomy over the communities they cultivate across multiple platforms, potentially reducing the barriers associated with proprietary ecosystems.[322] However, these regulations may also have significant downstream effects on revenue models, as technology platforms will likely face increased compliance costs and operational constraints.[323]

One foreseeable impact is the imposition of stricter content standards and enforcement mechanisms as platforms take on expanded liability for user-generated content.[324] This heightened regulatory oversight could limit the freedom creators have previously enjoyed under more lenient liability regimes, making it more challenging to produce and share content without risk of takedown or censorship.[325] On the other hand, the DSA introduces requirements for greater platform transparency and safeguards designed to protect fundamental rights, including freedom of expression and speech, thereby offering creators certain protections within the regulated environment.

As aspects of the DSA and DMA became effective on a rolling basis throughout 2023 and 2024, and as additional platform operators come within scope based upon categories of classification, the full extent of the regulatory burden on technology platforms remains to be seen, particularly in terms of how compliance obligations will affect their operational expenses and profitability.[326] Historically dominant platforms with robust advertising-based revenue streams may need to adjust their business strategies, and by extension, these shifts could influence the revenue-generating opportunities available to creators who depend on these platforms for income and audience engagement.

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[320] *See* Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on Platform Content Moderation*, 24 CHI. J. INT'L L. 115 (2023).

[321] Franklin Graves, *Here's how sweeping legal changes will affect content creators in 2023*, TUBEFILTER (Dec. 29, 2022), https://www.tubefilter.com/2022/12/29/content-creators-legal-effects-2023/.

[322] *Id.*

[323] *Id.*

[324] Nunziato, *supra* note 320.

[325] Nunziato, *supra* note 320.

[326] *See* Gabby Miller, *The Digital Services Act Is Fully In Effect, But Many Questions Remain*, TECH. POL'Y PRESS (Feb. 19, 2024), https://www.techpolicy.press/the-digital-services-act-in-full-effect-questions-remain/.

In October 2023, the Parliament of the United Kingdom passed the Online Safety Act 2023 (OSA) with an aim at curbing harmful and abusive content and protecting both children and adults from online harms.[327] The OSA increases the obligations on service providers and search engines, operating both within and outside of the UK, to ensure the safety of their end users, including robust risk assessments for algorithms, removal of misinformation, age-gating content inappropriate for minors, control over recommendation algorithms, and more.[328]

The increase of regulations across the EU and UK reflects a new era of regulatory intervention aimed at balancing online innovation, safety, and accountability. While the DSA prioritizes the protection of users' rights, transparency, and the mitigation of illegal content within the EU, the DMA focuses on ensuring fair competition and addressing monopolistic practices among large digital players. Meanwhile, the OSA takes a targeted approach to online safety in the UK, with a particular emphasis on protecting children and addressing harmful and illegal content. Despite their differences, these frameworks share common themes of proportionality, risk-based obligations, and enhanced oversight of digital platforms, indicating a broader regulatory trend toward making online environments safer and more transparent. However, as these laws evolve through enforcement and legal interpretation, their practical impact—particularly regarding content moderation, platform liability, and innovation—remains to be fully realized and understood.

F. Content Regulation and Moderation

1. First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[329]

The First Amendment to the U.S. Constitution affords unique protections for creators, brands, and platforms, and limits the ability for federal or state governments to interfere with these rights. While freedom of speech is a largely well-established area of law

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[327] *Online Safety Act: explainer*, DEP'T FOR SCI., INNOVATION & TECH. (May 8, 2024), https://www.gov.uk/government/publications/online-safety-act-explainer/online-safety-act-explainer.
[328] *Id.*
[329] U.S. CONST. amend. I.

when it comes to creators and brands, the degree of protection afforded to platforms remains somewhat in flux.

In 2024, a pair of cases before the U.S. Supreme Court, *NetChoice, LLC v. Paxton* and *Moody v. NetChoice, LLC*, explored the question of how, if at all, First Amendment protections apply to the actions of social media platforms, specifically regarding their content moderation decisions that result in the removal of content.[330] The Court ultimately found that the lower courts failed to conduct a proper First Amendment analysis on the two state laws from Florida and Texas that were attempting to regulate the actions of social media platforms and force platforms to "carry and promote user speech."[331] The cases were remanded back to the lower courts to perform an analysis in line with the Supreme Court's decision.[332]

However, the Supreme Court's opinion sheds some light on the degree to which some activity may be considered protected under the Free Speech Clause of the First Amendment. As the majority writes in the opinion:

> [T]he current record indicates that the Texas law does regulate speech when applied in the way the parties focused on below—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law then prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. Still more, the law—again, in that specific application—is unlikely to withstand First Amendment scrutiny. Texas has thus far justified the law as necessary to balance the mix of speech on Facebook's News Feed and similar platforms; and the record reflects that Texas officials passed it because they thought those feeds skewed against politically conservative voices. But this Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to "un-bias" what it thinks biased, rather than to

[330] Moody v. NetChoice, LLC, 603 U.S. 707 (2024).
[331] *Id.* at 744-45.
[332] *Id.* at 745.

> leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others.
>
> In sum, there is much work to do below on both these cases, given the facial nature of NetChoice's challenges. But that work must be done consistent with the First Amendment, which does not go on leave when social media are involved.[333]

Freedom around content moderation decisions allows platforms to reduce the sharing of "lawful but awful" content.[334] This freedom also allows platforms to compete in the marketplace based on their content moderation decisions, which impact user growth, advertiser spend,[335] and consumer protection. However, the extent to which Congress, or state legislators, will continue to push the bounds of regulating platforms remains to be seen. In the meantime, platforms have begun to favor a model of content moderation that removes the platform from deciding and, instead, pushing the obligation to the broader community of end users. For example, in early 2025, Meta ended a certified, third-party fact checking program for its Facebook, Instagram, and Threads services and launched Community Notes—a product feature that allows users to add written notes and ratings to content—as a replacement.[336] In a press release, Meta said it expects Community Notes "to be less biased than the third party fact checking program it replaces because it allows more people with more perspectives to add context to posts."[337] The move, which followed a similar decision from X, is likely an effort to decrease scrutiny from regulators targeting specific viewpoints.[338]

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[333] *Id.* at 718-19.

[334] *See* Daphne Keller, *Lawful But Awful? Control Over Legal Speech By Platforms, Governments, and Internet Users*, UNIV. CHI. L. REV. ONLINE (June 2022), https://lawreview.uchicago.edu/online-archive/lawful-awful-control-over-legal-speech-platforms-governments-and-internet-users.

[335] *See* Michael Sawyer, *Why YouTubers are losing so much ad money (and how they can survive the crunch)*, POLYGON (May 10, 2017, 12:00 PM), https://www.polygon.com/2017/5/10/15609660/youtube-youtuber-ad-money-google; *see also* Kate Conger & Ryan Mac, *X May Lose Up to $75 Million in Revenue as More Advertisers Pull Out*, N.Y. TIMES (Nov. 26, 2023), https://www.nytimes.com/2023/11/24/business/x-elon-musk-advertisers.html.

[336] *Testing Begins for Community Notes on Facebook, Instagram and Threads*, META NEWSROOM (Mar. 13, 2025, 5:00 AM), https://about.fb.com/news/2025/03/testing-begins-community-notes-facebook-instagram-threads/.

[337] *Id.*

[338] Bruna Horvath et al., *Meta is ending its fact-checking program in favor of a 'community notes' system similar to X's*, NBC NEWS (Jan. 7, 2025, 6:05 AM),

2. Section 230

Section 230 of the Communications Decency Act (CDA),[339] enacted in 1996, is a U.S. law that establishes a legal framework that shields an interactive computer service (ICS) from liability arising from their role in hosting and providing access to user-generated content. Courts have broadly defined an ICS to capture any online services, including social media platforms (such as Facebook and Reddit).[340] Absent the protections afforded by Section 230, an ICS could be subject to lawsuits and held liable for damages stemming from user-generated material, including content deemed defamatory, libelous, sexually explicit, obscene, harassing, or otherwise harmful or violent.

It is important to note that Section 230 operates independently of certain other legal obligations, such as those relating to intellectual property—specifically the removal of copyrighted material or trademark-infringing content—as well as data privacy regulations and federal criminal statutes.[341]

Section 230 has become a cornerstone of the modern open internet,[342] facilitating the growth of social media platforms and other online services. These businesses have developed sustainable models, primarily supported by advertising revenue or, in some cases, subscription-based models. In exchange, users are afforded the ability to communicate and share information freely, subject to platform-specific content moderation policies.[343]

Prior to the enactment of Section 230, the determination of liability for harmful or illegal content was contingent on two key questions: "Who is the *publisher* of the content?" and "Who is the *distributor* of the content?" For example, a bookstore carrying a book containing illegal or obscene material could not be held liable unless there was evidence demonstrating its knowledge of the

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https://www.nbcnews.com/tech/social-media/meta-ends-fact-checking-program-community-notes-x-rcna186468.

[339] 47 U.S.C. § 230.

[340] Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, SANTA CLARA UNIV. LEGAL STUD. RSCH. PAPER 1, 3-4 (Dec. 1, 2018), *in* THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio, ed., Oxford University Press 2020) ("[C]ourts have interpreted 'providers' expansively to include virtually any service available through the Internet."); *see also id*. at 4 n.4 (citing 6 IAN C. BALLON, 4 E-COM. & INTERNET L. 37.05[2] (2017 update)) ("almost any networked computer would qualify as an interactive computer service, as would an access software provider.").

[341] *See* 47 U.S.C. §§ 230(e)(1)-(5).

[342] Casey Newton, *Everything you need to know about Section 230*, VERGE (Dec. 29, 2020, 3:50 PM), https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation.

[343] *See* Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 192 (2021).

book's content.[344] Section 230 effectively extends this principle to internet platforms, treating them similarly to traditional distributors, such as bookstores, with platforms like YouTube benefitting from this broadened protection.

However, Section 230 also includes a requirement that platforms engage in good faith efforts to remove or restrict content that is obscene, excessively violent, harassing, or otherwise objectionable.[345] This provision underscores the significance of developing and enforcing content moderation policies, which play a central role in determining how platforms maintain compliance with the law while addressing user safety.

In 2020, the Oversight Board began reviewing escalations of Meta's content moderation decisions in connection with the Facebook and Instagram platforms. For example, in 2021 the Board reached a decision to uphold the company's decision to suspend former President Donald Trump from publishing content to Facebook and Instagram, but that the indefinite nature of the original suspension needed to be reassessed.[346]

In recent years, Section 230 has faced heightened scrutiny and calls for reform, driven in part by politically charged debates that have garnered increasing bipartisan support.[347] Critics of the current framework argue that the dramatically expanded size and influence of internet businesses—far surpassing what was contemplated when the CDA was enacted—necessitates a reassessment of the law's broad liability protections.[348] They contend that large technology companies, often viewed as monopolistic entities with significant control over content distribution and public discourse, should be held to a higher standard of accountability given their pervasive role in shaping the flow of information and the potential harm arising from their platforms' reach.[349]

The expansive interpretation of Section 230 that exists today did not emerge immediately but is the product of decades of

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[344] *See* Smith v. California, 361 U.S. 147 (1959).
[345] 47 U.S.C. § 230(c)(2).
[346] *In re Donald Trump*, META OVERSIGHT BD. (May 5, 2021), https://www.oversightboard.com/decision/fb-691qamhj/; *see also* Makena Kelly, *Facebook's oversight board will include a former prime minister and Nobel Prize winner*, VERGE (May 6, 2020, 12:00 PM), https://www.theverge.com/2020/5/6/21249427/facebook-oversight-board-nobel-peace-prize-instagram-snowden.
[347] Sarah Grevy Gotfredsen, *Section 230 Is Under Attack (Again)*, COLUM. JOURNALISM REV. (Mar. 27, 2025), https://www.cjr.org/the_media_today/section_230_bipartisan_bill_repeal.php.
[348] *Id.*
[349] *Id.*

judicial scrutiny and case law.[350] Courts have consistently evaluated its scope and applicability within the context of the rapidly evolving digital environment.[351] These legal challenges placed growing internet platforms in a defensive posture, shaping the legal landscape that underpins today's online ecosystem.

With the growing use of artificial intelligence and related algorithmic recommendation technologies by social media platforms, the question has become whether or not Section 230 protects an ICS from liability arising out of harmful or relatedly sensitive content that is surfaced to end users. Lawmakers have shown an increased interest in the use of recommendation algorithms, including during March 2023 congressional hearings with TikTok CEO Shou Chew.[352]

In 2023, the U.S. Supreme Court began exploring the issue of algorithmic content recommendations and the application of Section 230 in connection with the *Gonzalez v. Google* case.[353] During oral arguments, the Justices were hesitant to apply liability to a platform because it deployed the use of an algorithm in a neutral manner to enhance the user experience.[354] Ultimately, the Court avoided making any decision with respect to Section 230 in *Gonzalez*, and instead focused its attention on a more robust ruling in *Twitter v. Taamneh*, another case before the Court at the same time as *Gonzalez* that explored the issue of social media platform liability for hosting and recommending ISIS content.[355]

G. Contract Law

Digital contracts serve as a foundation for the relationships that make up the creator economy. Digital contracting has become

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[350] Alan Rozenshtein, *Interpreting the ambiguities of Section 230*, BROOKINGS INST. (Oct. 26, 2023), https://www.brookings.edu/articles/interpreting-the-ambiguities-of-section-230/ ("And so it is remarkable that, nearly 30 years after its enactment, basic questions about Section 230's meaning and scope remain uncertain.").

[351] *See* Gregory M. Dickinson, *Section 230: A Juridical History*, 28 STAN. TECH. L. REV. 1, 13-22 (2025).

[352] Franklin Graves, *What Creators Need To Know About TikTok CEO Shou Chew's Congressional Testimony*, PASSIONFRUIT (Mar. 27, 2023), https://passionfru.it/shou-chew-tiktok-testimony-creators-3518/.

[353] 598 U.S. 617 (2023).

[354] Amy Howe, *"Not, like, the nine greatest experts on the internet": Justices seem leery of broad ruling on Section 230*, SCOTUSBLOG (Feb. 21, 2023, 4:31 PM), https://www.scotusblog.com/2023/02/not-like-the-nine-greatest-experts-on-the-internet-justices-seem-leery-of-broad-ruling-on-section-230/.

[355] *See* Twitter, Inc. v. Taamneh, 598 U.S. 471, 472 (2023) (holding that platforms not liable under § 2333 of the Antiterrorism and Effective Death Penalty Act of 1996 without evidence that the platforms "intentionally provided any substantial aid to" or "otherwise . . . participated in" a terrorist attack); *see also Gonzalez*, 598 U.S. at 622 (remanding to the lower courts for reconsideration based on *Twitter*).

an integral part of consumers' everyday lives, and well-established as a means of forming a binding agreement, under most circumstances, with businesses.[356] Consumers encounter countless digital agreements throughout their lifetimes, especially with online service providers. E-signatures have replaced traditional "wet" signatures, or using a pen and paper signature on a physical document, in forms such as 'tapping to agree' or virtual signature pads.[357]

The creator economy operates largely on digital contracts that range from online service providers posting a set of legal and policy documents to unilateral license agreements for application programming interfaces (APIs). Additionally, all of the topics discussed previously in this article can be addressed in some manner by parties through contracts, with liability and obligations shifting from one party to the other.

Service providers present a set of documents to users at registration, or during the course of the relationship as necessary to unlock additional product features or service offerings. As covered above, service providers have a foundational set of documents consisting of a terms of service and privacy policy, with additional links to a content or acceptable use policy, community guidelines, and copyright and trademark policies. The terms of service and privacy policy are often the subject of lawsuits that aim to either confirm or challenge valid acceptance by end users, such as when a forced arbitration clause is triggered.[358]

Case law around internet contract formation has developed over the years and attempts to address "the way in which the user purportedly gives their assent to be bound by the associated terms."[359] Internet contracting formation and related activity can generally fit into the following four categories:[360]

- A 'browsewrap' agreement is one in which an internet user accepts a website's terms of use merely by browsing the site.
- A 'clickwrap' agreement is one in which an internet user accepts a website's terms of use by clicking an 'I agree' or 'I accept' button, with a link to the agreement readily available.

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[356] Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459-60 (2006).
[357] *See* Andrea J. Boyack, *The Shape of Consumer Contracts*, 101 DENVER L. REV. 1, 11, 56 (2023).
[358] *See id.* at 4-5.
[359] Sellers v. JustAnswer LLC, 73 Cal. App. 5th 444, 463 (Cal. Ct. App. 2021); *see also What is a Clickwrap Agreement?,* IRONCLAD, https://ironcladapp.com/journal/contract-management/what-is-a-clickwrap-agreement/, at "Is clickwrap legally enforceable?," (last visited Apr. 4, 2025).
[360] *JustAnswer LLC*, 73 Cal. App. 5th at 463-64.

- A 'scrollwrap' agreement is like a 'clickwrap', but the user is presented with the agreement and must physically scroll to the bottom of it to find the 'I agree' or 'I accept' button.
- 'Sign-in wrap' agreements are those in which a user signs up to use an internet product or service, and the sign-up screen states that acceptance of a separate agreement is required before the user can access the service. While a link to the separate agreement is provided, users are not required to indicate that they have read the agreement's terms before signing up.[361]

Beyond unilateral platform agreements, creators, influencers, and brands are sometimes offered additional direct deals that offer more favorable terms—including increased royalty payments or advertising revenue shares—or unlock additional revenue capabilities, such as subscriptions and digital products or experiences.[362] As mentioned in Section I above, the numerous revenue streams for creators and influencers each come with their own set of contracts and deal structures that vary from niche to niche. Every sponsored post, referral sale, and product sale is backed, in some form or fashion, by a meeting of the minds. Additionally, traditional contracts make their way into the creator economy sphere, such as when an Instagram personality signs a book deal with a publisher, or a viral music artist signs a Multiple Rights Deal[363] with a record label. Lastly, business-to-business (B2B) contracts power many of the less noticeable areas of the creator economy, from platform partnership agreements to co-marketing campaigns and beyond.

As with many commercial agreements, business disputes remain a common occurrence across the creator economy. One such example is a contract dispute involving Jimmy Donaldson, the most popular YouTube channel owner[364] known more widely as

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[361] *Id.* (citing Selden v. Airbnb, Inc., No. 16-cv-00933 (CRC), 2016 WL 6476934, at *4 (D.D.C. Nov. 1, 2016)); *see also* Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 394–95 (E.D.N.Y. 2015). Author's Note: Bullet points added for ease of reading.

[362] *See* Sam Gutelle, *YouTube creators can earn Shorts ad revenue on February 1 (if they agree to new Partner Program terms)*, TUBEFILTER (Jan. 10, 2023), https://www.tubefilter.com/2023/01/10/youtube-shorts-ad-revenue-sharing-begin-new-partner-program/; *see also Choose how you want to monetize,* YOUTUBE HELP, https://support.google.com/youtube/answer/94522 (explaining that YouTube offers subscription memberships, paid chat features, and product sales tools).

[363] *See generally* Loren Mulraine, *Reimagining the Music Industry: In Search of a More Perfect Union*, 27 VAND. J. ENT. & TECH. L. 279, 284-85 (2025).

[364] As of August 2024, the MrBeast channel is the most subscribed channel on YouTube with over 308 million subscribers, and Donaldson consistently tops the

"MrBeast," and a virtual dining company that helped distribute branded food items through local delivery apps under the MrBeast Burger brand.[365] Donaldson faced backlash on social media as customers would share photos comparing marketing images for the food to drastically different looking items that they received from virtual kitchens through food delivery apps like GrubHub.[366]

Donaldson, through his company Beast Investments, LLC, filed a lawsuit against dining partner Celebrity Virtual Dining (CVD), and a group of related companies, in July 2023 in federal court. The lawsuit alleged numerous breaches of contract terms and asked the court to end the MrBeast Burger business entirely. In a separate counter-lawsuit filed on August 7, CVD countered with a filing that claimed Donaldson "believes his fame means that his word does not matter, that the facts do not matter, and that he can renege and breach his contractual obligations without consequence."[367]

At the heart of the dispute is an endorsement and services agreement, signed in September 2020, that established the partnership between Donaldson's brand and the virtual kitchen company.[368] These types of deals go beyond traditional endorsement deals, where an influencer is promoting an existing product or service. The endorsement and service structure relies on products or services branded under the creator or influencer's brand, creating more risk and potential for reputational impact.[369]

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annual Forbes list of highest-paid YouTube stars. *See* Adam Brown & Abigail Freeman, *The Highest-Paid YouTube Stars: MrBeast, Jake Paul And Markiplier Score Massive Paydays*, FORBES (May 11, 2022, 11:10 PM), https://www.forbes.com/sites/abrambrown/2022/01/14/the-highest-paid-youtube-stars-mrbeast-jake-paul-and-markiplier-score-massive-paydays/; YOUTUBE, https://www.youtube.com/@MrBeast (last visited Feb. 14, 2025).

[365] *See generally* Complaint, Beast Invs., LLC v. Celebrity Virtual Dining, LLC, No. 0653908/2023 (N.Y. Sup. Ct. Aug. 14, 2023), https://trellis.law/doc/175412062/summons-complaint.

[366] *Id*. at 4.

[367] Kalhan Rosenblatt & Diana Dasrath, *YouTuber Mr Beast Sued By Mr Beast Burger Food Delivery Service Partner*, NBC NEWS, https://www.nbcnews.com/business/mrbeast-sued-mrbeast-burger-company-virtual-dining-concepts-rcna98578 (last updated Aug. 7, 2023, 4:39 PM) (quoting the complaint filed in this case). The dispute moved to New York state court after being dismissed by Beast Investments at the federal level. *See* Notice of Voluntary Dismissal, Beast Invs., LLC v. Celebrity Virtual Dining, LLC, 1:23-cv-06658-MKV (S.D.N.Y. Aug. 14, 2023), https://storage.courtlistener.com/recap/gov.uscourts.nysd.603226/gov.uscourts.nysd.603226.11.0.pdf.

[368] Complaint, Beast Invs., LLC v. Celebrity Virtual Dining, LLC, *supra* note 365, at 6.

[369] Influencers are also launching their own brands and investing through equity deals as part of a sponsorship arrangement. *See* Eran Nizri, *Why Are More Influencers Launching Their Own Brands?*, FORBES (June 27, 2022, 8:15 AM), https://www.forbes.com/councils/forbestechcouncil/2022/06/27/why-are-more-

At the end of the day, contract law remains an integral part of the creator economy and powers many of the transactions and commercial arrangements between different corners of the ecosystem.

IV. Future Opportunities Across Creator Economy Law

Decentralized and federated social networks, generative AI, and recent developments across regulation, law, and policy present numerous opportunities for future exploration of Creator Economy Law.

A. Decentralized Platforms and Communities

Historically, operation and control of social networks, platforms, and communities within the creator economy have been centralized to a relatively small number of major players, such as Meta, Pinterest, or Google. Each platform operates within a closed environment where content, users, and other data remain siloed, granting them considerable authority over creators and brands when it comes to policy decisions, privacy, and competition.[370]

In contrast, federated social networks operate across independently run servers that maintain an underlying interoperable framework to allow the formation of one globally connected social network.[371] The networks can be either server-based or peer-to-peer (p2p) operated. Open-source software projects typically power the Fediverse, the name given to this decentralized, interoperable social network experience. Mastodon is one such federated social network that gained popularity following Elon Musk's takeover of Twitter (which became X). Freedoms of association and speech have become prominent talking points in favor of federated social networks, which shift power to end users that have controls over types of speech they filter out or prioritize and allow into their content feeds.[372]

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influencers-launching-their-own-brands/; *see also* Franklin Graves, *The Rise of the Creator-Investor: A New Kind of Brand Deal*, PASSIONFRUIT (May 29, 2024), https://passionfru.it/alix-earle-creator-investor-68716/.

[370] *See* Becky Chao & Ross Schulman, *Promoting Platform Interoperability*, HOUSE.GOV 1, 12-13 (May 11, 2020), https://docs.house.gov/meetings/JU/JU05/20210225/111247/HHRG-117-JU05-20210225-SD008.pdf.

[371] *See* Corynne McSherry, *User Generated Content and the Fediverse: A Legal Primer*, ELEC. FRONTIER FOUND. (Dec. 20, 2022), https://www.eff.org/deeplinks/2022/12/user-generated-content-and-fediverse-legal-primer.

[372] *See* Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Aug. 21, 2019), https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech.

Email is a commonly referenced example of interoperability that can be understood by a wide audience. As explained by New America's Becky Chao and Ross Schulman:

> [...] regardless of which email provider and software people use, they can all email each other across systems because all are interoperable. But social media sites and other platforms are not generally interoperable. Thus, if individuals want to leave a platform, they will not be able to reach their friends or followers or other contacts on the platform they left behind. [373]

In true web3 fashion, decentralization and interoperability allow anyone to run a server and begin offering a unique community experience that is no longer controlled by one entity, and which can still offer access to a wider user base.[374] Envision this as a platform similar to X or Facebook, with the distinction that anyone has the capacity to establish their own instance, and all instances can communicate with one another seamlessly.[375] Along with such ownership and operational control comes the ability for operators to establish nuanced approaches to content moderation decisions.[376] A critique of federated social networks is that they could potentially become echo chambers or narrowly-tailored content delivery algorithms that offer users an echo chamber that is lacking diversity and non-bias content variety.[377]

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[373] *See* Chao & Schulman, *supra* note 370.

[374] However, some argue that creating groups on social media platforms is easy but federating them is not. *See* James J. Brown, *Groups Are Easy, Federating Is Hard*. ASS'N OF INTERNET RSCH. (Dec. 31, 2023), https://doi.org/10.5210/spir.v2023i0.13403 (using Mastodon as an example of a federated platform and discussion of challenges with federating groups in online and offline contexts).

[375] ActivityPub is a popular example of an open-source protocol standard developed by the World Wide Web Consortium (W3C) that allows servers running one platform (such as Mastodon or WordPress) to communicate and exchange data with other platforms (such as Tumblr or Blue Sky) using an agreed-upon protocol. *See* ACTIVITY PUB, https://activitypub.rocks/ (Jan. 4, 2021).

[376] *See* Jose Van Dijck et al., *Deplatformization and the governance of the platform ecosystem*, 25 NEWS MEDIA & SOC'Y 1, 4 (2021), https://doi.org/10.1177/14614448211045662 ("Whereas deplatforming denotes when users or channels lose their profiles on social media platforms, often due to the dissemination of content that violates the Terms of Use, deplatformization applies to tech companies' efforts to reduce toxic content by pushing back controversial platforms and their communities to the edge of the ecosystem, denying them access to basic infrastructural services needed to function online.").

[377] Alan Rozenshtein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3 J. FREE SPEECH L. 217, 231 (2023).

The Fediverse offers creators and brands more control over their content and audiences. Over time, creators and brands have come to appreciate the substantial value associated with retaining ownership of their audiences, typically in the forms of control and direct access, independent of any one platform. This hub-and-spoke model of content distribution and relationship building has been driven by several factors, including the increasing fragmentation of the digital and social media landscapes and the growing significance of data.[378]

Owning one's audience presents several advantages. Firstly, it provides direct access to the audience's data, enabling creators and brands to gain a deeper understanding of their interests and expectations. These data can then be utilized to create more pertinent and engaging content. Secondly, owning one's audience allows for control over the distribution of content, eliminating reliance on the often-unpredictable algorithms of third-party platforms. Thirdly, owning one's audience grants greater freedom to experiment and innovate, as creators and brands are not constrained by the limitations (functional, policy-based, or otherwise) imposed by third-party platforms. It is important to also note that owning one's audience is not without challenges. It necessitates a substantial investment of both time and resources and can create legal and regulatory risks.

Additionally, decentralized, interoperable platforms present opportunities for revenue sharing that can be attributed back to individual content producers, such as creators. Integration of Fediverse technologies with other web3 technologies, such as blockchain and cryptocurrency, will present opportunities to incentivize an open ecosystem for content distribution and consumption. Traditional social media platform structures gave rise to third-party integration and analytic platforms—from scheduling and insights platforms like HootSuite[379] and Sprout Social[380] to monitoring and social listening tools like Meltwater[381] and Brandwatch[382] which became critical business operation tools for creators and brands to more efficiently manage content, measure engagement, and monitor discourse.[383] However, social media

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[378] *See generally* Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Aug. 21, 2019), https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech.

[379] HOOTSUITE, https://www.hootsuite.com/ (last visited Apr. 4, 2025).

[380] SPROUT SOC., https://sproutsocial.com/ (last visited Apr. 4, 2025).

[381] MELTWATER, https://www.meltwater.com/ (last visited Apr. 4, 2025).

[382] BRANDWATCH, https://www.brandwatch.com/ (last visited Apr. 4, 2025).

[383] *See Social Media Monitoring*, LEXISNEXIS, https://www.lexisnexis.com/en-int/glossary/media-intelligence/social-media-monitoring (last visited Apr. 4, 2025).

management services are reliant upon developer tools, such as public and private application programming interface (API) access, that the platforms control and charge to access and use. A federated system presents opportunities to provide open access to systems that historically have offered limited or no transparency and accountability. When, and to what extent, current adtech infrastructures will expand to integrate with federated networks remains to be seen. Currently, few—if any—centralized options for integrating an advertising network exist given the decentralized operations of most federated networks.

Increased liability is a risk that comes as creators make the switch into being an online service provider under a Fediverse model where they may be operating their own platform or private community. Creators offering subscriptions and other gated access mechanisms in connection with their communities may be opening up exposure to similar potential liability. In online communities hosted on platforms such as Discord or Slack, content creators have the responsibility of establishing and enforcing regulations, moderation protocols, and resolution mechanisms within their respective communities.[384] It isn't a stretch to see current lawsuits that are being filed against platforms to also start including creators themselves as the community operators.[385]

Lastly, a federated social media system also calls into question the efficacy of government restrictions or bans of individual service providers, such as the 2024 restrictions in the U.S. of providing hosting and distribution services for mobile apps and social media platforms such as ByteDance's TikTok.[386] In late 2024, Brazil's Supreme Court instituted a ban of X following a series of failures to comply with orders to remove misinformation from the platform.[387] The ban, which lasted for a month, was lifted following the company's payment of a fine, compliance with court ordered content moderation practices, and establishing a legal representative

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[384] *See Developing Server Rules*, DISCORD, https://discord.com/community/developing-server-rules (last visited Apr. 4, 2025); *see also Understanding Custom Experience Rules on Roblox*, ROBLOX, https://en.help.roblox.com/hc/en-us/articles/203312500-Understanding-Custom-Experience-Rules-on-Roblox (last visited Apr. 4, 2025).

[385] *See* Adi Robertson, *Anti-social media lawsuits are coming for Roblox and Discord,* VERGE (Oct. 6, 2022, 9:58 AM), https://www.theverge.com/2022/10/6/23390796/roblox-discord-facebook-snapchat-social-media-lawsuits-addiction-child-abuse.

[386] H.R. 7521, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-bill/7521/text.

[387] Eléonore Hughes & Barbara Ortutay, *Elon Musk's X is back in Brazil after its suspension, having complied with all judicial demands*, ASSOCIATED PRESS, https://apnews.com/article/brazil-x-platform-musk-suspension-return-44be5cc35225e352b33c8b8c6fa20af2# (Oct. 9, 2024, 7:36 PM).

in the country.[388] Within a Fediverse, any such "bans" effectively shutter just one means of connecting with and consuming content that is available across a federated system.

B. Generative Artificial Intelligence

Recent proliferation of generative artificial intelligence (GAI) technology, propelled into the public discourse by wide releases of consumer-focused services from OpenAI (Dall·E and ChatGPT), Stability AI (Stable Diffusion) and Midjourney, has had a profound impact on the creator economy in a relatively short period of time. Creators and brands have seen GAI tools and features become a part of the software and workflows they utilize across their technology stacks, most often in a "genAI-as-a-service" model.[389] GAI technologies can generally be categorized into two buckets: (1) operational tools; and (2) creation tools. The term "create" is rather controversial when used within the context of GAI tools, which *generate* synthetic output that can easily mimic the human *creative* process. From office productivity suites by Microsoft and Google to creator tools by companies like Adobe, Murf AI, and Synthesia, the line continues to blur as GAI technology advances and becomes incorporated (and unavoidable) into the tech stack everyone uses, often with little choice to the end users.[390]

Additionally, backlash and concerns over how GAI systems have been trained is being challenged by some creators, welcomed by others, and presenting divisive questions around fair use under copyright law.[391] Platforms have been experimenting with ways to integrate GAI technology into their services for use by both consumer end users and creators and brands.[392] Meta is one such platform with a history of failed attempts at launching GAI-powered chatbots, but reportedly see such bots as the future of social media and existing alongside human user accounts and content.[393] In

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[388] *Id.*

[389] Author's Note: "genAI-as-a-service" is a play on the normalization of the software-as-a-service model in which consumers do not gain access to the software itself, but rather are provisioned access by a service provider, often over the internet. Popular GAI technologies are provided behind a hosted service interface, such as a chatbot, instead of locally installed software.

[390] *See* Cassandre Coyer & Aruni Soni, *Adobe Responds to AI Fears with Plans for Updated Legal Terms*, BL (June 12, 2024, 9:05 AM), https://news.bloomberglaw.com/privacy-and-data-security/adobe-responds-to-ai-fears-with-plans-for-updated-legal-terms.

[391] *See* Matthew Sag, *Fairness and Fair Use in Generative AI*, 92 FORDHAM L. REV. 1887 (2024); *see also* Jane C. Ginsburg and Luke Ali Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L. J. 1 (2019) (exploring the relationship of creators and AI systems in light of copyright law).

[392] *See* Franklin Graves, *AI Disclosure Requirements are Coming,* 34 IPLS PROCS. 5 (2023).

[393] Christina Criddle & Hannah Murphy, *Meta envisages social media filled with AI-generated users,* FIN. TIMES (Dec. 26, 2024),

September 2023, Meta launched AI chatbots designed as digital replicas of well-known celebrities, only to shut them down less than a year later.[394] In 2025, Meta shut down additional GAI-chatbot accounts that were designed to mimic normal users, but with a reported focus on diverse racial and sexual identities.[395]

The future regulation of GAI technologies is beginning to take shape around the world. The European Union's Artificial Intelligence Act[396] is one of the first comprehensive regulations that address regulation of AI technologies, coupled with existing obligations under consumer-focused laws such as the GDPR, DMA, and DSA which contain language addressing concepts like automated decision making and data use disclosure and consent. Such regulations and standards are attempting to address ways to protect consumers most often within the context of responsible artificial intelligence ("RAI") initiatives. Generally, RAI addresses concepts such as disclosure and transparency, bias and discrimination, and privacy and security with regards to the development, deployment, and use of GAI tools and systems. Self-regulation and standards setting is taking place around the disclosure of GAI technology use, through organizations such as the Content Authenticity Initiative (CAI),[397] and dissemination of synthetic content outputs, through organizations such as Partnership on AI and its Responsible Practices for Synthetic Media framework.[398]

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https://www.ft.com/content/91183cbb-50f9-464a-9d2e-96063825bfcf; *see also* Frank Landymore, *Facebook Planning to Flood Platform with AI-Powered Users*, FUTURISM (Dec. 28, 2024, 12:18 PM), https://futurism.com/the-byte/facebook-planning-ai-powered-users.

[394] Jay Peters, *Meta moves on from its celebrity lookalike AI chatbots*, VERGE (Jul. 30, 2024, 5:46 PM), https://www.theverge.com/2024/7/30/24209918/meta-celebrity-lookalike-ai-chatbots-moves-on.

[395] Allison Morrow, *Meta scrambles to delete its own AI accounts after backlash*, CNN (Jan. 3, 2025, 5:42 PM), https://www.cnn.com/2025/01/03/business/meta-ai-accounts-instagram-facebook/index.html.

[396] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Dec. 7, 2024), https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng.

[397] The Content Authenticity Initiative (CAI) and Coalition for Content Provenance and Authenticity (C2PA) offer a set of open-source tools to advance an industry standard for content authenticity and provenance. *See* CONTENT AUTHENTICITY INITIATIVE, https://contentauthenticity.org/ (last visited Feb. 15, 2025); *see also* COALITION FOR CONTENT PROVENANCE AND AUTHENTICITY, https://c2pa.org/ (last visited Feb. 15, 2025).

[398] The Partnership on AI's (PAI) Responsible Practices for Synthetic Media provides guidance on the ethical development, creation, and sharing of synthetic media, which refers to "audiovisual content often generated or modified by AI." *See* P'SHIP ON AI, https://syntheticmedia.partnershiponai.org/ (last visited (Feb. 15, 2025).

In October 2023, President Joe Biden signed Executive Order 14110 on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence that set the groundwork for regulation of artificial intelligence (AI) across nearly every industry and government.[399] The order largely pushed action to federal agencies—such as the Federal Trade Commission, National Institutes of Standards and Technology (NIST), and the U.S. Patent and Trademark Office—and requested that Congress take the lead in drafting and passing laws, obtaining funding, and implementing changes around the regulation of AI technologies. The underlying principles established within the executive order will undoubtedly impact the creator economy, and likely remain in some form with any future regulation or policy. For example, transparency and trustworthiness requirements will obligate platforms and developers of AI systems to share safety test results and related information with the U.S. government, similar to existing oversight and regulatory authority of agencies such as the Food and Drug Administration in connection with food and medicine.

The order has already led to updates across several areas impacting the creator economy. A U.S. AI Safety Institute has been established within NIST to aid in efforts to protect audiences and consumers from potentially harmful or manipulative algorithms and content.[400] Regulation and oversight could unlock a new layer of trust between platforms, creators, and audiences. However, it could potentially slow down a historically open internet with processes and policies for publishing content, regardless of whether it is synthetic or human-created.

The future of AI regulation, including prior Executive Orders ("EOs") and policy initiatives, remains uncertain following a change in administration at the start of 2025. During his first 100 days, President Donald Trump signed numerous EOs, including one that walks back the AI policy initiatives under President Biden's administration. His executive order, "Removing Barriers to American Leadership in Artificial Intelligence," points towards a shifting perspective on law, policy, and regulation around AI technologies.[401]

Within the creator economy, a significant transformation is taking place due to the widespread accessibility of tools enabling the generation of synthetic content, commonly known as AI-generated or generative material. This paradigm shift has raised concerns among regulators regarding the potential proliferation of

[399] Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191 (Oct. 30, 2023).
[400] *U.S. Artificial Intelligence Safety Institute,* NIST, https://www.nist.gov/aisi (last visited Aug. 5, 2024).
[401] Removing Barriers to American Leadership in Artificial Intelligence, 90 Fed. Reg. 8741 (Jan. 23, 2025).

misinformation, deepfakes, and other types of harmful content produced through GAI technology.

AI slop[402] is inevitable, and in the future audience preferences and tolerance levels will evolve. A delicate balance for platforms will be whether they cater to the end user experience or the creator experience. YouTube, for example, began offering AI-powered experiences which arguably benefits end users and, if not controlled, bypasses creator experience.[403] A large question still looms around how to monetize GAI services, like those provided by Anthropic and OpenAI, with advertising content. Many GAI services have already started dethroning Google's power in search, which impacts an entire ad tech industry built around serving ads on content a user is consuming.[404] Take away the consumption, or dramatically change it as GAI tools do, then brands and agencies logically will take away the ad spend. Creative solutions are being developed to solve for this challenge, which we will likely start seeing signs of throughout 2025.[405]

NIST released a draft publication, *Reducing Risks Posed by Synthetic Content*, in response to the order's call for standards and best practices that support the identification, detection, and tagging of GAI material.[406] For example, Adobe's Content Credentials incorporate C2PA standardized metadata to identify applications used to create content and whether or not GAI was involved.

While imposing more regulations may affect the ability of creators to continue utilizing various tools and technologies, it may also result in enhanced user confidence in platforms, algorithms, content, and creators. Furthermore, if consumers perceive the content displayed on social media platforms as trustworthy, advertisers will deem the ecosystem as reputable and secure, potentially enabling platforms, brands, and creators to gain financially, while also avoiding issues like YouTube's demonetization following child advertising crackdowns.[407]

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[402] Benjamin Hoffman, *First Came 'Spam.' Now, With A.I., We've Got 'Slop'*, N.Y. TIMES (June 11, 2024), https://www.nytimes.com/2024/06/11/style/ai-search-slop.html.

[403] *YouTube's AI Power-Up: How We Got Even More Helpful This Year,* YOUTUBE OFF. BLOG (Dec. 12, 2024), https://blog.youtube/inside-youtube/2024-in-youtube-ai/.

[404] Kylie Robison, *AI search is starting to kill Google's 'ten blue links'*, VERGE (Mar. 17, 2025, 5:30 PM), https://www.theverge.com/ai-artificial-intelligence/631352/ai-search-adobe-analytics-google-perplexity-openai.

[405] *Id.*

[406] *Reducing Risks Posed by Synthetic Content*, NIST AI 100-4, https://airc.nist.gov/docs/NIST.AI.100-4.SyntheticContent.ipd.pdf (draft as of April 2024).

[407] *See* Julia Alexander*, YouTube addresses 'aggressive action' amid creator concerns over new 'adpocalypse'*. POLYGON (Nov. 29, 2017, 2:27 PM), https://www.polygon.com/2017/11/29/16716176/youtube-adpocalypse-kids.

Questions remain as to how much, or how little, consumers will want to engage with synthetic content, and whether opinions, perceptions, or preferences around the use of GAI in the creative process will develop and shift over time. These activities also bring into focus issues around control. Specifically, concepts of control over when and how these tools are embedded within a platform, which historically has been held by the platform.[408] End users that are creators and brands continue to find little reminders that they are on borrowed land.

C. Law and Policy in the Creator Economy

As noted in Section II above, there are numerous areas of law through which Creator Economy Law can be explored. That same approach applies to developments of law and policy within each area.

Protecting children online, for example, remains a critical concern as the creator economy expands, with regulators and policymakers placing heightened emphasis on enforcing stricter privacy and content guidelines. Laws like the U.K.'s OSA and provisions under COPPA in the U.S. already address some of these concerns, but as digital content increasingly targets or affects children, platforms will likely face new obligations from regulators. The FTC is already starting to implement updates to COPPA. In January 2025, updates to the rule included data retention limits, requiring parents to opt in to third-party advertising, and implementing other measures to limit companies' ability to monetize children's data.[409] These developments underscore the evolving regulatory landscape aimed at safeguarding young users in the digital space. The question remains: at what expense will some of these protections come for adult users?

Debates continue to swirl around the scope of liability that protection platforms should continue receiving under Section 230. Maintaining robust First Amendment protections for creators and platforms is central to the future of the creator economy, particularly in the U.S., where the concept of freedoms of speech, religion, press, and rights to assembly and petition the government, remain unique and special. The extent to which platforms should receive First

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[408] *See* James Hale, *Murder, she wrote: YouTube's AI chat summary is making mistakes*, TUBEFILTER (Aug. 26, 2024), https://www.tubefilter.com/2024/08/26/murder-she-wrote-youtubes-ai-chat-summary-is-making-mistakes/ (explaining that users of YouTube took to social media to complain when its GAI summary tool began conveying incorrect information).

[409] *FTC Finalizes Changes to Children's Privacy Rule Limiting Companies' Ability to Monetize Kids' Data*, FTC (Jan. 16, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-finalizes-changes-childrens-privacy-rule-limiting-companies-ability-monetize-kids-data.

Amendment protections has become contentious, especially as they engage in content moderation and exercise significant control over digital speech. Arguments will persist over whether large platforms qualify as publishers or neutral service providers under Section 230 until an act of Congress or a court is willing to directly tackle the issue.

Internationally, the EU's continued regulatory developments, including the DSA and DMA, contrast with the absence of comprehensive federal-level legislation in the U.S., highlighting a fragmented global policy environment. As concerns about foreign adversaries, disinformation, and the politicization of platforms grow, particularly in election contexts, lawmakers must navigate the complex intersection of free expression, national security, and platform responsibility in shaping the future of Creator Economy Law.

V. Conclusion

The creator economy is a rapidly evolving landscape, with new technologies, business models, and legal issues emerging all the time. Creator Economy Law as an area of focus for study and practice provides an opportunity to explore the last two decades and the future that remains to be shaped by technological advancements, regulatory oversight, and evolving consumption and creation behaviors.

As the creator economy continues to grow and evolve, it is important for all stakeholders to be aware of the legal and policy issues that are presently involved and as-yet shaped. Through a comprehensive understanding of the legal landscape, creators, platforms, brands, and policymakers can guarantee that pertinent past opportunities are not rendered obsolete and that future opportunities are not stifled, as more creators, brands, and platforms harness the transformative potential of the creator economy

* * *

CROSS-EXAMINING LITIGATION AND INCLUSION EFFICACY FOR BLACK WOMEN IN CINEMA: SAY "HELLO" TO MY LITTLE OSCARS INCLUSION STANDARDS, SHOW ME THE MONEY, AND MAY THE FORCE BE WITH YOU

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I. INTRODUCTION

We remember movie lines because we remember the movies. What they mean. What they tell us about ourselves and others. Take this iconic line from one of the most beloved films ever made: "Pay no attention to that man behind the curtain!"[1] As we watch a shrewd Toto unveiling what had been so purposefully concealed, there is no way we will "pay no attention." It is the moment when all the pieces begin to fall in place, when we learn that the wizard isn't quite who we thought he was. It is a moment of revelation leading to a host of new perspectives and opportunities for heretofore disenfranchised companions seeking to address barriers encountered at every turn in their journey. Not just for them, but for an entire glittering, emerald community. As if mirroring a filmic moment, 2020 was a year of pulling back curtains.

The racial uprisings of 2020 would reverberate around the world, not only in street protests precipitated by the video capture of George Floyd's police-induced murder, but in seats of power for industries and organizations contemplating their complicity in creating a social order that engenders disregard for Black life. Accordingly, the term "systemic" racism became a bellwether for the year's dialogues.[2] Recognizing systemic action is a kind of curtain pull-back, divulging that racism's origins and effects are not limited to the isolated nefariousness of singular bad actors who warrant individual sanctioning. Rather, systemic racism describes a more pervasive result of bias that is inherently incorporated in economic and social apparatuses through policies.[3] It describes a social phenomenon in which systems routinize practices that customarily and historically—consciously or unconsciously—create adverse conditions for marginalized groups like African Americans through commercial and social transactions and processes; limits on pay equity; and systematized hierarchies that influence who advances through promotion, opportunities, and inclusion in decision-making. Structural constraints are supported through narratives, pretexts and activities purporting to esteem earned merit that is ostensibly threatened by policies that advance equity and equality.[4] Accordingly, forums convened in the aftermath

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[1] THE WIZARD OF OZ (Metro-Goldwyn-Mayer & Warner Bros. 1939).

[2] Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020), https://time.com/5851855/systemic- racism-america/.

[3] JEMAR TISBY, HOW TO FIGHT RACISM: COURAGEOUS CHRISTIANITY AND THE JOURNEY TOWARD RACIAL JUSTICE 158 (2021).

[4] Autumn McDonald, *The Racism of the 'Hard-to-Find' Qualified Black Candidate Trope*, STAN. SOC. INNOVATION REV. (June 2021), https://ssir.org/articles/entry/the_racism_of_the_hard_to_find_qualified_black_candidate_trope; *see also* Janet Foutty, *The Myths that Undermine Racial Equity at Work*, HARV. BUS. REV. (June 2021), https://hbr.org/2021/06/the-myths-that-undermine-racial-equity-at-work.

of Floyd's murder urged the examination not of a single physical death, but of practices that incite normalized disregard for Black social and economic viability, that precipitate African American societal, economic, and physical demise.

2020's revelatory moment led to the proliferation of initiatives ranging from solidarity statements posted on company websites avowing dedication to diversity, equity, and inclusion (DEI), to the hiring of chief diversity officers and the establishment of DEI units and training programs, all ostensibly dedicated to righting systemic wrongs against African Americans.[5] Some critiques of these aftermaths have suggested performative motivation, i.e., visible but insincere signals that give the impression of making change without addressing the heartbeat of systemic power: the establishment of policies and procedures that balance the scales of justice by imbedding equity in systems historically structured to limit it.

The relationship between systemic change and policymaking is well-established. For example, in the context of higher education, policy shifts have led to noticeable changes on campuses in the area of admissions, where higher education institutions have found diversity in student bodies to have educational benefits that are achievable through admissions policies.[6] Conversely, state laws banning the consideration of race in admissions, such as Proposal 2 in Michigan[7] and Proposition 209 in California,[8] reduced the enrollment of students of color in those states[9] through university policies that enacted them.

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[5] The McKinsey Report found that "[t]he police killing of George Floyd in May 2020 spurred many organizations to take action. Nearly a third of Fortune 1000 companies made public statements on racial equity; 22 percent made external commitments, including more than $66 billion for racial-equity initiatives." Michael Chui et al., *America 2021: The Opportunity to Advance Racial Equity*, MCKINSEY (Feb. 2021), https://www.mckinsey.com/bem/our-insights/america-2021-the-opportunity-to-advance-racial-equity; *see also* Alan Gutterman, *Businesses and Racial Equity: Taking a Stand and Committing to Action* (Jan. 3, 2024), https://ssrn.com/abstract=4657528.

[6] Jonathan R. Alger, *A Supreme Challenge: Achieving the Educational and Societal Benefits of Diversity After the Supreme Court's* Fisher *Decision*, 6 J. DIVERSITY HIGHER EDUC. 147, 149 (2013) (discussing comments made by the Washington Higher Education Secretariat).

[7] Suzanne Lowe, *Ballot Proposal 06-2: An Overview*, MICH. S. FISCAL AGENCY, Sep. 2006, at 2, https://sfa.senate .michigan.gov/Publications/BallotProps/Proposal06-2.pdf (constitutionalized as MICH. CONST. art. I, § 26, cl. 2.).

[8] CAL. CONST. art. I, § 31.

[9] Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-Level Administrators Understand a Prohibition on Race-Conscious Postsecondary Admissions Policies*, 52 AM. EDUC. RSCH. J. 828, 836 (Oct. 2015).

Echoing higher education's efforts to expand equity for underrepresented students, Hollywood established its own parity standards in 2020 when the Academy of Motion Picture Arts & Sciences ("AMPAS" or "the Academy") created the AMPAS Representation and Inclusion Standards for Oscars Eligibility.[10] Upon going into effect in 2024, the AMPAS Standards garnered mixed reactions ranging from protestations of their superfluousness[11] and critiques regarding them as too performative to be meaningful,[12] to praise for them as a good starting point for equity.[13] Additionally, the Supreme Court's decision in *Students for Fair Admissions v. Harvard*[14] produced speculation that DEI initiatives in Hollywood would encounter greater scrutiny.[15] I argue that the Academy standards serve a relevant but limited role for Black women professionals in cinema, in light of the following factors:

> (1) Exclusion and representation of Blacks in cinema, historically systemic in nature, requires a systemic solution like the industry-wide initiative represented by the AMPAS standards.
> (2) Causes of action pursued by Black women in cinema match industry data that documents their underrepresentation and inequities encountered. These areas of inequity are also reflected in the AMPAS standards.
> (3) According to information compiled and presented here, in the past 40 years, Black

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[10] *See* ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING & THE ARTS § 17:14 (Clark Boardman Callaghan 3d ed. 2024); *see also Representation and Inclusion Standards*, ACAD. OF MOTION PICTURE ARTS & SCIS., https://www.oscars.org/awards/representation-and-inclusion-standards (last visited Feb. 17, 2025).

[11] Conor Murray, *Anti-'Woke' Critics Target the Oscars-But Here's What the Academy's New Diversity Rules Actually Require*, FORBES (June 20, 2023, 4:40 PM), https://www.forbes.com/sites/conormurray/2023/06/20/anti-woke-critics-target-the-oscars-but-heres-what-its-new-diversity-rules-actually-require/.

[12] Jeremy W. Peters & Brooks Barnes, *The Oscars Now Have D.E.I. Rules, but Some Say It's Just a Performance*, N.Y. TIMES (Mar. 10, 2024), https://www.nytimes.com/2024/03/08/us/oscars-oppenheimer-dei-diversity.html.

[13] Nicole Sperling, *Academy Explains Diversity Rules for Best Picture Oscar*, N.Y. TIMES (Sept. 8, 2020), https://www.nytimes.com/2020/09/08/movies/oscars-diversity-rules-best-picture.html.

[14] Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023).

[15] Winston Cho, *Hollywood Diversity Initiatives May Be Challenged After Supreme Court Affirmative Action Ruling*, HOLLYWOOD REP. (July 14, 2023, 12:40 PM), https://www.hollywoodreporter.com/business/business-news/dei-supreme-court-affirmative-action-hollywood-1235532273/.

> women in cinema have rarely sought DEI through the courts. Therefore, benefits from industry compliance with AMPAS standards could have a more pervasive impact than litigation.
> (4) Litigation outcomes for Black women have offered little benefit or equity for them.

I discuss each factor in the following four-part analysis. Part I addresses factor 1, describing the systemic nature of disparities in onscreen representation of African Americans in the movies. Part II further addresses factor 1, discussing the nexus between the AMPAS standards and the Academy's historical connection to systemic racism in Hollywood. Part III addresses factors 2, 3, and 4 through examining relevant data and cases. Part IV discusses the future of equity for Black women in the entertainment industry.

References to Black women in "cinema" in this article describe African American women professionals and participants in the cinematic enterprises, including both traditional Hollywood filmmaking and network and cable television as well as television streaming platforms. Television and film both engage in the business of filmed storytelling, as technological advances like streaming continue to blur the lines between conventional Hollywood and TV. "Participants" includes Black women who are cinema-adjacent, namely, those who have an identifiable legal interest in cinema that lies outside a professional occupation within the industry. "DEI" can be read here as "equity."

II. ONCE UPON A TIME IN HOLLYWOOD

The late John Singleton, director of coming-of-age film *Boyz 'n the Hood*,[16] reflected on what drew him to the medium that would lead him to become not only the youngest director to be nominated for the Best Director Oscar at age 24, but also the first African American to receive the nomination.[17] In his pre-directorial youth he queried, simply but profoundly: "How did *those Black people* get on screen? Who put them there?"[18] His early curiosity is a foundational inquiry essential to an understanding of what films portray. These questions—concerning which Black images are depicted and who decides the when, whether, and how—are central to the purpose of the AMPAS standards, and to an understanding of why such questions matter to this kind of analysis.

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[16] BOYZ 'N THE HOOD (Columbia Pictures, 1991).
[17] JOHN SINGLETON, *Foreword* in DONALD BOGLE, HOLLYWOOD BLACK: THE STARS, THE FILMS, THE FILMMAKERS (2019).
[18] *Id.*

A. "Those Black people"

There is a proverbial debate over whether movies mirror human stories, or whether they tell the stories people *want* to see or believe are real. If happily-ever-after fairytales, a defining feature of Hollywood narratives,[19] fail to accurately depict stories of human romantic encounter, it is both reasonable and responsible to scrutinize Hollywood's track record for getting other stories right. For Black Americans, Story,[20] with a capital "S," has historically been told through a litany of routinely-appearing images. The history reel of Black imprisonment as chattel in U.S. slavery for over 200 years; the Jim Crow and lynching years; the emergence of Civil Rights years; the George Floyd years; and intervening and subsequent years of subjugation, incarceration, and systemized poverty all surface in film, as well as stories of African American political and economic progress. Casual observers might conclude that cinematic accuracy is achieved whenever those stories are told. But closer observation exposes subtexts created via the "who" in Story.

Eyeball-popping coons, mammies, Uncle Toms, bucks, simpletons and ninnies, pimps and "inherently violent" criminals, consistently derelict fathers and perpetually angry mothers and other stereotypical images educate the viewing public about what some may believe to be Black life, values, and personages.[21] Other stereotypes depicted include the invisible Black American in domestic service to White Americans: the maid or porter whose disregarded presence is regularly captured on screen taking the master's bags or setting the mistress's table, as if both the duty and disregard were completely normative. A subtler stereotype is the Black intellectual whose unapologetic dignity, achievements, or unexpected grasp of opera or literature is depicted as a kind of too-big-for-your-britches, putting-on-airs, or you-don't-know-your-place hubris,[22] outsider characters attempting to "better" themselves

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[19] HARRY M. BENSHOFF & SEAN GRIFFIN, AMERICA ON FILM: REPRESENTING RACE, CLASS, GENDER, AND SEXUALITY AT THE MOVIES 46 (Wiley-Blackwell 3d ed. 2021).

[20] "Story" refers to Hollywood narratives and film content. The term also suggests that multiple stories all tell essentially the same story. Stereotypes and narratives have been constructed to tell a story some may believe to be true, but not necessarily based on true events.

[21] BENSHOFF & GRIFFIN, *supra* note 19, at 83-84.

[22] For example, Sidney Poitier's highly accomplished character, Dr. John Prentice, in *Guess Who's Coming to Dinner* (1967, directed by Stanley Kramer) is ironically decried as not knowing his place by Tillie, the African American maid employed by the family of Prentice's White fiancée. *See* FREDERICK W. GOODING, JR., BLACK OSCARS: FROM MAMMY TO MINNY, WHAT THE ACADEMY AWARDS TELL US ABOUT AFRICAN AMERICANS 72 (Rowman & Littlefield 2020); *see also* GUESS WHO'S COMING TO DINNER (Columbia Pictures 1967).

by donning unsuitable clothes or mispronouncing words they do not appear to understand. *Those* Black people.

Film scholars have documented Hollywood's gaze, i.e., the proliferation of these stereotypes, and identified them as both prevalent and inveterate.[23] For example:

> A twenty-year study by the Graduate School of Business Administration at the University of California, Los Angeles noted that in 1946 the overwhelming majority of Blacks "were depicted in the ads as having laborer or service jobs: maid, waiter, slave, field hand, personal servant, the Aunt Jemima, or the Uncle Tom."[24]

Far from merely entertaining, such characterizations have landed with fierce social impact. *Birth of A Nation*[25] is well-known for its early image-shaping of Black people, adding to the bevy of stereotypes the Black Buck rapist enthralled with White women.[26] The film so enraged White viewers that it incited lynchings,[27] was used as a recruiting tool by the Ku Klux Klan,[28] was protested by the NAACP, and was banned in five states and nineteen cities.[29] Whether films accurately portray reality, their impact can be powerful and even deadly.[30] *Birth of a Nation* is but one of many Hollywood films that have portrayed Black people in suggestive roles.[31] Film historian Donald Bogle makes a distinction between the information conveyed about Black culture and the actors who

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[23] DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS (Bloomsbury Academic 5th ed. 2016).

[24] GOODING, JR., *supra* note 22, at 37.

[25] THE BIRTH OF A NATION (David W. Griffith Corp. 1915).

[26] BOGLE, *supra* note 23, at 10.

[27] BOGLE, *supra* note 23, at 12.

[28] HARRY M. BENSHOFF & SEAN GRIFFIN, AMERICA ON FILM: REPRESENTING RACE, CLASS, GENDER, AND SEXUALITY AT THE MOVIES 85 (Wiley-Blackwell 3d ed. 2021); BOGLE, *supra* note 23, at 12.

[29] DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS 12 (Bloomsbury Academic 5th ed. 2016).

[30] The violent influence of films represented in the aftermath of *Birth of a Nation* extends to other contexts. *See* Tilmann Betsch & Dorothee Dickenberger, *Why do aggressive movies make people aggressive? an attempt to explain short-term effects of the depiction of violence on the observer*, 19 AGGRESSIVE BEHAV., 137 (1993); *see also* Lillian R BeVier, *Controlling Communications That Teach or Demonstrate Violence: "The Movie Made Them To It,"* 32 J. L., MED. & ETHICS, 47 (2004).

[31] Space prohibits listing all such films here. Some early examples include James H. White's *The Watermelon Contest* (1896) and *Sambo and Aunt Jemima* (1897) (as discussed in BENSHOFF & GRIFFIN, *supra* note 28, at 83).

played these roles, heralding their exercise of artistic proficiency in times when acting careers for Blacks offered few alternatives.[32] The existence of limited and limiting roles bears witness to the relevance of one of the areas addressed by the AMPAS standards.[33]

B. "Who put them there?"

Singleton's ensuing query is as symbiotically significant as the threshold question concerning the onscreen "who." The answer is stratified.[34] On the one hand, it is evident that directors, writers and producers decide whether and how a story will be told, while entertainment entities and financiers greenlight stories for funding. But there is an additional layer of industry forces that have historically influenced the decision makers. The early emergence of the Hollywood Production Code (hereafter "The Code")[35] and its enforcement vehicle, the Seal of Approval (1934), promulgated a set of rules establishing boundaries for depictions, including prohibition of onscreen violence, sexual promiscuity, and interracial marriage.[36] The Code reflected both the moral and racial mood of the 30s and 40s[37] that morphed into a formula that would endure beyond the early 20th century to become systemized as the classical Hollywood narrative form.[38]

In examining the role of filmmakers, industry practices, and the Academy in the representation of African Americans in film, it is also interesting to contemplate the role of the law through depictions of the law and lawyers. Cynthia Bond has identified three emergent themes in this regard: (a) the racialized lawyer-hero, routinely depicted as a White male, e.g., typified in *A Time to Kill* and *To Kill a Mockingbird*; (b) the denial of the law's role in

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[32] BOGLE, *supra* note 29, at xxiv.

[33] *See* ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING & THE ARTS § 17:14 (Clark Boardman Callaghan 3d ed. 2024), Standards A1 and A2; *see also Representation and Inclusion Standards*, ACAD. OF MOTION PICTURE ARTS & SCIS., https://www.oscars.org/awards/representation-and-inclusion-standards (last visited Feb. 17, 2025).

[34] Stephen Galloway, *The New Power of "Yes": Who Actually Has Greenlight Authority at the Movie Studios*, HOLLYWOOD REP. (Feb. 15, 2017, 6:20 AM), https://www.hollywoodreporter.com/news/general-news/new-power-yes-who-actually-has-greenlight-authority-at-movie-studios-976236/.

[35] Also known as the "Hays Code." HARRY M. BENSHOFF & SEAN GRIFFIN, AMERICA ON FILM: REPRESENTING RACE, CLASS, GENDER, AND SEXUALITY AT THE MOVIES 37 (Wiley-Blackwell 3d ed. 2021).

[36] *Id.*

[37] FREDERICK W. GOODING, JR., BLACK OSCARS: FROM MAMMY TO MINNY, WHAT THE ACADEMY AWARDS TELL US ABOUT AFRICAN AMERICANS 34 (Rowman & Littlefield 2020).

[38] BENSHOFF & GRIFFIN, *supra* note 35, at 25, 182.

constructions of race and race-based discrimination; and (c) suppression of the story of politics.[39]

Ultimately, decisions concerning depictions of African Americans, as well as other racially marginalized groups, have upheld Hollywood narratives of White supremacy and a history of hegemony within the movie industry.[40] Frederick Gooding addressed the importance of agency:

> African Americans are in a unique, poorly leveraged position, since most of their iconography sold to the public is invented, crafted, and created by those with no direct relation to the African American experience. While there is no law forbidding this, we must consider how such imagery and messaging might be different if more African Americans had more agency in their creation.[41]

The AMPAS standards represent a step toward facilitating such agency.

III. SAYING "HELLO" TO THE OSCARS STANDARDS

In addition to practices encouraged or prohibited by The Code and the will of individual filmmakers, the early Academy was itself instrumental in systemizing racialized images. For example, *The Jazz Singer*, featuring Al Jolsen in blackface,[42] received an honorary Academy Award in 1927.[43] It takes its place in history as not only one of the first films to shift Hollywood from the silent era to pictures with sound[44] along with *Birth of a Nation*,[45] but as one of the first films to hoist African American stereotypes.[46] The Oscar stands alone as the industry's symbol of excellence and is regarded

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[39] Cynthia D. Bond, *Laws of Race/Laws of Representation: The Construction of Race and Law in Contemporary American Film,* 11 TEX. REV. ENT. & SPORTS L. 219, 243-58 (2010).

[40] BENSHOFF & GRIFFIN, *supra* note 35, at 83.

[41] GOODING, JR., *supra* note 37, at xvii-xviii.

[42] Some scholars point out that Blackface allowed White performers to appropriate and "try on" Blackness as a costume without the experience of Blackness. BRYNN W. SHIOVITZ, BEHIND THE SCREEN: TAP DANCE, RACE, AND INVISIBILITY DURING HOLLYWOOD'S GOLDEN AGE 6 (2023).

[43] FREDERICK W. GOODING, JR., BLACK OSCARS: FROM MAMMY TO MINNY, WHAT THE ACADEMY AWARDS TELL US ABOUT AFRICAN AMERICANS 31 (Rowman & Littlefield 2020).

[44] SHIOVITZ, *supra* note 42, at 37.

[45] GOODING, JR., *supra* note 43, at 33.

[46] DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS 7 (Bloomsbury Academic 5th ed. 2016); GOODING, JR., *supra* note 43, at 30.

as the highest honor a film can receive.[47] As noted by scholar Cate Chatoo in her study of #OscarsSoWhite, "To the public, the award conveys a hierarchy of stories and people worthy of cultural attention."[48] In addition to signaling excellence, receipt of the award brings attention that often translates into box office success.[49] Accordingly, when the Academy gave *The Jazz Singer* its highest award it tacitly celebrated the film's legitimacy, including the racist images[50] it contained.

It is not just the record of who the Academy *has* awarded that marks its influence. There is also the matter of whom they have *not* awarded. Gooding's research points out that "in the whole history of the ninety-one years of the Academy Awards, only one Black director has ever claimed the award for Best Picture."[51] That honor went to Steve McQueen—who is British, not African American—for *12 Years a Slave*.[52] No Black director has ever won Best Director.[53] In 2015, Cheryl Boone Isaacs—elected in 2013 as the first African American President of the Academy—expressed that she was "pleased that this year two of our honorees happen to be women and one an African-American man."[54] Isaacs's statement signaled the general lack of diversity in Oscars contention and is a reflection of the particular absence of Black women. Their lack of participation both on and off screen has been confirmed by data collected by the University of Southern California's (USC) Annenberg Inclusion Initiative. Through the research of Dr. Stacy L. Smith, Dr. Katherine Pieper and Sam Wheeler, the Initiative examines "barriers and opportunities facing women and people of

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[47] GOODING, JR., *supra* note 43, at xvi.

[48] Caty Borum Chatoo, *Oscars So White: Gender, Racial, and Ethnic Diversity and Social Issues in U.S. Documentary Films (2008–2017)*, 21 MASS COMM. & SOC'Y 368, 369 (2018).

[49] HARRY M. BENSHOFF & SEAN GRIFFIN, AMERICA ON FILM: REPRESENTING RACE, CLASS, GENDER, AND SEXUALITY AT THE MOVIES 29 (Wiley-Blackwell 3d ed. 2021). The Jazz Singer was already profitable. In fact, it was such a huge box office success that it was ineligible for a Best Picture award, because it was deemed to have a competitive advantage. FREDERICK W. GOODING, JR., BLACK OSCARS: FROM MAMMY TO MINNY, WHAT THE ACADEMY AWARDS TELL US ABOUT AFRICAN AMERICANS 31 (Rowman & Littlefield 2020).

[50] According to scholars, Blackface is a mockery of African American physiognomy that denigrates Black personhood and culture. GOODING, JR., *supra* note 49, at 33.

[51] GOODING, JR., *supra* note 49, at xvii.

[52] 12 YEARS A SLAVE (Fox Searchlight Pictures 2013).

[53] GOODING, JR., *supra* note 49, at xvii.

[54] Gregg Kilday, *Spike Lee: Getting a Black President Is Easier Than a Black Studio Head*, HOLLYWOOD REP. (Nov. 14, 2015, 7:50 PM), https://www.hollywoodreporter.com/news/general-news/spike-lee-getting-a-black-840371/.

color in the entertainment industry."[55] Reporting on Oscars awarded from 1929 to the present, they found that "of the 13,444 nominees since 1929, 6% were from underrepresented racial/ethnic groups. The ratio of White to underrepresented nominees is 16 to 1."[56] These data and other data discussed here support the focus of this article on Black women.

Given the Academy's role in shaping the industry's racist structure, the AMPAS standards purport to establish new messages of inclusion, not just concerning onscreen depictions of marginalization, but extending its reach to the off-camera power centers of the industry that determine the who, what, and why of filmed storytelling. The preamble to the four (4) standards reads, "The Academy of Motion Picture Arts and Sciences representation and inclusion standards for Oscars® eligibility in the Best Picture category are designed to encourage equitable representation on and off screen to better reflect the diverse global population."[57]

Standard A requires inclusion in onscreen representation, themes and narratives.[58] Standard B requires inclusion in creative leadership and project teams.[59] Standard C requires inclusive industry access and opportunities and Standard D encourages inclusive audience development.[60] An Oscar-seeking film must comply with two of the four standards to be deemed eligible for Best Picture Oscar consideration.[61] Each standard includes subsections that further elucidate that standard's goals. For example, Standard B1 requires:

> At least two of the following creative leadership positions and department heads—Casting Director, Cinema-tographer, Composer, Costume Designer, Director, Editor, Hairstylist, Makeup Artist, Producer, Production Designer, Set Decorator, Sound, VFX Supervisor, Writer—are from the following underrepresented groups:
>
> - Women
> - Racial or ethnic group

[55] The Initiative compiles a range of analyses including race/ethnicity, gender, age, disability, LGBTQ+ inclusion for on and behind-the-camera inclusion. USC Annenberg, *Race/Ethnicity Overall*, ANNENBERG INCLUSION INITIATIVE, https://www.inclusionlist.org/oscars/race-ethnicity (last visited Feb. 22, 2025).
[56] *Id.*
[57] *See Representation and Inclusion Standards*, ACAD. OF MOTION PICTURE ARTS & SCIS., https://www.oscars.org/awards/representation-and-inclusion-standards (last visited Feb. 17, 2025).
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *See id.*

- LGBTQ+
- People with cognitive or physical disabilities, or who are deaf or hard of hearing.[62]

The AMPAS standards do not represent the first industry foray into the waters of inclusivity. In 2015, the #OscarsSoWhite social media campaign "highlighted the lack of diversity in the top scripted Oscar categories."[63] That same year, Cheryl Boone Isaacs launched A2020—an initiative designed to "promote more diversity of age, gender, race, national origin and point-of-view, in Hollywood" over a five-year period.[64] What distinguishes the AMPAS standards from other efforts is the Academy's redemptive use of the same power it exercised throughout its history to celebrate racially problematic films to instead bring systemic equity to a historically inequitable industry.

IV. SHOW ME THE MONEY

A. The Data

Where opportunity is inequitable, unequal compensation follows. This premise is substantiated by data within the entertainment industry. Gaps in equity for Black women in cinema are not measurable solely by Oscars' representation. Since 2015, the University of California at Los Angeles (UCLA) has annually produced the *Hollywood Diversity Report* which provides statistical analyses of representation in television and film.[65] The report documents the prevalence of cinematic opportunity on and off-camera for various groups. Categories reported include racial/ethnic identity of lead talent, gender of lead talent, disability status of lead talent, writer diversity, director diversity, and other categories.[66] The 2024 report examined "109 of the top English-language, theatrical film releases in 2023"[67] to determine representation levels amongst demographic groups based on the group's representation in the

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[62] *Id.*

[63] Caty Borum Chatoo, *Oscars So White: Gender, Racial, and Ethnic Diversity and Social Issues in U.S. Documentary Films (2008–2017)*, 21 MASS COMM. & SOC'Y 368, 369 (2018).

[64] Gregg Kilday, *Spike Lee: Getting a Black President Is Easier Than a Black Studio Head*, HOLLYWOOD REP. (Nov. 14, 2015, 7:50 PM), https://www.hollywoodreporter.com/news/general-news/spike-lee-getting-a-black-840371/.

[65] ANA-CHRISTINA RAMÓN ET AL., HOLLYWOOD DIVERSITY REPORT 2024 FEATURING FILM (UCLA Entm't & Media Rsch. Initiative 2024), https://socialsciences.ucla.edu/initiatives/hollywood-diversity-report/.

[66] *Id.*

[67] ANA-CHRISTINA RAMÓN ET AL., HOLLYWOOD DIVERSITY REPORT 2024 PART 1: THEATRICAL 7 (UCLA Entm't & Media Rsch. Initiative 2024).

general population. Reporting for Black, Indigenous, and other people of color (BIPOC) was aggregated, with breakouts based on race and gender, offering a glimpse into how Black women fare. According to the report, they are often at the bottom of the ladder, barrel, or any other metaphorical position.[68] Highlights from the 2024 report:

- *Leads*. Amongst BIPOC professionals, Black, Latinx, and Indigenous artists are underrepresented for lead roles, in contrast with Asian and Middle Eastern and North African (MENA) professionals who are not underrepresented.
    - Amongst BIPOC women, Black women remain underrepresented and were outnumbered by Black men. Latinx and Asian women were not outnumbered by Latinx or Asian men, respectively.[69]
    - Out of 106 leads: 75 were White, 11 were Black. 20 of the 74 White leads were women. 8 of the Black leads were men, 3 were Black women.[70]
- *Cast diversity* (i.e., the number of non-lead cast members). Out of 806 cast members, 38 were Black women, versus 67 Black men, 305 White men, and 171 White women.[71]
- *Directors*. Of 109 films, 2 were directed by Black women, 8 by Black men, 11 by White women, and 73 by White men.[72]
- *Writers*. Out of 108 films, 5 had Black women writers, 4 Black men, 18 White women, and 66 White men.[73]

These data indicate that there are substantial gaps in opportunity for Black women. Accordingly, in this section I discuss the extent to which Black women have utilized litigation to address those gaps, how effective litigation has been in helping to balance inequities, and whether a particular AMPAS standard is related to the cause of action/relief sought.

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[68] *See generally id.*
[69] *Id.* at 12.
[70] *Id.* at 16.
[71] *Id.* at 21.
[72] *Id.* at 26.
[73] ANA-CHRISTINA RAMÓN ET AL., HOLLYWOOD DIVERSITY REPORT 2024 PART 1: THEATRICAL 31 (UCLA Entm't & Media Rsch. Initiative 2024).

B. The Cases

An exhaustive review of all cases filed by Black women professionals in cinema is outside the scope of this article. Therefore, this review focused on available cases covering the years 1986 to 2023. Cases selected were those filed by Black women working across the cinematic spectrum during those years, since filmed storytelling has expanded its boundaries to include streaming platforms and other non-Hollywood studios that produce Oscar-eligible films.[74] For example, "67 individual Netflix original movies, shorts, and documentaries have been nominated at the Oscars since 2014."[75] As modern cinematic universes intersect, entertainment professionals likewise traverse both sides of the intersection. For example, Mo'Nique Hicks, who sued Netflix for pay discrimination in 2019 (see Table 1), is an Academy Award-winning actor and comedian whose career occupies both big and small screens.

According to the available cases, litigation as an equity-seeking strategy was rarely undertaken by Black women in cinema between 1986 and 2023. Out of hundreds of citations reviewed, six cases were identified.[76] Table 1 displays issues alleged, cinematic content, plaintiff's role, disposition, and related AMPAS standard.

[74] However, to be clear, television programs are not eligible for Oscars awards. *See 97th Academy Awards of Merit*, ACAD. OF MOTION PICTURE ARTS & SCIS., https://www.oscars.org/sites/oscars/files/2024-04/97th_oscars_complete_rules.pdf (last visited Feb. 16, 2025).

[75] Kasey Moore, *Netflix at the Oscars: How Many Nominations and Wins Does The Streamer Have?*, WHAT'S ON NETFLIX (Mar. 3, 2025, 4:23 AM), https://www.whats-on-netflix.com/news/netflix-at-the-oscars-how-many-nominations-and-wins-does-the-streamer-have/.

[76] Over 200 citations were reviewed to identify these 6 cases.

Table 1: Litigation Initiated by African American Women in Cinema (1986-2023)[77]

Case	Issue(s) Alleged	Cinematic Content	Role	Year Decided/ Filed	Disposition	AMPAS Standard
Schuler v. Chronicle Broadcasting 793 F.2d 1010	Race discrimination: Not hired for permanent position	Television	Camera operator	1986	Aff'd for Chronicle	*Standards B2, C1, C2*
Chase-Riboud v. DreamWorks 987 F.Supp. 1222	Copyright infringement of Plaintiff's book	Film: *Amistad*	Author	1997	Plaintiff's Mot. for Prelim. Injunction denied	*Standard A, B1 – not fully applicable*
Cooper v. Stockett 251-11-134 CIV (Circuit Court of the First Judicial District of Hinds County Mississippi)	Privacy; Right of Publicity	Film: *The Help*	Private citizen	2011	Dismissed	*Not applicable*
Mauze v. CBS 2019 WL 8137641 (2019) & 340 F. Supp. 3d 186 (2018)	Race & gender discrimination: wrongful termination; Pay discrimination; Not promoted; Retaliation	Television sports	Producer	2018; 2019	Defendant's Mot. Summ. Judgment re: retaliation denied on Reconsideration.	*Standard B1*
Hicks v. Netflix 472 F.Supp. 3d 763 & 2020 WL 2463380	Race & gender discrimination: Pay equity; Retaliation	TV comedy special	Artist (Comedian)	2020	Defendant's Motion to Dismiss denied; Settled	*Not applicable*
Hicks v. Big Ticket Media 23ST-CV08063 (Superior Court of California, County of Los Angeles)	Breach of contract: Unpaid royalties	TV sitcom	Artist (Actor)	2023	Pending	*Not applicable*

In *Schuler v. Chronicle Broadcasting*,[78] the Plaintiff was employed as a part-time temporary camera operator for the television station and sued when the job she had been performing on a temporary basis for three months became available as a permanent

[77] The AMPAS Standard column designates which AMPAS standard matches the Plaintiff's claims or relief sought (e.g., pay, promotion, pay equity, opportunity, etc.), and does not assess Oscar eligibility for the cinematic content. This "match" is intended to indicate whether the standards address an issue of interest to the Plaintiff. *See Representation and Inclusion Standards*, ACAD. OF MOTION PICTURE ARTS & SCIS., https://www.oscars.org/awards/representation-and-inclusion-standards (last visited Feb. 17, 2025).

[78] 793 F.2d 1010, 1011 (9th Cir. 1986).

position but was given to a White male employee. In *Chase-Riboud v. DreamWorks*, the author of *Echo of Lions* sued the Defendant upon recognizing a number of specific similarities between the Plaintiff's book and the film *Amistad*.[79] The Plaintiff in *Cooper v. Stockett*[80] was the longtime maid and nanny for the brother of the author who wrote *The Help*. When the movie by the same name was released, Ablene Cooper identified unique similarities between her life and those of the central maid character, Aibileen, and brought right of publicity and privacy actions.[81]

Of the six cases identified, the plaintiffs in *Mauze v. CBS*[82] and *Hicks v. Netflix*[83] prevailed in pretrial motions. Both alleged gender and race-based discrimination for pay inequity. Mauze, a producer of television sports programming, filed Title VII actions for pay discrimination, retaliation, and wrongful termination upon being fired after working for CBS for 12 years. Plaintiff Hicks, better known as actor and comedian Mo'Nique, sued Netflix when she discovered that she had been offered substantially less for a comedy special than Black male and White female comedians of comparable stature who had also negotiated comedy specials. Hicks reached a settlement with Netflix.[84] Hicks' media company sued Paramount, CBS, and other co-defendants in breach of contract for misreporting and underpaying royalties in *Hicks Media v. Big Ticket Productions*.[85]

Some themes emerged: (1) The causes of action are split between intellectual property and race + gender-based discrimination; (2) Where stakes were high in the two Hollywood film cases that yielded big box office receipts (*The Help* grossed

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[79] 987 F. Supp. 1222, 1224 (C.D. Cal. 1997).

[80] Andrea Slane, *The Story of My Life: Fiction, Ethics and the Self at Law*, *in* INTELL. PROP. FOR THE 21ST CENTURY: MULTIDISCIPLINARY PERSPECTIVES ON INTELL. PROP. L. 387, 389 (B Courtney Doagoo, Mistrale Goudreau, Teresa Scassa & Madelaine Saginur eds., Toronto: Irwin L. 2014). A reconsideration was reportedly filed by the Plaintiff but was unavailable for review or disposition. *Id.*

[81] Though the Plaintiff in this case is not a cinema professional, the case warrants inclusion here, as Ms. Cooper meets the criteria for being cinema-adjacent as a Black woman with a legal interest in the industry.

[82] Mauze v. CBS Corp., No. 15-CV-4905 (RJD) (SLT), 2019 U.S. Dist. LEXIS 228561, at *1 (E.D.N.Y. Jan. 23, 2019); Mauze v. CBS Corp., 340 F. Supp. 3d 186 (E.D.N.Y. 2018).

[83] Hicks v. Netflix, Inc., 472 F. Supp. 3d 763, 767 (C.D. Cal. 2020); Hicks v. Netflix, Inc., No. CV 19-10452-AB (MAAx), 2020 U.S. Dist. LEXIS 87213 (C.D. Cal. Mar. 19, 2020).

[84] Winston Cho, *Netflix Settles With Mo'Nique Over Discrimination, Retaliation Lawsuit*, HOLLYWOOD REP. (June 15, 2022, 9:34 AM), https://www.hollywoodreporter.com/business/business-news/netflix-settles-with-monique-over-discrimination-retaliation-lawsuit-1235166070/.

[85] Hicks Media, Inc. v. Big Ticket Prods., Inc., No. 23STCV08063, 2024 Cal. Super. LEXIS 50813 (Cal. Super. Ct. Mar. 19, 2024).

$216.6 million worldwide in 2011[86] and *Amistad* grossed $44.2 million worldwide in 1997[87]), both plaintiffs were unsuccessful; and (3) Both plaintiffs bringing Title VII discrimination claims (Schuler and Mauze) were largely unsuccessful. Both courts found that neither plaintiff established their claims for discrimination, while Mauze narrowly (according to the court) established her retaliation claim.[88]

While empirical data is unavailable to explain why Black women in cinema have either *not* used the courts—or have done so sparingly—for access to justice, two statistical factors shed light on what Black women encounter when they *do* seek judicial access to justice. One factor is the statistical probability that their cases will be heard by a judiciary that lacks diversity. For example, a study by the Center for American Progress identified the following disparities:

> Eight of the 13 circuit courts—61.5 percent—have no women of color actively serving as judges. Women of color do not comprise even one-fifth of any circuit court…. Sixty percent, or 55 out of 91, of all Article III district courts have no women of color actively serving on them…. African American women make up only about 3 percent of all sitting judges and 5 percent of all active district and circuit judges.[89]

A judiciary lacking diversity can impact not only judicial outcomes, but public trust in the system,[90] including trust among Black women.

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[86] *2011 Worldwide Box Office*, BOX OFF. MOJO BY IMDBPRO, https://www.boxofficemojo.com/year/world/2011/ (last visited Feb. 16, 2025).

[87] *1997 Worldwide Box Office*, BOX OFF. MOJO BY IMDBPRO, https://www.boxofficemojo.com/year/world/1997/ (last visited Feb. 16, 2025).

[88] *See* Schuler v. Chron. Broad. Co., 793 F.2d 1010, 1011 (9th Cir. 1986); Mauze v. CBS Corp., No. 15-CV-4905 (RJD) (SLT), 2019 U.S. Dist. LEXIS 228561, at *1 (E.D.N.Y. Jan. 23, 2019); Mauze v. CBS Corp., 340 F. Supp. 3d 186, 215 (E.D.N.Y. 2018).

[89] "Although people of color comprise roughly 40 percent of the U.S. general population, they make up just 17 percent of sitting circuit court judges and 23 percent of active judges. On no circuit court do judges of color comprise more than 36 percent of the bench. The 7th Circuit has no judges of color at all. Moreover, despite comprising 12.5 percent of the U.S population, African Americans make up just 7.5 percent of all sitting circuit court judges and approximately 10 percent of all active judges. African American judges are entirely absent from two circuit courts." THE DEMOCRACY AND GOV'T REFORM TEAM, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 5 (2020), https://www.americanprogress.org/article/examining-demographic-compositions-u-s-circuit-district-courts/.

[90] *Id.*

Secondly, when Black women have invested trust in the judiciary, they have not received a beneficial return on their investment. In fact, their litigation outcomes have been abysmal. Thirty years ago, Kimberlé Crenshaw devised and defined the term "intersectionality" to refer to the unique multidimensional nature of double discrimination on the basis of both race and sex, a term originally designated for Black women.[91] Since that time, her groundbreaking scholarship has been affirmed by other scholars documenting, including through empirical research, that "failure to acknowledge and recognize intersectional discrimination claims disproportionately affects Black female plaintiffs by leaving them with no adequate remedy"[92] in the case of Title VII discrimination claims. Additionally, "plaintiffs who make intersectional claims are only half as likely to win their cases as plaintiffs who allege a single basis of discrimination."[93]

This outlook is not limited to Title VII discrimination cases. African Americans have also fared poorly in protecting their intellectual property (IP).[94] Noted IP-justice scholar K.J. Greene has been at the forefront of pulling back the curtain on the facial neutrality of the IP landscape, particularly concerning protections for African Americans. From interrogating the Hollywood business model for acquiring IP[95] to exposing gaps in right of publicity law,[96] his scholarship helps us contemplate why Ablene Cooper—who failed in her claim as the real-life maid in *The Help*—was unsuccessful. Or why Chase-Riboud was likewise unsuccessful against DreamWorks. Their experiences align with a history of exploitation of African Americans' IP.

Lest we conclude that the dearth of litigation means the absence of serious concern about the data-supported challenges of prospective plaintiffs, prominent Black women in cinema—those who might be presumed to be free of such challenges—have used

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[91] Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139, 140 (1989); Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1242-43 (1991); Kimberlé W. Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1467 (1991).

[92] Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 UNIV. PA. J. L. & SOC. CHANGE 1, 3 (2019).

[93] Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC. REV. 991, 991 (2011).

[94] K. J. Greene, *Right of Publicity, Identity, and Performance*, 28 SANTA CLARA HIGH TECH. L. J. 865, 865-66 (2012).

[95] K. J. Greene, *Idea Theft: Frivolous Copyright-Lite Claims, or Hollywood Business Model?*, 7 HASTINGS SCI. & TECH. L. J. 119, 119 (2015).

[96] Greene, *supra* note 94, at 866.

their celebrity as a platform to expose their experiences of inequity. Award-winning actress Taraji P. Henson has been particularly vocal about her pay disparity experiences, including a televised interview resulting in a tearful breakdown. [97] It's not just Henson.[98] Octavia Spencer[99] and Viola Davis who both co-starred in *The Help* have been outspoken about the limiting roles they have been offered and not offered, as well as pay inequality.[100] Viola Davis reports that even though she has been regarded as "the Black Meryl Streep" for her dramatic range and versatility and is an EGOT (Emmy, Grammy, Oscar, and Tony) winner, she has nonetheless faced continuing challenges in securing lead roles and expressed that her compensation pales in comparison to Ms. Streep's and other White peers.[101] Kerry Washington,[102] Angela Bassett, Keke Palmer, Robin Thede, Gabrielle Union, and others have also outed their adverse experiences.[103] Their voices are the faces of the USC and UCLA data, telling the story that all is neither well nor happily ever after, despite a low incidence of litigation.

C. The AMPAS Standards

An empirical analysis of the efficacy of the AMPAS standards to assess whether they achieve their stated goal of

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[97] Chris Gardner, *Taraji P. Henson in Tears While Saying "The Math Ain't Mathing" Due to Pay Disparity in Hollywood*, HOLLYWOOD REP. (Dec. 20, 2023, 2:46 PM), https://www.hollywoodreporter.com/movies/movie-news/taraji-p-henson-crying-interview-gayle-king-salary-pay-hollywood-1235767002/; Elizabeth Wagmeister, *Taraji P. Henson Reveals She Suffers From Depression and Still Faces Pay Inequality*, VARIETY (Apr. 2, 2019, 10:56 AM), https://variety.com/2019/tv/features/taraji-p-henson-depression-pay-inequality-empire-1203178582/.

[98] Conor Murray, *Here's Why Black Actors Are Rallying Behind Taraji P. Henson's Comments On Being Underpaid In Hollywood*, FORBES (Dec. 21, 2023, 12:29 PM), https://www.forbes.com/sites/conormurray/2023/12/21/heres-why-black-actors-are-rallying-behind-taraji-p-hensons-comments-on-being-underpaid-in-hollywood/.

[99] David W. Marshall, Opinion, *MARSHALL: Black Women and Pay Inequality*, WASH. INFORMER (Jan. 3, 2024), https://www.washingtoninformer.com/black-women-pay-inequality-hollywood/; Sophie Lloyd, *Taraji P. Henson Defends Oprah Over Racial Pay Disparity Claims*, NEWSWEEK (Dec. 22, 2023, 11:15 AM), https://www.newsweek.com/taraji-henson-defends-oprah-racial-pay-disparity-claims-gayle-king-black-actors-1854816.

[100] Jessica Bennett, *9 Black Actresses On Pay Inequality In Hollywood: Taraji, Mo'Nique, Viola And More*, VIBE (Dec. 22, 2023, 10:05 AM), https://www.vibe.com/lists/black-actresses-pay-inequality-hollywood/.

[101] *Id.*

[102] Chelsey Sanchez, *Kerry Washington on Why Hollywood Is "Still Centering Whiteness",* HARPER'S BAZAAR (June 24, 2020, 1:24 PM), https://www.harpersbazaar.com/celebrity/latest/a32958807/kerry-washington-hollywood-diversity-problem/.

[103] Bennett, *supra* note 100; Murray, *supra* note 98.

"encouraging equitable representation on and off screen"[104] is outside the scope of this article. Rather, I contemplate whether issues litigated by Black women in cinema in the cases identified are reflected within the standards' scope. All of the cases pre-date the 2024 effective date of the AMPAS standards. Therefore, examining the standards in relation to these cases offers a way to contemplate whether they cover equity and inclusion ground that matters to Black women and therefore renders the standards more useful and less performative.

Table 1 includes a column to crosswalk each litigated issue/cause of action to a particular AMPAS standard.[105] Overall, the scope of the standards speaks to experiences encountered by some plaintiffs, to a limited extent. For example, in *Schuler* the temporary job the Plaintiff performed before losing it[106] is an opportunity comparable to the apprenticeships and internships represented in Standards C1 and C2; the permanent job she sought is required in Standard B2. In *Mauze*, the plaintiff's job[107] is represented in Standard B1. However, the cinematic content in both cases would not likely have qualified for Oscar consideration. Concerning the two *Hicks* cases,[108] the AMPAS standards do not represent the Plaintiffs' interests since the standards do not address pay equity. (Mauze also sought pay equity.)[109] Additionally, it is unlikely that the cinematic content in those cases would have qualified for Oscar consideration.

Chase-Riboud[110] and *Cooper*[111] both fit squarely within the ambit of the standards in terms of eligible cinematic content.

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[104] *See Representation and Inclusion Standards*, ACAD. OF MOTION PICTURE ARTS & SCIS., https://www.oscars.org/awards/representation-and-inclusion-standards (last visited Feb. 17, 2025).

[105] The issue/cause of action was generalized to reflect the focus of the case, rather than iterated for every count or issue raised. *See generally* Schuler v. Chron. Broad. 793 F.2d 1010, 1011 (9th Cir. 1986); Chase-Riboud v. DreamWorks, Inc. 987 F. Supp. 1222, 1224 (C.D. Cal. 1997); Andrea Slane, *The Story of My Life: Fiction, Ethics and the Self at Law*, *in* INTELL. PROP. FOR THE 21ST CENTURY: MULTIDISCIPLINARY PERSPECTIVES ON INTELL. PROP. L. 387, 389 (B Courtney Doagoo, Mistrale Goudreau, Teresa Scassa & Madelaine Saginur eds., Toronto: Irwin L. 2014) (discussing *Cooper v. Stockett*, No. 251-11-134 CIV (Miss. Cir. Ct. 2011)); Mauze v. CBS Corp., 340 F. Supp. 3d 186, 193 (E.D.N.Y. 2018); Hicks v. Netflix 472 F. Supp 3d 763, 766 (C.D. Cal. 2020); Hicks Media, Inc. v. Big Ticket Prods., Inc., No. 23ST-CV08-63, 2024 Cal. Super. LEXIS 50813, at *1 (Cal. Super. Ct. Mar. 19, 2024).

[106] Schuler v. Chron. Broad. 793 F.2d 1010, 1011 (9th Cir. 1986).

[107] Mauze v. CBS Corp., 340 F. Supp. 3d 186 (E.D.N.Y. 2018).

[108] *See* Hicks v. Netflix, Inc., 472 F. Supp. 3d 763 (C.D. Cal. 2020); *see also* Hicks Media, Inc. v. Big Ticket Prods., Inc., No. 23ST-CV08-63, 2024 Cal. Super. LEXIS 50813, at *1 (Cal. Super. Ct. Mar. 19, 2024).

[109] *Mauze*, 340 F. Supp. at 194.

[110] *See* Chase-Riboud v. DreamWorks, Inc., 987 F. Supp. 1222, 1224 (C.D. Cal. 1997).

[111] *See* Cooper v. Stockett, No. 251-11-134 CIV (Miss. Cir. Ct. Feb. 9, 2011).

However, the applicability of the standards for these cases is relevant but not directly on point. First, with the exception of Standard A3 (which requires representation in main storyline or subject matter), the AMPAS standards focus on achieving representation through employment or hiring-type engagement.[112] We can imagine how this might work hypothetically in these cases. In *Chase-Riboud*, the plaintiff is a novel writer.[113] Standard B1 includes writers in its requirement for representation,[114] so in this sense the standard arguably orbits this Plaintiff's interests. However, DreamWorks would have had to engage the plaintiff as a writer to satisfy Standard B1. But that would not satisfy the plaintiff unless engagement led to their acquisition of her content that resembled the content in the movie. Ultimately, the standards do not address IP ownership or acquisition, which was Plaintiff's actual interest. Similarly, Plaintiff Cooper was not seeking engagement by the Defendant.[115] Her interests are arguably represented in Standard A3 (storyline centered on an underrepresented group), except that the standards do not require respect for storylines or persons represented in them,[116] as do the rights of privacy and publicity actions Cooper filed.[117]

In summary, it would be fair to say that the scope of the AMPAS standards reflects some of the experiences of Black women in cinema as undertaken through litigation. However, the standards do not adequately address those experiences.

V. THE FUTURE OF DIVERSITY, INCLUSION AND EQUITY IN ENTERTAINMENT: MAY THE FORCE BE WITH YOU

The Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard*[118] has had a marked impact on DEI initiatives in higher education and beyond. In analyzing how the decision might affect the movie industry, *The Hollywood Reporter Esq's* legal analysis concluded that "the high court's ruling is legally limited to higher education and won't directly impact most private employers" but could intimidate companies who want to forestall being sued for reverse discrimination.[119] Thus far, that prediction is

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[112] *See Representation and Inclusion Standards*, ACAD. OF MOTION PICTURE ARTS & SCIS., https://www.oscars.org/awards/representation-and-inclusion-standards (last visited Feb. 17, 2025).
[113] 987 F. Supp. at 1224.
[114] *See Representation and Inclusion Standards, supra* note 112.
[115] *Cooper*, No. 251-11-134 CIV.
[116] *See Representation and Inclusion Standards, supra* note 112.
[117] Cooper v. Stockett, No. 251-11-134 CIV (Miss. Cir. Ct. Feb. 9, 2011).
[118] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 181 (2023).
[119] Winston Cho & Scott Feinberg, *How the Supreme Court's Affirmative Action Ruling Could Impact the Academy's New Diversity Requirements*, HOLLYWOOD

proving true. In early 2024, Brian Beneker, a script coordinator for *SEAL Team*, sued CBS-Paramount citing an "illegal policy of race and sex balancing."[120] A legal analysis reported by *The Hollywood Reporter* suggested that Beneker's suit may be the tip of an imminent iceberg.[121]

In the meantime, a pivotal case in the live theatre industry has implications that could sound in the cinematic universe. In *Moore v. Hadestown*, the Court held that "*Hadestown's* creative decisions about what story to tell when it stages the Musical fall squarely within the protection of the First Amendment."[122] The creative decision in question was whether to continue to cast the Plaintiff, a Black woman, in her role or to replace her with a White actor, reportedly to avoid telling a White Savior story.[123] Even though race-conscious initiatives have received increased scrutiny in the wake of the *Students for Fair Admissions* decision, in this case, making an employment decision based on race was *permitted* as an artistic decision with First Amendment protection, effectively trumping the Equal Protection clause.[124] This decision marks another unfavorable judicial outcome for a Black woman artist; one that supported her job loss. The casting context of the *Moore*[125] decision means the case may be invoked to apply to motion picture and television casting as well. Even more specifically, the decision may apply to Black women, as it did in *Moore.*[126] If so, their struggle in cinema continues.

VI. CONCLUSION

What if the story of Black women in cinema were a movie, say, like *Hidden Figures*,[127] the film that pulled the curtain back on the role of Black women at NASA during the space race? How

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REP. (July 20, 2023, 12:39 PM), https://www.hollywoodreporter.com/business/business-news/supreme-court-affirmative-action-academys-diversity-rules-1235540531/.

[120] Brian Beneker v. CBS Studios, Inc., No. 2:24-CV-01659 (C.D. Cal. Jan. 15, 2025); *see also* Winston Cho, *CBS Sued by 'SEAL Team' Scribe Over Alleged Racial Quotas for Hiring Writers*, HOLLYWOOD REP. (Mar. 4, 2024, 1:02 PM), https://www.hollywoodreporter.com/business/business-news/cbs-studios-paramount-reverse-discrimination-lawsuit-racial-quotas-1235842493/.

[121] Winston Cho, *Netflix Settles With Mo'Nique Over Discrimination, Retaliation Lawsuit*, HOLLYWOOD REP. (June 15, 2022, 9:34 AM), https://www.hollywoodreporter.com/business/business-news/netflix-settles-with-monique-over-discrimination-retaliation-lawsuit-1235166070/.

[122] Moore v. Hadestown Broadway LLC, 722 F. Supp. 3d 229, 259 (S.D.N.Y. 2024).

[123] *Id.* at 241.

[124] *Id.* at 259.

[125] *Id.*

[126] *Id.*

[127] *See* HIDDEN FIGURES (Fox 2000 Pictures 2016).

would it end? If the story focuses on litigation as a means to equity and inclusion for Black women in cinema, the closing credits would read: minimally effective. If the story focuses on the AMPAS standards, the ending is similar. In returning to the mixed reaction they have received, are the standards superfluous? Not for Black women. They have some value. Are they too performative to be meaningful? They are meaningful in highlighting select areas of import to Black women in cinema, but do not address important issues like pay equity. Moreover, because the standards only apply to certain types of cinematic content, they do not reach the parts of the broader cinematic universe in which Black women work. Are they a good starting point for equity? Given the recency of their implementation, that remains to be seen.

To require this story to conclude with a Hollywood happy ending is best left to Hollywood. But to move toward a story that looks toward equity for a group whose disenfranchisement is supported by multiple sources of data is the domain of legal scholarship. The issues I have raised are ripe for further study, including: (1) a continuing, more extensive look at litigation undertaken by Black women in cinema; (2) an empirical study on the efficacy of the AMPAS standards + studies on access to justice for Black women in cinema; (3) a continuing look at diversity in the judiciary with proposals for addressing it.

One final movie line: "May the Force be with you."[128] The first time the infamous Jedi farewell was spoken was in the original Star Wars trilogy in *Star Wars: Episode IV — A New Hope.*[129] The Rebel Alliance was continuing its quest to take down the Death Star. Some missions were successful, some were not. Either way, the warriors sent each other off with hope, believing that transcending injustice was bolstered by verbalizing optimism. This brings to mind the buoyant words of Donald Bogle: "Often we may find it hard to fathom how past moviegoers could have accepted Hollywood's stereotyped view of Black America. But while some films and personalities are stuck in the past, others gloriously transcended it."[130] In the quest for equity, there have been tenacious, successful plaintiffs. In spite of the challenges Black women in cinema face in the courts, there will likely be a few more. Recently, The Academy reaffirmed its commitment to equity.[131] And Black women with

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[128] STAR WARS: EPISODE IV – A NEW HOPE (Lucasfilm 1977).

[129] Sydney Odman, *'Star Wars': 20 Memorable Quotes From the Iconic Films*, HOLLYWOOD REP. (June 19, 2023, 10:15 AM), https://www.hollywoodreporter.com/lists/best-star-wars-quotes/; STAR WARS: EPISODE IV – A NEW HOPE (Lucasfilm 1977).

[130] DONALD BOGLE, HOLLYWOOD BLACK: THE STARS, THE FILMS, THE FILMMAKERS xiii (2019).

[131] Winston Cho & Scott Feinberg, *How the Supreme Court's Affirmative Action Ruling Could Impact the Academy's New Diversity Requirements*, HOLLYWOOD

celebrity will likely continue to courageously call out inequity. If these are the most promising signs of hope and transcendence, challenging times for Black women in cinema lie ahead. May the force be with them, and us, all.

REP. (July 20, 2023, 12:39 PM), https://www.hollywoodreporter.com/business/business-news/supreme-court-affirmative-action-academys-diversity-rules-1235540531/.

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CROSSING BORDERS, CROSSING RIGHTS: THE LEGAL BATTLE OVER CELL PHONE SEARCHES AT THE BORDER

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INTRODUCTION

The United States of America is a desired destination for "many people from around the world . . . to escape [ ] unchecked executive investigatory discretion."[1] The Fourth Amendment is the shield these travelers seek, "safeguarding 'the privacy and security of individuals from arbitrary invasions by government officials . . .'"[2] Yet, "a curious first lesson in American liberty awaits them on their arrival."[3] The United States Customs and Border Protection ("CBP") has the boundless authority to "examine an electronic device and [ ] review and analyze information encountered at the border," whether the device belongs to a United States citizen or a noncitizen.[4] Extending further, if an agent has only reasonable suspicion, CBP is authorized to conduct what is known as a forensic search by "connect[ing] external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents."[5]

CBP has not hesitated to utilize its authority, achieving a record number in 2022, conducting more than 45,000 electronic device searches and almost 42,000 in 2023.[6] This is a significant spike from the mere 8,503 electronic devices searched in 2015.[7] Among the thousands of victims of the CBP's unbridled authority at the border was George Anibowei, a United States citizen who is an

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[1] United States v. Montoya de Hernandez, 473 U.S. 531, 560 (1985) (Brennan, J., dissenting).

[2] *Id.* at 555 (Brennan, J., dissenting) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

[3] *Id*. at 560-61 (Brennan, J., dissenting).

[4] *CBP Directive No. 3340-049A Border Search of Electronic Devices*, U.S. CUSTOMS & BORDER PROT. 4 (Jan. 4, 2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf [hereinafter 2018 *CBP Directive*].

[5] *Id.* at 5.

[6] *CBP Enforcement Statistics Fiscal Year 2023*, U.S. CUSTOMS & BORDER PROT. (Nov. 14, 2023), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy2023 [hereinafter *CBP Enforcement Statistics*] (showing that CBP conducted 45,499 border searches of electronic devices in Fiscal Year 2022, and 41,567 in Fiscal Year 2023); Sophia Cope, *Federal Judge Makes History in Holding That Border Searches of Cell Phones Require a Warrant*, ELEC. FRONTIER FOUND, (May 30, 2023) https://www.eff.org/deeplinks/2023/05/federal-judge-makes-history-holding-border-searches-cell-phones-require-warrant#:~:text=In%20Fiscal%20Year%202022%2C%20CBP,high%20of%2045%2C499%20device%20searches.

[7] Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. F. 961 (2019).

immigration attorney.[8] Anibowei was subject to no less than five warrantless searches and seizures of his cell phone at the border,[9] each lasting "two to five hours each time they were performed."[10] These searches implicated privacy concerns reaching beyond Anibowei as a result of "government agents download[ing] and ke[eping] the data on his phone, including communications protected by the attorney-client privilege."[11] Anibowei has spent roughly eight years in litigation seeking to protect privacy rights at the border. This eight-year saga consists of countless procedural mistakes by the plaintiff which obscure the heart of the issue—"[w]hether warrants [supported by probable cause] are presumptively required to search cell phones at the border."

In October 2016,[12] as passengers were disembarking the flight from Canada to Dallas-Fort Worth International Airport ("DFW Airport"), Department of Homeland Security ("DHS") officers directed the flight crew to order the passengers to return to their assigned seats as DHS singled out a passenger to be removed and taken to an interrogation room.[13] That passenger was George Anibowei, a United States citizen originally from Nigeria where he was licensed to practice law, now a member of the Texas Bar practicing as an immigration attorney[14] and maintaining a law office in Dallas, Texas.[15]

Once at the interrogation room, a United States Customs and Border Protection ("CBP") agent took, without probable cause or a warrant, Anibowei's cell phone "for examination and copying."[16] Anibowei was interrogated for approximately two hours.[17] The CBP agents never suggested that "Anibowei had broken the law or that he had any illegal material on his cell phone," nor was there any indication that the CBP agents had any indicia of suspicion to support the interrogation.[18] In fact, the CBP agents were acting pursuant to a CBP Directive "authoriz[ing] CBP officers, in the course of a border search, to examine electronic devices and review

[8] Anibowei v. Morgan, 70 F.4th 898, 900 (5th Cir. 2023).
[9] Anibowei v. Wolf, No. 3:16-CV-3495-D, 2020 WL 208818, at *2 (N.D. Tex. Jan. 14, 2020).
[10] Petition for a Writ of Certiorari, Anibowei v. Mayorkas, 144 S.Ct. 551 (2024) (No. 23-199), 2023 WL 5725456, at *9 (Aug. 30, 2023) [hereinafter *Anibowei* Petition].
[11] *Id.* at *i.
[12] Anibowei v. Sessions, No. 3:16-CV-3495-D, 2017 WL 9802735, at *1 (N.D. Tex. Dec. 15, 2017).
[13] Anibowei v. Barr, No. 3:16-CV-3495-D, 2019 WL 623090, at *1 (N.D. Tex. Feb. 14, 2019).
[14] Anibowei v. Morgan, 70 F.4th 898, 900 (5th Cir. 2023).
[15] *Barr*, 2019 WL 623090 at *1.
[16] *Id.* (internal quotation marks and citation omitted).
[17] *Id.*
[18] *Id.*

and analyze the information encountered at the border '*with or without individualized suspicion*.'"[19]

Following this incident, Anibowei filed a suit in December 2016 as a *pro se* plaintiff[20] against various federal defendants "in their official capacities only."[21] Subsequent to filing, CBP agents detained and questioned Anibowei again for approximately three hours upon returning from Nigeria in February 2017.[22] During this interrogation, Anibowei's cell phone was not forensically searched; rather, the agents only performed a manual search,[23] searching through his text messages and emails.[24] Anibowei thus filed an amended complaint to include the incidents from February 2017 claiming the CBP agents violated his Fourth Amendment rights.[25]

Anibowei sought "declaratory judgment that the relevant acts were unconstitutional; an injunction ordering defendants to return or destroy all information they copied from his cell phone; and an injunction directing defendants to disclose whether Anibowei's data was shared with any other entities or individuals, and, if so, in what form and with whom."[26] The defendants moved to dismiss Anibowei's complaint[27] and, ultimately, were successful because Anibowei failed to overcome the defendants' sovereign immunity by suing them in their official capacity rather than in their personal capacity, thus lacking allegations that the defendants "personally violated his constitutional rights."[28] Nonetheless, the district court granted Anibowei leave to replead his claim.[29]

Anibowei took advantage of his second chance and, this time through counsel,[30] sued again, alleging that the DHS officers' searches and seizures of Anibowei's cell phone at DFW Airport

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[19] Anibowei v. Wolf, No. 3:16-CV-3495-D, 2020 WL 208818, at *1 (N.D. Tex. Jan. 14, 2020) (emphasis added) (citing *CBP Directive No. 3340-049 Border Searches of Electronic Devices Containing Information*, U.S. CUSTOMS & BORDER PROT. 3 (Aug. 20, 2009), https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf).

[20] Anibowei v. Barr, No. 3:16-CV-3495-D, 2019 WL 623090, at *1 n.1 (N.D. Tex. Feb. 14, 2019).

[21] Anibowei v. Sessions, No. 3:16-CV-3495-D, 2017 WL 9802735, at *1 (N.D. Tex. Dec. 15, 2017).

[22] *Id.*

[23] *Id.*

[24] *Sessions*, 2017 WL 9802735, at *2.

[25] *Id.* at *1. Anibowei also claimed violations of the First Amendment and of the Administrative Procedures Act; however, only his Fourth Amendment claim is relevant for this Note.

[26] Anibowei v. Barr, No. 3:16-CV-3495-D, 2019 WL 623090, at *2 (N.D. Tex. Feb. 14, 2019).

[27] Anibowei v. Sessions, No. 3:16-CV-3495-D, 2017 WL 9802735, at *1 (N.D. Tex. Dec. 15, 2017).

[28] *Barr*, 2019 WL 623090, at *7.

[29] *Id.*

[30] Anibowei v. Morgan, 70 F.4th 898, 901 (5th Cir. 2023).

violated the Fourth Amendment and that the United States Immigration and Customs Enforcement ("ICE") directive and two CBP directives are unconstitutional under the Fourth Amendment as "they authorize such searches and seizures without probable cause and a search warrant."[31] Since the initial search of Anibowei's cell phone in October 2016, his cell phone "ha[d] been searched without a warrant at least four more times."[32] However, Anibowei created a "procedural imbalance" with his second chance by moving for partial summary judgment, or, alternatively, for a preliminary injunction, before the defendants were even able to respond to his complaint.[33] The district court denied Anibowei's motion for partial summary judgment because there is no Supreme Court or Fifth Circuit authority "impos[ing probable cause] requirements in the context of border searches."[34] The district court denied Anibowei's request for a preliminary injunction because the evidentiary record "consist[ed] only of Anibowei's second amended complaint," providing insufficient support to meet the essential elements required to warrant such relief.[35]

After the district court's denial of Anibowei's motion, the government filed its answer to Anibowei's complaint, which was followed by Anibowei's appeal.[36] Anibowei argued the district court erred in denying his request for a preliminary injunction because "he [was] suffering irreparable injury because his private information and his confidential attorney-client communications" were "in the government's possession as the result of an unconstitutional search and seizure."[37] Additionally, Anibowei argued he would face "irreparable injury each time he travels internationally by being subject to warrantless searches of his cell phone."[38] The Fifth Circuit rejected both of Anibowei's arguments, ultimately affirming the district court's judgment,[39] finding that his conclusory allegations failed to establish irreparable injury through the retention of his private information.[40] Moreover, the Fifth Circuit commented that Anibowei's "conten[tion] that his rights w[ould] likely be violated in the future" relied on his assertion that warrantless border searches

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[31] Anibowei v. Wolf, No. 3:16-CV-3495-D, 2020 WL 208818, at *1 (N.D. Tex. Jan. 14, 2020).
[32] *Id.* at *2.
[33] *Id.* at *1, *3; *Id.* at *4 ("In a typical case[,] . . . a plaintiff like Anibowei would pursue development of the record (through his own evidence and/or discovery from defendants), move for a preliminary injunction, and perhaps later seek partial summary judgment on a more developed record.").
[34] *Id.* at *3.
[35] *Id.*
[36] Anibowei v. Morgan, 70 F.4th 898, 902 (5th Cir. 2023).
[37] *Id.* at 902.
[38] *Id.* at 902-03.
[39] *Id.* at 905.
[40] *Id.* at 903-04.

of cell phones are unconstitutional and, even assuming that such assertion is true, the Fifth Circuit declared that Anibowei lacked "additional evidence to establish that he w[ould] be stopped by border agents in the future and that the agents w[ould] search his cell phone without a warrant."[41]

Even though Anibowei repeatedly encountered defeat throughout these proceedings, he petitioned for writ of certiorari on August 30, 2023.[42] On January 8, 2024, the Supreme Court of the United States denied Anibowei's petition for writ of certiorari without opinion.[43] There are a multitude of reasons the Supreme Court could have denied certiorari. Admittedly, reviewing a case pervaded with procedural anomalies such as this is not the ideal background to be deciding such an important constitutional issue.[44] Nevertheless, one thing is clear—this issue will return.[45]

The discussion of Fourth Amendment jurisprudence in this note will explain why the United States Circuit Courts of Appeals which have addressed the issue of searches of electronic devices at the border absent probable cause and a warrant decided the cases incorrectly. Through analyzation of recent precedent of the Supreme Court of the United States addressing warrantless searches of cell phones, this note will justify why the Court should accept certiorari the next time this issue comes before it and subsequently increase Fourth Amendment protection provided to individuals and their electronic devices, particularly their cell phones, at the border.

Section I will provide an overview of the basic Fourth Amendment jurisprudence and how it has evolved over time. Section II highlights common exceptions to the Fourth Amendment's warrant requirement, briefly touching upon the dominance exceptions possess. Section III will then provide enough history to create a foundation of knowledge explaining the origin of border security and how it has governed the border search exception's development in Fourth Amendment jurisprudence.

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[41] *Id.* at 904-05 (footnote omitted) (brackets in original) (denying to exercise pendent appellate jurisdiction over the district court's denial of partial summary judgment since the Fifth Circuit "does not have [such] jurisdiction over a denial of summary judgment merely '[b]ecause the summary judgment ruling, like the preliminary injunction test for success on the merits, turns on the [same legal issue].'").

[42] *See generally Anibowei* Petition.

[43] Anibowei v. Mayorkas, 144 S.Ct. 551 (2024).

[44] *See* Anibowei v. Barr, No. 3:16-CV-3495-D, 2019 WL 623090, at *7 (N.D. Tex. Feb. 14, 2019) (citations omitted) ("Before deciding this weighty question [as to whether the Constitution prohibits the government from conducting suspicionless searches of individuals' electronic devices at the border], the court seeks certainty concerning its own jurisdiction.").

[45] *See CBP Enforcement Statistics* (showing that CBP conducted 45,499 border searches of electronic devices in Fiscal Year 2022, and 41,567 in Fiscal Year 2023).

Subsequently, Section IV will delve into the seminal Supreme Court cases—*Riley v. California*[46] and *Carpenter v. United States*[47]—the logic therein supporting the proposition that warrants are required to conduct border searches of electronic devices. Section V will summarize the Federal Circuit Courts of Appeals' caselaw which has addressed the issue of border searches of electronic devices. Finally, Section VI will apply the Supreme Court's reasoning from *Riley* and *Carpenter*, justifying why suspicionless and warrantless border searches of electronic devices at the border violate the Fourth Amendment, and why the Fourth Amendment requires probable cause to conduct such searches at the border.

I. GUARDIANS OF LIBERTY: UNRAVELING THE ESSENCE OF THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution applies to all persons in the United States; that is,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[48]

Despite its language, to whom or what the Fourth Amendment applied was unclear as criminal law developed.[49] In the beginning, the "Fourth Amendment was understood to embody a particular concern for government trespass upon" real or personal property.[50] Uncertainty arose as to whether the Fourth Amendment only protected property, but the Supreme Court clarified the confusion in *Katz v. United States*, reassuring that "the Fourth Amendment protects people, not places."[51] To be sure, "*Katz* d[oes] not repudiate th[e] understanding" that the Fourth Amendment has a "close connection to property" and, as such, "*added to*, not *substituted for*, the common-law trespassory test."[52] Accordingly, the Fourth Amendment protects both people and property.[53]

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[46] 573 U.S. 373 (2014).
[47] 585 U.S. 296 (2018).
[48] U.S. Const. amend. IV.
[49] *See generally* Katz v. United States, 389 U.S. 347 (1967).
[50] United States v. Jones, 565 U.S. 400, 406 (2012).
[51] *Katz*, 389 U.S. at 351.
[52] *Jones*, 565 U.S. at 405, 406-07, 409.
[53] *Id.* at 407.

When a government officer, whether federal or state, conducts a search "without prior approval by a judge or magistrate," the search is "per se unreasonable under the Fourth Amendment."[54] In its majority opinion, the Supreme Court declared the foundational rule in *Katz*;[55] however, uncertainty arose as to what constitutes a "search or seizure" under the Fourth Amendment. Fortunately, Justice Harlan provided a workable test in his concurrence[56] that the Supreme Court uses to determine whether a search is conducted under the Fourth Amendment, thus requiring a warrant supported by probable cause.[57] Accordingly, when an individual has a subjective expectation of privacy in a person, place, or effect, and said "expectation [is] one that society is prepared to recognize as 'reasonable,'" a warrantless search of such a person, place, or effect would be a violation of the Fourth Amendment.[58]

Even with Justice Harlan's insight as to what conduct constitutes a search, the public, law enforcement, and the courts lacked precise clarity as to what constituted a seizure under the Fourth Amendment.[59] Seizure is evident when an officer physically restrains an individual but it is not as apparent when there is no physical restraint.[60] In light of such struggles, the Supreme Court declared a person "'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."[61] Of course, not all interactions between law enforcement and individuals constitute a seizure, only those interactions in which law enforcement objectively "restrained the liberty of a citizen."[62] Therefore, reasonableness is the test for both searches and seizures which "is objective and presupposes an *innocent* person."[63]

A reasonable search or seizure is conducted pursuant to a warrant "issue[d] . . . upon probable cause . . . particularly describing" under oath who or what is to be searched or seized.[64] Probable cause is established when the totality of the circumstances provides "a fair probability that contraband or evidence of a crime will be found."[65]

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[54] *Katz*, 389 U.S. at 357.
[55] Katz v. United States, 389 U.S. 347, 357 (1967).
[56] *Id.* at 361 (Harlan, J., concurring).
[57] United States v. Jones, 565 U.S. 400, 406 (2012).
[58] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
[59] *See generally* United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[60] *Id.* at 552 (citing Terry v. Ohio, 392 U.S. 1, 19 (1968)).
[61] *Id.* at 554.
[62] *Terry*, 392 U.S. at 19 n.16.
[63] United States v. Drayton, 536 U.S. 194, 202 (2002) (internal quotation marks and citation omitted).
[64] U.S. Const. amend. IV.
[65] Illinois v. Gates, 462 U.S. 213, 238 (1983).

The most offensive violation of the Fourth Amendment is an unlawful seizure of a person, i.e., an arrest not supported by probable cause, as "'[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person.'"[66] Warrants are preferred; however, an officer may, without violating the Fourth Amendment, conduct a warrantless arrest when the officer witnesses an individual commit a crime and the arrest is supported by probable cause.[67] Such an arrest is constitutional regardless of the severity of the crime[68] so long as "an objectively reasonable police officer" would believe there to be probable cause based on the totality of the circumstances preceding the arrest.[69] Dependence on totality of the circumstances highlights the ambiguous and imprecise nature of the probable-cause standard.[70] At its core, however, "probable cause is a reasonable ground for belief of guilt."[71] And since reasonableness is the test, the subjective intent of the officer is generally irrelevant.[72]

Although probable cause is the benchmark, some brief searches and seizures, respectively termed "frisks" and "stops," are constitutional due to law enforcement's necessity to protect themselves and the public from violence when the circumstances *in toto* do not amount to probable cause.[73] As such, an officer may briefly stop and detain an individual when "specific and articulable facts which, taken together with reasonable inferences," amount to reasonable suspicion.[74] And an officer may only frisk an individual when "a reasonably prudent person in [said officer's] circumstances would" believe the individual to be armed and dangerous.[75] These frisks must be limited to what "is necessary for the discovery of [dangerous] weapons" as a search which is initially reasonable may nonetheless "violate the Fourth Amendment by virtue of its intolerable intensity and scope."[76]

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[66] Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251 (1891)).
[67] United States v. Watson, 423 U.S. 411, 424 (1976).
[68] Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").
[69] Maryland v. Pringle, 540 U.S. 366, 371 (2003).
[70] *Id.*
[71] Brinegar v. United States, 338 U.S. 160, 175 (1949) (internal quotation marks and citation omitted).
[72] Whren v. United States, 517 U.S. 806, 812-13 (1996); *but see Whren*, 517 U.S. at 818 ("When probable cause has existed," the Court has only considered subjective intent when "searches or seizures . . . [were] unusually harmful to an individual's privacy or even physical interests.").
[73] Terry v. Ohio, 392 U.S. 1, 24 (1968).
[74] *Id.* at 21.
[75] *Id.* at 27.
[76] *Id.* at 18, 26 (citations omitted).

These limitations on law enforcement are scant, however, if evidence obtained in violation of an individual's Fourth Amendment right to be free from unreasonable search and seizure is nonetheless admissible in criminal proceedings. For that reason, evidence obtained in violation of the Fourth Amendment is "fruit of the poisonous tree"[77] and should thus be excluded subsequent an opponent's proper objection.[78] Through the Due Process Clause of the Fourteenth Amendment, the exclusionary rule was incorporated to the states and unlawfully obtained evidence is excludable in state criminal proceedings in the same manner and scope as in federal criminal proceedings.[79] The exclusionary rule provides criminal defendants with the power to potentially eliminate any condemning evidence and ultimately have the case dismissed because of law enforcement's unlawful conduct.

II. BENDING THE BARS: THE EROSION OF FOURTH AMENDMENT PROTECTIONS THROUGH EXCEPTIONS

Seemingly, the exclusionary rule provides assurance against *law* enforcement's *unlawful* searches and seizures and, even if a government officer performs such unlawful conduct, evidence obtained therefrom is inadmissible—not so.[80] The Supreme Court has declared that "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions" which do not fall victim to the exclusionary rule.[81] Throughout the years, the Court has repeatedly created exceptions to the exclusionary rule, "tipp[ing] the scales further, reducing the significance of individual interests" in privacy and rights against unreasonable search and seizures.[82] Perhaps the Supreme Court feels it has greater discretion to create exceptions to the exclusionary rule since it is only a "judicially created remedy"

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[77] Nardone v. United States, 308 U.S. 338, 341 (1939).
[78] Weeks v. United States, 232 U.S. 383, 398 (1914).
[79] Mapp v. Ohio, 367 U.S. 643, 660 (1961) ("Because [the Fourth Amendment] is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause [of the Fourteenth Amendment], we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.").
[80] *See* David E.B. Smith, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 CHI.-KENT L. REV. 505, 526 (1993).
[81] Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (citing Flippo v. West Virginia, 528 U.S. 11, 13 (1999) (per curiam); *see also* Katz v. United States, 389 U.S. 347, 357 (1967).
[82] Smith, *supra* note 80, at 526.

not grounded in the Constitution.[83] Regardless, exceptions are now the norm,[84] and warrants are the anomaly.[85]

Since early on in the development of Fourth Amendment jurisprudence and the application of the exclusionary rule therein, the Court has maintained that "a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few *specifically established* and *well-delineated* exceptions.'"[86] As the word itself suggests, exceptions to the warrant requirement must only be implemented in "exceptional circumstances."[87] And because the Fourth Amendment "marks the right of privacy as one of the unique values of our civilization," the reasons to invade privacy must be compelling and courts "cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily."[88]

Notwithstanding the obligation of the Court to protect individuals' privacy, it has invented categories of exceptions which aid law enforcement in circumventing the Fourth Amendment.[89] For example, law enforcement is authorized, *inter alia*, to conduct warrantless searches incident to arrest,[90] to conduct warrantless searches of an automobile if the officer possesses probable cause that there is "contraband or illegal merchandise" in the automobile,[91] to enter private property without a warrant "to prevent the imminent destruction of evidence,"[92] "or to engage in 'hot pursuit' of a fleeing suspect."[93] Additionally, emergency circumstances "mak[ing] the needs of law enforcement so compelling" may authorize a warrantless search of an individual's home or body.[94] Further, and most pertinent to this note, customs officers and those similarly

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[83] United States v. Calandra, 414 U.S. 338, 348 (1974).
[84] *See* Riley v. California, 573 U.S. 373, 382 (2014) ("[T]he label 'exception' is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant.").
[85] *See* Smith, *supra* note 80, at 515.
[86] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (citations omitted) (ellipses in original) (emphasis added).
[87] Johnson v. United States, 333 U.S. 10, 14-15 (1948).
[88] McDonald v. United States, 335 U.S. 451, 453-55 (1948).
[89] *See* David E.B. Smith, *Clean Sweep or Witch Hunt?: Constitutional Issues in Chicago's Public Housing Sweeps*, 69 CHI.-KENT L. REV. 505, 526 (1993).
[90] Chimel v. California, 395 U.S. 752, 762-63 (1969). The search incident to arrest exception will be discussed in further detail in Section IV, as the justification for such exception is critical to the Supreme Court's ruling in Riley v. California, 573 U.S. 373 (2014).
[91] Carroll v. United States, 267 U.S. 132, 154 (1925).
[92] Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (citing Ker v. California, 374 U.S. 23, 40 (1963)).
[93] *Id.* (citing United States v. Santana, 427 U.S. 38, 42, 43 (1976)) (some internal quotation marks omitted).
[94] *Id.* (citing Mincey v. Arizona, 437 U.S. 385, 393-94 (1978)) (internal quotation marks omitted).

situated may conduct warrantless and suspicionless border searches when an individual is "crossing an international boundary."[95]

Noticeably, this nonexclusive list emphasizes the prevalence of exceptions to the warrant requirement. Nonetheless, all the exceptions share the commonality of generally being limited to the purpose they are intended to serve.[96] For instance, the automobile exception rests on the fact that the lapse in time between applying for and securing a search warrant will allow the suspect to use the mobility of the automobile to his advantage and hide or destroy the contraband therein.[97] However, the Court limited the automobile exception when declaring "an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception" and thus may not trespass onto private property to circumvent the Fourth Amendment and reap the benefits of said exception.[98]

While exceptions to the warrant requirement are generally limited to the purpose they are intended to serve, the border search exception, which affects thousands yearly,[99] has exceeded its scope and purpose as technology rapidly advances. The traditional approach of the border search exception is impractical when applied in the modern era, and the exception has vastly expanded to the detriment of privacy protections and the Fourth Amendment. But before expounding upon the border search exception, the history of the border, and the United States of America's reactions to events occurring there, must be introduced.

III. BORDER SEARCHES THROUGH THE AGES: FROM COLONIAL COMMERCE TO DIGITAL DILEMMAS

A. Customs and Contraband

In the 17th Century, England believed the American Colonies could solidify England's "dominance in global shipping and trade."[100] So, in the span of approximately 15 years, Parliament passed three Navigation Acts which imposed stringent regulations on the importation and exportation of commodities desiring to

[95] United States v. Ramsey, 431 U.S. 606, 616, 618 (1977) (footnote and internal quotation marks omitted).
[96] Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion) (declaring that warrantless searches "must be limited in scope to that which is justified by the particular purposes served by the exception").
[97] Carroll v. United States, 267 U.S. 132, 153 (1925).
[98] Collins v. Virginia, 584 U.S. 586, 596 (2018) ("The automobile exception does not afford the necessary lawful right of access to search a vehicle within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage.").
[99] *See CBP Enforcement Statistics*.
[100] Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. F. 961, 972 (2019).

monopolize colonial trade.[101] England mistakenly believed "most or all colonial trade involved overseas commerce," so its statutes applicable to the colonies stopped focusing on commercial regulation and, instead, turned its attention on revenue generation.[102] Due to the focus shift, "the absence of regulation" imposed on the colonies allowed intracolonial trade to thrive.[103] The lack of regulations meant colonial commodities could reach Europe untaxed, thereby undercutting Parliament's trade goals.[104] Parliament's failure to control and profit from colonial trade further damaged its efforts as it was unable to collect tariffs or duties on goods exported to Europe from the colonies.[105] And a thriving trade system in the colonies meant less reliance on Parliament, further interfering with its goal of colonial dominance.[106]

Recognizing their miscalculation of intracolonial trade caused them to lose an abundance of revenue, Parliament passed "the Navigation Act of 1673, [which] requir[ed] that a bond be paid on enumerated items where the ship traveled between plantations;" however, England was unable to effectively enforce it.[107] While customs agents in England "could search 'any ship, house, or place soever,' in London for prohibited goods," there was no similar authority in the Colonies.[108] England was not blind to its inability to properly enforce the Navigation Act of 1673 in the Colonies, however, and, over time, its "powers to search for, and to seize, colonial contraband" expanded greatly.[109]

The expansion of customs' powers survived the American Revolution, marking the continuation of significant government authority, and the beginning of such authority to last for the years to come.[110] Customs retained the ability to board vessels in a warrantless pursuit of contraband.[111] This provision, established in the early days of independence, has maintained its prevalence and continued to shape customs enforcement procedures across the United States.

"In 1789, the same year that Congress forwarded the Bill of Rights to the states for ratification," it reaffirmed and formalized the

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[101] *Id.* at 972-73.
[102] Donohue, *supra* note 100, at 973.
[103] Donohue, *supra* note 100, at 973.
[104] Donohue, *supra* note 100, at 973.
[105] *See* Donohue, *supra* note 100, at 973.
[106] *See* Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. F. 961, 972 (2019).
[107] *Id.*
[108] Donohue, *supra* note 106, at 973-74.
[109] Donohue, *supra* note 106, at 974.
[110] Donohue, *supra* note 106, at 974-75.
[111] Donohue, *supra* note 106, at 974-75.

broad custom powers through legislative action.[112] The passage of an Act empowered customs officials with explicit authority to board any vessel where they harbored suspicion of concealed goods subject to duty, but such officials were required to be armed with a warrant to enter a home.[113] The Act authorized the customs inspectors to "'search for, seize, and secure any such goods, wares or merchandise'" subject to duties, emphasizing the new government's commitment to enforcing trade regulations and protecting its revenue interests.[114]

B. Unwanted Outsiders

Fearing history would repeat itself, Congress was quick to act in affording customs broad-ranging powers at the border.[115] About 30 years later, Congress expanded this power, making it "lawful for customs officers, not only to board and search vessels, . . . but also to stop, search, and examine" anything or anyone they suspected possessed dutiable merchandise or contraband while crossing the border.[116] If a customs officer "had *probable cause* to believe [dutiable merchandise or contraband] had been so unlawfully brought into the" United States, the officer was authorized to seize the individuals, vehicle, and the merchandise or contraband.[117] While much attention today is given to the entry of noncitizens to the United States, whether lawful or not, this did not arise as a grave concern to the federal government until the late 19th Century.[118] Responding to the cries, Congress fed into the public pressure which, in its final form, made it "unlawful for an[y]" Chinese laborers not in the United States "before the passage of th[e] act[] to return to or remain [sic] the United States," regardless of whether they were lawfully authorized to return under the prior version of the Chinese Exclusion Act.[119] Thus came the plenary power doctrine.[120]

The Court declared that it cannot determine "whether our government is justified in disregarding its engagement with another nation."[121] In fact, Congress possessing the power to exclude noncitizens is "not open to controversy" because "[i]f it could not exclude aliens it would be to that extent subject to the control of

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[112] Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. F. 961, 975 (2019).
[113] *Id.*
[114] Donohue, *supra* note 112, at 975 (footnote omitted).
[115] *See* Donohue, *supra* note 112, at 975.
[116] Carroll v. United States, 267 U.S. 132, 152 (1925).
[117] *Id.* (emphasis added).
[118] Ping v. United States, 130 U.S. 581, 595-96 (1888).
[119] *Id.* at 599 (citation and internal quotation marks omitted).
[120] *See id.* at 604.
[121] *Id.* at 602.

another power."[122] Congress' "jurisdiction of the [United States]" must be "exclusive and absolute" and "[a]ll exceptions" therein "must be traced up to the consent of the nation itself."[123] Accordingly, the Supreme Court stated that Congress' determination that "the presence of foreigners of a different race in this country" was "dangerous to its peace and security," even absent imminent or actual war, was not to be questioned.[124]

Despite the abhorrent racial foundations of the above decision, the general power of the government to control the lawful entry of individuals into the United States recognized by the Court in *Ping v. United States* remains in effect today. In totality, therefore, the historical evolution of customs power and border security reveals the current fundamental purposes of these institutions: to effectively sift contraband and ensure the lawful entry of individuals into the United States of America.[125] Today, the measures implemented at the border are an important component of safeguarding national interests, upholding trade regulations, and maintaining national security.

Nonetheless, history is also a reminder that, while these institutions play critical roles in the United States, they are not immune to limitations and scrutiny.[126] The constitutional framework seeks to ensure that "what is needed for the promotion of legitimate governmental interests"[127] does not unduly encroach upon personal rights and liberties.[128] Even the plenary power doctrine, which grants sweeping authority to the government in immigration and border control matters, is subject to constraints imposed by the United States Constitution.[129]

C. The Border Search Exception

The Supreme Court has generally remained faithful to the "longstanding recognition" and history that, "[b]order searches, [ ] from before the adoption of the Fourth Amendment, [are]

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[122] *Id.* at 603-04.
[123] *Id.* at 604 (citation and internal quotation marks omitted).
[124] Ping v. United States, 130 U.S. 581, 606 (1888).
[125] United States v. Ramsey, 431 U.S. 606, 618 (1977).
[126] *Ping,* 130 U.S. at 604.
[127] Wyoming v. Houghton, 526 U.S. 295, 300 (1999).
[128] *See* Riley v. California, 573 U.S. 373, 385 (2014) (noting that determining the need for an exception to the warrant requirement without "guidance from the founding era" necessitates balancing the governmental interests against those of the individual).
[129] *Ping*, 130 U.S. at 604 (noting that public policy concerns may limit Congress' plenary authority); *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (emphasis added) (marking the first time the Supreme Court has required suspicion for a search at the border, holding that it is not a violation of the Fourth Amendment to detain a traveler "beyond the scope of a routine customs search and inspection" if the agents "*reasonably suspect* that the traveler is smuggling contraband in her alimentary canal").

considered to be 'reasonable' by the single fact that the person or item in question had entered into [the United States] from outside."[130] Since the birth of the nation, there has existed a "distinction between searches within this country, requiring probable cause, and border searches . . . ."[131] This distinction remains significant today because "[t]he Government's interest in *preventing the entry* of *unwanted persons and effects* is at its zenith at the international border."[132] As such, no warrant, nor any standard of suspicion, is required for routine searches at the border.[133]

Nonetheless, the Supreme Court does not simply write off all border searches; the Court executes its obligation of reviewing the conflict before it to determine whether a search is reasonable, as "the Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable."[134] At the border, however, "the Fourth Amendment balance of interests leans heavily to the Government" because "customs [and immigration] officials . . . are charged . . . with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives."[135]

This imbalance of interests at the border is extreme. It has empowered the government to "remove, disassemble[], and reassemble [ ] gas tank[s]" at a secondary inspection station, requiring no level of suspicion to support such conduct.[136] The Supreme Court's logic being that an individual's "dignity and privacy interests . . . simply do not carry over to vehicles."[137]

The government authority inherent at the border also extends some distance within the country, allowing for reasonably located fixed checkpoints to stop vehicles and question whether occupants therein are lawfully within the country "in the absence of any individualized suspicion."[138] Such checkpoints are constitutional because they "involve less discretionary enforcement activity," the locations are "not chosen by officers in the field[] but by officials responsible for making overall decisions," and the potential for abuse is diminished "since field officers may stop only those cars passing the checkpoint . . . ."[139]

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[130] *Ramsey*, 431 U.S. at 619.
[131] United States v. Ramsey, 431 U.S. 606, 618 (1977) (citing Carroll v. United States, 267 U.S. 132, 153-54 (1925)).
[132] United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (emphasis added).
[133] *Montoya de Hernandez*, 473 U.S. at 537 (citation omitted).
[134] *Carrol*, 267 U.S. at 147.
[135] United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985).
[136] *Flores-Montano*, 541 U.S. at 155.
[137] *Id.* at 152.
[138] United States v. Martinez-Fuerte, 428 U.S. 543, 545, 562 (1976).
[139] *Id.* at 559; *but see* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) ("Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with

Indeed, the government authority is significant and far-reaching at the border, yet not significant enough to fully overcome the Fourth Amendment when applied to a "situation[] involving alimentary canal smuggling at the border."[140] The Supreme Court narrowly held in *United States v. Montoya de Hernandez* that if the totality of the circumstances lead customs agents to "reasonably suspect that [a] traveler is smuggling contraband in her alimentary canal," then a detention "beyond the scope of a routine customs search and inspection" is constitutional under the Fourth Amendment.[141] The Court found the reasonable suspicion standard was appropriate for such a situation because there are no "external signs" that could lead to "probable cause to arrest or search, yet the governmental interests in stopping smuggling at the border are high indeed."[142]

Although the Supreme Court has addressed various issues at the border, it has yet to confront a case involving the complex realm of technology, leading the circuit courts to handle the issue, which subsequently led to varying enforcement procedures and divergent treatment of travelers depending on the port of entry to the United States.[143] The Court has mentioned the reasonableness of suspicionless routine border searches in cases before *Montoya de Hernandez*,[144] but its significance mattered little until it held an alimentary canal search to require reasonable suspicion due to it going "beyond the scope of a *routine* customs search."[145] Thereafter, circuit courts took great efforts to distinguish routine searches from nonroutine searches.[146]

Now, with little guidance as to whether there may ever be a scenario requiring a higher standard than reasonable suspicion for a border search, the circuit courts are split as to how the border search

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rational inferences from those faces, that reasonably warrant suspicion that the vehicles contain aliens who may illegally be in the country.").

[140] *Montoya de Hernandez*, 473 U.S. at 541.

[141] *Id.*; *but see Montoya de Hernadez*, 473 U.S. at 541 n.4 ("It is also important to note what we do *not* hold. Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches. Both parties would have us decide the issue of whether aliens possess lesser Fourth Amendment rights at the border; that question was not raised in either court below and we do not consider it today.").

[142] *Id.*

[143] *Anibowei* Petition, at *13.

[144] *See* United States v. Ramsey, 431 U.S. 606, 619 (1977) (emphasis added) (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973)) ("[I]t [is] 'without doubt' that the power to exclude aliens 'can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders.'").

[145] United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

[146] *See* United States v. Alfaro-Moncada, 607 F.3d 720, 729 (11th Cir. 2010) (requiring reasonable suspicion for "a strip search or an x-ray examination").

exception to the Fourth Amendment warrant requirement applies to cell phones.[147] While the Supreme Court has addressed how cell phones impact the search incident to arrest exception in *Riley v. California* and the substantial privacy concerns associated with obtaining location information stored by cell phones in *Carpenter v. United States*, it has done little to influence the First, Fifth, Eighth, Tenth, and Eleventh Circuits in how the border search exception applies to cell phones.[148] Contrarily, the Fourth and Ninth Circuits have attached meaning to the intrusive nature of cell phone searches, increasing Fourth Amendment protection for cell phone searches at the border.[149] Still, there is much left unknown in this area of Fourth Amendment jurisprudence which can only be clarified through a Supreme Court ruling.

IV. PROTECTING PRIVACY IN THE DIGITAL AGE: SUPREME COURT'S STANCE ON CELL PHONE SEARCHES

Prior to dissecting the approaches taken by the circuit courts to deal with this unique area of law, an understanding of the Supreme Court's emphasis placed on protecting the information stored on cell phones from an overreaching government is required.

A. *Riley v. California*: Cell Phone Searches Incident to Arrest

As mentioned, an officer can forego the Fourth Amendment's warrant requirement if a search is conducted incident to arrest.[150] Conceivably, this exception to the warrant requirement is frequently utilized.[151] And its utility is for good reason because, absent a rule, officers performing these arrests are subject to imminent danger which may be concealed on the arrestee's person.[152] As such, the Supreme Court has consistently held that the Fourth Amendment authorizes officers to search an individual recently arrested, and the area within that person's reach, to remove any threat of imminent danger and to "prevent [the] concealment or

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[147] *Anibowei* Petition, at *3 (noting the varying opinions among the First, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuit).
[148] *See infra*, V(i)(a)-(e).
[149] *See infra*, V(ii)(a)-(b).
[150] Chimel v. California, 395 U.S. 752, 762-63 (1969).
[151] Riley v. California, 573 U.S. 373, 382 (2014) (citation omitted); *see also* Veera Korhonen, *Number of arrests for all offenses in the United States from 1990 to 2022*, STATISTA (Oct. 20, 2023), https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990/ (stating that, in 2022 alone, "[t]here were over 7.36 million arrests for all offenses").
[152] Preston v. United States, 376 U.S. 364, 367 (1964); *see id.* (citing Agnello v. United States, 269 U.S. 20, 31 (1927)) ("But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search mate at another place, without a warrant, is simply not incident to arrest.").

destruction" of "any evidence on the arrestee's person."[153] The exception applies regardless of the severity of the offense[154] and even if "the arresting officer ha[s] no specific concern that [the arrestee] might be armed."[155] However, the exception is limited by precluding "routine[] search[es] [of] any room other than that in which an arrest occurs" and declared "searching through all the desk drawers or other closed or concealed areas in that room itself" is not reasonably justified under the search incident to arrest exception if a person who poses a threat is not in, or could not be in, such concealed areas.[156]

While the foundation of the search incident to arrest exception did not cause much controversy, "its scope has been debated nearly as long [as it has been recognized]."[157] Its scope was again brought into question when the pervasiveness of cell phones[158] and the advanced technology therein presented an important question to the Supreme Court: "whether the police may, without a warrant, search digital information on a cell phone seized" pursuant to a search incident to arrest.[159]

Recognizing the novel issue before it, the Supreme Court in *Riley* noted that "phones are based on technology nearly inconceivable just a few decades ago," much less during the founding era.[160] As such, whether searching cell phones incident to arrest is a valid exception to the warrant requirement must be

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[153] *E.g., Chimel*, 395 U.S. at 763.

[154] United States v. Robinson, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

[155] *Riley*, 573 U.S. at 384 (citing *Robinson*, 414 U.S. at 236).

[156] Chimel v. California, 395 U.S. 752, 763 (1969); *see also Chimel*, 395 U.S. at 767 ("'After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant . . . .'").

[157] Riley v. California, 573 U.S. 373, 382 (2014); *Compare* New York v. Belton, 453 U.S. 454, 460 (1981) (establishing *per se* rule allowing compartments and any other containers in a vehicle to be searched when an occupant is arrested after being pulled over), *and* Thornton v. United States, 541 U.S. 615, 622 (2004) (alteration omitted) (emphasis added) (citation omitted) (extending the decision in *Belton*, holding it "allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both occupants *and recent occupants*."), *with* Arizona v. Gant, 556 U.S. 332, 343 (2009) ("[W]e reject [*Thornton*'s] reading of *Belton* and hold that" police are authorized "to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.").

[158] *Riley*, 573 U.S. at 385 ("[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.").

[159] *Id.* at 378.

[160] *Id.* at 385.

determined "'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"[161] In addition to balancing interests, the Court needed to analyze the issue in a way that would not disrupt *Robinson*'s categorical approach permitting searches of physical effects, and thus inquired "whether application of the search incident to arrest doctrine to this particular category of effects would 'untether the rule from the *justifications* underlying the . . . exception.'"[162]

Without much difficulty, the Supreme Court concluded permitting warrantless cell phone searches would "'untether the rule from the justifications underlying the [search incident to arrest] exception,'"[163] namely, to ensure officer safety and prevent the destruction of evidence.[164] First, while "unknown physical objects [on an arrestee's person] may always pose risks" to officer safety, the same cannot be said for cell phone data.[165] Even assuming *arguendo* that the data could provide officers with pertinent information warning officers of potential threats heading their way, permitting warrantless cell phone searches for this potential danger would severely extend the exception from the current purpose of precluding the "*arrestee himself* [from] grab[bing] a weapon and us[ing] it against an officer,"[166] to the purpose of precluding *any and all* "potential dangers lurking"[167] in shadows isolated from the scene of the arrest.[168] The Court thus concluded that the interest in officer safety permits officers to ensure "the physical aspect of a phone . . . will not be used as a weapon" but, once the phone proves to be no physical threat, the data on the phone is of no immediate consequence.[169]

Similarly, warrantless cell phone searches did not support the justification of securing and preserving evidence on the arrestee's person.[170] While it is true, though unusual, that cell phone data could be destroyed through remote wiping or data

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[161] *Id.* (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
[162] *Id.* at 386 (emphasis added) (quoting *Gant*, 556 U.S. at 343).
[163] Riley v. California, 573 U.S. 373, 382 (2014) (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).
[164] *E.g.,* Chimel v. California, 395 U.S. 752, 763 (1969).
[165] *Riley*, 573 U.S. at 387.
[166] *Id.* at 388.
[167] United States v. Chadwick, 433 U.S. 1, 14-15 (1977).
[168] *Riley*, 573 U.S. at 388.
[169] Riley v. California, 573 U.S. 373, 387 (2014) (noting that "determin[ing] whether there is a razor blade hidden between the phone and its case" as an example of examining a phone's physical aspects).
[170] *E.g.,* Chimel v. California, 395 U.S. 752, 763 (1969).

encryption,[171] these concerns do not arise from any affirmative action of the arrestee to whom the exception applies.[172]

After determining warrantless cell phone searches incident to arrest were not tethered to the exception's justifications, the Court continued its analysis by dissecting the extent to which such a search would impact an individual's privacy interests.[173] "Some searches" may be so intrusive as to make "the privacy-related concerns [] weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy" which allow for exceptions to the Fourth Amendment warrant requirement.[174] Simply because an "individual has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely."[175]

Taken aback by the government's contention in *Riley* that cell phone searches are "'materially indistinguishable' from searches of" wallets or purses, the Court compared such declaration to "saying a ride on horseback is materially indistinguishable from a flight to the moon" as "the term 'cell phone' itself is misleading" because cell phones are truly just miniature computers that "happen to have the capacity to be used as a telephone."[176]

The search incident to arrest exception originated during a time when the "search of a person was limited by physical realities and tended . . . to constitute only a narrow intrusion on privacy."[177] Today, however, "physical practicability" is only a fraction of what is digitally feasible, as cell phones contain "millions of pages of texts, thousands of pictures, [] hundreds of videos,"[178] and they have the capacity to "reconstruct someone's specific movements down to the minute . . . ."[179] And yet a cell phone search is not constricted to the device, as data can be stored "on remote servers rather than on the device itself [and the] users may not [even] know" the distinction,[180] ultimately containing "many sensitive records

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[171] *Riley*, 573 U.S. at 388; *see Riley*, 573 U.S. at 388-89 (citations omitted) ("Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas . . . . Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but 'unbreakable' unless police know the password.").
[172] *Id.* at 389, 390-91.
[173] *See id.* at 391-92.
[174] Maryland v. King, 569 U.S. 435, 463 (2013).
[175] Riley v. California, 573 U.S. 373, 392 (2014).
[176] *Id.* at 393.
[177] *Id.*
[178] *Id.* at 394.
[179] *Id.* at 396.
[180] *Id.* at 397.

previously found in the home" or even "private information never found in a home in *any form* . . . ."[181] While the Court notes the government *could* "develop protocols to address" concerns of overreaching the reasonable bounds of cell phone searches incident to arrest, the Court took care to remind that "the Founders did not fight a revolution to gain the right to government agency protocols."[182]

Since the government's comparison of cell phones to wallets and purses did not persuade the Court, the government attempted to persuade the Court, as a last-ditch effort, to adopt the reasoning in *Gant* and permit "a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of the arrest."[183] The Court was not fooled, however, as it observed "*Gant* generally protects against searches for evidence of past crimes" and "restricts broad searches resulting from minor crimes."[184] Yet no such limits exist with cell phones as "it is reasonable to expect that incriminating information will be found on a phone regardless on when the crime occurred" and no similar restriction based on minor crimes would exist for cell phones as just about anyone can "come up with several reasons to suppose evidence of just about any crime could be found on a cell phone."[185]

In the end, the Court concluded that warrantlessly "plac[ing] vast quantities of personal information in the hands of individuals" is simply unjustifiable and, as such, "officers must generally secure a warrant before conducting a [cell phone] search."[186] The Supreme Court was not blind to the reality of the major role cell phones play in the criminal realm, but "[p]rivacy comes at a cost."[187] The warrant requirement serves a meaningful role in government, and it is "not merely 'an inconvenience to be somehow "weighed" against the claims of police efficiency.'"[188] In fact, the evolution of technology raising these privacy concerns make "the process of obtaining a warrant itself more efficient"[189] as warrant requests and the warrants themselves can be received without an officer ever having to move.[190]

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[181] Riley v. California, 573 U.S. 373, 396-97 (2014).
[182] *Id.* at 398 (citation omitted).
[183] *Id.*
[184] *Id.* at 399.
[185] *Id.*
[186] *Id.* at 386.
[187] Riley v. California, 573 U.S. 373, 401 (2014).
[188] *Id.* (quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)).
[189] *Id.*
[190] *See* Missouri v. McNeely, 569 U.S. 141, 173 (2013) (Roberts, C.J., concurring in part and dissenting in part) ("[P]olice officers can e-mail warrant requests to judges' iPads; judges have signed such warrants and e-mailed them back to officers in less than 15 minutes."); *see also McNeely*, 569 U.S. at 154 (quoting Fed. Rule Crim. Proc. 4.1.) ("The Federal Rules of Criminal Procedure were

B. *Carpenter v. United States*: Cell-Site Location Information

The analysis of the Supreme Court's approach in *Riley*, when refusing to considerably broaden the search incident to arrest exception, demonstrated the implications of cell phone searches from a global point of view. Roughly five years later, the Supreme Court narrowed its focus on a particular aspect inherent in modern cell phones briefly mentioned in *Riley*: "the reconstruct[ion of] specific movements."[191] In 2018, the Supreme Court was tasked with determining "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements."[192]

Cell phones function "by connecting to a set of radio antennas called 'cell sites.'"[193] Even when not being used, a cell phone connects to a cell site if its signal is on.[194] Each connection creates "a time-stamped record known as cell-site location information (CSLI)" and, as technology advances, the accuracy of the CSLI advances with it.[195] In the case before the Court, pursuant to a court order securable by showing reasonable suspicion, law enforcement obtained months' worth of CSLI from the defendant's wireless carriers to aid in an investigation.[196] The government obtained "an average of 101 [location] data points per day," eventually charging him with various criminal violations.[197]

The defendant moved to suppress the CSLI, arguing "the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause."[198] The defendant's motion was denied, and the Sixth Circuit affirmed denial based on the third-party doctrine in *Smith v. Maryland*,[199] finding that the defendant "lacked a reasonable expectation of privacy in the location information collected [ ] because he had shared that information with his wireless carriers."[200]

While the Sixth Circuit believed the third-party doctrine fit the bill, the Supreme Court held such an application would be "a

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amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone . . . . As amended, the law now allows a federal magistrate judge to consider 'information communicated by telephone or other reliable electronic means.'")

[191] *Riley*, 573 U.S. at 396; Carpenter v. United States, 585 U.S. 296, 300 (2018).

[192] *Carpenter*, 585 U.S. at 300.

[193] *Id.*

[194] *Id.*

[195] *Id.* at 301.

[196] *Id.* at 302.

[197] Carpenter v. United States, 585 U.S. 296, 302 (2018).

[198] *Id.*

[199] 442 U.S. 735, 741 (1979).

[200] *Carpenter*, 585 U.S. at 303 (citation omitted).

significant extension of [the doctrine] to a distinct category of information."[201] The rationale for allowing warrantless seizures under the third-party doctrine is "that an individual has a reduced expectation of privacy in information knowingly shared with another."[202] Whether information is shared should never be the sole consideration, however; "[i]nstead, [one must] consider[] 'the nature of the particular documents sought' to determine whether 'there is a legitimate "expectation of privacy" concerning their contents.'"[203]

The Supreme Court precedent's application of the third-party doctrine centered on the limited information obtained. In *Smith*, a pen register revealed minimal information; so, not only is the information shared with a third party, but the nature of telephone call logs cannot be said to be highly confidential.[204] And in *United States v. Miller*, the documents sought "were [checks,] 'not confidential communications but negotiable instruments to be used in commercial transactions,'" and the limitation on what may be revealed through checks is apparent.[205] But CSLI "implicates [far greater] privacy concerns"[206] by "revealing not only [the user's] particular movements, but through them [the user's] familial, political, professional, religious, and sexual associations."[207] Additionally, it can hardly be said that CSLI is voluntarily shared as "carrying [a cell phone] is indispensable to participation in modern society"[208] and is compiled "without any affirmative act on the part of the user beyond" turning the cell phone on.[209]

The Court was sure to make clear that the Court in *Smith* could not have predicted there to be technology with such comprehensive information-gathering capabilities that is such a pervasive part of modern-day life.[210] When *Smith* was decided, extensive investigation and pursuit of a suspect was costly, both physically and monetarily.[211] Knowing this to be true, "society's expectation [was] that law enforcement agents and others would not–and indeed, in the main, simply could not–secretly monitor and catalogue every single movement of an individual[] . . . ."[212]

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[201] *Id.* at 314.
[202] *Id.* at 314.
[203] Carpenter v. United States, 585 U.S. 296, 314 (2018) (quoting United States v. Miller, 425 U.S. 435, 442 (1976)).
[204] *Id.* (citing Smith v. Maryland, 442 U.S. 735, 742 (1979)).
[205] *Id.* (quoting *Miller*, 425 U.S. at 442).
[206] *Id.* at 315.
[207] *Id.* at 311 (internal quotation marks omitted) (citation omitted).
[208] *Id.* at 315 (citing Riley v. California, 573 U.S. 373, 384 (2014)).
[209] Carpenter v. United States, 585 U.S. 296, 315 (2018).
[210] *Id.* at 309.
[211] *Id.* at 310.
[212] *Id.* (internal quotation marks omitted) (citation omitted).

"[T]he Court is obligated—as 'subtler and more far-reaching means of invading privacy have become available to the Government'—to ensure that the 'progress of science' does not erode Fourth Amendment protections."[213] When law enforcement conducts a search "'to discover evidence of criminal wrongdoing,'" the search must be pursuant to a warrant supported by probable cause.[214] The digital age does not give the Court free reign "to uncritically extend existing precedents."[215] As such, the Court held that obtaining CSLI to be a search under the Fourth Amendment requiring a warrant supported by probable cause.[216]

V. BORDER SEARCH EXCEPTION: DIVERGING PATHS IN JUDICIAL INTERPRETATION

The prior section illustrates that the Supreme Court has approached the realities of the modern era with a mindfulness to the history of the United States and why the Fourth Amendment was created.[217] In fact, the Court has declared that as technological advancements have "enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, th[e] Court has sought to 'assure [ ] preservation of that degree of privacy against the government that existed when the Fourth Amendment was adopted.'"[218] The Court has the important task of ensuring that individuals in the United States are not "'at the mercy of advancing technology.'"[219]

However, there have been an abundance of cases arising from border searches of electronic devices implicating the concern that people actually are "at the mercy of advancing technology,"[220]

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[213] *Id.* at 320 (alteration in original) (quoting Olmstead v. United States, 227 U.S. 438, 473-74 (1928) (Brandeis, J., dissenting)).
[214] *Id.* at 316 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995)).
[215] Carpenter v. United States, 585 U.S. 296, 318 (2018).
[216] *Id.* at 317 ("Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one–get a warrant.").
[217] Weeks v. United States, 232 U.S. 383, 390 (1914) (noting that the Fourth Amendment "took its origin in the determination of the framers of the Amendments . . . to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under the government . . . ."); *see also* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)) (emphasizing that the Fourth Amendment "was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of the 'sanctity of a man's home and the privacies of life[]' from searches under general, indiscriminate, general authority.").
[218] *Carpenter*, 585 U.S. at 305 (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).
[219] *Id.* at 305 (quoting *Kyllo*, 533 U.S. at 34).
[220] *Id.* (quoting *Kyllo*, 533 U.S. at 34).

and the Supreme Court has declined to take action.[221] And although there is mistaken belief that no circuit court requires warrants for forensic cell phone searches at the border,[222] but instead "differ[] *only* as to whether reasonable suspicion is required" for such border searches,[223] the circuit courts do not provide a unified front against the extensive searches occurring at the border, letting the individuals fall victim to advanced technology.[224]

The facts of each particular case are not pertinent to this note; rather, the focus is each circuit court's reasoning. However, it is worth mentioning that each case discussed was decided *after* the Supreme Court's decision in *Riley*. Furthermore, some of the cases discussed arrived before the circuits as a civil matter seeking injunctions on invasive electronic border searches,[225] while others arrived as criminal matters seeking suppression of evidence obtained through electronic border searches.[226] And while each circuit has added its own flavor as to what level of suspicion is required for electronic border searches and why, one thing is consistent among the circuits which have addressed the issue: They are all wrong.

A. The Ubiquitous Border Agencies

The forthcoming explanations demonstrate the varying dispositions of the circuit courts that have authorized an expansion of the border search exception to the Fourth Amendment's warrant requirement. Although similar in various ways, the nuances in the reasoning will prove important in Section VI. Some circuits rely on

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[221] *See* United States v. Cano, 141 S.Ct. 2877, 2878 (2021) (denying the United States' petition for writ of certiorari); *see also* Anibowei v. Mayorkas, 144 S.Ct. 551 (denying Anibowei's petition for writ of certiorari).

[222] *Compare* Malik v. U.S. Dep't of Homeland Sec., 78 F.4th 191, 201 (5th Cir. 2023) (stating the circuit courts only disagree as to whether forensic cell phone searches at the border require reasonable suspicion or no suspicion at all), *with* United States v. Aigbekaen, 943 F.3d 713, 721 (4th Cir. 2019) (emphasis added) ("If a [forensic] search becomes too 'attenuated' from the[ ] historical rationales [of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband], . . . the search will be unconstitutional unless *accompanied by a warrant* or justified under a different exception to the warrant requirement.").

[223] *Malik*, 78 F.4th at 201.

[224] *Anibowei* Petition, at *13 ("Individuals entering the United States face enormously disparate Fourth Amendment protections based only on their port of entry."); *see also Anibowei* Petition, at *13 ("And now that the [circuit] split has reached seven circuits, with all sides firmly set on their respective rules, the hope of the split resolving itself has vanished . . . . Definitive guidance over whether warrants are generally required to search cellphones at the U.S. border is overdue.")

[225] *See generally Malik*, 78 F.4th 191.

[226] *See generally* United States v. Xiang, 67 F.4th 895 (8th Cir. 2023).

the others to support their holding, while others stand firm in their reasoning, answering only to the highest court.

1. Imposition of a Meaningless Barrier

The First Circuit took the position that a warrant supported by probable cause is not required to search electronic devices at the border.[227] The First Circuit was engrossed in the distinction between the border search exception and the search incident to arrest exception, declaring that *Riley*'s holding and its logic cannot possibly apply to the border search exception because the rationales supporting each of the exceptions are "entirely separate" from one another.[228]

The First Circuit held that manual cell phone searches require no suspicion at all because, unlike the nonroutine search in *Montoya de Hernandez* "involv[ing] an intrusive search of a *person*," a search of a cell phone is simply not as intrusive.[229] As for forensic cell phone searches, the First Circuit deferred to Congress, recognizing it is better equipped to "identify the harms that threaten [the United States] at the border," only clarifying that a warrant supported by probable cause is not required to conduct such a search.[230]

The Fifth Circuit in *United States v. Castillo* followed the First Circuit's lead and decided that manual cell phone searches at the border are routine and thus require no suspicion whatsoever.[231] It decided to punt the question of whether any individualized suspicion is required for nonroutine forensic cell phone searches at the border;[232] however, that question reappeared quicker than intended.[233]

Still, the Fifth Circuit avoided expressly determining whether a warrant is required for a forensic cell phone search at the border when confronted with an evident forensic search.[234] However, the court noted that inspections at the border are either routine border searches which do not require individualized suspicion, or they are nonroutine border searches which merely require "reasonable suspicion, not the higher threshold of probable

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[227] Alasaad v. Mayorkas, 988 F.3d 8, 18 (1st Cir. 2021).
[228] *Id.* at 17 (citing Riley v. California, 573 U.S. 373, 384-86 (2014)).
[229] *Id.* at 18 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 541, 441 n.4 (1985)).
[230] *Id.* at 13, 19-20.
[231] United States v. Castillo, 70 F.4th 894, 898 (5th Cir. 2023).
[232] *Id.*
[233] *See generally* Malik v. U.S. Dep't of Homeland Sec., 78 F.4th 191 (5th Cir. 2023).
[234] *See id.* at 201 (declining to address whether warrants are required for forensic cell phone searches because the complainant did "not even attempt[] to argue that the search was anything other than routine").

cause."[235] Presumably, then, the Fifth Circuit will explicitly hold that forensic cell phone searches at the border need only be supported by reasonable suspicion when faced with this issue in the future.[236]

2. Attempts to Avoid the Controversy

The Eighth Circuit's decision in *United States v. Xiang* seemed to fall in line with the First Circuit's holding.[237] The Eighth Circuit implied that no suspicion is required for manual border searches of electronic devices since "[n]o Circuit has held that the government must obtain a warrant to conduct a routine border search of electronic devices," and the Eighth Circuit refused to disrupt that fact.[238]

The Eight Circuit did not decide what suspicion is required for forensic searches of electronic devices at the border.[239] Undoubtedly, though, the highest standard required for a forensic search in the Eighth Circuit will be reasonable suspicion.[240] Indeed, it noted that "a forensic [search] . . . conducted away from the port of entry[] becomes a non-routine border searches [sic] requiring some level of reasonable, individualized suspicion, but not probable cause or a warrant" seems like "an appropriate standard [because of] the heightened personal privacy interest in electronic devices."[241]

The Tenth Circuit similarly declined to expressly "'formulate a rule of constitutional law'"[242] in when it was asked to hold that forensic searches of electronic devices at the border require reasonable suspicion.[243] Still, it stated, "under any interpretation of the Fourth Amendment put forth by [the defendant], reasonable suspicion is sufficient to justify a border search of personal electronic devices."[244] Since the Tenth Circuit found the border agents to have possessed reasonable suspicion at the time of the search, the defendant's "own arguments preclude[d] him from

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[235] *Id.* at 200.
[236] *See id.* at 201 ("Even for non-routine searches, our sister circuit [sic] 'have differed *only* as to whether reasonable suspicion is required.'").
[237] *See generally* United States v. Xiang, 67 F.4th 895 (8th Cir. 2023).
[238] *Id.* at 900.
[239] *Id.* at 901.
[240] *See id.*
[241] *Id.* at 900-01.
[242] United States v. Williams, 942 F.3d 1187, 1190 (10th Cir. 2019) (quoting Liverpool, N.Y. & Phila. Steam-Ship Co. v. Com'rs of Emigration, 113 U.S. 33,39 (1885)).
[243] Appellant's Opening Brief, *United States v. Williams*, 942 F.3d 1187 (10th Cir. 2019) (No. 18-1299), 2018 WL 6837408, at *15. Notably, Williams argued that not just any reasonable suspicion suffices to conduct a warrantless forensic search; rather, the reasonable suspicion must be connected to the rationales supporting the border search exception. *Id.*
[244] *Williams*, 942 F.3d at 1190.

prevailing,"[245] and the Tenth Circuit was able to skate by without addressing the constitutionality of the searches.

3. Refusal to Restrict the Agencies

The most extreme decision decimating the Fourth Amendment's protection came from the Eleventh Circuit in *United States v. Touset*.[246] In *United States v. Vergara*, a few months before its decision in *Touset*, the Eleventh Circuit decided that "border searches never require a warrant or probable cause" and, since the forensic search at issue occurred at the border, it was valid. [247] However, it did not need to, nor did it, decide whether any suspicion is required since the defendant did "not challenge[] the finding of the district court that reasonable suspicion existed for the searches of his phones."[248]

The issue reappeared before the Eleventh Circuit again in *Touset*, and their baseline rule that forensic border searches of electronic devices do not require a warrant or probable cause would not suffice to dispose of this case.[249] For the court, though, this was a no-brainer. It held that no suspicion is required for a forensic border search of electronic devices.[250] Even though "the Supreme Court required reasonable suspicion for the prolonged detention of a *person* until she excreted the contraband she was suspected of 'smuggling,'"[251] it has never, nor has the Eleventh Circuit, "required reasonable suspicion for a search of property at the border, however non-routine and intrusive."[252] And since no suspicion is required for other types of property, there is "no reason why the Fourth Amendment would require suspicion for a forensic search of an electronic device."[253]

Quite adamant about ensuring that the border search exception not be altered because of advanced technology, the Eleventh Circuit continued:

> And it does not make sense to say that electronic devices should receive special treatment because so many people now own them or because they can store vast quantities of records or effects. The same could be said for a recreational vehicle

[245] *Id.*
[246] 890 F.3d 1227 (11th Cir. 2018).
[247] United States v. Vergara, 884 F.3d 1309, 1311, 1313 (11th Cir. 2018).
[248] *Id.*
[249] *See Touset*, 890 F.3d at 1229.
[250] *Id.*
[251] *Id.* at 1233 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 541(1985)).
[252] United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018).
[253] *Id.*

> filled with personal effects or a tractor-trailer loaded with boxes of documents. Border agents bear the same responsibility for preventing the importation of contraband in a traveler's possession regardless of advances in technology. Indeed, inspection of a traveler's property at the border "is an old practice and is intimately associated with excluding illegal articles from the country."[254]

The Eleventh Circuit went on to state that a reasonable suspicion standard for searches are only considered when a search is so intrusive that it results in "personal indignity."[255] The intrusiveness of a search to the Eleventh Circuit is not defined by the "extensiveness" or "'whether one search will reveal more than another.'"[256] Simply put, "data stored on electronic devices c[annot] trigger this kind of [personal] indignity . . . ."[257]

The Eleventh Circuit was also undeterred by the Supreme Court's decision in *Riley*.[258] It had already decided in *Vergara* that the Supreme Court's reasoning in *Riley* was rigorously limited to "the search-incident-to-arrest exception . . . ."[259] The "'territorial integrity'"[260] of the United States is much more important than "a traveler's privacy interest."[261] Besides, it reasoned, "the Fourth Amendment does not guarantee the right to travel without great inconvenience, even within our borders."[262] Ultimately, steady in its position, the Eleventh Circuit requires no suspicion for electronic border searches, whether they are manual or forensic.[263] If a traveler does not want their phone searched, "they are free to leave [their phone] . . . —unlike their bodies—at home."[264] And if Congress wants to provide greater Fourth Amendment protection at the border, it is free to do so.[265]

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[254] *Id.* (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) (plurality opinion)).
[255] *Id.* at 1234 (quoting United Stated v. Vega-Barvo, 729 F.2d 1341, 1345 (11th Cir. 1984)).
[256] *Id.* (quoting *Vega-Barvo*, 729 at 1345, 1346).
[257] *Id.*
[258] United States v. Touset, 890 F.3d 1227, 1234 (11th Cir. 2018).
[259] *Id.* (citing United States v. Vergara, 884 F.3d 1309, 1312 (11th Cir. 2018)).
[260] *Id.* at 1235 (quoting United States v. Flores-Montano, 541 U.S. 149, 153 (2004)).
[261] *Id.*
[262] *Id.*; *see also Touset*, 890 F.3d 1235 ("Anyone who has recently taken a domestic flight likely experienced inconvenient screening procedures that require passengers to unpack electronic devices, separate and limit liquids, gels, and creams, remove their shoes, and walk through a full-body scanner.").
[263] *Id.* at 1229.
[264] United States v. Touset, 890 F.3d 1227, 1235 (11th Cir. 2018).
[265] *Id.* at 1236.

B. Attempts to Limit the Limitless

As seen, the circuits just discussed have essentially allowed the agencies to decide how the border search exception applies. True, some of the circuits require reasonable suspicion for a forensic cell phone search, but the reasonable suspicion standard is not a significant hurdle for border agents to overcome; in fact, the circuits do not even limit the scope of the search to border-specific concerns.[266]

On the other hand, the Fourth and Ninth Circuit attempted to sensibly apply the Supreme Court's logic in *Riley* to the border search exception. While this note strives to explain why their rulings did not meet the mark, their efforts were a step in the right direction.

1. Striving to Apply the Exception Correctly

In 2018, the Fourth Circuit addressed the issue of forensic border searches of electronic devices in *United States v. Kolsuz*[267] because it had already held in 2005 that manual searches of electronic devices are routine border searches and, thus, not subject to Fourth Amendment protection.[268] In *Kolsuz*, however, the court held forensic border searches of electronic devices to be nonroutine, thus "requiring some form of individualized suspicion."[269]

What qualified as the requisite level of individualized suspicion was left unclear in *Kolsuz*. But in 2019, the Fourth Circuit provided some clarity to the question.[270] Building off its decision in *Kolsuz*, the Fourth Circuit declared that, when a forensic border search of electronic devices is conducted, it must be supported by "some level of individualized suspicion, [and] the object of that suspicion must bear some nexus to the *purposes of the border search* exception in order for the exception to apply."[271] Importantly, "inherent in the notion of *individualized* suspicion is some evidentiary basis for what a specific crime *does* involve in the

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[266] Alasaad v. Mayorkas, 988 F.3d 8, 19 (1st Cir. 2021) (quoting *Ramsey*, 431 U.S. at 620) ("As for advanced searches, we cannot reasonably conclude that the 'substantive limitations imposed by the Constitution' on the border search exception prevent Congress from giving border agencies authority to search for information or items other than contraband."); United States v. Xiang, 67 F.4th 895, 902 (8th Cir. 2023) ("If law enforcement officers have reasonable suspicion to search a[n] . . . electronic device, they have not conducted an unconstitutional 'rummaging' if they find the contraband at issue . . . underneath lots of innocent items they did not seize or further search.").

[267] *See generally* United States v. Kolsuz, 890 F.3d 133 (4th Cir. 2018).

[268] *Id.* at 140 (quoting United States v. Kolsuz, 185 F.Supp.3d 843, 853 (E.D. Va. 2016)).

[269] *Id.* at 146.

[270] *See* United States v. Aigbekaen, 943 F.3d 713, 723 (4th Cir. 2019).

[271] *Id.* (emphasis added).

individual case at hand, not just what [a specific crime] 'commonly involves' as a general matter."[272]

The Fourth Circuit supported its decision by touching upon the fact that "neither the Supreme Court nor this court has ever authorized a warrantless border search unrelated to the sovereign interests underpinning the exception . . . ."[273] Accordingly, the government is precluded from "'invok[ing] the border exception on behalf of its *generalized interest in law enforcement and combatting crime*'"[274] as tolerating such Fourth Amendment circumvention "'would untether the rule from the justifications underlying [it].'"[275] While cell phones may contain some of the most intimate details of an individual's life, they "cannot contain many forms of contraband, like drugs or firearms, the detection of which constitutes 'the strongest historical rationale for the border-search exception.'"[276] Ultimately, whether the border search exception is applicable to a forensic search of an electronic device depends on the "search's relation to the Government's *sovereign interests*."[277]

Therefore, in the Fourth Circuit, if a warrantless forensic search of an electronic device at the border is not supported by "individualized suspicion of an offense that bears some nexus to the border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband," the search is in violation of the Fourth Amendment.[278]

2. Imposing Boundaries on the Border Search Exception

Finally, the Ninth Circuit attempted to tackle the issue without rocking the boat too much. In 2019, the Ninth Circuit held that manual cell phone searches at the border require no suspicion and that forensic cell phone searches must be supported by reasonable suspicion.[279] Yet, "'reasonable suspicion' in this context means that officials must reasonably suspect that the cell phone contains digital contraband."[280] Similarly, *all* cell phone searches at the border "must be limited in scope to a search for digital

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[272] *Id.* at 721.
[273] *Id.* at 720-21.
[274] *Id.* at 721 (emphasis added) (quoting United States v. Kolsuz, 890 F.3d 133, 143 (4th Cir. 2018)).
[275] *Id.* at 720 (alteration in original) (quoting Riley v. California, 573 U.S. 373, 386 (2014)).
[276] United States v. Aigbekaen, 943 F.3d 713, 721 (4th Cir. 2019) (quoting United States v. Molina-Isidoro, 884 F.3d 287, 295 (5th Cir. 2018) (Costa, J., concurring)).
[277] *Id.* at 722 (citing *Kolsuz*, 890 F.3d at 142-43).
[278] *Id.* at 721.
[279] United States v. Cano, 934 F.3d 1002, 1007 (9th Cir. 2019).
[280] *Id.*

contraband."[281] Notably, the Ninth Circuit is the only circuit to limit the manual border searches of cell phones in any way.

The Ninth Circuit supported its holding by following an approach similar to the Supreme Court in *Riley*:

> Exceptions to the warrant requirement are subject to two important constraints. First, any search conducted under an exception must be within the *scope* of the exception. Second, some searches, even when conducted within the scope of the exception, are so *intrusive* that they require additional justification, up to and including probable cause and a warrant.[282]

The scope of the border search exception is a narrow one, limited by the statutes which only authorize "customs and immigration officials, but not general law enforcement officers" to conduct border searches.[283] The scope is further limited by the purpose of "'enforc[ing] importation laws[]' and not for 'general law enforcement.'"[284]

The Ninth Circuit recognizes that "digital data on a cell phone cannot conceal objects such as drugs, guns, or smuggled persons," but that "the data can contain *digital contraband*," like child pornography.[285] Thus, the forensic cell phone searches at the border "are [not] always beyond the scope of the border search exception."[286] Further, the intrusiveness of a forensic search of an electronic device "is 'essentially a computer strip search,'"[287] thus requiring reasonable suspicion to make the search reasonable under the Fourth Amendment.

In the end, the Ninth Circuit held that since it is "deal[ing] with the border search exception—not the search incident to arrest exception—and the difference in context is critical,"[288] it must not go further than requiring only reasonable suspicion for forensic cell phone searches at the border.[289]

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[281] *Id.*
[282] *Id.* at 1011.
[283] *Id.* at 1013.
[284] *Id.* (quoting *United States v. Soto-Soto*, 598 F.2d 545, 549 (9th Cir. 1979)).
[285] United States v. Cano, 934 F.3d 1002, 1013-14 (9th Cir. 2019).
[286] *Id.*
[287] *Id.* at 1015 (quoting United States v. Cotterman, 709 F.3d 952, 960-61 (9th Cir. 2013) (en banc)).
[288] *Id.*
[289] *Id.* at 1016.

VI. PRESERVING CONSTITUTIONAL INTEGRITY: BORDER SEARCHES OF CELL PHONES GENERALLY REQUIRE A WARRANT SUPPORTED BY PROBABLE CAUSE

As can be seen, the split among the circuits runs wide. The conclusions reached have resulted in a cluster of interpretations, applying (or refusing to apply) one Supreme Court case in such distinct ways for a multitude of reasons. Like the Supreme Court recognized in *Riley* and in *Carpenter*, cell phones are such a pervasive aspect of daily life implicating severe privacy concerns through a mere manual search.[290] Yet, while all the circuits at least gave a nod toward *Riley*, not one circuit that adjudicated its case after the decision in *Carpenter* gave any recognition to the Supreme Court's rationale.[291] How the Fourth Amendment applies to cell phone searches at the border "is of significant importance" and "presents a sharp, recognized, and enduring circuit split" which needs the Supreme Court's input.[292] It is essential for the Supreme Court to address this issue and it should hold that a warrant supported by probable cause is generally required before conducting a border search of a cell phone, whether the search be manual or forensic.

A. The Border Search Exception's Untethered State

As it stands, CBP Directive No. 3340-049A authorizes CBP agents to conduct manual searches "with or without suspicion" and "examine an electronic device and . . . review and analyze information encountered at the border . . . ."[293] A forensic search must be supported by reasonable suspicion, allowing CBP agents to "connect[] external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents."[294] DHS released a Privacy Impact Statement ("PIA") detailing some specifics of forensic searches of electronic devices, stating such a search to "acquire a *mirror* copy of the data on the device," which

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[290] *See* Riley v. California, 573 U.S. 373, 394 (2014) ("[T]he possible intrusion on privacy is not physically limited in the same way when it comes to cell phones."); *see also* Carpenter v. United States, 585 U.S. 296, 311 (2018) (citation omitted) ("[T]he time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'").

[291] *But see* United States v. Aigbekaen, 943 F.3d 713, 719 n.3 (4th Cir. 2019) ("Aigbekaen also moved to suppress the CSLI on the ground that the Government's procurement of it constituted a search and so required a warrant.") He conceded, however, that the argument was foreclosed as *Carpenter* was not controlling precedent at the time the search occurred. *Id.*

[292] *Anibowei* Petition, at *i.

[293] 2018 *CBP Directive* at 4.

[294] *Id.* at 5.

> enable[s] CBP to conduct a variety of analyses on electronic device data, including: 1) timeframe analysis, which can help in determining when data was entered, modified, or deleted from a device; 2) detection and recovery of concealed data; 3) correlation of files to installed applications, examination of drive file structure, and review of metadata; and 4) reviews to help to identify individuals who created, modified, or accessed a file.[295]

Additionally, certain information can either be "extract[ed] or later identif[ied] and retain[ed] from an electronic device," including, *inter alia*, "IP Addresses used by the device," "GPS Locations used by the device," and "Cell Site Information."[296]

But who sees information obtained by the digital forensic searches is not restricted to the CBP authorities as "[n]othing in th[e] Directive limits the authority of CBP to share copies of information contained in electronic devices (or portions thereof) . . . with federal, state, local, and foreign law enforcement agencies to the extent consistent with applicable law and policy."[297] Importantly, the only "limitation" on electronic border searches is that the information reviewed must be "information that is resident upon the device and accessible through the device's operating system or through other software, tools, or applications."[298] It should be apparent that border agents are virtually unrestricted when searching an electronic device

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[295] *Privacy Impact Assessment for the U.S. Border Patrol Digital Forensics Programs*, U.S. DEP'T HOMELAND SEC. 4 (July 30, 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp053a-digitalforensics-july2020.pdf [hereinafter *Privacy Impact Assessment*] (emphasis added).

[296] *Id.* at 6. As mentioned, it is striking that not one circuit referenced the Supreme Court's decision in *Carpenter v. United States* when determining whether forensic searches of electronic devices at the border require probable cause or reasonable suspicion—especially when the PIA specifically addressed Cell Site Information. 585 U.S. 296 (2018).

[297] 2018 *CBP Directive* at 10; *see also* U.S. Immigr. & Customs Enf't, *Border Searches of Electronic Devices*, U.S. DEP'T HOMELAND SEC. 3 (August 18, 20009) https://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf (noting ICE agents have nearly identical authority, so long as the search is "performed by an ICE Special Agent who meets the definition of 'customs officer' . . . or another properly authorized officer with border search authority . . . ."); *see also Alasaad*, 988 F.3d at 14 (citation omitted) (noting that ICE amended its policy such that ICE agents "'should no longer perform advanced border searches of electronic devices without reasonable suspicion'").

[298] 2018 *CBP Directive* at 4.

with the liberty to search a cell phone until they no longer desire *as long as the information is resident on the device*.[299]

Yet, the Fourth Amendment was designed to prevent such ubiquitous authority. After all, it "was a reaction to the evils of the use of the general warrant in England . . . and was intended to protect against invasions of the 'sanctity of a man's home and the *privacies of life*[]' from searches under indiscriminate, general authority."[300] The CBP practices look incredibly similar to a general warrant. But instead of the authority running amok deep inside the United States, the severe intrusion on privacy is allowed at the edge of the United States or any functional equivalents thereof.

Except the distinction between a search at the border and a search conducted within the United States is meaningless when applied to cell phones. While there is a "longstanding concern for the protection of the integrity of the border," the searches and seizures must nonetheless be reasonable, and "[w]hat is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."[301] Whether a search or seizure takes place within the United States or at its border, "[t]he permissibility of a particular law enforcement practice is judged by '*balancing* its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'"[302]

Thus, in border searches of cell phones, courts must "balance the government's interest in protecting the integrity of the border against [the individuals'] privacy interest in the data" on a cell phone.[303] But the circuit courts have not balanced interests as evinced by the First Circuit's declaration that, while searches of "modern electronic devices 'implicate privacy concerns *far beyond* those implicated'" by routine searches of "'other objects that might be kept on [a traveler's] person,'" those "privacy concerns, however significant or novel, are nevertheless tempered by the fact that the searches are taking place at the border . . . ."[304] The First Circuit did nothing more than give a slight nod to the substantial violation of privacy conducted by a cell phone search, dismissing the concern because it is being conducted at the border. Frankly, the circuits

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[299] *See id.*

[300] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 301 (1967) (emphasis added) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[301] United States v. Montoya de Hernandez, 473 U.S. 531, 537-38 (1985) (citation omitted).

[302] *Id.* (emphasis added) (citations omitted) (quoting United States v. Villamonte-Marquez, 462 U.S. 579. 588 (1983)).

[303] United States v. Vergara, 884 F.3d 1309, 1315 (11th Cir. 2018) (Pryor, J., dissenting).

[304] Alasaad v. Mayorkas, 988 F.3d 8, 18 (1st Cir. 2021) (alterations in original) (quoting Riley v. California, 573 U.S. 393 (2014)).

dismissing the significant privacy concerns seem to have taken the position that "diminished privacy concerns [at the border] mean that the Fourth Amendment falls out of the picture entirely."[305]

But, just as having a person in custody does not make every search lawful, "[n]ot every search 'is acceptable solely because a person is [at the border].'"[306]

B. Reining in the Overreach: Constraining Border Searches to Their Constitutionally Permissible Scope

The appropriate solution arises not from asking where the search occurs, but "whether application of the [border search] doctrine to [cell phones] would 'untether the rule from the *justifications* underlying the exception.'"[307] Since before the American Revolution customs agents had the authority to search and seize contraband,[308] remaining one of the principal purposes of the border search exception.[309] In the 19th Century, United States citizens developed an animosity toward "outsiders," from which the second border search exception blossomed: the "exclu[sion of] aliens."[310] Concisely, if cell phone searches at the border "'untether the rule from the justifications'"[311] of "preventing the entry of unwanted persons and effects,"[312] such searches will generally require a warrant.

"[C]ustoms [and immigration] officials" are obligated "with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives."[313] A cell phone may have pictures of narcotics, or internet searches of explosives, but it does not have the physical capacity to carry or ship an item under either of those categories. And to suggest as the Eleventh Circuit did in *United States v. Touset*[314] that there is no distinction between a border search of an individual's physical belongings and a border search of the individual's cell phone data "is like saying a ride on a horseback is materially indistinguishable from a flight to the moon."[315]

To be sure, a cell phone could contain electronic contraband such as "[c]hild pornography, nuclear weapon designs, and

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[305] *Riley*, 573 U.S. at 392.
[306] *See id.* (quoting Maryland v. King, 569 U.S. 435, 463 (2013)).
[307] *Id.* at 386 (emphasis added) (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).
[308] Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. F. 961, 974-75 (2019).
[309] United States v. Flores-Montano, 541 U.S. 149, 152 (2004).
[310] Ping v. United States, 130 U.S. 581, 603-04 (1888).
[311] Riley v. California, 573 U.S. 386 (2014) (quoting *Gant*, 556 U.S. at 343).
[312] *Flores-Montano*, 541 U.S. at 152.
[313] *Montoya de Hernandez*, 473 U.S. at 544.
[314] 890 F.3d 1227, 1233 (11th Cir. 2018).
[315] *Riley*, 573 U.S. at 386.

counterfeit currencies [which] are all expressly forbidden under customs laws."[316] It is not debatable that "child pornography [is] contraband for good reason" and that electronic devices are "the [types of] property most often used to store and disseminate child pornography."[317] Unfortunately, however, it is equally true that "electronic contraband [like child pornography] is *borderless* and can be accessed and viewed in the United States without ever having crossed a physical border."[318] If the electronic contraband's set destination is within the United States, it will likely arrive without needing a human to physically carry it in.

The history of the border search exception has always been reasonable when weighed against the government interest because the searches were limited to the physical realities of the world. The limitation justifies even a suspicionless deconstruction of a vehicle because it "simply" is not "a more 'intrusive' search of a person,"[319] like detaining a woman for over 24 hours waiting for her to excrete balloons filled with drugs which requires reasonable suspicion.[320] Because of these different standards, emphasis has been placed on the distinction between property searches and searches of the person.[321] For example, the Eleventh Circuit stated:

> A forensic search of an electronic device is not like a strip search or an x-ray; it does not require border agents to touch a traveler's body, to expose intimate body parts, or to use any physical force against him. Although it may intrude on the privacy of the owner, a forensic search of an electronic device is a search of property.[322]

However, a cell phone search, whether it be forensic or manual, can reveal intimate body parts, copies of x-rays, and so much more. A cell phone search can result in a detailed summary "of an *individual's private life* [as it] can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions . . . ."[323]

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[316] Laura K. Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 YALE L.J. F. 961, 1009 (2019).
[317] *Touset*, 890 F.3d 1227, 1235-36 (11th Cir. 2018).
[318] United States v. Vergara, 884 F.3d 1309, 1317 (11th Cir. 2018) (Pryor, J., dissenting) (emphasis added).
[319] United States v. Flores-Montano, 541 U.S. 149, 152 (2004).
[320] United States v. Montoya de Hernandez, 473 U.S. 531, 546 (1985) (Brennan, J., dissenting).
[321] United States v. Touset, 890 F.3d 1227, 1234 (11th Cir. 2018).
[322] *Id.*
[323] Riley v. California, 573 U.S. 394 (2014) (emphasis added).

1. Applying Probable Cause to the Digital Frontier

Personal dignity and intimacy are not limited to what can be felt. Even the Supreme Court recognized that "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the *intimate*."[324] In fact, when comparing a cell phone to a house, which has received the most protection from warrantless searches since the origin of the United States of America, the Court acknowledged in *Riley* that "a cell phone search would typically expose to the government far *more* than the *most exhaustive search of a house* . . . ."[325] It added that, beyond what is typically found in a home, a phone "contains a broad array of private information *never* found in a home in any form—unless the phone is."[326]

Remarkably, these concerns were raised from a mere manual search incident to arrest *which was supported by probable cause*; imagine if the Supreme Court faced the concerns raised through a full-scale forensic search. In *Carpenter*, the Court dealt with something similar: cell site location information.[327] There, the Court held that a warrant was generally necessary before obtaining CSLI.[328] And still, the CBP Directive authorizes obtaining CSLI—and much more—based off mere reasonable suspicion.[329]

With reasonable suspicion alone, CBP agents can obtain *and then distribute* "an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations"[330] to any "federal, state, local, and foreign law enforcement agencies."[331]

Repeated time and again throughout Fourth Amendment jurisprudence, "warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.'"[332] Exceptions to the warrant requirement are intended to serve purposes distinct from the justifications of general law enforcement and "investigati[ons of] suspected criminal activity."[333] Yet forensic border searches of

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[324] *Id.* at 395 (emphasis added).
[325] *Id.* at 396 (second emphasis added).
[326] *Id.* at 396-97 (emphasis added).
[327] Carpenter v. United States, 585 U.S. 296, 301 (2018).
[328] *Id.* at 317.
[329] 2018 *CBP Directive* at 5; *Privacy Impact Assessment* at 6.
[330] *Carpenter*, 585 U.S. at 311 (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).
[331] 2018 *CBP Directive* at 10.
[332] *Carpenter*, 585 U.S. at 316 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995)).
[333] United States v. Montoya de Hernandez, 473 U.S. 531, 554 (1985) (Brennan, J. dissenting).

electronic devices cannot be justified by any rationale other than the promotion of general law enforcement because "extract[ing] all system and *deleted* data out of [an] electronic device"[334] does not "prevent[] the entry of unwanted persons and effects."[335]

In truth, suspicionless forensic border searches of cell phones go beyond the promotion of general law enforcement. Assuming *arguendo* that the government could only obtain CSLI through forensic searches, it would nevertheless be significantly more invasive than the CSLI search in *Carpenter*. There, the government obtained 134 days' worth of CSLI, totaling "12,898 location data points *cataloging* [the defendant]'s movements . . ."[336] At the border, constrained by nothing besides "reasonable suspicion," a customs agent can forensically search a cell phone to "extract all system and deleted data out of" it, [337] undoubtedly obtaining considerably more location data points than 134 days' worth. Adding insult to injury, "the retrospective quality of the data here gives police access to a category of information otherwise unknowable," providing "the Government" and any agency it decides to share the information with "near perfect surveillance[] as if it had attached an ankle monitor to the phone's user."[338]

Beyond the significant privacy concerns implicated by a warrantless cell phone search at the border, requiring anything less than probable cause "impose[s] few meaningful constraints" on border agents,[339] even if the reasonable suspicion "means that officials must reasonably suspect that the cell phone contains digital contraband."[340] The purported limitations imposed by the Fourth and Ninth Circuits are meaningless for the same reasons the Supreme Court in *Riley* refused to permit "a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of the arrest."[341] As in the search incident to arrest exception, "[i]t would be a particularly inexperienced or unimaginative [border agent] who could not come up with several reasons to suppose evidence of *just about any crime* could be found on a cell phone."[342] The consequence of such imagination being the "'unbridled discretion to rummage at will among a person's private effects.'"[343] And "the Founders did not

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[334] *Privacy Impact Assessment* at 5.
[335] United States v. Flores-Montano, 541 U.S. 149, 152 (2004).
[336] Carpenter v. United States, 585 U.S. 296, 302 (2018) (emphasis added).
[337] *Privacy Impact Assessment* at 5.
[338] *Carpenter*, 541 U.S. at 311-12.
[339] Riley v. California, 573 U.S. 373, 399 (2014).
[340] United States v. Cano, 934 F.3d 1002, 1007 (9th Cir. 2019).
[341] *Riley*, 573 U.S. at 398.
[342] *Id.* at 399 (emphasis added).
[343] *Id.* (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

fight a revolution to gain the right to government agency protocols"[344] like the CBP Directive.

As a matter of fact, too much discretion is provided to border agents, contradicting the rationales of the constitutionality of border checkpoints in *Martinez-Fuerte*. Unlike the "fixed checkpoint . . . chosen by . . . officials responsible for making overall decisions" in *Martinez-Fuerte*, the decisions to search a cell phone is wholly an independent one.[345] In a border checkpoint context, "since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals . . . ."[346] Yet, the exact opposite is true in border searches of cell phones. Finally, while checkpoint "stops should not be frightening or offensive because of their public and relatively routine nature,"[347] the search of a cell phone is private which would make even the most innocent individual uneasy. "[T]hose charged with investigative duties at the border 'should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks,' because '*unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy.*'"[348]

Searching cell phones at the border "is not . . . a straightforward application of the [border search] doctrine, but instead a *significant extension* of it to a distinct category of information."[349] The Eleventh Circuit utterly disregards Supreme Court precedent in stating, "it does not make sense to say that electronic devices should receive special treatment because so many people now own them or because they can store vast quantities of records or effects."[350] The pervasiveness of cell phones and the undeniable truth that "the possible intrusion on privacy is not physically limited in the same way" it was when the Fourth Amendment was enacted is precisely the reason the Supreme Court gave cell phone searches "special treatment" in *Riley*.[351]

Truthfully, "special treatment" is misleading because "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, th[e] Court has sought to 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was

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[344] *Id.* at 398 (citation omitted).
[345] United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).
[346] *Id.*
[347] *Id.* at 560.
[348] United States v. Montoya de Hernandez, 473 U.S. 531, 556 (1985) (Brennan, J., dissenting) (emphasis added) (quoting United States v. United States District Court, 407 U.S. 297, 317 (1972)).
[349] Carpenter v. United States, 585 U.S. 296, 314 (2018) (emphasis added).
[350] United States v. Touset, 890 F.3d 1227, 1233 (11th Cir. 2018).
[351] Riley v. California, 573 U.S. 373, 385, 394 (2014).

adopted.'"[352] The same technology which has increased capacity to infringe on privacy with technology has increased the capacity and efficiency in which law enforcement may obtain a warrant.[353]

The "warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow "weighed" against the claims of police efficiency.'"[354] Border searches of cell phones is about so much more than just "using a phone," these searches are "about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years"[355] providing an omniscient "record of nearly every aspect of [individual] lives—from the mundane to the intimate."[356] Thus, before conducting *either* a manual or forensic cell phone search at the border, absent exigent circumstances, "the Government's obligation is a familiar one—get a warrant."[357]

CONCLUSION

So, what about George Anibowei? Why did the Supreme Court deny his petition for a writ of certiorari when the question presented is of this importance?[358] The Court did not give a reason; however, the Court likely believed Anibowei's case which had been riddled with errors from the commencement of proceedings should not be the vehicle for a question implicating such significant constitutional issues.[359] But one thing is inevitable: the issue will make its way back to the Supreme Court.

As for Anibowei, he is going to have to continue "refrain[ing] from carrying his work phone during international travel"[360] to prevent undesirable consequences concerning attorney-client privilege and confidentiality. The amount of electronic border searches will continue to skyrocket as the years pass. And while Congress might be in a better position to identify threats at the border,[361] the judiciary is responsible for ensuring the government respects the Fourth Amendment in order "to protect liberty and privacy from arbitrary and oppressive interference by government officials."[362] Thus, the only practicable and acceptable solution is

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[352] *Carpenter*, 541 U.S. at 305 (second alteration in original) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).
[353] *Riley*, 573 U.S. at 401.
[354] *Id.* (quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)).
[355] Carpenter v. United States, 585 U.S. 296, 315 (2018).
[356] *Riley*, 573 U.S. at 395.
[357] *Carpenter*, 541 U.S. at 317.
[358] Anibowei v. Mayorkas, 144 S.Ct. 551.
[359] *Id.*
[360] *Anibowei* Petition, at *i.
[361] Alasaad v. Mayorkas, 988 F.3d 8, 20 (1st Cir. 2021) (citation omitted).
[362] United States v. Ortiz, 422 U.S. 891, 895 (1975).

for the Supreme Court to hold that warrants are generally required for *all* border searches of cell phones.

"The greater regularity attending the stop [and subsequent search] does not mitigate the invasions of privacy that a search entails."[363] And "the justifications for the border exception necessarily limits its breadth."[364] The border search exception serves the purpose of ensuring people are entitled to be here and that effects are those "which may be lawfully brought in."[365] The exception is *not* meant to "expose the government [to] far *more* [information] than the most exhaustive search of a house" would reveal.[366] Yet, "[b]ecause the [suspicious-looking traveler] is on American soil, he is fully subject 'to the criminal enforcement powers of the Federal Government;'" however, "notwithstanding that he is on American soil, he is *not* fully protected by the guarantees of the Bill of Rights applicable everywhere else in the country."[367] The Supreme Court must take action and generally require warrants for border searches of cell phones, both to protect privacy and reunify the border.

[363] *Id.* at 891.
[364] United States v. Montoya de Hernandez, 473 U.S. 531, 563 (1985) (Brennan, J., dissenting).
[365] Carroll v. United States, 267 U.S. 132, 154 (1925).
[366] Riley v. California, 573 U.S. 373, 396 (2014).
[367] *Montoya de Hernandez*, 473 U.S. at 565. (Brennan, J., dissenting) (citations omitted) (internal quotation marks omitted).

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PROTECTING DEFENDANTS' SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL DURING THE PLEA PROCESS: WHY AND HOW THE *STRICKLAND* PREJUDICE REQUIREMENT MUST CHANGE IN THE NEW ERA OF PLEAS

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INTRODUCTION

It has been over a decade since the United States Supreme Court knighted the American criminal justice system as a "system of pleas, not a system of trials."[1] The fact that roughly 98% of criminal convictions nationwide are obtained through pleas indicates the recognition of this new title.[2] This seismic shift in the landscape of criminal prosecution has led jury trials to become "rare legal artifacts" that hardly exist in some jurisdictions in the United States.[3] In a country founded on the constitutional right to a public jury trial, plea bargaining has almost entirely replaced this right that has been protected by the Sixth Amendment since the 1700s.[4]

Plea agreements fully relieve the prosecution of the burden to prove its incriminating case, as the defendant chooses self-incrimination over the potential risk and longevity of a jury trial. The defendant often makes the choice of pleading guilty to the charges brought against him for the purpose of receiving a lesser sentence, also known as sentence bargaining.[5] In another scenario termed charge bargaining, a defendant will plead guilty to some charges in exchange for the prosecution's promise to amend the indictment and drop other charges.[6]

Unlike the right to a jury trial, however, a criminal defendant has no right to a plea bargain.[7] Further, once a plea bargain has been offered and the defendant has accepted it, there is no constitutional right to have that bargain enforced; it is within the court's discretion whether to accept or reject the bargain.[8] Thus, plea bargaining serves as a means to "mitigate the excessive harshness of the modern American criminal system. [It] is not so much providing a benefit [to defendants] as it is a safety valve for quotidian injustice."[9]

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[1] Lafler v. Cooper, 566 U.S. 156, 170 (2012).

[2] *2023 Plea Bargain Task Force Report urges fairer, more transparent justice system*, AM. BAR ASS'N (Feb. 22, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/02/plea-bargain-task-force/#:~:text=Share%3A,currently%20coming%20from%20guilty%20pleas.

[3] *2023 Plea Bargain Task Force Report*, AM. BAR ASS'N 14, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf (last visited Mar. 6, 2024).

[4] *Id.* at 6.

[5] *2023 Plea Bargain Task Force Report, supra* note 3, at 12.

[6] *2023 Plea Bargain Task Force Report, supra* note 3, at 12.

[7] Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to a plea bargain; the prosecutor need not [offer one] if he prefers to go to trial.").

[8] Fed. R. Crim. P. 11(c)(3); *see also* Missouri v. Frye, 566 U.S. 134, 148 (2012) (citing Santobello v. New York, 404 U.S. 257, 262 (1971)) (explaining that a defendant has no right that a federal judge accept an offered plea).

[9] *2023 Plea Bargain Task Force Report*, AM. BAR ASS'N 6, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf (last visited Mar. 6, 2024).

Considering the prominence and relative novelty of plea bargaining in the American criminal justice system, the United States Supreme Court still has significant decisions to make regarding how pleas intertwine with other facets of criminal and constitutional law—especially criminal defendants' Sixth Amendment right to effective assistance of counsel.[10] Despite the need for jurisprudence in this area of the law, in 2023, the Supreme Court denied certiorari in *Davis v. United States*, a case that would have resolved a circuit split regarding how a defendant can demonstrate that his counsel's actions were prejudicially ineffective during the plea process.[11]

Davis, the defendant who received a prison sentence of nearly 160 years, sought relief for ineffective assistance of counsel after his similarly situated co-defendants were sentenced to less than 40 years.[12] Davis's claim rested on the fact that his attorney did not initiate plea negotiations with the prosecution after the government did not offer him a plea deal.[13] Davis's claim failed in the Eleventh Circuit.[14] The appellate court concluded that the actions of Davis's attorney did not constitute prejudicially ineffective assistance of counsel under the standard established by the Supreme Court in *Strickland v. Washington*, because a showing of prejudice was not possible where the government had not made a formal plea offer.[15]

The significance of this issue demands the Supreme Court's attention if there is to be a congruent standard for effective assistance of counsel for criminal defendants in the plea bargaining process. This note explains why, in the interest of justice, the Supreme Court must decide that a defendant may establish a claim for prejudicially ineffective assistance of counsel during the plea process even when the prosecution has not offered a plea deal. Otherwise, defendants like Davis will continue to be significantly harmed by their counsel's inaction but afforded no constitutional protection—making the Sixth Amendment right to effective assistance of counsel nothing but an empty promise in the new era of pleas.

In Part I, this note provides a historical account of the development of plea bargaining in the American criminal justice

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[10] *See* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1230 (2016) ("While plea bargaining is pervasive worldwide, U.S.-style-bargaining *rules* are not. Under state and federal law, plea bargaining is, in effect, unregulated.").

[11] Davis v. United States, 143 S. Ct. 647 (2023) (Jackson, J., dissenting from denial of certiorari).

[12] *Id.* at 648.

[13] *Id.* at 647.

[14] Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753, at *6 (11th Cir. Feb. 10, 2022).

[15] *Id.*

system—a development so recent that there are considerable holes of jurisprudence that the Supreme Court has yet to fill. Part II discusses *Davis v. United States*—a case that was denied certiorari by the Court but still garnered a written dissent by two Justices who believe Davis' case to be an ideal candidate to resolve the circuit split regarding *Strickland* prejudice and the right to effective assistance of counsel in the plea bargaining context. Part III explains the ineffective assistance of counsel standard created by the Supreme Court's decision in *Strickland v. Washington*, and Part IV lays out the lingering circuit split regarding what constitutes prejudicially ineffective assistance of counsel, which is required by *Strickland* for a defendant to be granted relief. Part V discusses criticisms of the *Strickland* prejudice standard, which provides a basis for Justice Jackson's *Davis v. United States* dissent explained in Part VI. Finally, part VII examines the best avenue for resolving the circuit split and how eliminating a threshold requirement that a plea has been offered before prejudice can be established would provide all criminal defendants with more uniform and robust Sixth Amendment protection throughout the plea process.

I. THE HISTORY OF PLEA BARGAINING IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

Despite the dominant presence of plea bargaining today, its arrival on the scene of criminal prosecution was not met with open arms. In fact, early Anglo-American courts actively discouraged guilty pleas.[16] Thus, when the Americanized concept of prosecutorial plea bargaining began to emerge in the late nineteenth century following the American Civil War, it was strongly condemned.[17] Plea bargaining never came before the Supreme Court during this period, but it is surmised that the Court likely would have invalidated the concept had the issue been presented.[18]

Fighting against the current of courts' disfavor, plea bargaining nonetheless became a dominant force in the criminal justice system in the early 1900s as substantive criminal law expanded dramatically.[19] Liquor-prohibition laws especially boosted the caseloads of the courts, and pressure on the courts to push defendants through the system more quickly began to rise.[20]

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[16] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979).
[17] Alschuler, *supra* note 16, at 5-6.
[18] Alschuler, *supra* note 16, at 6.
[19] Alschuler, *supra* note 16, at 6 ("Despite general disapproval, plea bargaining became a dominant method of resolving criminal cases at the end of the nineteenth century and beginning of the twentieth—at a time when the bondsman, the ward politician, the newspaper reporter, the jailer, and the fixer exerted an everyday influence on the administration of criminal justice.").
[20] Alschuler, *supra* note 16, at 6.

While plea bargaining was the clear solution to the problem of burdened courts and slow-moving cases, appellate courts remained generally uniform in their opposition to plea bargaining.[21] However, in 1968, the American Bar Association came out with a standard on guilty pleas, which, in its commentary, encouraged plea bargaining as a recommendation to help with the burdened judicial system.[22] Thereafter in 1970, the Supreme Court finally recognized that the institution of plea bargaining was "inherent in the criminal law and its administration" in its *Brady v. United States* decision, and the tide of resistance towards plea bargaining began to turn.[23]

Fifty years—in comparison to the life of the American legal system—is fleeting.[24] Many facets of the American criminal justice system have hundreds of years of history rooted in common law, yet the Supreme Court is still shaping them today.[25] Therefore, the novelty of plea bargaining is extremely significant. There are many wrinkles in the fabric of the American plea system that the Supreme Court has yet to iron out and an overwhelming number of regulations that need to be implemented in order to achieve robust and congruent protection of defendants' rights during the plea process.[26] Thus, considering the work that has yet to be done, the Supreme Court's decisions surrounding plea bargains are not only highly anticipated but will also have profound influence in an area of law that is in desperate need of guidance from the court.[27]

Moreover, as significant as Supreme Court rulings in the area of plea agreements are, the Court's decision *not* to grant certiorari on a novel plea-related issue is almost equally so.[28] The

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[21] Lucian E. Dervan, *Fourteen Principles and a Path Forward for Plea Bargaining Reform*, 38 CRIM. JUST. 24, 26-27 (2024).
[22] *Id*.
[23] Brady v. United States, 397 U.S. 742, 751 (1970).
[24] *See* Samuel Walker, *Popular Justice: A History of American Criminal Justice*, 79 MICH. L. REV. 921 (1981) ("At the opening of the nineteenth century the predecessors of today's police forces sprang into being.").
[25] Samuel Strom, *What Effect Do Supreme Court Rulings Have?*, FINDLAW (Aug. 7, 2024), https://constitution.findlaw.com/article3/annotation03.html ("[I]n cases involving the Federal Constitution, where correction through legislation is practically impossible, [the Supreme] Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error… is appropriate in the judicial function.").
[26] *See* Matthew T. Mangino, *ABA Report on Plea Bargains Reveals Need for Reform*, LAW.COM (May 11, 2023, 1:28 PM), https://www.law.com/thelegalintelligencer/2023/05/11/aba-report-on-plea-bargains-reveals-need-for-reform/?slreturn=20240211150743 ("For the most part, plea bargaining is not governed in detail by rules of court or established policy. What [Justice] Kennedy called 'the criminal justice system' has few safeguards and little oversight.").
[27] *See* Strom, *supra* note 25.
[28] Spencer Gottlieb, *High Court Cert Denial Puts New Spotlight on Plea Bargains*, LAW360 (June 22, 2023, 1:56 PM),

Supreme Court placed a new spotlight on plea bargains in relation to a defendant's Sixth Amendment right to effective assistance of counsel in its denial of certiorari in *Davis v. United States* in February 2023.[29]

This denial of certiorari is particularly significant for two reasons. First, the denial assured the continuance of a circuit split regarding whether a criminal defendant can satisfy the prejudice prong required for an ineffective assistance of counsel claim under the Sixth Amendment by showing that his counsel failed to initiate plea negotiations when the government did not offer a plea deal.[30] Second, the denial of certiorari in *Davis* resulted in a written dissent from Justice Ketanji Brown Jackson, joined by Justice Sonia Sotomayor—a rare move by the Supreme Court.[31] For context, the Court denied almost 350 petitions for writ of certiorari between the months of May and June in 2023.[32] None of those denials generated a written dissent.[33] The Supreme Court receives nearly 10,000 petitions for a writ of certiorari a year, so "a justice's willingness to take on the additional authorial work of a dissent from… the denial of certiorari… indicates that the views being expressed are strongly held."[34] By publishing this dissent, Justice Jackson and Justice Sotomayor are providing this issue a foothold on the Court's future docket—so long as two other justices realize the importance of resolving this issue.

II. *DAVIS V. UNITED STATES*

In February 2011, a grand jury indicted Quartavious Davis and five co-defendants on seventeen counts for committing a series of armed robberies in South Florida.[35] Davis's five co-defendants all negotiated plea deals and were sentenced to less than forty years in prison.[36] Davis—a 19-year-old with no prior convictions at the time of the robberies and who suffers from bipolar disorder and a severe learning disability—did not receive a plea offer.[37] Davis's appellate

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https://www.law360.com/articles/1690472/high-court-cert-denial-puts-new-spotlight-on-plea-bargains.

[29] *See* Davis v. United States, 143 S. Ct. 647 (2023) (Jackson, J., dissenting from denial of certiorari).

[30] Gottlieb, *supra* note 28.

[31] Gottlieb, *supra* note 28.

[32] Gottlieb, *supra* note 28.

[33] Gottlieb, *supra* note 28.

[34] Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L. J. F. 551, 553 (2014).

[35] Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753, at *2 (11th Cir. Feb. 10, 2022).

[36] Brief for Petitioner at 37, Davis v. United States, 143 S. Ct. 647 (2023) (No. 22-5364).

[37] Brief for Petitioner, *supra* note 36, at 3.

counsel argued in his petition for certiorari to the United States Supreme Court that his background indicates he would have been a suitable recipient of a similar plea agreement to those extended to his co-defendants, as well as the fact that there was undisputed trial evidence that other persons planned the robberies and recruited Davis to participate.[38] Nevertheless, neither the prosecution nor Davis's own defense attorney attempted to negotiate a plea agreement similar to the ones his co-defendants received.[39] Davis was thereafter charged and convicted on sixteen counts, resulting in a sentence of almost 160 years in prison.[40]

In 2019, Davis filed a motion to vacate his convictions.[41] He challenged his convictions and sentences on multiple grounds, including a claim that his trial counsel was "ineffective in failing to seek and negotiate a plea on [his] behalf, and in failing to adequately advise [him] to plead guilty, despite the near-certain conviction and dire sentencing consequences."[42] Davis alleged that his counsel was ineffective by failing to discuss with him:

> (1) the benefits and detriments of going to trial as opposed to pleading guilty; (2) the potential consequences of his codefendants' guilty pleas and cooperation with the government, particularly when considered alongside powerful cellphone location data evidence placing Davis near the robbery sites; and (3) counsel's understanding that Davis faced a "certainty of conviction," and that Davis would receive a life sentence based on the mandatory stacking of his . . . penalties.[43]

The United States District Court for the Southern District of Florida denied Davis's motion, concluding that he failed to satisfy the governing two-prong test established in *Strickland v. Washington*. [44] The *Strickland* test requires defendants claiming ineffective assistance of counsel to allege facts showing that: (1) his

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[38] Brief for Petitioner, *supra* note 36, at 9.
[39] Brief for Petitioner, *supra* note 36, at 5.
[40] Davis was charged with two counts of conspiring to commit Hobbs Act robbery; seven counts of Hobbs Act robbery; six counts of using, carrying and possessing a firearm during a crime of violence; and one count of using, carrying, and possessing a firearm during a crime of violence. Brief for Petitioner, *supra* note 36, at 2.
[41] Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753, at *2 (11th Cir. Feb. 10, 2022).
[42] *Id.* at *2-3 (alteration in original).
[43] *Id.* at *3.
[44] Davis v. United States, No. 19-21457-CIV, 2020 U.S. Dist. LEXIS 12453, at *56 (S.D. Fla. Jan. 23, 2020).

counsel was deficient (i.e., below an objective standard of reasonableness), and (2) the deficient performance prejudiced the defense.[45] Despite presuming deficiency, the court held that Davis was unsuccessful in demonstrating prejudice because "there [was] no evidence that the Government ever offered a plea deal."[46] The court's finding of a lack of prejudice was supplemented by the fact that Davis never told his counsel that he was interested in pursuing a plea deal, nor had he told his counsel that he would have accepted a plea offer had one been presented to him.[47]

The Eleventh Circuit Court of Appeals granted a certificate of appealability to review the District Court's denial of Davis's ineffective assistance of counsel claim.[48] Davis pointed to the fact that "(1) it was clear that he was going to be convicted for charges that would yield a longer-than-life mandatory sentence and (2) two of Davis's similarly situated co-defendants negotiated a plea deal resulting in the dismissal of multiple . . . charges" as indicators of his counsel's ineffectiveness.[49] He contended that these facts indicated the government would have offered a plea agreement—likely dismissing some of his charges—had his counsel not been deficient in his performance, and he would have been willing to enter a guilty plea had he been given proper advice to do so.[50] Accordingly, Davis argued his defense was prejudiced by his counsel's failure to pursue a plea deal.[51]

In the absence of a Supreme Court decision settling the question raised by his appeal, the outcome of Davis's argument depended on the approach of the circuit in which his case was being tried. Davis's case provided the Eleventh Circuit the opportunity to decide how prejudice could be established by a defendant in this context—and now-27-year-old Quartavious Davis was left hoping that his future did not entail 160 years in prison while his co-defendants would eventually walk free.

Unfortunately, Davis, found himself in a circuit that rejected his argument on the basis that a demonstration of *Strickland* prejudice was not possible without showing that the government offered a plea deal to the court.[52] Because Davis did not allege that the government offered a deal, nor that he would have accepted one, the court determined there was no valid ineffective assistance of

[45] Strickland v. Washington, 466 U.S. 668, 687 (1984).
[46] *Davis*, 2020 U.S. Dist. LEXIS 12453, at *49.
[47] *Id.* at *53-54.
[48] Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753, at *1 (11th Cir. Feb. 10, 2022).
[49] *Id.* at *5.
[50] *Id.*
[51] *Id.*
[52] *Id.* at *6.

counsel claim.[53] In the Court's eyes, Davis was attempting to expand his Sixth Amendment rights to a degree they do not reach—a degree which, in other circuits, is within a defendant's constitutional right to achieve.

III. *STRICKLAND*'S INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

The Sixth Amendment of the United States Constitution guarantees criminal defendants "the right… to have the Assistance of Counsel for his defence,"[54] assuring "fairness, and thus the legitimately, of [the United States'] adversary process."[55] This fundamental right has been interpreted as the right to *effective* assistance of counsel, not merely an attorney's presence alongside a criminal defendant.[56] Moreover, defendants are entitled to effective assistance of counsel at all *critical* stages of a criminal proceeding—including pretrial stages where a defendant cannot be presumed to make crucial decisions without counsel's advice.[57] This right therefore extends to the plea bargaining process, as it "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[58]

Although an attorney can violate this constitutional right "simply by failing to render 'adequate legal assistance'" to the defendant,[59] the Supreme Court established a two-pronged test in *Strickland v. Washington*, requiring defendants seeking relief for ineffective assistance of counsel to show: (1) the defense counsel's performance was deficient; and (2) the deficient performance prejudiced the defense.[60] The deficiency prong is assessed with enormous deference to the counsel's strategy for representation and a strong presumption of reasonableness.[61] An attorney's representation is considered deficient only when his or her actions fail to meet an objective standard of reasonableness "under prevailing professional norms," judged "on the facts of the particular case, viewed as of the time of counsel's conduct."[62] However, the

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[53] *Id.*
[54] U.S. CONST. amend. VI.
[55] Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).
[56] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Strickland v. Washington, 466 U.S. 668, 685 (1984).
[57] U.S. CONST. amend. VI; Lafler v. Cooper, 566 U.S. 156, 165 (2012) (citing United States v. Wade, 388 U.S. 218, 226 (1967)).
[58] *Lafler*, 566 U.S. at 170 (citing Missouri v. Frye, 566 U.S. 134, 143-144 (2012)).
[59] Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).
[60] *Id.* at 687.
[61] *Id.* at 689.
[62] *Id.* at 687, 690.

Strickland Court directed lower courts to dismiss ineffectiveness claims on the ground of insufficient prejudice without "grad[ing] counsel's performance" whenever "it is easier" to do so.[63]

Therefore, the second prong of *Strickland*—that the assistance was *prejudicially* ineffective—serves as the lynchpin for a valid ineffective assistance of counsel claim.[64] The standard for determining prejudicial ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result."[65] In the plea bargaining context, it must be shown that "the outcome of the plea process would have been different with competent advice."[66] To do so, a defendant must demonstrate a reasonable probability that, but for counsel's ineffectiveness:

> the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea, and the prosecution would not have withdrawn it), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that were imposed.[67]

This is an enormous hurdle for criminal defendants who claim prejudicially ineffective assistance of counsel to overcome. In fact, in the five years following the Court's *Strickland* decision, defendants alleging ineffective assistance of counsel prevailed in only *four percent* of the 702 reported cases.[68] Instructing courts to dispose of these claims by first assessing the prejudice prong is the Supreme Court's attempt to increase efficiency in the handling of these Sixth Amendment cases, but perhaps at the cost of defendants' constitutional rights.[69]

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[63] *Id.* at 697.
[64] *Id.*
[65] Strickland v. Washington, 466 U.S. 668, 686 (1984).
[66] Lafler v. Cooper, 566 U.S. 156, 163 (2012); *see also* Missouri v. Frye, 566 U.S. 134, 148 (2012) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)) (noting that *Strickland*'s inquiry, as applied to advice with respect to plea bargains, turns on "whether 'the result of the proceeding would have been different.'").
[67] *Lafler*, 566 U.S. at 164.
[68] This statistic reflects defendants' claims of ineffective assistance of counsel throughout all critical stages of a criminal proceeding rather than just the plea process. Martin C. Calhoun, *Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 458 (1988).
[69] *See* Kellsie J. Nienhuser, *Criminal Law – Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel after* Osborne v. State, *2012 WY 123, 285 P.3d 248 (Wyo. 2012)*, 14 WYO. L. REV. 161, 174 (2014)

Notably, a defendant's guilt does not preclude his Sixth Amendment right to effective assistance of counsel, nor does it mean "that he suffered no prejudice from his attorney's deficient performance during plea bargaining."[70] "The [S]ixth [A]mendment guarantee does *not* extend only to someone who should have been acquitted. It therefore does *not* require proof of prejudice. It says nothing about 'guilt' or 'prejudice'. What it does refer to, and guarantees, is 'assistance of counsel' … to innocent *and* guilty alike."[71]

Nevertheless, a significant division among the Circuit Courts has since arisen concerning what exactly is required for a showing of prejudicially ineffective assistance of counsel in the plea process.[72] This enduring circuit split means that what is encompassed by a defendant's Sixth Amendment right to effective assistance of counsel in the plea process varies based merely on his geographical location. As a result, a defendant in Tennessee may have a viable claim for a violation of his constitutional rights where his counsel failed to initiate plea negotiations in the absence of a plea offer from the prosecution, but mere miles away in Arkansas, that same defendant must simply live with the consequences of his counsel's inaction.[73]

IV. THE DIVISION OVER WHAT QUALIFIES AS PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL AFTER *STRICKLAND*

A. The Eighth and Eleventh Circuits' Stringent Prejudice Threshold Requirement

On one side of the circuit split, the Eighth and Eleventh Circuits hold that *Strickland*'s prejudice prong is not satisfied if a defendant cannot sufficiently show: (1) that a plea bargain was offered by the prosecution, and (2) the defendant's outcome would have been different but for his counsel's deficient performance.[74] These circuits seemingly interpret the Supreme Court's decisions in

("Efficiency appeared at the forefront of the *Strickland* court's analysis, while the true purpose of the *Strickland* standard, to evaluate claims of ineffective assistance, is put on the back burner.").

[70] *Lafler*, 566 U.S. at 169.

[71] Commonwealth v. Garvin, 485 A.2d 36, 49-50 (Pa. Super. Ct. 1984).

[72] Spencer Gottlieb, *High Court Cert Denial Puts New Spotlight on Plea Bargains*, LAW360 (June 22, 2023, 1:56 PM), https://www.law360.com/articles/1690472/high-court-cert-denial-puts-new-spotlight-on-plea-bargains.

[73] Gottlieb, *supra* note 72; *see also* Davis v. United States, 143 S. Ct. 647 (2023) (Jackson, J., dissenting from denial of certiorari).

[74] *See* Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753, at *4-6 (11th Cir. Feb. 10, 2022); *see also* Ramirez v. United States, 751 F.3d 604, 607-08 (8th Cir. 2014); *Davis*, 143 S. Ct. at 647 (Jackson, J., dissenting from denial of certiorari).

Lafler v. Cooper and *Missouri v. Frye*—both of which held that a defendant's Sixth Amendment rights can be violated by counsel's deficient performance during the plea bargaining stage of a trial—as rules that are premised on the prosecutor formally making a plea offer to the defendant.[75] This interpretation of the Court's decisions transforms a plea offer by the government into a threshold requirement for a showing of ineffective assistance of counsel in the context of plea bargaining, despite the fact that the Supreme Court has never precluded a defendant from the right to effective assistance of counsel prior to a plea offer being made by the prosecution.[76]

For example, in *Ramirez v. United States* (2014), the Eighth Circuit denied relief to defendant Lino Ramirez claiming ineffective assistance of counsel due to his attorney's "fail[ure] to inform him of the government's interest in a cooperation agreement."[77] Ramirez's argument was rejected on the basis that "there was never a plea offer for counsel to convey to [him]," and "[t]he mere possibility of obtaining more advantageous plea agreement terms is not sufficient to satisfy the prejudice required by *Strickland*."[78] In denying Ramirez relief, the Eighth Circuit expressly distinguished *Frye* (and acknowledges its "sister case" *Lafler*) from Ramirez's case by noting that the defendant in *Frye* received a formal plea offer from the government, whereas Ramirez did not.[79]

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[75] *See Davis*, 143 S. Ct. at 647 (Jackson, J., dissenting); *see also* Byrd v. Skipper, 940 F.3d 248, 264 (6th Cir. 2019) (Griffin, J., dissenting) (collecting cases to support the suggestion that ineffective assistance of counsel in plea bargaining context "require[s] proof of a plea offer").

[76] *See* United States v. Cook, No. 10-20716, 2014 U.S. Dist. LEXIS 132777, at *10 (E.D. Mich. Sept. 21, 2014) ("As there is no substantive right to pursue and enter into plea negotiations with the Government, counsel could not have been ineffective for failing to pursue a plea deal."); *see also* McClain v. United States, No. 12-2205, 2013 U.S. Dist. LEXIS 37641, at *14 (D.N.J. Mar. 19, 2013) ("That Petitioner's counsel did not seek a plea deal and did not discuss with Petitioner any aspects of a hypothetical plea deal does not constitute deficient performance under Strickland."); United States v. Rumble, 111 F. Supp. 3d 207, 212-13 (N.D.N.Y. 2015) (defense counsel's failure to negotiate a plea bargain for defendant did not amount to ineffective assistance of counsel where defendant advised counsel that he was not interested in any plea agreements); United States v. McArthur, No. 12-26 (JRT/JSM), 2024 U.S. Dist. LEXIS 159431, at *8 (D. Minn. Sep. 5, 2024) ("The fact that the Government never tendered a formal plea offer within a range that McArthur authorized counsel to negotiate does not demonstrate ineffective assistance.").

[77] *Ramirez*, 751 F.3d at 605 (alteration in original).

[78] *Id.* at 606.

[79] *Id.* at 607-08.

B. The Defendant-Friendly Fourth and Sixth Circuits' Approach

Alternatively, the Fourth and Sixth Circuits have a less stringent standard—applying a subjective, case-by-case approach to deciding whether a defendant can establish prejudicially ineffective assistance of counsel "as result of counsel's failure to initiate plea negotiations when prosecution has proposed no plea terms."[80] In these circuits, there is no threshold requirement that the government put a plea offer on the table before the defendant can demonstrate his counsel's failure to pursue a plea deal prejudiced him.[81] Instead, a defendant in this situation must show "a reasonable probability that the prosecution would have offered a plea deal, that the defendant would have accepted the proposed terms, that the trial court would have approved it, and that the deal would have contained better terms than the judgment that resulted from the trial."[82]

In *Byrd v. Skipper* (2019), the Sixth Circuit reversed a felony murder conviction on the ground that the Byrd's counsel failed to initiate plea negotiations, reasoning that the right to effective assistance of counsel "extends to all critical stages of a criminal proceeding, including pretrial plea negotiation," and "the Supreme Court has never cabined that right to negotiations that take place only *after* an offer has been made."[83] Byrd received a life sentence without the possibility of parole for aiding and abetting a felony murder, while his co-defendant received a plea deal of a 30 to 50 year sentence in exchange for serving as a witness in Byrd's trial.[84] Evidence presented at trial indicated that Byrd would have been offered a plea agreement if his attorney had requested it.[85] Thus, the Sixth Circuit held that "where a petitioner alleges ineffective assistance of counsel prevented plea negotiations, demonstrating [*Strickland*] prejudice requires that he establish a *reasonable probability* that but for counsel's errors, the petitioner would have received a plea offer."[86] Significantly, the Sixth Circuit further held

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[80] Carson v. United States, 88 F.4th 633, 640 (6th Cir. 2023) (citing *Byrd,* 940 F.3d at 255-57); *see* United States v. Pender, 514 F. App'x 359, 360-61 (4th Cir. 2013) (finding prejudice although the defendant did not allege the government had offered a plea deal, where the government "concede[d] that a plea bargain with a beneficial sentence would have been (or was) offered had counsel pursued it").

[81] *Carson*, 88 F.4th at 640 (rejecting the approach "that a defendant cannot make out an ineffective-assistance claim unless the prosecution puts a plea deal on the table."); *see also* Byrd v. Skipper, 940 F.3d 248, 259-61 (6th Cir. 2019); *Pender*, 514 F. App'x at 361.

[82] *Carson*, 88 F.4th at 640.

[83] *Byrd*, 940 F.3d at 255 (emphasis added).

[84] *Id.* at 251-52.

[85] *Id*. at 252.

[86] *Id.* at 257 (citing Lafler v. Cooper, 566 U.S. 156, 163-64 (2012); Missouri v. Frye, 566 U.S. 134, 148-49 (2012)) (emphasis added).

that a defendant can establish that a favorable plea deal could have been obtainable through negotiation by pointing to a plea deal received by a co-defendant.[87]

Similarly, in *United States v. Pender* (2013), the Fourth Circuit appellate court granted relief to a defendant whose counsel failed to initiate plea negotiations despite the existence of strong evidence against the defendant and the fact that he would receive a life sentence if convicted.[88] The court acknowledged that "[defense] counsel does not have a general duty to initiate plea negotiations," but still determined that an ineffective assistance claim was viable where there was "no evidence that counsel was acting reasonably or strategically" in foregoing those negotiations, and the decision not to do so "exposed [the defendant] to a mandatory life sentence."[89]

C. The Split's Influence in *Davis v. United States* in the Eleventh Circuit

If Davis's case had been brought in a Fourth or Sixth Circuit Court, it is likely that his claim for ineffective assistance of counsel would have succeeded.[90] By pointing to the plea deal received by his co-defendants, Davis likely could have established that a favorable plea deal was obtainable.[91] Further, Davis could have established ineffectiveness by showing that his counsel did not act reasonably or strategically, considering that his counsel's failure to initiate plea discussions exposed him to a mandatory life sentence, and his similarly situated co-defendants received favorable plea deals.[92] Ultimately, however, Davis's constitutional right to seek relief for ineffective assistance of counsel was limited by the absence of a plea offered by the government,[93] and he continues to face nearly 160 years in prison while his co-defendants will go free in just a few decades.[94]

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[87] *Byrd*, 940 F.3d at 258.
[88] United States v. Pender, 514 F. App'x 359, 360 (4th Cir. 2013).
[89] *Id.* at 361.
[90] Davis v. United States, 143 S. Ct. 647, 647 (2023) (Jackson, J., dissenting from denial of certiorari) ("[U]nder the circumstances presented here, it was exceedingly likely that Davis would have prevailed with respect to the prejudice prong if the Eleventh Circuit had not applied [the] threshold requirement" that an actual plea offer was made.).
[91] *See* Byrd v. Skipper, 940 F.3d 248, 258 (6th Cir. 2019).
[92] *See Pender*, 514 F. App'x at 361.
[93] Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753, at *6 (11th Cir. Feb. 10, 2022).
[94] *Id.*; Brief for Petitioner at 37, Davis v. United States, 143 S. Ct. 647 (2023) (No. 22-5364).

V. CRITICISMS OF THE *STRICKLAND* PREJUDICE REQUIREMENT

Unfortunately for criminal defendants, the Supreme Court has protected the right to counsel much more effectively than it has safeguarded defendants' right to receive constitutionally effective assistance of counsel.[95] Because of the enormous burden defendants must overcome as a result of *Strickland v. Washington*, the constitutional guarantee of effective assistance of counsel can return unfulfilled and meaningless to criminal defendants like Quartavious Davis.[96] The *Strickland* prejudice requirement has long been criticized for perpetuating this void by creating a nearly "insurmountable hurdle for defendants claiming ineffective assistance" and "fostering tolerance of abysmal lawyering."[97] This may be acceptable if the right to effective assistance of counsel were rather insignificant. However, criminal defendants' futures are generally at the mercy of their defense counsel, and yet, the burden of showing a violation of their Sixth Amendment rights is virtually undefeatable.[98]

A significant part of the Supreme Court's basis for the *Strickland* decision was combating excessive amounts of ineffective assistance claims and promoting an efficient judicial system.[99] "The Court believed that ineffective assistance of counsel appeals would burden the judicial system."[100] By prioritizing efficiency over "the true purpose of the *Strickland* standard"—to assess claims of ineffective assistance—the Court seems to place more weight in the concern for an overburdened court than a defendant's Sixth Amendment Rights.[101] However, the Constitution trumps a policy argument in favor of efficiency.[102] "Although there are judicial efficiency and cost concerns… what courts should always keep in

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[95] Martin C. Calhoun, *Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 413 (1988).

[96] *See* Kellsie J. Nienhuser, *Criminal Law – Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel after Osborne v. State*, *2012 WY 123, 285 P.3d 248 (Wyo. 2012)*, 14 WYO. L. REV. 161, 161 (2014).

[97] William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995); *see also* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 6 (2002).

[98] Calhoun, *supra* note 95, at 457 (noting that only four percent of defendants alleging ineffective assistance of counsel prevailed in 702 reported cases).

[99] *See* Nienhuser, *supra* note 96, at 174.

[100] Nienhuser, *supra* note 96, at 174; *see* Strickland v. Washington, 466 U.S. 668, 690 (1984) ("The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.").

[101] Nienhuser, *supra* note 96, at 174.

[102] U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land.").

mind as their paramount concern is the constitutional demand that criminal [proceedings] be fair."[103]

Moreover, some scholars believe the prejudice prong "overemphasiz[es counsel's] innocence and sacrific[es] the means of procedural safeguards for the ends of reliable [proceedings]."[104] In his *Strickland* dissent, Justice Marshall specifically criticizes the prejudice prong, stating that it "seems… senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice" because it is nearly impossible for defendants to show that the outcome would have been different if their counsel had acted differently.[105] Essentially, few defendants seeking relief for ineffective assistance of counsel "will be able to pass through the 'eye of the needle' created by *Strickland*."[106]

Despite its shaky foundation and onslaught of criticism, some variation of the federal *Strickland* standard has been almost universally adopted by state courts nationwide—except in Hawaii.[107] The Hawaii Supreme Court has explicitly rejected the "double burden" enforced by *Strickland*, stating the prejudice prong is "unduly difficult for a defendant to meet."[108] Instead, to establish ineffective assistance of counsel in Hawaii, defendants "must show that there were 'specific errors or omissions … reflecting counsel's lack of skill, judgment or diligence, and these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'"[109]

In other states, members of the judiciary have expressed concern over the *Strickland* standard, arguing that once a defendant proves his counsel was ineffective, this burden should shift to the State to prove beyond a reasonable doubt that the counsel's incompetence was harmless error.[110] This concern stems from the fact that the *Strickland* standard places the entire burden on the defendant to prove his counsel's ineffectiveness—a sharp contrast

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[103] Nathan Oswald, *In Defense of Fairness: Protecting the Adversarial Process When a Pro Se Criminal Defendant is Removed from the Courtroom*, 41 UNIV. TOL. L. REV. 735, 736 (2010).
[104] Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 3 (2009).
[105] Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting).
[106] Richard Klein, *The Constitutionalizing of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1472 (1999) (quoting Sullivan v. Fairman*,* 819 F.2d 1382, 1391 (7th Cir. 1987)).
[107] Kellsie J. Nienhuser, *Criminal Law – Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel after Osborne v. State*, *2012 WY 123, 285 P.3d 248 (Wyo. 2012)*, 14 WYO. L. REV. 161, 166 (2014).
[108] *Id.* (internal quotation marks omitted) (quoting State v. Smith, 712 P.2d 496, 500 (Haw. 1986)).
[109] Nienhuser, *supra* note 107, at 166 (quoting *Smith*, 712 P.2d at 500).
[110] Commonwealth v. Garvin, 485 A.2d 36, 52 (Pa. Super. Ct. 1984).

to other constitutional rights.[111] Similar to the Fourth and Sixth Circuits' approach, the Supreme Court of Alaska requires only that the accused create a reasonable doubt that counsel's incompetence contributed to the proceedings outcome before prejudice can be established.[112] Finally, the New York Court of Appeals refers to its approach to the prejudice component as a "flexible" one, focusing on whether the attorney provided meaningful representation "viewed in totality and as of the time of the representation" to consider the "fairness of the process as a whole."[113]

In sum, the critics and judges who have strayed from the traditional *Strickland* prejudice standard appear to be united in this understanding: in a criminal justice system founded upon the defendant's right to a fair and impartial criminal proceeding, *Strickland* does little to grant relief to defendants seeking to establish ineffective assistance of counsel due to the giant hurdle it imposes upon potentially injured defendants.[114]

VI. JUSTICE KETANJI BROWN JACKSON'S *DAVIS V. UNITED STATES* DISSENTING OPINION

Notably, the two Justices whose names accompany the *Davis v. United States dissent* are former criminal law attorneys.[115] Prior to their appointments to the United States Supreme Court, Justice Jackson was an assistant federal public defender in Washington, D.C., and Justice Sotomayor was an assistant district attorney in Manhattan.[116] The two justices with criminal law backgrounds clearly recognize the importance of resolving this circuit split and the implications a Supreme Court decision would

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[111] Strickland v. Washington, 466 U.S. 668, 696 (1984); Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 48 (2009) (explaining that the burden placed on the defendant by *Strickland* is "in sharp contrast to other constitutional rights, with regard to which the defendant bears the burden of showing the violation and the state bears the burden of showing absence of harm.").

[112] Nienuhuser, *supra* note 107, at 167.

[113] Kellsie J. Nienhuser, *Criminal Law – Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel after Osborne v. State*, *2012 WY 123, 285 P.3d 248 (Wyo. 2012)*, 14 WYO. L. REV. 161, 167 (2014) (internal quotation marks omitted) (citing People v. Henry, 744 N.E.2d 112, 113 (N.Y. 2000)).

[114] Martin C. Calhoun, *Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 427 (1988).

[115] Spencer Gottlieb, *High Court Cert Denial Puts New Spotlight on Plea Bargains*, LAW360 (June 22, 2023, 1:56 PM), https://www.law360.com/articles/1690472/high-court-cert-denial-puts-new-spotlight-on-plea-bargains.

[116] *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 6, 2024).

have for defendants in a predominately plea-based criminal justice system.[117]

In her dissent joined by Justice Sotomayor, Justice Jackson acknowledges that the answer to the question of how a defendant like Davis can show prejudice as a result of his counsel's failure to initiate plea discussions remains unclear.[118] She believes the Eleventh Circuit's opinion in *Davis* not only further solidifies an existing "divergence of circuit opinions," but that Davis's case "is an ideal vehicle to evaluate the Eleventh Circuit's bright-line rule that an adequate showing of prejudice requires an actual plea offer."[119] Justice Jackson indicates her belief that Davis likely "would have prevailed with respect to the prejudice prong" if the threshold requirement that a plea offer was made had not been applied because "each of Davis'[s] five codefendants had lawyers who negotiated favorable plea agreements with respect to the same series of armed robberies."[120]

Justice Jackson also explicitly highlights the District Court judge's assertion that "*while he thought the appropriate sentence for Davis was 40 years*, he was bound by the consecutive mandatory minimums."[121] Despite this acknowledgment from the District Court judge, Justice Jackson believes the Eleventh Circuit "gave short shrift to [the] alleged facts" that indicated a sufficient showing of prejudice due to the "bright-line rule that prejudice cannot be shown in the absence of a plea offer."[122] It is for these reasons that Justice Jackson and Justice Sotomayor would grant certiorari.[123]

VII. REMOVING THE THRESHOLD REQUIREMENT THAT DEFENDANTS RECEIVE A FORMAL PLEA OFFER BEFORE THEY CAN ESTABLISH A VALID INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AT THE PLEA STAGE

Justice Jackson and Justice Sotomayor recognize a gaping hole in the country's Sixth Amendment effective assistance of counsel jurisprudence that needs to be addressed quickly: How can a defendant demonstrate *Strickland* prejudice as a result of his counsel's actions during the plea bargaining stage of trial?[124] The framework proposed in this article mirrors the answer Justice Jackson proffers in her dissent: there should be no threshold

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[117] Gottlieb, *supra* note 115.
[118] Davis v. United States, 143 S. Ct. 647, 647 (2023) (Jackson, J., dissenting from denial of certiorari).
[119] *Id.* (Jackson, J., dissenting from denial of certiorari).
[120] *Id.* at 648 (Jackson, J., dissenting from denial of certiorari).
[121] *Id*. (Jackson, J., dissenting from denial of certiorari) (emphasis added).
[122] *Id.* (Jackson, J., dissenting from denial of certiorari).
[123] *Id.* (Jackson, J., dissenting from denial of certiorari).
[124] Davis v. United States, 143 S. Ct. 647, 647 (2023) (Jackson, J., dissenting from denial of certiorari).

requirement that a defendant has been formally offered a plea deal by the government before he can establish *Strickland* prejudice for ineffective assistance of counsel at the plea stage.[125] Instead, defendants should be able to establish prejudice by pointing to various factors indicating a reasonable probability that, but for the counsel's action (or inaction), the outcome of the plea process would have been different.

It is noteworthy that Justice Jackson came to her conclusion only after considering the case's surrounding circumstances, including the fact that Davis's co-defendants had lawyers who negotiated favorable plea agreements with respect to the same crimes, each receiving sentences of less than forty years as a result of their respective agreements.[126] Employing Justice Jackson's subjective, case-by-case approach to determining whether prejudice can be established is a familiar concept when it comes to the application of *Strickland*.[127] In his concurring *Strickland* opinion, Justice Brennan noted that strict application guidelines would be inappropriate, and that "the [*Strickland*] standards are sufficiently flexible to accommodate the wide variety of situations giving rise to [ineffective assistance] claims."[128]

Moreover, in *Weaver v. Massachusetts*—a case in which the defendant was seeking relief for ineffective assistance of counsel during trial—Justice Kennedy, writing for the majority, was careful to emphasize that the *Strickland* opinion itself "cautioned that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion" and noted that "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'"[129] The defendant argued "even if there is no showing of a reasonable probability of a different outcome, relief must still be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." The Court presumed "that [this] interpretation of *Strickland* [was] the correct one."[130]

The view that prejudice inquiries should not be applied in a mechanical, one-size-fits-all fashion directly contradicts the Eighth

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[125] *Id.* at 648 (Jackson, J., dissenting from denial of certiorari).
[126] *Id.* (Jackson, J., dissenting from denial of certiorari).
[127] *See* Strickland v. Washington, 466 U.S. 668, 688-89 (1984) (internal citations omitted) ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.").
[128] *Id*. at 703 (Brennan, J., concurring in part and dissenting in part).
[129] Weaver v. Massachusetts, 582 U.S. 286, 300 (2017).
[130] *Id.*

and Eleventh Circuits' holdings. On this side of the circuit split, prejudice can be shown *only if* the prosecution has offered the defendant a plea deal.[131] This approach to *Strickland* prejudice ignores the premise that the ultimate inquiry should be concentrated on a proceeding's fundamental fairness and instead focuses on only one aspect of the proceeding: the government's strategy.[132] Without a plea offer on the table, defendants in these circuits are stripped of their right to relief for a violation of their constitutional rights during the plea process, no matter how egregious the defense counsel's actions. This allows the government to inadvertently act as a gatekeeper to defendants' ineffective assistance of counsel claims. Ultimately, this threshold requirement means that the government's action—*not* the defense counsel's—determines whether a defendant can establish the requisite prejudice needed for a valid effective assistance of counsel claim.

On the other hand, the Fourth and Sixth Circuits' line of reasoning fits squarely within *Strickland*'s instruction to avoid a mechanical application of the rule, and it is the one the United States Supreme Court should adopt.[133] Instead of requiring a plea offer by the government before *Strickland*'s prejudice prong can be satisfied, the court should look to the surrounding circumstances—including plea deals received by codefendants and whether a defendant is exposed to a mandatory life sentence because of the counsel's failure to initiate plea discussions—to determine whether prejudice has been established.[134] By eliminating this threshold requirement, defendants' Sixth Amendment rights are prioritized over court efficiency, providing defendants with a legitimate means by which they may seek relief for ineffective assistance of counsel during the plea stage. The flexibility offered by this application of *Strickland* makes the test easier to apply while still incorporating the prejudice component.[135]

Ironically, the prejudice prong can be the most challenging to demonstrate in the cases where the attorney's actions were the most egregious, such as when an attorney's failure to initiate plea

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[131] *See* Ramirez v. United States, 751 F.3d 604, 607-08 (8th Cir. 2014); *see also* Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753, at *6 (11th Cir. Feb. 10, 2022).

[132] *See Weaver*, 582 U.S. at 300 (warning courts not to apply *Strickland* in a mechanical, one-size-fits-all fashion).

[133] *See* Byrd v. Skipper, 940 F.3d 248, 259 (6th Cir. 2019); *see also* United States v. Pender, 514 F. App'x 359, 361 (4th Cir. 2013).

[134] *See Byrd*, 940 F.3d at 359; *see also, e.g.,* Davis v. United States, 143 S. Ct. 647, 647 (2023) (Jackson, J., dissenting from denial of certiorari).

[135] Kellsie J. Nienhuser, *Criminal Law – Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel after Osborne v. State*, *2012 WY 123, 285 P.3d 248 (Wyo. 2012)*, 14 WYO. L. REV. 161, 177 (2014).

discussions exposes the defendant to a mandatory life sentence.[136] As Justice Marshall made clear, "the difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."[137] For example, there is going to be no evidence where counsel fails to initiate plea discussions, precisely because the prejudicial act was the *lack* of action. Therefore, to prevent defendants from establishing prejudice by making a plea offer a threshold requirement renders potentially injured defendants helpless, especially considering evidence of counsel's prejudicially ineffective assistance may not even exist. It is in circumstances like these where the necessity of removing the threshold requirement that a plea has been offered becomes glaringly obvious.

Notably, under this proposed framework, a defense attorney's failure to pursue a plea agreement is not a per se violation of a defendant's constitutional right to effective assistance of counsel.[138] As previously mentioned, criminal defendants have no constitutional right to a plea bargain. [139] Thus, attorneys will not be forced to initiate plea negotiations in cases where it is not practical or feasible simply to avoid giving rise to a claim for ineffective assistance of counsel. Even if a defendant believes in good faith that his defense counsel's failure to initiate plea negotiations violates the rules of professional conduct, the attorney's actions will give rise to a claim for ineffective assistance of counsel only if there is a displacement of the adversarial process.[140] The prejudice prong would still require a showing of "a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."[141]

Instead, this framework would place more responsibility in the hands of defense attorneys to consider whether initiating plea

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[136] *See* Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 166-67 (2009)

[137] *See* Dufour v. Mississippi, 479 U.S. 891, 892-93 (1986) (Marshall, J., dissenting from denial of certiorari) (noting defendant claimed ineffective assistance because counsel's alleged error was failing to request appointment of psychiatrist to assist in developing psychological evidence, and state supreme court denied claim for lack of prejudice under *Strickland* because indigent defendant did not proffer psychiatric evidence; however, defendant was unable to demonstrate prejudice precisely because counsel failed to seek appointment of expert without whose assistance evidence tending to show prejudice could not have been brought to light).

[138] *See Pender*, 514 F. App'x at 360 ("[C]ounsel does not have a general duty to initiate plea negotiations[.]").

[139] Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

[140] Burger v. Kemp, 483 U.S. 776, 795-96 (1987).

[141] Strickland v. Washington, 466 U.S. 668, 694 (1984).

negotiations is in the best interest of their defendant. Defense counsel in a situation like Quartavious Davis's attorney would no longer be protected from an ineffective assistance of counsel claim by a threshold requirement of a plea being offered by the government. As a result, the quality of defendants' legal representation would improve—a necessity for achieving better protection of defendants' Sixth Amendment rights. "[I]f defendants do not now receive the level of representation guaranteed by the [S]ixth [A]mendment, then any means to the end of protecting the right to effective assistance of counsel necessarily must improve the quality of legal representation."[142] Such an improvement in quality of representation could mean the difference between forty years and 160 years in federal prison to a defendant like Quartavious Davis.

CONCLUSION

In the forty years since *Strickland* was decided, the American criminal justice system has shifted to a system primarily comprised of pleas instead of trials, whereas the standard for ineffective assistance of counsel has remained essentially unchanged. As a result, criminal defense attorneys are wading into murky waters when plea agreements are in question, unsure of exactly what the Sixth Amendment requires of their representation. On the other side of the coin, criminal defendants receiving constitutionally insufficient assistance of counsel may only sometimes meet the prejudice threshold required to seek relief.

If there is to be congruence in the Sixth Amendment's application—and for the right to effective assistance of counsel to effectuate robust, meaningful protection of criminal defendants' rights—the Supreme Court must resolve the lingering circuit split regarding whether a defendant can establish *Strickland* prejudice when the government has not offered a plea deal. Otherwise, defendants like Quartavious Davis, whose constitutional rights have been violated because of their counsel's representation, will continue to be denied any avenue to seek relief.

How are defendants whose Sixth Amendment rights have been violated during the plea process able to show prejudice in this scenario if this threshold requirement prevents them from stating a claim upon which relief can be granted? That answer to that question—offered by Justice Jackson in her *Davis* dissent—is the only one that makes the Sixth Amendment more than an empty promise to criminal defendants: that a defendant may, in the absence of a formal plea offer from the government and in the presence of

[142] Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L. J. 413, 436 (1988).

other supporting factors,[143] establish prejudicially ineffective assistance of counsel when his counsel has failed to initiate plea negotiations.

Ultimately, the flexibility offered by this application of *Strickland* makes the test more feasible to apply while still incorporating the prejudice component imposed by the Supreme Court.[144] By focusing on the fundamental fairness of the proceeding, this approach better achieves the Sixth Amendment's purpose: to "increase the likelihood of justice ultimately being reached."[145]

[143] Factors such as a co-defendant's plea deal or exposure to a mandatory life sentence. *See* Davis v. United States, 143 S. Ct. 647, 647 (2023) (Jackson, J., dissenting from denial of certiorari).

[144] Kellsie J. Nienhuser, *Criminal Law – Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel after* Osborne v. State, *2012 WY 123, 285 P.3d 248 (Wyo. 2012)*, 14 WYO. L. REV. 161, 177 (2014).

[145] Legal Info. Inst., *Effective Assistance of* Counsel, CORNELL L. SCH., https://www.law.cornell.edu/wex/effective_assistance_of_counsel#:~:text=The%20purpose%20of%20this%20guarantee,government%20in%20an%20adversarial%20position (last visited Mar. 11, 2024); *see also* Nienhuser *supra* note 144, at 177.

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OH MOTHER, WHERE ART THOU PAYCHECK?: ANSWERING THE MOMMY BLOGGER DILEMMA WITH INCREASED PRIVACY AND FINANCIAL PROTECTIONS FOR MINORS

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INTRODUCTIONS

Privacy is paramount. In an age of technological surveillance—both by increasingly militarized[1] police forces[2] and seemingly benign social media companies[3]—privacy rights have attained an increased relevance and importance in society.[4] However, in most discussions of privacy rights, there is little focus on the impact of increased access to technology on one community in particular: minor children. In fact, fitting with the nascent internet industry, privacy rights of children in a modern, digital age are a subject of recent legal phenomena.[5]

As a field still in the early stages, few cases discuss the prevalence and legal impacts of children-centered and child-led entertainment on social media platforms like YouTube and TikTok. Even fewer consider the rights of these children from a privacy law perspective. However, the rising popularity and normalization of family bloggers and vloggers—sometimes (and typically derogatorily[6]) referred to as "mommy bloggers"[7]—raises questions about the impact these industries can have on the children unwittingly involved. Long-lasting impacts from this work manifest not only in negative psychological effects, both for the child and parents,[8] but also with damaging legal ramifications. This online

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[1] Jeff Adachi, *Police Militarization and the War on Citizens*, HUM. RTS. MAG., www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-1/police-militarization-and-the-war-on-citizens/ (last visited Jan. 31, 2024).

[2] Jennifer Valentino-Devries, *How the Police Use Facial Recognition, and Where It Falls Short*, N.Y. TIMES, (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/technology/facial-recognition-police.html.

[3] *See, e.g.* Megan McCluskey, *TikTok Has Started Collecting Your 'Faceprints' and 'Voiceprints:' Here's What It Could Do With Them*, TIME (June 14, 2021, 12:45 PM), https://time.com/6071773/tiktok-faceprints-voiceprints-privacy/ & Anna Cooban, *Meta accused of 'massive, illegal' data processing by European consumer groups*, CNN (Feb. 29, 2024, 11:04 AM), https://www.cnn.com/2024/02/29/tech/meta-data-processing-europe-gdpr/index.html.

[4] Colleen McClain et al., *How Americans View Data Privacy,* PEW RSCH. CTR. (Oct. 18, 2023), https://www.pewresearch.org/internet/2023/10/18/how-americans-view-data-privacy/.

[5] *See* Michelle FormyDuval Lynch, *Privacy Rights of Children in the Digital Age,* NC BAR BLOG (Jan. 31, 2024), https://www.ncbarblog.com/jjcr-privacy-rights-of-children-in-the-digital-age/; *see also* Children's Online Privacy Protection, 15 U.S.C. § 6501-6506.

[6] Lauren Apfel, *I'm a Mommy Blogger and Proud of It*, TIME (Nov. 18, 2014, 2:21 PM), https://time.com/3592698/im-a-mommy-blogger-and-proud-of-it/.

[7] *Mommy Blogger*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/mommy-blogger_n?tl=true (last visited Jan. 24, 2024).

[8] *See* Robert T. Muller & Jessica Ferrier, *Mommy Blogging Shown to Have Upside and Downside*, PSYCH. TODAY (June 24, 2021),

content impacts the privacy of all individuals involved, which is especially concerning considering the essentially permanent presence of these videos and images of minor children on the internet.[9]

Recently, the tragic story of the abuse suffered by the children who were the stars of the well-known YouTube channel 8 Passengers captured national attention.[10] The now-defunct 8 Passengers channel became popular for its content featuring the six children. Videos of the family's day-to-day life—including punishing the children by depriving them of food, beds, and other necessities[11]—were monetized and provided a sizeable yearly income for the parents.[12]

The abuse that these children experienced perversely captured the media's attention: the seemingly "perfect" family hid a dark underbelly.[13] But calling the Franke family "perfect" does not reflect concerns that viewers had over the years the channel existed. In fact, the same videos that made the family famous and provided the main source of income for years have now become a large source of the evidence gathered to be used in the mother's child abuse case.[14] The reality of the Franke family's situation did not come to light until the youngest son escaped from captivity at the house of Franke's business partner Jodi Hildebrant.[15] Upon discovery, the

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https://www.psychologytoday.com/us/blog/talking-about-trauma/202106/mommy-blogging-shown-have-upside-and-downside; Eloise R. Germic et al., *The Impact of Instagram Mommy Blogger Content on the Perceived Self-Efficacy of Mothers*, RESEARCHGATE (2021), https://www.researchgate.net/publication/354148070_The_Impact_of_Instagram_Mommy_Blogger_Content_on_the_Perceived_Self-Efficacy_of_Mothers.

[9] *See* Catherine Thorbecke, *Why deleting something from the internet is 'almost impossible,'* CNN (Sept. 18, 2022, 8:44 AM) https://www.cnn.com/2022/09/18/tech/deleting-data/index.html.

[10] Kelsey Ables & Kim Bellware, *What to know about Ruby Franke, parenting YouTuber charged with child abuse*, WASH. POST (Sept. 1, 2023, 7:05 PM), https://www.washingtonpost.com/nation/2023/09/01/ruby-franke-youtube-8passengers-child-abuse/.

[11] *See Connexions/8 Passengers Links*, GOOGLEDOCS, https://docs.google.com/document/d/1-FyAscr8vIhCfBEXDNT4OiZLVHmkf__8RlT55m4SNX0/mobilebasic (for a list compiled by people across the internet of incidents by Ruby Franke).

[12] Julian, *How Much Money 8 Passengers Makes On YouTube – Net Worth*, NAIBUZZ (Mar. 9, 2021), https://naibuzz.com/much-money-8-passengers-makes-youtube-net-worth/.

[13] *See* Mattea Bubalo, *Who is Ruby Franke, the parenting influencer jailed for child abuse?*, BBC (Feb. 21, 2024), https://www.bbc.com/news/world-us-canada-66719859.

[14] *See* Ables & Bellware, *supra* note 10.

[15] Leyla Mohammed, *Here's How YouTuber Ruby Franke's Son Reacted To Her Being Sentenced For Felony Child Abuse*, BUZZFEED NEWS (Feb. 23, 2024, 5:43 AM), https://www.buzzfeednews.com/article/leylamohammed/ruby-franke-son-chad-reacts-child-abuse-joke-tiktok.

youngest child was "found 'emaciated and malnourished' with 'open wounds'" and another Franke child was found malnourished as well.[16] These discoveries led to the arrest of Franke and Hildebrant.[17]

In the aftermath of the arrest, concerned former-viewers and those drawn in by the story collaborated to compile clips from 8 Passengers videos into a document sourced by Shari Franke, the oldest daughter.[18] These videos illustrate the abusive tendencies and comments that Ruby Franke made throughout the life of the YouTube channel.[19]

Although the 8 Passengers story is exceptional and should not be understood to represent the whole industry, or imply that family bloggers are inherently abusive, the story illustrates the unexpected impacts this lifestyle can have on the minors involved. Not only were these children subjected to horrific abuse in their personal lives, but these experiences were captured on video by their mother, uploaded to an international platform, viewed by millions of people, and monetized to supplant the family income.[20] Even worse, these videos continue to be readily available online, despite the original videos and channel being taken down.[21] The videos will serve as a permanent reminder of what the children endured. Their public consumption is something that the six Franke children were powerless to prevent at the time of recording, and are just as powerless to stop now, even as time passes, and they gradually reach the age of majority.

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[16] *Id.*

[17] *Id.*

[18] Amrita Das, "'*Pain is meant to be a teacher': Shari Franke Google Doc receives tons of video evidence links in wake of crowdsourcing effort*," SKPOP, https://www.sportskeeda.com/pop-culture/news-pain-meant-teacher-shari-franke-google-doc-receives-tons-video-evidence-links-wake-crowdsourcing-effort (Sept. 2, 2023, 08:03 GMT).

[19] *Id.*

[20] *See* Kieran Press-Reynolds, *Fans are recirculating old clips of Ruby Franke being 'awful' to her kids, among other questionable parenting advice, after she was arrested on suspicion of child abuse*, BUS. INSIDER (Sept. 1, 2023, 3:44 PM), https://www.businessinsider.com/ruby-franke-8-passengers-family-vlog-child-abuse-allegations-neglect-2023-9#:~:text=8%20Passengers%20was%20one%20of,Julie%2C%20Russell%2C%20and%20Eve.

[21] *See, e.g.*, Rel, *How to Watch Deleted YouTube Videos [2024 Best Guide]*, EASEUS, https://recorder.easeus.com/screen-recording-resource/how-to-watch-deleted-youtube-videos.html#:~:text=Viewers%20who%20want%20to%20watch,to%20try%20to%20find%20them (Oct. 16, 2024) (giving a how-to guide on accessing deleted YouTube videos).

No matter how the child abuse charges against Ruby Franke result,[22] the lives of the Franke children have been irreparably impacted by the family blogging industry. This story illustrates the dangers of the total lack of legal protections and safeguards in place for the children involved in the "mommy blogging" industry. The consequences of the abuse will impact the Franke children their whole lives. This story highlights the dark realities that can result from seemingly perfect content creators and should serve as cautionary guidance for the creation of future laws to protect these minors.

Of course, not all stories of family content creators involve the same unsafe and horrific circumstances as the 8 Passengers case. Implementing legal protections for children in this industry would protect children like the Franke's, as well as those that have no existing way to claim their financial earnings. Unfortunately, the 8 Passengers story is only the most recent example of why greater protections should be put in place for child entertainers—so-called "kidfluencers"[23] or "childrentertainers." Serious privacy concerns are implicated by the original filming, as well as the continued publication and availability of such content, even after the minor reaches the age of majority.

To protect such a vulnerable community, legal protections modeled after child employment[24] and Coogan laws[25] should be put in place. Due to the unique online nature of blogging content, these protections must either be regulated at a federal level or there must be at a minimum a baseline standard for Coogan laws that each state must implement. Essentially, these protections can take the form of a federally mandated Coogan law, or a Uniform Child Entertainer's Code (modeled after something like the Uniform Commercial Code)[26] that advises states of the best practices to adopt.

Currently, many existing legal protections for minor performers are based upon their work output[27]—in essence, the

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[22] *See Ruby Franke, the YouTube mom who gave parenting advice, pleads guilty to child abuse*, NPR (Dec. 18, 2023, 4:52 PM), https://www.npr.org/2023/12/18/1220098496/ruby-franke-the-youtube-mom-who-gave-parenting-advice-pleads-guilty-to-child-abu.

[23] *See* Charlotte B. Winckler, Article, *Kidfluencers: How the Law's Failure to Keep Up Leaves Children Across the Country at Risk of Labor Abuse and Financial Exploitation*, 16 CHARLESTON L. REV. 111, 111 (2022).

[24] Wage & Hour Div., *Child Labor Enforcement: Keeping Young Workers Safe*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/whd/child-labor/enforcement-keeping-young-workers-safe.

[25] *Coogan Law*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/young-performers/coogan-law (last visited Jan. 26, 2024).

[26] *See generally* U.C.C.

[27] *See, e.g.*, Wage & Hour Div., *Child Entertainment Laws As of January 1, 2023*, U.S. DEP'T OF LABOR (Jan. 1, 2023), https://www.dol.gov/agencies/whd/state/child-labor/entertainment.

product or service they provide—but this system is not compatible with the work done by children influencers. Further, a federal system would resolve complicated jurisdictional issues that arise within Internet-based cases.

These minor entertainers—essentially, minor entertainment as they are the main subject of the online content—are in an entirely different position from minors that work other part-time jobs, which many of the federal child labor laws target.[28] Rather, the minors who partake in these family blogging videos are on the clock 24/7, always on, always observed, no "shifts" to schedule.

With every day a workday, every memory something that can be monetized, and with no formal legal protections, these individuals slip through the cracks. Privacy rights are achieving an increasing importance in the zeitgeist, particularly in the social media age, and action should be taken to implement protections for minors who perform in their guardian's content before it is too late.

This note will begin with a historical discussion of privacy interests in America, beginning with the initial recognition of privacy as a legal right and the later creation of state law privacy torts.[29] Next, the note provides an analysis of the development of child labor laws before culminating with the history of the creation and expansion of Coogan laws, the first of its kind to provide legal protection for minor performers. Additionally, the note discusses the expansion of Coogan laws, focusing on the state-by-state approach and highlighting the Illinois version.[30]

The next section will address the difficulties of crafting a law to deal with social media's unique jurisdictional and content-based questions.[31] This note ultimately argues for the creation and adoption of a nationwide Coogan system modeled after Illinois' most recent law covering social media and Europe's General Data Protection Regulation's right to be forgotten for minors.[32] Conversely, and under the likely assumption that a federal Coogan law is unlikely to succeed, the note will provide certain key provisions that should be included in a model uniform code for states to adopt covering minor social media entertainer laws.[33]

Before beginning this discussion, it is important to note once again that while the 8 Passengers story is illustrative, it is not representative of the family blogger community. The industry is not inherently destructive or abusive, and not every child involved experiences the same difficulties. However, even if such dangerous

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[28] *Workers Under 18*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/hiring/workersunder18.
[29] *Infra* Section I.
[30] *Infra* Section II.
[31] *Infra* Section III.
[32] *Infra* Section IV.
[33] *Infra* Section V.

abuse of authority and the use of family blogging to punish children is rare, it is important to have baseline legal protections in place. Having such a system will provide safeguards and a regulatory framework to address issues of abuse and financial mistreatment that will inevitably occur in the future.

ARGUMENT

I. BACKGROUND

A. History of Privacy Laws in America

The concept of a legal right to privacy is a relatively modern invention.[34] Origins of the idea in America date to a famous law review article by Samuel D. Warren II and later Supreme Court Justice Louis Brandeis that lauded the concept as a "right to be let alone."[35] The article largely discussed the right through a defamation framework, with a particular focus on invasions of privacy by the press; the article further aimed for the creation of a legal framework to address this invasion, "to whatever degree and in whatever connection a man's life has ceased to be private."[36] This latter concern has important ramifications in the modern world as it clearly acknowledges the need for constantly modernizing privacy laws to address technological changes and their legal impacts on a person's privacy.[37]

Although Warren and Brandeis's law review article was written in 1890—and plainly acknowledged that other countries, including France, had privacy laws in the books at the time[38]—the right to privacy in Supreme Court jurisprudence did not explicitly appear until 1965 in the case *Griswold v. Connecticut*.[39] This case focused on the right of married couples to access contraceptives and established a right to privacy that is federally protected by various "zones of privacy" from penumbras of different Constitutional Amendments.[40]

Since *Griswold*, privacy protections have greatly increased.[41] In fact, every state now has legal protections in place

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[34] Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 1 (1979).
[35] *Id.*; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).
[36] Warren & Brandeis, *supra* note 35, at 205-06, 215.
[37] Warren & Brandeis, *supra* note 35, at 211.
[38] Warren & Brandeis, *supra* note 35, at 214.
[39] 381 U.S. 479, 483 (1965).
[40] *Id.* at 484.
[41] *See, e.g.*, Eli A. Meltz, *No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 FORDHAM L. REV. 3431, 3440-43 (2015), for a fifty-state survey of invasion of privacy torts, with a focus on

for invasion of privacy claims.[42] Typically, these privacy claims arise from state-based tort laws or from privacy statutes.[43] However, there is markedly less development in terms of laws regulating this right in the digital arena.[44] At the time of this article's writing, only thirteen states have in place legal protections for consumer data privacy.[45] Further, even within states that do have more robust digital privacy laws, these laws are aimed at protecting consumers in general, not protecting the privacy or safety of children online.

That is not to say that *no* laws aimed at protecting children online exist. In fact, in 1998 Congress passed the Children's Online Privacy Protection Act ("COPPA"), and in 2000, the Federal Trade Commission ("FTC") implemented and enforced COPPA via the Children's Online Privacy Protection Rule.[46] Under the FTC's most recent amendments to COPPA in 2013, the law prohibits websites that are directed at children from collecting personal information from a child under the age of thirteen.[47] Although this law provides requirements for websites that know or should know that children are main consumers, the law has several shortcomings.[48] For instance, only children under the age of thirteen are within the law, and the law only prevents websites from collecting personal information but does nothing to prohibit other data collection or implement other proactive protections for children.[49]

Plainly, the text of COPPA is not enough to provide any meaningful protection to children outside of preventing targeted advertisements. Although this is nonetheless a useful protection for children, additional safeguards are needed to protect children online, particularly when the child's name, image, and likeness is being used for profit. There is a difference between protections for children as consumers of different websites and entertainment

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intrusion upon seclusion; 46 states have such a tort, with two states explicitly rejecting to recognize intrusion and two states undecided.

[42] 1 PUNITIVE DAMAGES § 9.28 (2023).

[43] Meltz, *supra* note 41, at 3437.

[44] *See Consumer Data Privacy Laws*, BL, https://pro.bloomberglaw.com/insights/privacy/consumer-data-privacy-laws/#state-privacy-laws (last visited Jan. 26, 2024) for consumer data privacy laws by state.

[45] *Id.*

[46] 15 USCS § 6501; Children's Online Privacy Protection Rule, 16 C.F.R. § 312 (2013).

[47] 16 C.F.R. §§ 312.2-312.3 (2013).

[48] 15 U.S.C.S. § 6502(a)(1); 16 C.F.R. § 312.3; *see also* Senator Markey, *To amend the Children's Online Privacy Protection Act of 1998 to strengthen protections relating to the online collection, use, and disclosure of personal information of children and teens, and for other purposes*, SENATE OF THE U.S., https://www.markey.senate.gov/imo/media/doc/coppa_20_in_118th_-_050323pdf.pdf.

[49] 15 U.S.C.S. §§ 6501(1), 6502(a)(1); 16 C.F.R. §§ 312.2-312.3.

sources, and protections for children that function as the entertainers themselves.

B. An Overview of Child Labor Laws

There are laws in place that protect the work children do. For instance, federal child labor laws have been on the books since 1916, to varying degrees of success.[50] It took many years for federal child labor laws to be successful, partially because of the Court's resistance and struggle to root the laws in the Interstate Commerce Clause.[51] The initial act—the Keating-Owen Child Labor Act—was quickly overturned by the Supreme Court in *Hammer v. Dagenhart*.[52] A subsequent ruling just four years later overturned another law that attempted to regulate child labor via the Interstate Commerce Clause.[53]

The judicial rejection of both these child labor laws inspired some Members of Congress to go as far as to suggest a Child Labor Amendment to the United States Constitution.[54] The text of the amendment is short, containing two sections.[55] Said sections provide that Congress has the power to regulate child labor and that state power would be "unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."[56] Plainly read, the suggested amendment provides broad power to Congress to "limit, regulate, and prohibit the labor" of minors.[57]

However, this amendment never reached the necessary number of state ratifications to become law and eventually became moot when Congress passed the Fair Labor Standards Act of 1938.[58] The Fair Labor Standards Act defines "oppressive child labor" as a child under the age of sixteen being employed by an employer, or any child between the ages of sixteen and eighteen employed in a particularly hazardous occupation.[59] This act received Supreme Court approval just three years later in *United States v. Darby Lumber Company*.[60] *Darby Lumber Company* ultimately overturned

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[50] H.R. 8234, 64th Cong. (1916) (enacted).
[51] Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became a Con Game*, 10 WHITTIER J. CHILD & FAM. ADVOC. 89, 117 (2010).
[52] 247 U.S. 251, 277 (1918).
[53] Bailey v. Drexel Furniture Co., 259 U.S. 20, 39, 44 (1922).
[54] Jessie Kratz, *Unratified Amendments: Regulating Child Labor*, NAT'L ARCHIVES (Mar. 24, 2020), https://prologue.blogs.archives.gov/2020/03/24/unratified-amendments-regulating-child-labor/.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] 29 U.S.C. § 203(l).
[60] 312 U.S. 100, 125 (1941).

Dagenhart, ruling that the power to exclude products that are the result of child labor is within the purview of Congress.[61]

Consequently, existing child labor laws provide that fourteen is the minimum age for non-agricultural jobs and that no minor may be employed in hazardous occupations.[62] However, other than the inclusion of a hazardous occupation provision, these laws are not industry-specific, creating space for additional entertainment law focused laws.

C. Protecting THE KID: Coogan Laws

The most famous—with an infamous background—legal source for children in the entertainment industry is Coogan Laws.[63] Jackie Coogan was arguably one of the first and most famous child stars, known for his role alongside Charlie Chaplin in THE KID at just four years old.[64] Although he became a nationwide star at age four, Coogan's first role in Hollywood was only at eighteen months.[65]

It is difficult to describe just how successful Coogan was. In the infancy of professional movie making, Coogan's stardom was shocking and unprecedented.[66] The young actor went on tours around Europe to advertise his movie, gathering crowds of thousands.[67] The *New York Times* wrote article after article about the child, with details of Coogan's yearly contract of $300,000[68] as well as the five-year old's desire to retire from movies by the age of thirteen[69] drawing attention. After Coogan's astronomical rise to fame in the 1920s, the young star was reportedly earning three to four million dollars by the age of nine.[70] Adjusting for inflation, that fortune would be worth anywhere from sixty-five million to eighty-

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[61] *Id.* at 116.
[62] 29 C.F.R. § 570.2 (2024).
[63] *See Coogan Law, supra* note 25.
[64] THE KID (Charlie Chaplin Productions 1921).
[65] Maham Javaid, *Before child influencers, a 1920s movie star sued his mother for wages*, WASH. POST (Aug. 25, 2023, 7:30 AM), https://www.washingtonpost.com/history/2023/08/25/illinois-child-influencer-earnings-law-history-jackie-coogan/.
[66] *The Strange Case of Jackie Coogan's $4,000,000*, LIFE, Apr. 25, 1938, at 50.
[67] *See id.*
[68] *Jackie Coogan Coming for $300,000 Contract; Chaplin's Five-Year-Old Co-Star Likes to Play Poker and Rhummy and to Shoot Craps*, N.Y. TIMES (Apr. 9, 1921), https://nyti.ms/4aTx7y2.
[69] *Infant Film Star Dotes on Casino; That and Rum--the Card Game, Not the Liquor--Jackie Coogan's Hobbies at 5. WANTS TO RETIRE AT 13 Calls His Partner "Charles Expensive Chaplin" and "TreatsGirls Rough,"* N.Y. TIMES (Apr. 10, 1921), https://www.nytimes.com/1921/04/10/archives/infant-film-star-dotes-on-casino-that-and-rumthe-card-game-not-the.html.
[70] Ailbhe Rogers, *More Than Pocket Money: A History of Child Actor Laws*, IN CUSTODIA LEGIS (June 1, 2022), https://blogs.loc.gov/law/2022/06/more-than-pocket-money-a-history-of-child-actor-laws/.

six million dollars today.[71] A hefty sum for anyone, it is hard to imagine a child not even in the double digits earning such a massive fortune. Unfortunately for Coogan, with such a massive fortune came the perils of greed and selfishness from those around him.[72] At the time, California law provided that all of a minor's earnings belonged entirely to the parent, leaving the actual performer and worker with nothing and no form of legal remedy.[73]

Coogan ultimately sued his mother and stepfather, seeking to recover his earnings[74] and receive an accounting of the $4,000,000 he had earned by working in film.[75] Understandably, the lawsuit was extremely contentious, with Coogan's mother describing the then twenty-three-year-old as a "bad boy"[76] and stating, "no promises were ever made to give Jackie anything."[77] Essentially restating the law at the time, Bernstein argued "every dollar a kid earns before he is twenty-one belongs to his parents;" Bernstein went as far to say that "Jackie will not get a cent of *his* earnings" (emphasis added).[78]

Although the money from Coogan's films was the product of his own work, Coogan did not recover his entire fortune.[79] Coogan had been fighting for access to the $4,000,000 he was owed, but the actual amount of money left from that fortune was revealed to be just $252,000 by the end of the case; Coogan only received $126,000 in total from the suit, ending up with around 3% of his total earnings as a child.[80] The remaining money was split between Coogan's mother and stepfather.[81]

The outcome of Coogan's case shocked and upset onlookers—fitting, considering his once formidable fame—resulting in California promptly enacting Civil Code sections 36.1

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[71] Inflation Calculator 1936 USD to 2024 USD, CARBON COLLECTIVE, https://tools.carboncollective.co/inflation/us/1936/4000000/ (follow hyperlink and input $4,000000 from 1936 to 2024 and calculate).
[72] Rogers, *supra* note 70.
[73] *See Coogan Law, supra* note 25.
[74] Rogers, *supra* note 70.
[75] Rogers, *supra* note 70.
[76] *Mrs. Lillian Coogan Bernstein*, LIFE, May 2, 1938, at 16.
[77] *The Strange Case of Jackie Coogan's $4,000,000*, LIFE, Apr. 25, 1938; *see also Article clipped from The Los Angeles Times*, NEWSPAPERS.COM BY ANCESTRY, https://www.newspapers.com/article/the-los-angeles-times/36001869/.
[78] *The Strange Case of Jackie Coogan's $4,000,000, supra* note 77.
[79] Ananya Bhattacharya, *Child influencers in Illinois have a Jazz Age actor to thank for their earnings*, QUARTZ (Aug. 24, 2023), https://qz.com/child-influencers-in-illinois-have-a-jazz-age-actor-to-1850769254#:~:text=At%20the%20time%2C%20there%20was,only%20received%20half%20of%20that.
[80] *Agreement Gives Coogan $126,000*, N.Y. TIMES (Aug. 17, 1939), https://www.nytimes.com/1939/08/17/archives/agreement-gives-coogan-126000.html.
[81] *Id.*

and 36.2.[82] These laws created a mechanism in which the court has the authority to oversee the creation of contracts concerning minors, and requires that a portion of the minor's earnings, not to exceed one half of such earnings, be set aside in a trust fund.[83]

However, this initial law left open many loopholes, and more stories of financially manipulated child actors inundated the public consciousness for years[84] until the California law was revised in 2000.[85] The legislative history of the updated Coogan law reveals that other stories about child actors losing money—including Shirley Temple, Macaulay Culkin, and Gary Coleman—motivated the updates to the law.[86]

As updated, the 2000 version of the law provides that 15% of the minor's earnings must be entered into a set-aside fund from which no withdrawals can be made until the actor is eighteen.[87] The court retains jurisdiction over these accounts and any contracts into which the minor enters.[88] The expanded law also covers a broad collection of professions, including minors who perform "services as an actor, actress, dancer, musician, comedian, singer, stuntperson, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer."[89]

With these latest updates, California's current Coogan law provides some of the most expansive protections to child performers in a variety of fields in the country. Unfortunately, such protections are by no means nationalized, and few states have followed along the path of California in their child entertainer acts. Even fewer states have adopted laws to protect these individuals. Additionally, the law, in what is certainly a function of its latest updates occurring in 2000, does not explicitly include social media performers in the definition of child performer.[90]

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[82] Robert A. Martis, *Children in the Entertainment Industry: Are they Being Protected — An Analysis of the California and New York Approaches*, 8 LOY. L.A. ENT. L. REV. 25, 27 (1988).
[83] *Id*.
[84] Ailbhe Rogers, *More Than Pocket Money: A History of Child Actor Laws*, IN CUSTODIA LEGIS (June 1, 2022), https://blogs.loc.gov/law/2022/06/more-than-pocket-money-a-history-of-child-actor-laws/.
[85] Amanda Bronstad, *Coogan Law loophole leaves child actors at financial risk*, NAT'L L. J. ONLINE (2011), https://www.vrmlaw.com/sitecontent/media/news/Coogan-Law-Loophole-Leaves-Child-Actors-at-Financial-Risk.pdf.
[86] S.B. 1162, 1999-2000 Reg. Sess. (Cal. 1999).
[87] *Id*.
[88] *Id*.
[89] CAL. FAM. CODE § 6750(a)(1).
[90] *Id*.

II. MODERN LEGAL STANDARD: THE DEVELOPMENT OF COOGAN ACCOUNTS

A. Coogan Law Make Its Way Out of California

After California updated its Coogan law in 2000, New York was the next state to adopt a Coogan law in 2003.[91] New York law set up a similar system to California, but the New York system does not forbid the parents from accessing the money until the child is eighteen.[92] This law, while providing a system for parents of a minor to set aside money in good faith for their child, does not prevent the same loophole and manipulation of the system that California's law attempted to do.[93]

Following New York, other states continued in the trend and created their own version of Coogan Laws.[94] However, the only states that require a Coogan account—in a compulsory format, compared to the majority approach that takes a more permissive approach—are California, New York, Louisiana, and New Mexico.[95]

1. Brief Case Law Comparison

Even in states with laws that specifically protect minor performers, case law reveals that the issues of payment and equity for the minors remain contentious.[96] For instance, in the case of *Phillips v. Bank of America*, the plaintiff (guardians of minor performers) sued the bank to recover losses after the bank withdrew money from secured Coogan accounts.[97] The court held that, within California, banks may not withdraw any amount of money under the guise of service charges from Coogan accounts.[98] This case provides one example of a court providing greater protection to Coogan accounts, particularly when compared with other financial accounts of a similar nature.[99]

However, not all cases come out as strongly protective of Coogan accounts as the former case.[100] For instance, in *Suleman v. Superior Court*, the court granted a motion to dismiss in a case

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[91] JON M. GARON, ENTERTAINMENT LAW AND PRACTICE, 121 (2020).
[92] N.Y. ARTS AND CULTURAL AFFAIRS LAW § 35.03(3)(a) (Consol. 2021).
[93] *See Today's New York Child Performer Law & Rules – Part 186,* Section within *New York Laws*, BIZPARENTZ FOUND., (Mar. 21, 2018), https://www.bizparentz.org/new-york-child-entertainment-laws/.
[94] *See, e.g.* Tenn. Code Ann. § 50-5-222 (2024) (placing 15% of the minor's earnings in a trust overseen by a judge).
[95] GARON, *supra* note 91, at 122.
[96] *See* Phillips v. Bank of Am., N.A., 236 Cal. App. 4th 217, 217 (Cal. Ct. App. 2015).
[97] *Id*. at 223.
[98] *Id.* at 222.
[99] *See id*.
[100] *See* Suleman v. Superior Court, 180 Cal. App. 4th 1287, 1287 (2010).

where a non-relative petitioned to take control of the finances of the mother's octuplets.[101] The court decided that dismissal was proper because there was no evidence of financial mismanagement, or whether the mother had created a Coogan account for the children, as required by California law.[102] Due to the case's procedural posture, it was dismissed before trial could be had to hear testimony from the children or others as to the financial management of the mother; the court was hesitant to intervene in the family's affairs without more evidence.[103]

This hesitance by the court illustrates another difficulty that arises in cases surrounding Coogan accounts. Not only do the individuals bringing the case have to allege sufficient facts of financial mismanagement to overcome a motion to dismiss,[104] but they must also persuade the court to intervene in the "private realm of family life which the state cannot enter."[105]

Ultimately, the volume of cases concerning minor performers suing to recover financially illustrates that the existence of protective laws can mean the difference between financial stability and struggle for these vulnerable performers. Just as the development of Coogan laws in the film industry occurred gradually, eventually enveloping other industries like the music recording business, so too has the industry now developed a need for updated laws that cover minor performers on social media.

B. Illinois Law Creates a New and Improved Standard

Several previous attempts at creating Coogan-like protections for children who work with social media have failed.[106] However, such legislation was successful in August 2023 when Illinois updated its Child Labor Law to include protections for child influencers.[107] This law revolutionizes child labor laws by providing explicit protections for children that are featured in social media content by their parents.[108] Under the definition of the law, a child

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[101] *Id.* at 1291.
[102] *Id.* at 1302.
[103] *See id.* at 1303.
[104] *See* Ashcroft v. Iqbal, 556 U.S. 662, 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 544 (2007) (establishing the plausibility pleading standard required for complaints).
[105] *Suleman,* 180 Cal. App. 4th at 1297 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
[106] *See* Claire Savage, *Starting next year, child influencers can sue if earnings aren't set aside, says new Illinois law*, AP NEWS (Aug. 12, 2023), https://apnews.com/article/tiktok-child-influencer-illinois-social-media-f784b4bc52cb75ad1e0d28785993b1c5#:~:text=Other%20Democratic%20%2DleD%20states (discussing suggested child labor bills from California and Washington that were not passed).
[107] S. B. 1782, 2024 Gen. Assemb. (Ill. 2024).
[108] *Id.* § 2.6(a)(1)-(2).

under the age of sixteen is considered to be working as a vlogger when the following criteria are met:

> (1) at least 30% of the vlogger's compensated video content produced within a 30-day period included the likeness, name, or photograph of the minor. Content percentage is measured by the percentage of time the likeness, name, or photograph of the minor visually appears or is the subject of an oral narrative in a video segment, as compared to the total length of the segment; and
>
> (2) the number of views received per video segment on any online platform met the online platform's threshold for the generation of compensation or the vlogger received actual compensation for video content equal to or greater than $0.10 per view.[109]

Once the above criteria are met, the vlogger (typically the parent or guardian) must set aside the earnings from such videos in a trust account for the minor.[110] This is a similar approach to California's Coogan law.[111] In Illinois, the earnings must be distributed along the following lines:

> (1) where only one minor meets the content threshold described in Section 2.6, the percentage of total gross earnings on any video segment including the likeness, name, or photograph of the minor that is equal to or greater than half of the content percentage that includes the minor as described in Section 2.6; or
>
> (2) where more than one minor meets the content threshold described in Section 2.6 and a video segment includes more than one of those minors, the percentage described in paragraph (1) for all minors in any segment must be equally divided between the minors, regardless of differences in percentage of content provided by the individual minors.[112]

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[109] *Id.* § 2.6(c)(6).
[110] *Id*.
[111] *See generally* CAL. FAM. CODE § 6753.
[112] Pub. L. No. 103-0556 § 12.6(a)(2), https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0556 (last visited Jan. 26, 2024).

This trust must be "held by a bank, corporate fiduciary, or trust company," until the minor turns eighteen or is emancipated.[113] This law went into effect July 1, 2024.[114]

Throughout the legislative development of the Illinois law, various changes to the original bill were made. For instance, the lawmakers explicitly removed from the protected definition of vlogger a minor under the age of sixteen who produces his or her own vlogs.[115] Unfortunately, this removal means the law's requirement that a trust be created for minors in these videos does not apply when a minor produces their own videos and social media content.[116] Additionally, an amendment removed the ability of a minor to request the permanent deletion of videos that include the minor's "likeness, name, or photograph from any online platform that provided compensation to the minor's parent in exchange for the video content."[117]

The Illinois law was considered a success by advocates for child privacy and legal protections for "childrenfluencers."[118] Although the Illinois law is something to celebrate for its modernization of outdated Coogan laws, this paper will next address why there are different and specialized needs for children on social media that necessitate the development of a national law.

III. UNIQUE CHALLENGES OF SOCIAL MEDIA: THE NEED FOR A MODERNIZED AND NATIONALIZED LEGAL STANDARD

A. Development of Children Influencers

Like Jackie Coogan in the 1920s, the modern version of children becoming the moneymakers for their family takes its form in social media influencers. Reports of children earning millions of dollars for their families from YouTube videos or commercial collaborations after reaching a certain level of success go back several years.[119] For instance, Ryan Kaji, an eleven-year-old YouTuber who has been making videos since 2015, reportedly earned almost $230 million in 2020 from YouTube videos and branded toys and clothing.[120] While there is no evidence of financial

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[113] *Id*. § 12.6(b)(2).
[114] *Id*. § 99.
[115] Savage, *supra* note 106.
[116] Savage, *supra* note 106.
[117] Savage, *supra* note 106.
[118] *See, e.g.* QUIT CLICKING KIDS, https://quitclickingkids.com/illinois-progress/ (last visited Jan. 26, 2024).
[119] *See* Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, HOLLYWOOD REP. (Aug. 20, 2019), https://www.hollywoodreporter.com/business/digital/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968/.
[120] Taylor Lorenz, *There are almost no legal protections for the internet's child stars*, WASH. POST (Sept. 1, 2023),

mismanagement of Kaji's earnings, there can be no guarantee that the money will be properly managed for him until he reaches the age of majority.

Without a form of a Coogan law in place, none of that money is secured for Kaji's future; every cent is at the discretion of his parents, with no guarantee that a percentage—or any money at all—will be put into a trust for Kaji. Although Kaji is a rare story of multi-million-dollar success from vlogging, his story still raises questions of ultimate importance that arise whenever discussing the monetization of minors online. Frankly put, it is important to ask when parental consent is inadequate when it concerns activities that will have lifelong consequences on a child's life and content that can never permanently be deleted.

The answer to this question is difficult but will resolve what legal protections must be put in place. Although opinions will vary as to the answer, the fact remains that there are some situations in which parental approval of an activity on behalf of their child is not sufficient and should not bind the child to a lifetime lived under the consequences of such choices. This is of particular importance as the impact of these consequences are more pronounced and enduring when documented online.

Of course, that is not to say that all parents of "kidfluencers" are malicious and will deliberately misuse their child's money. It is likely that many of these parents pursue the industry in good faith and have their child's best interests at heart. However, the law is intended to provide protection for the scenarios where this good faith effort does not exist. Therefore, laws ensuring a percentage of the money earned is set aside for the minor child until they reach the age of majority are essential to protect the safest child as well as the most vulnerable.

Further, as the breadth of the online economy grows, so does the popularity and impact of these "kidfluencer" accounts. In 2022 alone, the online influencer economy generated $16.4 billion for content creators.[121] In terms of commercial revenue, TikTok generated $9.6 billion in 2022,[122] and YouTube generated $29.2 billion.[123] Without increased regulation of the growing economic power of social media, these minors will continue to be unprotected and without a legal remedy for any economic issues that may arise.

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https://www.washingtonpost.com/technology/2023/04/08/child-influencers-protections-congress/.

[121] *Id*.

[122] Mansoor Iqbal, *Tiktok Revenue and Usage Statistics (2024)*, BUS. OF APPS (Oct. 10, 2024), https://www.businessofapps.com/data/tik-tok-statistics/.

[123] Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2024)*, BUS. OF APPS (Nov. 7, 2024), https://www.businessofapps.com/data/youtube-statistics/.

B. Nationalizing the Illinois Law

One solution to combat the dangers of an unprotected and unregulated social media industry is to follow the example of the Illinois law and nationalize these protections at a federal level. While the Illinois law creates a strong baseline for protections, if a national minor performers privacy act is to be created, the Illinois protections should be combined with certain provisions from the European Union's General Data Protection Regulation ("GDPR").[124] By strengthening the Illinois law and taking the better protections offered by the GDPR, this proposed national law would make America more on par with its global competitors in terms of privacy laws and protections for minors in general.

Certain changes and improvements could be made to both the Illinois and the European Union law to create the most secure protections for minors across America. For instance, while the Illinois law only applies to minors sixteen and under, the ideal national law would apply to all minors eighteen and under. The intent behind the law is to protect vulnerable minors, so the sixteen-year-old cutoff might be effective for the Illinois state law. However, for the most effective and broad reaching protection of all minors, the age limit for the national law should be extended to eighteen.

Additionally, the failed amendment to the Illinois law that would allow minors to request permanent deletion of content that featured them should be reinstated into the nationwide law.[125] Not only would this amendment ensure protection of minors who do not have the ability to control what content their parents post online, but this would place the United States in line with the European Union's more robust privacy protections. Other changes that should be made to Illinois' law and the GDPR before national implementation can occur will be discussed more in depth later in this paper.[126]

IV. THE MISSING PIECE OF THE PUZZLE: ADAPTING CHILD LABOR LAWS FOR A MODERN WORLD

Current federal child labor law does not explicitly protect or recognize social media work by minors. Further, online privacy laws in the United States are lacking or almost nonexistent, a result of the patchwork system that's arisen in the absence of a federal law in

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[124] *See General Data Protection Regulation (GDPR)*, GDPR.EU, https://gdpr.eu/tag/gdpr/ (last visited Feb. 15, 2024).
[125] *See* Child Labor Law, Pub. L. No. 103-0556 (2024) (amending the Child Labor Law).
[126] *See infra* Section V.

place.[127] The nation is behind many other advanced economies and global competitors in terms of data protection.[128] This discrepancy is particularly stark when comparing the United States to the European Union's GDPR, which is noted for its harsher standards for internet privacy.[129]

In a recent survey of internet privacy across the globe, the United States ranked behind many European countries that have adopted the GDPR.[130] The GDPR largely focuses on the user's ability to control the ways their data is collected and used.[131] For instance, the GDPR requires users to actively opt in for data collection, whereas most privacy laws in the United States utilize a passive system that automatically collects the user's data and requires the user to opt themselves out of the collection.[132]

Additionally, the GDPR includes a provision for the protection of children that requires minors to receive parental consent for many websites until they reach the age of sixteen.[133] Lastly, and perhaps most importantly for this paper's discussion, the GDPR allows users to submit complaints that their right to privacy has been violated, which the national data protection authority then investigates and responds to within three months.[134]

Historically, American privacy laws have been considerably less protective of user data and less responsive to user complaints.[135] In fact, it has become almost a resignedly accepted reality for US nationals that their online activities and communications are

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[127] Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELS. (Jan. 30, 2018), https://www.cfr.org/report/reforming-us-approach-data-protection.
[128] *Id.*
[129] Robert E.G. Beens, *The Privacy Mindset of The EU Vs. the US*, FORBES (July 29, 2020, 7:40 AM), https://www.forbes.com/sites/forbestechcouncil/2020/07/29/the-privacy-mindset-of-the-eu-vs-the-us/?sh=17a9effe7d01.
[130] *Internet Privacy Index (2024)*, BESTVPN (Dec. 31, 2023), https://bestvpn.org/privacy-index/.
[131] *Data protection and online privacy*, YOUR EUR. (Apr. 11, 2024), https://europa.eu/youreurope/citizens/consumers/internet-telecoms/data-protection-online-privacy/index_en.htm#inline-nav-4.
[132] *Comparing U.S. State Data Privacy Laws vs. the EU's GDPR*, BL (July 11, 2023), https://pro.bloomberglaw.com/brief/privacy-laws-us-vs-eu-gdpr/.
[133] Beens, *supra*, note 129.
[134] *Id*.
[135] Fredric D. Bellamy, *U.S. data privacy laws to enter new era in 2023*, REUTERS (Jan. 12, 2023, 9:21 AM), https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12/.

tracked[136] and used for a myriad of reasons.[137] Mass government surveillance underwent a massive increase in the aftermath of the September 11, 2001 terrorist attacks,[138] aided by the passage of legislation like the PATRIOT Act, which expanded the amount of information the government could access at a newly decreased level of scrutiny.[139] Additionally, after the Cambridge Analytica scandal in 2018—in which it was revealed that online consultants to Donald Trump's 2016 presidential campaign appropriated data from as many as eighty-seven million Facebook users to aid in creating voter profiles[140]—news coverage on the harm of online data harvesting and manipulation increased.[141]

This lesser protection has a variety of explanations but can perhaps be traced to not only the greater influence of Big Tech in the United States, but also the history of privacy struggles in Europe, including the "infamous data collection of the Nazis[.]"[142] Whatever the historical reasoning, privacy protections in the United States are lacking in comparison to global counterparts, and an updated federal

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[136] Robert E.G. Beens, *The Privacy Mindset of The EU Vs. the US*, FORBES (July 29, 2020, 7:40 AM), https://www.forbes.com/sites/forbestechcouncil/2020/07/29/the-privacy-mindset-of-the-eu-vs-the-us/?sh=17a9effe7d01.

[137] For instance, the U.S. Government Accountability Office states that online data collected is used by the government for "law enforcement, border control, and enhanced online interactions with citizens." The Office also makes note that the private sector uses it for things like marketing or tracking the spread of COVID-19. Overall, and perhaps most dauntingly, the Office emphasizes that "policymakers face some key challenges to protecting personal privacy in this environment." *See Protecting Personal Privacy*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/protecting-personal-privacy#:~:text=The%20federal%20governmego%20collects%20and,enhanced%20online%22interactions%20with%20citizens (last visited Jan. 7, 2025).

[138] *Surveillance*, WATSON INST. FOR INT'L & PUB. AFFS., BROWN UNIV. (Sept. 2023), https://watson.brown.edu/costsofwar/costs/social/rights/surveillance.

[139] *PATRIOT Act*, ELEC. PRIV. INFO. CTR., https://epic.org/issues/surveillance-oversight/patriot-act/ (last visited Feb. 22, 2024).

[140] Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html; *see also Internet Privacy: Additional Federal Authority Could Enhance Consumer Protection and Provide Flexibility*, U.S. GOV'T ACCOUNTABILITY OFF. (Feb. 13, 2019), https://www.gao.gov/products/gao-19-52 (reporting the Office's discussion of the impact of the Cambridge Analytica scandal and the need for "comprehensive Internet privacy legislation to better protect consumers.").

[141] *See The Great Hack': Cambridge Analytica is just the tip of the iceberg*, AMNESTY INT'L (July 24, 2019), https://www.amnesty.org/en/latest/news/2019/07/the-great-hack-facebook-cambridge-analytica/.

[142] Fredric D. Bellamy, *U.S. data privacy laws to enter new era in 2023*, REUTERS (Jan. 12, 2023, 9:21 AM), https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12/.

child labor law that protects children online is one step toward rectifying this much larger issue.

A. "The Right to be Forgotten"

The rights within the GDPR cover much more than just general data protection. In fact, contrary to the amendment that was rejected by the Illinois senate, the GDPR explicitly empowers users to request deletion of their data.[143] The GDPR artfully terms this the "right to be forgotten" or the "right of erasure."[144]

Included in Article 17 of the GDPR, the right to be forgotten is as follows:

> The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
>
> (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
> (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
> (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
> (d) the personal data have been unlawfully processed;
> (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
> (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).[145]

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[143] *Art. 17 GDPR: Right to erasure ('right to be forgotten')*, GDPR.EU, https://gdpr.eu/article-17-right-to-be-forgotten/ (last visited Feb. 15, 2024).
[144] *Id.*
[145] *Id.*

The GDPR guidelines also include a deletion request template[146] and emphasize that this right walks a fine line to provide privacy protections without rewriting history.[147] The GDPR highlights the right to be forgotten as a formidable protection for personal data, because otherwise "the right to control one's data is meaningless if people cannot take action when they no longer consent to processing, when there are significant errors within the data, or if they believe information is being stored unnecessarily."[148]

Critics of the GDPR's right to be forgotten online raise concerns about the potential chilling effect on speech,[149] the fact that such a right is not recognized in the United States,[150] or the importance of protecting the publication of truthful information.[151] While these criticisms are valid and reflect the importance of free speech in American society,[152] such attacks do not have the same force when applied in the context of minor speech. Just as student speech is subject to modified rules and a lower degree of protection,[153] the privacy rights of minor children—particularly when concerning videos and images that will remain permanently online ad infinitum and which the minor may have had no control over whether they were posted—must trump any questions of chilled or compelled speech.[154]

Further, as included in Article 17 of the GDPR, the right to be forgotten does not apply in various situations, including when such erasure would apply to information that is "being used to exercise the right of freedom of expression and information."[155] These safeguard exceptions ensure that the right to be forgotten is applied sparingly and only when necessary, including when the

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[146] *Right to Erasure Request Form (Template)*, GDPR.EU, https://gdpr.eu/right-to-erasure-request-form/ (last visited Mar. 7, 2024).
[147] *Everything you need to know about the "Right to be forgotten,"* GDPR.EU, https://gdpr.eu/right-to-be-forgotten/ (last visited Feb. 15, 2024).
[148] *Id*.
[149] Jeffrey Rosen, Response, *The Right to be Forgotten*, 64 STAN. L. REV. 88, 88 (2012).
[150] David L. Hudson, *Right to Be Forgotten*, FREE SPEECH CTR. (July 2, 2024), https://firstamendment.mtsu.edu/article/right-to-be-forgotten/.
[151] *See* Martin v. Hearst Corp., 777 F.3d 546, 552 (2d Cir. 2015).
[152] *See, e.g.,* Niemotko v. Maryland, 340 U.S. 268, 282 (1951).
[153] *See, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988); Morse v. Frederick, 551 U.S. 393, 393 (2007).
[154] Anastasia Couch & Cobun Zweifel-Keegan, *The Kids Are All Rights: The Conflict between Free Speech and Youth Privacy Laws*, INT'L ASS'N OF PRIV. PROS. (Sept. 2023), https://iapp.org/resources/article/the-kids-are-all-rights-the-conflict-between-free-speech-and-youth-privacy-laws/.
[155] *Everything you need to know about the "Right to be forgotten,"* GDPR.EU, https://gdpr.eu/right-to-be-forgotten/ (last visited Feb. 15, 2024).

company or organization needs the information to "exercise the right of freedom of expression."[156]

B. Applying the Right of Erasure Domestically

One solution to target the dangers of unregulated online work is integrating the right of erasure included in the GDPR into a federal child labor law modeled after Coogan laws with a focus on social media. Such a system would provide federal Coogan law protection by regulating child performers in the social media sphere: protection and regulation that is entirely missing in seventeen states.[157]

Of course, it is entirely logical that some seventeen states do not regulate the child entertainment industry because many of these states do not have such an industry there, particularly when compared with the prominent entertainment states like California and New York.[158] However, child entertainment via social media platforms is markedly different from the traditional forms of entertainment like acting and singing that the original Coogan laws were meant to target. Namely, child entertainers on social media and family bloggers can achieve a platform from anywhere with relative ease,[159] compared to the geographic-centered nature of other entertainment industries.[160]

Because of the ubiquitous nature of social media content, regulating legal issues like nonpayment, misappropriation of identity, intrusion upon privacy, or financial abuse on a state-by-

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[156] However, in discussing these exceptions, the EU's European Commission website explicitly lists an example where the information of a minor would have to be deleted: "A minor uploads photos [to a social media site]; however, some years later he decides that the said photos are potentially harming his career prospects. Since the individual was a minor at the time of uploading, your company/organisation is obliged to delete the said photos. Furthermore, if the photos have been processed on other websites, your company/organisation must take reasonable steps to inform them that a request to delete the photos was filed." *Do we always have to delete personal data if a person asks?*, EUR. COMM'N, https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/dealing-citizens/do-we-always-have-delete-personal-data-if-person-asks_en (last visited Jan. 7, 2024).

[157] *See, e.g.*, *Child Entertainment Laws As of January 1, 2023*, U.S. DEP'T OF LABOR (Jan. 1, 2023), https://www.dol.gov/agencies/whd/state/child-labor/entertainment.

[158] *See id*.

[159] *See* Sarah Min, *86% of young Americans want to become a social media influencer,* CBS NEWS (Nov. 8, 2019, 4:49 PM), https://www.cbsnews.com/news/social-media-influencers-86-of-young-americans-want-to-become-one/ (discussing the popularity of "influencer" as a career for young children).

[160] *See Hollywood*, HIST. CHANNEL (Aug. 27, 2018), https://www.history.com/topics/roaring-twenties/hollywood.

state basis creates issues surrounding jurisdiction.[161] Jurisdictional issues in social media-based cases raise many questions: what state has jurisdiction? Is the internet its own extraterritorial jurisdiction? Should jurisdiction matter in a case concerning facts solely expressed online?[162] The Supreme Court made this area of law murkier by issuing a plurality opinion in *Ford Motor Company v. Montana Eighth Judicial District Court* that left as many questions open as it created.[163] As of the writing of this article, there is no definite answer as to whether personal jurisdiction even exists in the social media context.[164] However, regardless of how the Court rules on the issue, the reality is that social media has created a swarth of new issues for courts to grapple with—not just on the most basic questions of jurisdiction, but also regarding the complicated issues of free speech[165] and parental supervision of minors' online activity.[166]

1. Matching America's Preferences

The implementation of greater online privacy protections, even with a focus on minors in the entertainment industry as a starting point, would reflect the concerns and desires for increased regulation of many Americans.[167] Not only would this newly created

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[161] *See Art. 3 GDPR: Territorial scope*, GDPR.EU, https://gdpr.eu/article-3-requirements-of-handling-personal-data-of-subjects-in-the-union/ (last visited Feb. 15, 2024) (conferring jurisdiction over internet privacy in the European Union (EU) to member states and other states that partake in data processing, even if not geographically located in the EU).

[162] *See e.g.,* Teresa Scassa & Robert J. Currie, *New First Principles? Assessing the Internet's Challenges to* Jurisdiction, 42 GEO. J. INT'L L. 1017, 1019 (2011), A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 UNIV. ILL. L. REV. 71, 72 (2006), *and* Ellen Smith Yost, *Tweet, Post, Share...Get Haled into Court? Calder Minimum Contacts Analysis in Social Media Defamation Cases*, 73 SMU L. REV. 693, 695 (2020), for discussions on the unique difficulties social media poses on jurisdictional questions.

[163] 592 U.S. 351, 351 (2021); s*ee also* Gregory C. Cook & Andrew Ross D'Entremont, *No End in Sight? Navigating the "Vast Terrain" of Personal Jurisdiction in Social Media Cases After Ford*, 73 ALA. L. REV. 621, 622 (2022) for a discussion on the questions remaining after the *Ford* ruling.

[164] Cook & D'Entremont, *supra* note 163.

[165] *Supreme Court Seems Open to Tech Companies' Challenge to Social Media Laws*, N.Y. TIMES (Sept. 18, 2024), https://www.nytimes.com/live/2024/02/26/us/supreme-court-arguments-social-media.

[166] Julia Shapero, *Meta urges lawmakers to require parental approval for app store downloads by teens*, HILL (Nov. 15, 2023, 2:38 PM), https://thehill.com/policy/technology/4311311-meta-urges-lawmakers-to-require-parental-approval-for-app-store-downloads-by-teens/.

[167] *Most Americans Continue to Have Privacy and Security Concerns, NTIA Survey Finds,* NAT'L TELECOMMS. & INFO. ADMIN. (Aug. 20, 2018), https://www.ntia.gov/blog/most-americans-continue-have-privacy-and-security-concerns-ntia-survey-finds.

system regulate a previously unmanaged industry and provide a jurisdictional answer to the tricky question of social media, but the inclusion of the right of erasure in the law would align with many Americans' existing preferences.[168]

Although dropped in an effort to gain more support for the Illinois privacy law, surveys reveal that most Americans actually support many aspects of the right to be forgotten in relation to their online privacy.[169] Public opinion varies depending on the type of information to be erased and the age group being questioned, but an overwhelming 85% of adults surveyed answered in the affirmative when asked whether people should have the right to request permanent deletion of potentially embarrassing photos or videos.[170] Additionally, 56% of Americans support the right to remove negative media coverage from online sources.[171] Therefore, implementing a right of erasure would put the United States in accord with global competitors[172] *and* domestic public opinion.

Illustrating that this right is consistent with American public opinion is the fact that state laws already exist that allow people to erase certain information.[173] For instance, forty-five states and the District of Columbia allow expungement of certain criminal offenses.[174] Additionally, other states have adopted broader laws that allow greater removal of information, including California's Eraser Law.[175] This law requires website to allow minors to "remove or…request and obtain removal of, content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the [minor] user."[176] Although critics of the bill—and, generally speaking, critics of any law that would allow deletion of online material or require websites to do such a thing—

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[168] Brooke Auxier, *Most Americans support right to have some personal info removed from online searches*, PEW RSCH. CTR. (Jan. 27, 2020), https://www.pewresearch.org/short-reads/2020/01/27/most-americans-support-right-to-have-some-personal-info-removed-from-online-searches/.

[169] *Id*.

[170] *Id*.

[171] *Id.*

[172] The countries of the EU are not the only ones to adopt the right to be forgotten. For example, Argentina and the Philippines both recently adopted the right. *See* Edward L. Carter, *Argentina's Right to be Forgotten*, 27 EMORY INT'L L. REV. 23 (2013); *see also* Francis N. Tolentino, *The right to be forgotten*, MANILA BULLETIN (Jun. 15, 2022, 7:05 PM), https://mb.com.ph/2022/06/16/the-right-to-be-forgotten/.

[173] *State Right to be Forgotten Policy*, ELEC. PRIV. INFO. CTR., https://epic.org/state-right-to-be-forgotten-policy/#:~:text=All%20across%20the%20UnitUn%20States,remove%20personal%20informatinf%20of%20minors (last visited Jan. 7, 2024).

[174] *Expungement*, ELEC. PRIV. INFO. CTR., https://archive.epic.org/privacy/expungement/ (last visited Jan. 7, 2024).

[175] S.B. 568, 2013 Reg. Sess. (Cal. 2013).

[176] *Id.*

would argue that such laws violate the First Amendment,[177] ultimately the law withstands constitutional scrutiny.[178] The law is constitutional not only because advertising provisions are subject to a lesser standard of scrutiny,[179] but also because it does not violate the dormant commerce clause as it is "not facially discriminatory against out-of-staters" and does not burden in-state commerce.[180]

It must be said that no state in the US has adopted the right of erasure from the GDPR itself. Therefore, application of a new law to expand Coogan laws and create a federal right of erasure would of course be slow and difficult at a national level. However, creating a federal law that combines the tenets of Illinois' Coogan law with the GDPR would establish a system that is workable within the existing regulatory system of the US.[181] Additionally, beginning with a law that focuses on applying the right to minors only at this point would likely be easier to accomplish[182] and would address the concerns of over half of the American population who feel they "have no control over who can access" information like their physical location, social media activity, and websites they visit.[183]

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[177] *See* Sam Ernst, *Does the California Eraser Law Withstand Dormant Commerce Clause Scrutiny? Does it do any good at all?*, ORANGE CNTY. LAW., July 2014, at 14, 14-15 https://www.chapman.edu/law/_files/faculty/SSamue-Ernst-OC-Lawyer-Magazine-July-2014.pdf; Eric Goldman, *California's New 'Online Eraser' Law Should Be Erased*, FORBES (Sept. 25, 2013, 1:19 AM), https://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased/?sh=40a82a47a33c.

[178] *See* E. Wesley Campbell, Note, *But It's Written in Pen: The Constitutionality of California's Internet Eraser Law*, 48 COLUM. J. L. & SOC. PROBS. 583, 603 (2015).

[179] Campbell, *supra* note 178, at 587.

[180] Campbell, *supra* note 178, at 600.

[181] In terms of population comparisons, critics need not be concerned about adapting the EU's system to the US. The total population of the EU is over 448 million, whereas the United States' population is 336 million. In fact, the EU has a larger population and was still able to implement the system for deletion easily, delisting over 2.5 million URLs since 2014, when the right of erasure was created. *See Facts and figures on life in the European Union*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/facts-and-figures-european-union_en (last visited Jan. 7, 2024); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Jan. 7, 2024); *Requests to delist content under European privacy law*, GOOGLE TRANSPARENCY REP. (last visited Feb. 26, 2024), https://transparencyreport.google.com/eu-privacy/overview?delisted_urls=start:1401321600000;end:1708991999999&lu=delisted_urls.

[182] *Illinois Enacts Law Protecting "Child Influencers,"* AM. ASS'N ADVERT. AGENCIES (Aug. 23, 2023, 11:38 AM), https://www.aaaa.org/illinois-enacts-law-protecting-child-influencers/?cn-reloaded=1.

[183] Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-

V. LIKE, COMMENT, ERASE: THE RIGHT TO BE FORGOTTEN IN THE CONTEXT OF FAMILY BLOGGERS

Returning to the issue underpinning this paper, family bloggers are a demographic that would be largely impacted by the creation of this new law and regulatory system. However, as illustrated by the 8 Passengers example, providing minors who are featured prominently in photos and videos posted on social media control over the dissemination of their name, image, and likeness, will have far-reaching impacts.

The final section of this note provides a sample uniform code that states, following the influence of Illinois, might implement in seeking to provide greater protections for this demographic. The proposals address the creation of both a uniform Coogan law as well as a right to be forgotten.

A. Proposed Model Uniform Code Provisions

This note argues for the creation of a federal Coogan law and the implementation of the right to be forgotten either in that Coogan law or as a freestanding protection. Both proposed laws aim to protect minors online, but the right to be forgotten has legal ramifications far beyond minors on social media. However, to address critics of the approach for which this paper advocates—and what is arguably the likely reality that the creation of such a federal regulatory system is unlikely in the near future—this section will briefly provide example provisions that a sample Uniform Child Entertainer's Code ("UCEC") would include.[184] Addressing another feature of this paper's proposal that critics would target, creating the UCEC would be in keeping with America's federalist principles and would not overstep state law.[185]

In general, the most important principles that the UCEC would contain are as follows:

> (1) expand the definition of entertainer in Coogan laws to include work done on and for social media;

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privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/.

[184] As inspired by other uniform codes, the idea behind the UCEC would be to provide uniform rules for child entertainer's privacy and safety that jurisdictions could adopt in their own time. By providing ideal example provisions, jurisdictions are free to adopt whatever provisions they want and may alter the rules to better fit their laws. *See, e.g.,* Unif. Com. Code and Unif. Prob. Code.

[185] Federalism is defined as "a government divided between central and state authorities" in which "the state governments have a degree of autonomy regarding local matters, and the central government has autonomy regarding collective affairs, with each having authority over matters of both local and collective significance." *See* WOLTERS KLUWER, *Bouvier Law Dictionary*, 1054-55 (Stephen M. Sheppard, eds., Desk ed. 2012).

> (2) require Coogan accounts for social media users in which at least [25%] of their financially compensated content includes the name, image, or likeness of a minor;
> (3) include within the protected definition of "social media content" images and videos uploaded to social media by adults, as well as content made and uploaded entirely by minors;
> (4) require that the Coogan laws mandate at least [5%] of the earnings from the protected social media content be placed into a trust account for the minor, which is managed by the state and must be untouchable until they reach 18 are or emancipated, except for emergency medical or financial assistance for use solely by the minor;
> (5) allow a person to request that online content which features him or her as a minor be permanently deleted, and ensure a designated state agency will respond to the request within [4 months]; and
> (6) subject to countervailing public policy concerns that may be analyzed on a case-by-case basis, when an individual requests deletion of photos or videos that feature them when they were a minor, the company is compelled to delete said photos or videos.[186]

The UCEC would also provide advisory notes that inform states that the Coogan Law is subject to the same or similar child labor laws already existing in the state, and that the right of erasure may be limited by certain exceptions, such as when there is a legal right to the information or public interest concerns dominate the deletion request.[187]

Of course, the right of erasure provisions could create conflicts between the minor's rights concerning their name, image, and likeness and the posting individual's right to freedom of

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[186] Sections that are bracketed in the included sample provision contain numbers and terms that states are most likely to alter in their interpretation and adoption of laws like the UCEC. For example, in creating an updated Coogan Law for State X, legislators may choose to require 30% of the income to be set aside in a trust, or that companies have 6 months to respond to requests for deletion. Additionally, it must be noted that these provisions draw heavily from the text of Illinois Child Labor Law and the GDPR. *See* Child Labor Law, Pub. L. No. 103-0556 (2024) (amending the Child Labor Law); *see also General Data Protection Regulation (GDPR)*, *supra* note 124.

[187] *See Everything you need to know about the "Right to be forgotten," supra* note 147.

expression, as well as the public's right to access certain information. However, the likelihood of these conflicts in the context of family blogging scenarios is low and could be dealt with by the courts on a case-by-case basis.[188]

Under the persuasive authority of the UCEC, states would be free to adopt or alter any—or none—of the above provisions. Summarizing the high points of both Illinois' Child Labor Law and the GDPR, the above provisions succinctly encapsulate the protections for which this paper advocates.

CONCLUSION

During the writing of this note, Ruby Franke was sentenced alongside her business partner to serve four terms of one to 15 years each, the maximum sentence possible.[189] At the sentencing, Franke apologized and stated she "was so disoriented that [she] believed dark was light and right was wrong."[190] Addressing her children, Franke said: "'you are a part of me…I would do anything in this world for you. I took from you all that was soft, and safe, and good."[191]

Franke's story serves as a grim reminder of what happens behind the scenes of some family blogging accounts, underpinning the importance of implementing legal protections like this paper suggests. However, Franke's 60-year sentence might be an indication that there has been a sea change in public opinion toward family bloggers, perhaps signaling that the uphill battle toward passing these laws will not be as steep as it once seemed.

In keeping with the development of Coogan laws, the natural step that must occur next is the inclusion of social media as the newest medium protected. Not only would the creation of a national law provide minor entertainers with control over their privacy, but this law would ensure greater financial security for the children involved in the industry.

Mandating at least 15% of the income earned off the minor's image and participation in the social media content be saved in a secure trust that cannot be touched until the minor reaches the age

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[188] *But see* Danielle Bernstein, Comment, *Why the "Right to be Forgotten" Won't Make it to the United States*, MICH. TECH. L. REV. (2020), https://mttlr.org/2020/02/why-the-right-to-be-forgotten-wont-make-it-to-the-united-states/, for an article proposing that the current climate in America towards protecting First Amendment freedoms, as well as the lack of legal precedent, make it difficult for the adoption of a right to be forgotten in the United States, but not impossible given a recent shift in public opinion.

[189] Mike Wendling, *Ruby Franke: Parenting advice YouTuber given maximum sentence for child abuse*, BBC (Feb. 20, 2024), https://www.bbc.com/news/world-us-canada-68353302.

[190] *Id.*

[191] Mohammed, *supra* note 15.

of eighteen will protect the children and encourage greater fiscal responsibility of the parents. Additionally, allowing the minor to petition for removal of content featuring them provides an avenue to rectify the permanent impact this content can have on the minor's life. Providing the right of erasure for certain content gives the minor more control over their online presence, something that may be unheard of for some children, and is currently not a legal or realistic option for any minor. Policymakers should be motivated to implement these laws and create a federal standard of protection. Doing so would bring the United States up to par with other countries that have already provided these protections for years.

The implementation of a modernized and federalized Coogan law that broadens its scope to include social media performers is something that the drafters of the original Coogan law could never have foreseen. However, in keeping with the original drafter's intent, this law would provide greater protection for a vulnerable population, while still encouraging the work and employment of minor performers. In an era where privacy online becomes increasingly difficult to attain, strengthening these Coogan protections is the start of regulating one's online data more rigorously. This system would bring America's outdated and company-centered laws into the modern, more personalized world, all while equipping the youth involved with a legal remedy and financial security.

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