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Video Game Trademarks and Rogers

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**LOS ANGELES LAWYER**

The magazine of The Los Angeles County Bar Association

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Hon. Wendell Mortimer (Ret.)

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No segment of society is undisturbed by the coronavirus scourge. The industry may have slowed down temporarily, but our work is more valuable and meaningful than ever as entertainment plays a vital role in helping us cope through difficult times. One of this issue’s coordinating editors said he would never forget the music videos on MTV and VH-1 that helped him process the 9/11 attacks. Today, an entirely different survey readily displays the value of entertainment—the memes on Facebook and Twitter, the Instagram stories, and the TikTok videos that pay tribute to the movie scenes, television episodes, songs, and bands that lift our spirits and inspire us to persevere. In that same vein of hope, we offer readers this year’s special entertainment law issue.

Over the past few years, a new enemy of the entertainment industry has emerged: the “deepfake.” Deepfakes are manipulated media in which a person in an existing video is replaced with someone else’s likeness. As artificial intelligence and machine-learning algorithms have advanced, the quality of deepfakes has greatly improved. Danielle Van Lier discusses the legal regimes emerging to fight against deepfakes, particularly sexual deepfakes.

Yen-Shyang Tseng discusses the robust protections that the Ninth Circuit affords creators of expressive works—specifically videogame publishers—from trademark infringement claims through its version of the Second Circuit’s Rogers test. Despite these protections, Tseng cautions readers to analyze the outlying district court cases that have sown confusion about the test. He also advises readers to pay attention to the “transformative use” test the Ninth Circuit has applied in right of publicity claims.

A vast ecosystem of entertainment is created solely for distribution on social media. As advertisers have embraced digital media, they have sought to engage a new generation of entertainers—social media influencers. Ben Mulcahy and Gina Reif Ilardi give readers a guide to negotiating influencer engagement agreements.

They may be socially distancing, but creators will continue to find opportunities to collaborate with others, perhaps virtually through e-mail, texting, Zoom, and Slack channels. Fortunately, a timely piece from Steven T. Lowe explains the rules governing ownership of jointly created works that will help readers guide their clients in negotiating collaboration agreements.

Megan Jones and Brad Cohen have taken an interest in artificial intelligence, at least for tax purposes. Their piece guides readers though the tax implications of AI-generated revenues and AI-based assets.

Our Closing Argument brings us back to the coronavirus. Brendan Everman examines under what circumstances the cancellation of a live event due to CoViD-19 might constitute a force majeure event.

As we write this, one of our coordinating editors lost a law partner—a champion trial lawyer and a wonderful man—to complications from CoViD-19. In these challenging times, we are reminded of what Václav Havel said about hope: “The kind of hope I often think about (especially in situations that are particularly hopeless, such as prison) I understand above all as a state of mind, not a state of the world.”

**From the Chair**

*Tom K. Ara, Sharon J. Glancz, Diana Hughes Leiden, and Thomas H. Vidal*

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We began this year at the Los Angeles County Bar Association with a renewed sense of energy and enthusiasm for all that LACBA is and can be for our members. Vibrant new practice sections planned exciting activities. Our rejuvenated Small Firm and Sole Practitioner Section burst forward with new programs and events, as well as with plans for even more in the near term. A cutting-edge attorney-to-attorney referral network with hubs throughout Los Angeles County was formed. Our fully engaged board of trustees relished a resurgent year with optimism.

Then, COVID-19 arrived on the scene. Schools and business were shuttered. Offices were closed. Our courts were nearly shuttered. The economy tipped precipitously downward. What would this new challenge mean for LACBA, our members and staff, and our families? While we cannot diminish the significant difficulties that many within the LACBA family have suffered, we should also take heart at the resilience and resourcefulness that have seen us through these hard times. At LACBA headquarters, a portion of our work force was already working remotely. As the coronavirus spread, we first closed our offices to the visiting public and, then, reluctantly, to our members. When necessary, for the health and safety of our staff and their families, LACBA implemented a work-from-home plan. All departments remain fully functional on a daily basis under the remote supervision of our executive director, senior staff, and department managers.

Calls to LACBA are answered by our cheerful staff, not by a virtual voice, and are forwarded to managers and their staff much as they were previously. All things considered, our staff has shown remarkable continuity in making this transition as seamless as possible. The working model is fully sustainable and will allow LACBA to serve our members and our community remotely until it is safe to return to LACBA headquarters.

What about the programs that we had scheduled? We had a full slate of planned programs and events sponsored by our sections and by LACBA itself. When it became clear that these could not proceed safely, they were canceled or postponed as far in advance as possible. Some will proceed remotely while others will be postponed until we are free to convene.

Among the programming casualties was the LACBA Awards Luncheon where we intended to honor selected individuals for their outstanding service during the year. We also intended to recognize those law offices in our community that support LACBA by enrolling all of their lawyers as LACBA members. We will present the service awards at the annual installation, which usually occurs in June. We also will find an appropriate time and place to honor the growing number of firms that vigorously support LACBA by office-wide membership.

The officers and board of trustees have continued to fulfill their responsibilities, notwithstanding the requirements of social distancing. March was a historic month at LACBA—the first virtual meeting of the board of trustees using Zoom technology. Trustees, guests, and staff fully participated. Business was conducted and completed. We even selected the recipients for our most prestigious awards: Justice Lee Smalley Edmon for the Shattuck-Price Outstanding Lawyer Award, U.S. District Court Judge Virginia Phillips for the Outstanding Jurist Award, and Munger Tolles & Olsen Fellows Program for the Diversity Impact Award. Congratulations to each recipient.

LACBA has taken a leadership role in assisting the Los Angeles County Superior Court in responding to the effects of the coronavirus on our local court system. Presiding Judge Kevin Brazile asked LACBA to disseminate court announcements to our members and to the many affiliate, affinity, and other bar groups throughout the county. We have remained available to Judge Brazile at all hours, seven days a week, to assure that his messages are transmitted throughout the Los Angeles County legal community within minutes after they are released.

Furthermore, LACBA is working with other organized bar groups in an effort to ease some of the burdens in our justice system while litigation activity is severely restricted and to help plan for an orderly transition when it is safe to return to a fully operational court system.

Our sections and committees responded to the required business closures and need for social distancing quickly and effectively. Section executive committees are meeting remotely. While some programs were canceled or postponed, new programs and events using remote technology were immediately planned and readied for launch. Almost overnight, our dedicated and hard-working sections and committees found technological solutions so that their operations barely skipped a beat.

We also are very proud of our pro bono projects operated through the LACBA Counsel for Justice. Of course, our ability to provide these critical pro bono services has been hindered, but our project directors and dedicated volunteers found ways to keep these projects running despite the obvious obstacles. So long as there is a need, we will find a way to meet it.

The 2019-20 president of the Los Angeles County Bar Association, Ronald F. Brot is a founding partner and chairman of Brot Gross Fishbein and a noted family law attorney. He is a past chair of LACBA’s Trial Lawyers Section (now the Litigation Section) and Family Law Section, among others.
The strength of LaCBa is rooted in its members—the lawyers of Los Angeles County. We are proud of the response of our members to the extraordinary challenges brought on by COVID-19. Seemingly, in an instant, our members have summoned a level of tech comfort and confidence. Video calls through FaceTime and similar modes of communication are commonplace. Even tech-averse lawyers now routinely participate in teleconferences through Zoom or similar technologies. Mediations, hearings, and trials are now being facilitated through remote technology. The ability to adjust shown by our members has been remarkable.

For the most part, in the face of the COVID-19 menace, the lawyers of Los Angeles County have displayed a most professional demeanor of civility and cooperation, reflective of our Code of Civility guidelines, and in keeping with the Attorney Oath mandating dignity, courtesy, and integrity. With few exceptions, the bar has shown an exemplary willingness to be professionally civil, cooperative, and kind to one another. Thank you for recognizing that civility and kindness are not a sign of weakness, but a resolve of strong moral character.

The health crisis will come to an end at some point, allowing our members to return to their offices and the LaCBa staff to return to our headquarters. Although the offices to which we will return may look the same, we will not be the same as when we left. Some of us will have fallen ill. Some of us may have lost a family member or friend. Many of us will have suffered substantial financial losses. Nevertheless, nearly all of us will have gained from the experience. We will have faced this unseen foe and survived. We will have learned new skills and adapted to new technologies that have seen us through these difficult times. We will not have been defeated, and we will be the stronger for it.

I am proud of our members and our staff for the ability to persist through the pandemic with determination and dignity. It is a great privilege to guide LaCBa as president during this turbulent time. Thank you for your trust.

Take good care, be well, and stay safe.

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In February 2019, Assembly Bill 1667, commonly known as the Electronic Wills Act, was introduced in California. It amends the Probate Code to apply to “written or electronic” wills. An electronic will is defined as “a writing in a textual record, with the intent that the textual record be the testator’s electronic Will, by either the testator or another individual in the testator’s name, in the testator’s conscious presence and at the testator’s direction.” The will may be signed by “electronic” means, which is defined as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” Furthermore, the act permits two or more witnesses to sign an e-will electronically, in the testator’s physical or “electronic presence,” which is defined as “two or more individuals in different locations who are able to communicate in real time by sight and sound.” Should the witnesses be residents of California, or even of the United States? Should an online notary be required? The legislation in its current form does not address these issues. The future of AB 1667 is still uncertain.

If such e-wills are inevitable, it is our duty as lawyers to make sure that the rules protect the public. Should the laws governing the process be dictated by software companies, which may have an incentive to make the will-signing process as simple as possible, or by attorneys with years of experience as fiduciaries?

We are now living in a new normal. Social distancing means clients are no longer able to meet with attorneys; finding disinterested witnesses poses yet another dilemma. The extraordinary circumstances of COVID-19 have forced society to adapt almost overnight. With will formalities changing about every 500 years, it just might take a pandemic to usher this field into the modern era.

Justin M. Gordon is a partner at Gordon & Gordon in Los Angeles, which focuses on estate planning, probate, and real estate law. He is a member of the Barristers’ Executive Committee and co-chair of the Barristers Networking Committee.
Roger That: Deciding Video Game Trademark Claims

Yen-Shyang Tseng is an appellate attorney at Horvitz & Levy LLP in Burbank, California.

In 2017, AM General LC, the owner of the HUMVEE and HMMWV trademarks, sued Activision Blizzard in the Southern District of New York, alleging trademark infringement and related claims over Activision’s use of Humvee vehicles and trademarks in several Call of Duty video games as well as associated sales and promotional materials.1 More recently, in 2019, two individuals sued Epic Games in the District of Maryland, alleging trademark infringement and other claims over Epic’s use of certain dance moves in Fortnite.2 These cases represent some of the latest clashes in a series of showdowns between trademark rights and the First Amendment in video games. In the Ninth Circuit, where many major video game companies (including Activision Blizzard, Electronic Arts, and Riot Games) are located, the law often leans toward protecting the creators of expressive works against claims of trademark infringement.

In 1989, the Second Circuit established what is now known as the Rogers test. In Rogers v. Grimaldi,3 actress Ginger Rogers sued an Italian filmmaker over a film titled Ginger and Fred alleging trademark infringement and other claims.3 Rogers alleged the defendants violated the Lanham Act by “creating the false impression that the film was about her or that she sponsored, endorsed, or was otherwise involved in the film.”5 The Second Circuit began by recognizing that “[m]ovies, plays, books, and songs are indisputably works of artistic expression and deserve protection,” yet are also “sold in the commercial marketplace like other more utilitarian products.”6 The court said, “Because overextension of Lanham Act restriction in the area of titles might intrude on First Amendment values, we must construe the Act narrowly to avoid such a conflict.”7

Balancing trademark rights with the First Amendment, the Second Circuit found the Lanham Act “should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”8 The court then fashioned what is now known as the two-prong Rogers test: “[T]hat balance will normally not support application of the [Lanham] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the course or content of the work.”9 Several other circuits, including the Ninth Circuit, would later adopt the Rogers test.

Ninth Circuit’s Rogers Test

The Ninth Circuit first adopted the Rogers test in Mattel v. MCA Records, Inc.,10 in which Mattel, the maker of the Barbie dolls, sued MCA Records for trademark infringement over the song “Barbie Girl.”11 The court found the song satisfied both prongs of the Rogers test. First, because the song was about Barbie, “the use of Barbie in the song title clearly is relevant to the underlying work.”12 Second, the “only
expression that Mattel might be associated with the song is the use of Barbie in the title; if this were enough to satisfy the prong of the Rogers test, it would render Rogers a nullity.\(^{13}\)

In E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.,\(^{14}\) the Ninth Circuit applied the Rogers test to the use of a trademark in a video game. The operator of the strip club named Play Pen Gentlemen’s Club in East Los Angeles sued Rockstar Games (a subsidiary of Take-Two Interactive) over Rockstar’s inclusion of a strip club called the Pig Pen in the video game Grand Theft Auto: San Andreas. The Ninth Circuit reiterated its adoption of the Rogers test and held it applied not just to the title of an expressive work, but also “to the use of a trademark in the body” of that work.\(^{15}\)

Applying the Rogers test, the court first found the Pig Pen had some “artistic relevance” because developing the “look and feel” of East Los Angeles was relevant to Rockstar’s artistic goal of developing a parody of the city: “Possibly the only way, and certainly a reasonable way, to do that is to recreate a critical mass of the businesses and buildings that constitute it.”\(^{16}\) The court then found the use of “Pig Pen” did not explicitly mislead consumers because Grand Theft Auto: San Andreas had “nothing in common” with the Play Pen: “[V]ideo games and strip clubs do not go together like a horse and carriage or, perish the thought, love and marriage.”\(^{17}\) No reasonable consumer would have “believed that ESS produced the video game or, for that matter, that Rockstar operated a strip club,” or believed that E.S.S. “provided whatever expertise, support, or unique strip-club knowledge it possesses to the production of the game.”\(^{18}\) Moreover, the game did not “revolve around running or patronizing a strip club,” and “[w]hatever one can do at the Pig Pen seems quite incidental to the overall story of the game.”\(^{19}\)

In 2011, three years after E.S.S. and before the next major case in the Ninth Circuit applying the Rogers test to video games, the U.S. Supreme Court issued its opinion in Brown v. Entertainment Merchants Association holding that the First Amendment protects video games as expressive works.\(^{20}\) Two years later, the Ninth Circuit addressed the Rogers test again in Brown v. Electronic Arts, Inc.,\(^{21}\) involving the Madden NFL series of video games developed by Electronic Arts. The court first clarified that the Rogers test—not the “likelihood of confusion” test or the “alternative means” test—applies when balancing trademark and similar rights against First Amendment rights in cases involving expressive works.\(^{22}\) It also reiterated that Rogers’s application did not turn on whether the trademark appeared in the title or in the body of the expressive work.\(^{23}\)

After addressing those preliminary matters, the court applied the Rogers test. First, it found Electronic Arts’ use of Brown’s likeness was “artistically relevant” to Madden NFL because the game aims for realism and its use of Brown’s likeness was important to “realistically recreate one of the teams in the game.”\(^{24}\) Second, the court found Electronic Arts’ use of Brown’s likeness did not explicitly mislead consumers into believing Brown was behind or sponsored Madden NFL.\(^{25}\) It reiterated that “the mere use of a trademark alone cannot suffice to make such use explicitly misleading,” and Brown offered no other evidence of any “explicit indication, overt claim, or explicit misstatement” that would cause confusion.\(^{26}\)

**Virag and Later Cases**

More recently, in VIRAG S.R.L. v. Sony Computer Entertainment America LLC,\(^{27}\) the owner of the VIRAG trademark sued Sony and other defendants over their use of the mark in the video games Gran Turismo 5 and Gran Turismo 6. In an unpublished opinion, the Ninth Circuit upheld the district court’s order granting the defendants’ motion to dismiss. The court clarified that the Rogers test applies “regardless whether the VIRAG trademark has independent cultural significance” and regardless whether “Sony’s use of the trademark within the video game serves to communicate a message other than the source of the trademark.”\(^{28}\) The Ninth Circuit found the first prong of the Rogers test satisfied because Sony’s use of the VIRAG mark “furthers its goals of realism, a legitimate artistic goal,” and the second prong of the Rogers test satisfied because VIRAG alleged no “explicit indication, overt claim, or explicit misstatement that would cause consumer confusion.”\(^{29}\)

Finally, while it involved a television show rather than a video game, Twentieth Century Fox TV v. Empire Distribution,\(^{30}\) is important here for two reasons. First, the Ninth Circuit built upon its previous holding that, while a likelihood of confusion test generally governs trademark infringement claims, the Rogers test applies when the allegedly infringing use is in an expressive work.\(^{31}\) Second, the court extended the Rogers test beyond the title and content of expressive works and into associated promotional activities. It held that while promotional efforts “technically fall outside the title or body of an expressive work, it requires only a minor logical extension of the reasoning of Rogers to hold that works protected under its test may be advertised and marketed by name, and we so hold.”\(^{32}\) The court reasoned that the “balance of First Amendment interests struck in Rogers and [MCA Records] could be stabilized if the titles of expressive works were protected but could not be used to promote those works.”\(^{33}\)

The Rogers test has been applied in a relatively straightforward manner in video games cases, despite some confusion over the years. To begin with, district courts determine whether the video game constitutes an expressive work—often an easy inquiry after Brown v. Entertainment Merchants. While the Ninth Circuit appears to have left open the possibility of drawing a line “between expressive video games and non-expressive video games,”\(^{34}\) no court appears to have tried to draw that line. After establishing the video game is an expressive work, courts apply the Rogers test—and no other. The Ninth Circuit has rejected alternative tests, such as the trademark “likelihood of confusion” and “alternative means” tests that previous plaintiffs have proposed to circumvent the Rogers test.\(^{35}\) Under the Rogers test, the Lanham Act does not apply 1) “unless the use of the mark has no artistic relevance to the underlying work whatsoever,” or 2) “if it has some artistic relevance, unless it explicitly misleads as to the source or the content of the work.”\(^{36}\)

A video game company satisfies the “artistic relevance” prong if its use of the mark has any artistic relevance to the game. For example, in E.S.S., Rockstar Games’ use of a strip club that looked like the Play Pen had artistic relevance to Grand Theft Auto: San Andreas, which aimed to recreate the “look and feel” of East Los Angeles.\(^{37}\) In Brown v. Electronic Arts, Electronic Arts’s use of a football player’s likeness had artistic relevance to Madden NFL, which aimed to be a realistic football game.\(^{38}\) In VIRAG, Sony’s use of a trademark associated with a racetrack and racecar had artistic relevance to Gran Turismo 5 and Gran Turismo 6, which aimed to be realistic racing games.\(^{39}\) Only when the use of the mark has absolutely no artistic relevance
whateover to the game should a court find this prong not met.40 As the Ninth Circuit clarified in Brown v. Electronic Arts, the “explicitly misleading” prong requires that the creator of an expressive work “use[] the mark or material” to “explicitly mislead consumers.”41 Thus, the analysis generally focuses on whether the video game developer made “an explicit indication, overt claim, or explicit misstatement” as to the “source or the content of the work” such that it would mislead consumers into believing the mark owner sponsored the video game.42 While in other contexts the Ninth Circuit has identified additional considerations—including whether consumers would view the mark alone as identifying the source of the expressive work, the degree to which the user and the mark owner use the marks in the same way, and the extent to which the user adds its own expressive content to the work beyond the mark itself—those considerations are typically absent when analyzing the use of trademarks in video games.43

Cautionary Matters

Through the cases discussed, the Ninth Circuit has developed a version of the Rogers test that offers significant protection to creators of expressive works from trademark infringement claims. Other circuits might not have developed the Rogers test quite the same way or might continue to apply a likelihood of confusion or alternative avenue analysis.44 Thus, plaintiffs might sue video game companies elsewhere, hoping for a more favorable forum. Because video games are sold and played across the country (and globally), inconsistent application of the Rogers test could create a chilling effect over video game companies’ ability to depict real-world materials in their games.

Even within the Ninth Circuit, outlier district court opinions have sometimes caused confusion. In Rebelution, LLC v. Perez,45 the court held that the Rogers test does not apply unless the trademark used has achieved “cultural significance” and that, to have artistic relevance, the use of the mark must be “with reference to the meaning associated” with the plaintiff’s mark. In Electronic Arts, Inc. v. Textron Inc.,46 the court applied the likelihood of confusion test and found that the game Battlefield 3 and its advertising was “misleading as to source of content” because the plaintiff alleged that the developer used the plaintiff’s helicopters in the game and advertisements, and the helicopters were a main selling point of the game. The Ninth Circuit has rejected both requirements imposed by the district court in Rebelution,47 and the district court’s analysis and application of the likelihood of confusion test in Textron violates the Ninth Circuit’s holding in Brown v. Electronic Arts.48 Many other district court cases soundly reject Rebelution’s and Textron’s analysis as well.49 Yet their existence, as well as some courts’ apparent reluctance to view video games as expressive works on par with films and television,50 appears to encourage continued lawsuits over the use of trademarks in video games.

Finally, while the Ninth Circuit uses the Rogers test in trademark infringement claims, it uses a separate “transformative use” test in right of publicity claims.51 Video game companies should carefully review the different tests governing each type of claim before deciding whether to include an individual’s likeness in a video game—especially if they intend the game to depict realistic scenarios.

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3 Rogers v. Grimaldi, 875 F. 2d 994 (2d Cir. 1989).
4 Id. at 996-97.
5 Id. at 997.
6 Id. at 998.
7 Id.
8 Id. at 999.
9 Id.
10 Mattel v. MCA Records, Inc., 296 F. 3d 894 (2d Cir. 2002).
11 Id. at 902.
12 Id.
13 Id.
14 E.S.S. Enmnt’2000, Inc. v. Rock Star Video Games, Inc., 547 F. 3d 1095 (9th Cir. 2008).
15 Id. at 1099.
16 Id. at 1100.
17 Id.
18 Id.
19 Id.
21 Brown v. Electronic Arts, Inc., 724 F. 3d 1235 (9th Cir. 2013).
22 Id. at 1241-42.
23 Id. at 1241.
24 Id. at 1243.
25 Id. at 1245-46.
26 Id. at 1245; see id. at 1245-47.
28 Id. at 668.
29 Id.
30 Twentieth Century Fox TV v. Empire Distrib., 875 F. 3d 1192 (9th Cir. 2017).
31 Id. at 1196.
32 Id. at 1196-97.
Every collaboration begins with comrades and high hopes but, unfortunately, relationships sour. In scenarios when two or more people collaborate on a copyrightable work (e.g., a composition, a sound recording, a screenplay, or a film), the line between who owns what and what each can do with it has been the subject of much litigation. Many artists and creators work with others to create copyrightable works but seldom realize the legal ramifications of their endeavor. The law labels these works that are created through joint effort as “joint works.” The authors must create the work “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” The authors of a joint work are co-owners of the copyright in the work.

The Copyright
As is typically the case when people collaborate on a joint work, not every collaborator contributes in the same manner. This raises the question: What is required from a contributor in order to be deemed a joint author of a work?

In Almuhamed v. Lee, the court found that although the plaintiff’s contributions to the film were substantial, they did not rise to the level of coauthorship, and thus he had no rights to the copyright of the film. Applying this test, the court found that although the plaintiff signed agreements that referred to the defendant as the sole author, the court concluded there was no intent to create a joint work.

Similarly, in Thomson v. Larson, the Second Circuit Court of Appeals found no intent to create a joint work in the hit musical Rent. The playwright of Rent had been adamant in his dealings with others that he intended to be the sole creator of the work, even though he engaged others to contribute to the project. In that case, the plaintiff and the defendant worked hand in hand to write the script; however, because the plaintiff signed agreements that referred to the defendant as the sole author, the court concluded there was no intent to create a joint work.

In Silva v. Sunich, the district court applied the factor test established in Almuhamed, finding co-
authorship when two individuals are involved in the design process of creating a copyrightable character. The court rejected the notion that because one author made the final modifications to the character without the other’s input, there was no joint copyright. The court focused on the intention of the authors and their unique contributions to the final character.

However, in Brown v. McCormick, the district court found no joint authorship. In that case, defendant Patricia A. McCormick commissioned plaintiff Barbara Brown to create quilt patterns to be used to create quilts which were to be featured in a film. Brown created the designs and faxed them to McCormick who ultimately produced the quilts by choosing materials, fabrics, and colors. Defendants argued that the quilt design was a joint work because it was interdependent with the finished quilt, similar to how lyrics and music are interdependent. The court rejected this argument finding that the value of a quilt is not solely in its final product but rather that the underlying designs can be used to produce quilts in any combination of fabrics and colors. The court found the designs were severable from the later work defendants produced. Thus, the quilt was found not to be a joint work even though it was contemplated that defendants would need to make creative choices to complete the work.

Co-Owners’ Rights

When joint authors collaborate on a creative work, and their contribution meets the threshold requirement to become a joint author, “each co-author automatically becomes a holder of an undivided interest in the whole.” Thus, if there is no agreement otherwise, each co-owner owns an equal portion of the work. Even when one party has contributed more in his or her individual contribution to the joint work, the ownership interest is equal among joint authors. Furthermore, any one of the coauthors can license the work to a third party, subject to his obligation to account to his coauthors. However, a coauthor can only grant a nonexclusive license. Moreover, an “assignment or exclusive license from one joint-owner to a third party cannot bind the other joint-owners or limit their rights in the copyright without their consent.”

The primary limitation on the foregoing principles of copyright law is that a “co-owner in a copyright may not transfer away more rights than he holds or enter into a settlement that binds the other owners.” In Davis v. Blige, in a case of first impression, the Second Circuit Court of Appeals decided the question of “whether an action for infringement by one co-author of a song can be defeated by a ‘retroactive’ transfer of copyright ownership from another co-author to an alleged infringer.” The case concerned Mary J. Blige and her hit songs “Love” and “Keep It Moving,” which allegedly were first written by the plaintiff and her coauthor. The plaintiff’s coauthor was approached by the defendants during the litigation, and the coauthor signed over the rights in the musical composition retroactively to the defendants in order to defeat the plaintiff’s infringement claim. The court rejected this subversion of copyright and denied the coauthor’s attempt to divest the plaintiff of her valuable right to sue for infringement.

Thus, a coauthor can only release his or her own copyright claims. This is consistent with the principle of law that holds that a settlement “cannot prejudice the rights of persons who are strangers to the proceeding, even though they may have actual knowledge of the settlement or the underlying litigation.” Thus, when a joint-author settles a copyright infringement claim with an infringing third party, the other coauthors may still bring a copyright infringement claim, unless those coauthors have joined in on the settlement.

The foregoing law boils down to this: If a third party wants a nonexclusive license from a joint author (which insulates the third party from copyright infringement claims), the third party must obtain title before the work is infringed; once the work is infringed, the infringing party cannot insulate itself from a copyright infringement claim by later obtaining rights from a joint-author. This appears to be the state of the law.

Breach of Fiduciary Duty

There is only one other limitation that has been imposed upon a coauthor’s right to grant nonexclusive licenses to third parties. In some instances, under particular circumstances, this may give rise to a breach of fiduciary duty claim against a coauthor. In Universal-MCA Music Publishing v. Bad Boy Entertainment, Inc., the songwriters of a copyright in musical compositions sued their coauthor, Sean Combs, and his record company, Bad Boy, for breach of fiduciary duty. The plaintiffs alleged that Combs failed to disclose material information regarding royalty fees to them before entering into a recording agreement with Bad Boy. In this case, Combs was acting in several capacities in the transaction between the parties: as a cowriter of the compositions, as co-owner of the copyrights of the compositions, and as president and CEO of the record company that released the compositions on the album. The court found that a fiduciary duty did, in fact, exist in these circumstances in which “special circumstances” were present. Thus, while a coauthor does not ordinarily have a fiduciary duty to his coauthors, if a co-owner acts in several capacities, then the business relationship of the two coauthors may constitute a fiduciary relationship. In this circumstance, a third party working in concert with the joint author in breaching the fiduciary duty may also be liable for “aiding and abetting” the breach of fiduciary duty.

With the foregoing exceptions in mind, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made. If a coauthor obtains any monetary gain from the creative work, that coauthor is obligated to make sure he cuts his coauthors in.

Transferability

Joint authors also have the right to transfer his or her individual interest in the joint work at any time, absent a written agreement to the contrary. Effectively, a third party can then license the work to whomever with only a duty to account for the earnings to other joint owners of the work. This may be surprising to many creative professionals who initially create works with colleagues but find that their work can literally get out of their hands and control. As the law stands, there is no need to give notice to any joint owner if such a transfer takes place.

The lesson to be learned from the foregoing is that the best practice for creative professionals (and their representatives) is to make sure that the creative team has some sort of written agreement clearly laying out the rights and responsibilities of each coauthor. If no written agreement exists, the parties are subject to having the court determine whether the creators intended to create a joint work. When there is a joint work and a valid copyright, each member has the
right to grant nonexclusive licenses to third parties, and members only have to account to each other for all revenues from the resulting exploitation. However, a joint author cannot grant more rights than he or she owns and cannot go back in time to “undo” a coauthor’s claims for infringement against a third party concerning a joint work. ■

2 Id. See also Thomas v. Larson, 147 F. 3d 195 (2d Cir. 1998) (stating that the touchstone definition of a joint work “is the intention at the time the writing is done that the parts be absorbed or combined into an integrated unit”).
4 Aalmuhammed v. Lee, 202 F. 3d 1227 (9th Cir. 2019).
6 See also Thomson v. Larson, 147 F. 3d 199, 200 (2d Cir. 1998) (stating that a joint author is entitled to revenue earned from the licensing of a copyright); Quintanilla v. Texas Television Inc., 139 F. 3d 494, 498 (5th Cir. 1998) (stating that “it is widely recognized that [a] co-owner of a copyright must account to other co-owners for any profits he earns from the licensing or use of the copyright….”); Jordan v. Sony BMG Music Enter’n, Inc., 637 F. Supp. 2d 1120, 1123 (C.D. Cal. 2001) (applying the three-factor test to find that music performers in a music video may be considered to be coauthors); Reinsdorf v. Cafferty v. Scotti Bros. Records, Inc., 969 F. Supp. 1328, 1343 (2014) (holding that “A defendant is liable for aiding and abetting another in the commission of an intentional tort, including a breach of fiduciary duty, if the defendant knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act”).
7 Thomas v. Larson, 147 F. 3d 195, 199 (2d Cir. 1998) (stating that each co-owner is entitled to an equal undivided interest in the work and that a co-owner must account to the other co-owners for any profits earned from licensing or use of that copyright).
8 1 Nimmer on Copyright §6.11 (2019).

Id.

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Deepfakes first made widespread headlines in late 2017, when a pornographic face-swap video alleged to depict Gal Gadot having sex with her stepbrother was posted to an Internet website frequently used to share pornography. Videos of other celebrities soon followed. These pornographic videos spread rapidly, and warning flags were soon raised regarding their potential for abuse beyond pornography and into politics, disinformation, and fraud, among other potential harms.

In January 2020, two laws in California directed toward different facets of deepfakes took effect. Of relevance to the entertainment practitioner is Civil Code Section 1708.86, a first-of-its-kind law intended to address the creation of hyper-realistic sexual content. In addition to prohibiting the nonconsensual creation and distribution of the pornographic content that first brought deepfakes to the public’s attention, the law prohibits the nonconsensual inclusion of digitally created or manipulated sexually explicit content in mainstream entertainment.

What are “Deepfakes”?
The term “deepfake” (or “deep fake”), a portmanteau of “deep learning” and “fake,” describes a broad category of digitized content created using artificial intelligence. While the term was coined in connection with pornographic videos, all deepfakes share certain key characteristics: the use of artificial intelligence (usually a deep-learning algorithm), automated creation, and the potential to deceive. Deepfakes should not be confused with the more prevalent “shallow fakes” or “cheap fakes,” videos manipulated through traditional video editing techniques or simply deceptively labeled to convey a narrative different from that actually depicted in the video.

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Deepfakes are created using generative adversarial networks (GAN), a type of artificial intelligence algorithm that is able to learn and develop without human intervention. To create a deepfake, a GAN is trained with a large data set, including images of the subject person and the target video, which it uses to generate a new video. A deepfake can be created in a matter of hours using an adequately powerful home computer.

The most prevalent form of deepfake, especially in pornography, is the “face swap,” in which one person’s face is digitally replaced with another. Two other prevalent forms include the “lip-sync,” in which a subject’s mouth is reanimated consistent with a new and arbitrary audio track, which could include deepfake audio of the subject, and the “puppet master,” in which the subject is animated based on the movements of an off-screen person’s movements, a form of performance or motion capture. Researchers continue to develop new, innovative, and sometimes abusive technologies at a rapid pace.

The same technology also can be used to create fake audio, replacing the time-consuming process of rearranging and combining sound fragments to simulate speech. Already, convincing voice facsimiles can be created with relatively small audio samples of an individual’s speech. For example, a company used this technology to recreate the speech President John F. Kennedy was planning to deliver on the day he was assassinated.

One emerging technology generates artificial faces that look realistic. The application can generate other objects—such as cars, rooms, and even cats—depending on the source data. This tool or a similar one has already been used to generate profile pictures for fake social media profiles that then have been used in phishing schemes, to promote disinformation, and in connection with online trolling and harassment.

It is important to note that the technology has potential for positive application. In the entertainment industry, the most likely use for the technology is to augment, and potentially to replace, expensive and time-consuming visual effects, such as those used to digitally resurrect Peter Cushing in Rogue One: A Star Wars Story. This also may give independent producers with lower budgets some of the same capabilities as the major motion picture studios. One deepfake technology may have broad utility in post-production, including allowing filmmakers to reposition an actor’s head or modify facial expressions to better fit a scene or to match an actor’s mouth and facial movements to dialogue in foreign-dubbed films.

The company that recreated Kennedy’s speech is researching the use of AI for speech synthesis, including applications that would allow those who have lost their ability to speak to communicate in their own voice. This technology also could be used to more effectively replace dialogue in motion pictures.

Author and researcher danah boyd notes that humans are “biologically programmed to be attentive to things that stimulate: content that is gross, violent or sexual, and gossip, which is humiliating, embarrassing, or offensive” and gravitate toward content that creates an emotional response.

Motion picture producers have long recognized this and have woven this type of content into their narrative. Deepfakes enhance their capabilities to do so, including to detrimental effect.

A Form of Image Abuse

In the movie, Nymphomaniac, filmmakers used digital technology to insert the film’s stars into explicit sex scenes. The scenes were performed by body doubles who actually engaged in the sex acts and who were then digitally replaced by the stars. This was done with the depicted actors’ consent, pursuant to negotiated contracts. Deepfakes put this capability in anyone’s hands and allow the creation of similar content without the subject’s participation, consent, or even knowledge.

As of September 2019, approximately 96 percent of all deepfakes on the Internet were nonconsensual sexual content, numbering close to 15,000. Nearly all these pornographic videos depict women, compared with 39 percent of non-pornographic deepfakes, and nearly 99 percent depict women in the entertainment industry with the remaining coming predominantly from media. As one writer observed, “Google gave the world powerful AI tools, and the world made porn with them.”

This pernicious new form of digital exploitation is not limited to celebrities. The technology is being used to create videos of former partners, coworkers, and others, and Internet communities have formed to assist people in creating them.

These videos fall along a continuum of image-based sexual abuse, which includes behaviors like revenge pornography, sexualized extortion, and voyeurism. All forms of image-based sexual abuse “reduce victims to sexual objects that can be exploited and exposed” and deny the victims “agency over their intimate lives.” The harm the victims suffer—including psychological and professional harm, as well as harm to personal relationships and reputation—is similar to other forms of sexual abuse.

Deepfakes are dehumanizing because “a single aspect of one’s self eclips[es] one’s personhood.” They exploit the victim’s sexual identity for others’ gratification and force victims, particularly women, into virtual sex. Victims of image-based sexual abuse can suffer serious and sustained mental health effects. Some victims experience visceral fear and may simply withdraw from public life, particularly online activities.

Image-based sexual abuse is stigmatizing, and victims may suffer professional and reputational consequences, including lost jobs or difficulty finding future employment. In today’s job market, a candidate’s online reputation is crucial. Studies have shown that nearly 80 percent of employers do online research about candidates and 70 percent rejected candidates based on their findings. Search results that include deepfakes may cost a victim interviews.

Victims may lose business opportunities, friendships, and even romantic opportunities. These harms are as real for performers—ranging from high-profile celebrities to those just starting out—as they are for any other victim.

For performers, there is significant potential for diminished job opportunities and reputational harm when they are involuntarily depicted in the nude or in sexual scenes. Contracts of the Screen Actors Guild—American Federation of Television and Radio Artists (SAG-AFTRA) include provisions against nonconsensual nudity, create standards for the filming of nude scenes, and require express written permission from performers. These terms only apply to productions shot pursuant to a SAG-AFTRA agreement and certainly do not extend to individuals creating nonconsensual content on their home computers. Deepfake technology gives filmmakers at any budget and experience level the capability to digitally alter a scene in postproduction to show more nudity or sexually explicit content without the subject’s participation, consent, or even knowledge. For example, a filmmaker can decide to “spice up” the film to make it more appealing to certain markets without bringing in performers for additional photography or even seeking their consent. This happens in traditional filmmaking with body doubles, and it has potential to expand rapidly using digital technology.

Once this content has been created and included in a motion picture, its out-of-context proliferation becomes difficult to control. Websites exist that are dedicated...
to hosting motion picture clips and stills featuring nudity and sexual situations, typically depicting women in various states of undress. Not only does this cause long-lasting professional and reputational harm, many performers express discomfort and even distress at learning their sometimes fleeting nudity has been captured and overtly sexualized.38

It should not be surprising that SAG-AFTRA was a sponsor and key proponent of Section 1708.86 and similar efforts in other jurisdictions, including New York, and has taken an active role in speaking out against abusive uses of the technology.

**Challenges to Stopping Deepfakes**

A number of factors make it difficult to fight the spread of sexually explicit deepfakes, and many celebrities have given up, at least for now. In December 2018, Scarlett Johansson, a frequent subject of deepfakes, including one that was viewed more than 1.5 million times on a single website, told The Washington Post she was giving up the fight. She described the Internet as “an abyss that remains virtually lawless,” a place “where sex sells and vulnerable people are preyed upon,” and lamented that fighting against the Internet’s depravity is “basically a lost cause” for female celebrities.39

Johansson’s frustration is understandable, as deepfake victims face numerous potential impediments to pursuing legal action. Litigation is resource-, time-, and cost-intensive, which might prevent some victims from pursuing civil remedies, even if they have strong cases.40 This is particularly problematic for individuals who lack the financial wherewithal to independently fund litigation. Online anonymity and other efforts taken by perpetrators to hide their identities are another impediment to adequate recourse.41 The defendant may find it difficult or even impossible to locate the deepfake creator, who may be located outside the United States. Even when the creator can be located, it is likely he or she lacks assets to offer the victim meaningful financial redress.

Some victims, including high-profile ones in the public eye, may be dissuaded if they are unable to proceed pseudonymously.42 Publicity from litigation tends to have the paradoxical effect of increasing interest and driving more traffic to the videos—the exact opposite of what the victim wants. Even if the victim can obtain monetary damages or injunctive relief ordering the videos removed from an individual website, it is unlikely to serve the primary goal of litigation—to remove the videos from the Internet and to repair the victim’s damaged reputation.

**Section 230 Concerns**

The Internet platforms that host or link to deepfakes are in the best position to stem their distribution, but these platforms have broad immunity under current law. Section 230 of the Communications Decency Act provides two broad immunities.43 First, it states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” effectively immunizing the online platforms from liability for a user’s speech.44 This immunity extends even to the deepfakes websites that host user-generated and user-uploaded nonconsensual, sexually explicit deepfakes, including when the sites openly solicit that content and provide detailed guidance on how to create it. Second, it provides a “good Samaritan” exception for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”45 While the first immunity protects platforms from their users’ actions, the second protects them from their own actions in trying to eliminate this harmful content.

There has been much discussion over Section 230 and the growing amount of troubling content on the Internet, including deepfakes. In late 2019, Congress held substantive hearings on Section 230, during which the tech industry executives testifying each agreed that the platforms could do a better job of combating this content.46 The hearing offered a substantive debate on the topic, but it is not clear if it will lead to imminent substantive changes.

Meanwhile, many of the platforms have taken steps intended to limit the spread of deepfakes through their services. Several that were among the earliest and most prominent repositories for pornographic deepfakes quickly updated their user policies or used existing policies to remove the nonconsensual videos. Reddit, where deepfakes first surfaced, updated its rules against nonconsensual sexual imagery to include deepfakes.47 Twitter and other social media platforms soon followed suit.48 Even pornography site Pornhub added deepfakes to its prohibited content.49

Google provides a process for individuals to request removal of fake pornographic images or videos of themselves from its search results. To qualify for removal under this policy, the individual must be identifiable; the imagery must be fake and must falsely depict the individual nude or in a sexually explicit situation; and there must be a lack of consent to its distribution.50 The process only removes the images or videos from Google’s search results, not from any other websites.

This January, Facebook and Reddit announced new policies relating to deepfakes that would expand beyond the pornographic videos to other forms of deceptive content. In November 2019, Twitter sought public comment on proposed deepfake and synthetic media policy that would flag and label content.51 In a February 4 blog post, it announced a new rule prohibiting deceptive sharing of “synthetic or manipulated media that are likely to cause harm,” explaining the criteria it will use and steps that will be taken to limit its spread.52 Twitter will evaluate content to determine if it is “significantly and deceptively altered or fabricated,” “shared in a deceptive manner,” and “likely to impact public safety or cause serious harm.”53

Reddit banned deepfake pornography in February 2018. The simple policy stated: “Reddit prohibits the dissemination of images or video depicting any person in a state of nudity or engaged in any act of sexual conduct apparently created or posted without their permission, including depictions that have been faked.”54 A new policy adds a prohibition for any content “that impersonates individuals or entities in a misleading or deceptive manner” and...
specifically includes “deepfakes or other manipulated content presented to mislead, or [that is] falsely attributed to an individual or entity.”

Facebook’s most recent deepfakes policy is limited to video content and expressly excludes many shallow fakes. It would prohibit videos that meet both of two criteria: They have been edited or synthesized...in ways that aren’t apparent to an average person and would likely mislead someone to thinking that a subject of the video said words that they did not actually say,” and they are “the product of artificial intelligence or machine learning...that merges, combines, replaces, and/or superimposes content onto a video, creating a video that appears authentic.” Deepfake audio content, and even video content that lacks audio, would not fall within the narrow terms of Facebook’s new policy. The new policy and its limitations do not extend to pornographic deepfakes, which are already banned under existing policies that ban “sexual activity.” While its new policy is limited, Facebook has been an active partner in research and training efforts to help identify manipulated media.

Section 1708.86
California has taken a major step forward in the legal fight against deepfakes. Civil Code Section 1708.86 creates a cause of action for individuals digitally depicted as “giving a performance they did not actually perform” in sexually explicit material. Sexually explicit material is defined as “any portion of an audiovisual work that shows the depicted individual performing in the nude [as defined] or appearing to engage in, or being subjected to, sexual conduct” as defined. The depicted individual has a cause of action against a person who either “creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure” or who “intentionally discloses sexually explicit material that the person did not create and the person knows the depicted individual in that material did not consent” to its creation. There are some exceptions, such as in connection with reporting unlawful activities or in law enforcement or legal proceedings, as well as other First Amendment-related exceptions. Notably, the inclusion of a disclaimer indicating the material was unauthorized or that the depicted individual did not participate in its creation or development is not a defense. Section 1708.86 applies not only to deepfakes but to any nonconsensual digitized sexually explicit material, including that incorporated into entertainment projects.

Of particular import to representatives of both producers and performers is the detailed definition of and approach to “consent” in Section 1708.86. The depicted individual’s consent must be set forth in “an agreement written in plain language” that must be “signed knowingly and voluntarily.” The agreement must include a general description of both the specific material and the work in which it will be incorporated. The depicted individual must be given at least 72 hours to review the agreement prior to signing it or an authorized representative (as defined) must provide written approval to the agreement. If these formalities are not met, the individual may rescind his or her consent within three business days from the date it was given.

The potential remedies for a violation are significant. In addition to an “amount equal to the monetary gain made by the defendant from the creation, development, or disclosure of the sexually explicit material,” a prevailing plaintiff can recover for each work either economic and non-economic damages, including damages for emotional distress, or statutory damages ranging from $1,500 to $30,000 or, when the act was committed with malice, as much as $150,000. Prevailing plaintiffs can also recover punitive damages and attorney’s fees and costs, as well as any “other available relief, including injunctive relief.” The victim has three years from the date the “unauthorized creation, development, or disclosure was discovered or should have been discovered with the exercise of reasonable diligence” to commence suit.

Importantly, Section 1708.86 may allow individuals to pursue the websites that host deepfake pornography, at least to the extent they are actively participating in its spread. These websites often act as more than mere conduits for their users’ speech as contemplated by Section 230. To the extent these sites participate in the creation and distribution of content on their site or possess knowledge that the content is being distributed without authorization, they are no longer mere passive conduits eligible for Section 230 immunity, and Section 1708.86 provides a way to hold them accountable.

These new laws are important steps toward combating the spread of pornographic and political deepfakes in California. True change will require a multi-pronged approach as the law alone is not equipped to respond to these rapidly advancing technologies. Technology, education, and simple common sense will be important tools to detect deepfakes and limit their spread.

Researchers are actively working on technologies to detect and defend against deepfakes. Professor Siwei Lyu, who has been at the forefront of this research, describes “the competition between generating and detecting fake videos [as] analogous to a chess game.” As quickly as researchers develop detection technology, deepfake creators adapt their algorithms and datasets to generate content that can avoid detection. As such, detection technology can only provide a partial solution to the problem.

Authentication Technologies
Authentication technologies, which make deepfakes harder to create, are another proposed technological approach. These include “digital provenance” technologies that embed digital watermarks or fingerprints into the content and use blockchain or similar technology to log the provenance. Among these solutions’ drawbacks is the necessity that website operators be willing to block or identify content that lacks this provenance.

“Authentic alibi services” or “life-logging” services offer another potential option for high-profile individuals who have a need to protect their public reputations. These technology-based services track and log every aspect of one’s life—a significant amount of data to turn over to a third party. It also raises the potential for unprecedented mass surveillance by for-profit entities.

Facebook offers revenge pornography victims a program that allows them to preemptively submit photos that might become the subject of nonconsensual distribution in order to block them in the future. The system creates a “hash” or “fingerprint” (a numerical representation that cannot be read by humans), the original sample image is deleted from Facebook’s servers, and the data is then used to block the future uploads of the same photographs. The same technology might not be as effective for deepfakes, in which the content being created is new rather than existing photographs or video. However, once the deepfake is released to the wild, and therefore can be hashed, it potentially can prevent future uploads on platforms that adopt the technology. It requires a large degree of trust in the platform and its data security as the victim is voluntarily submitting his or her sexual content.

The most obvious way for individuals
to limit the risk of being depicted in a deepfake is to limit the number of photos they post online. However, individuals in the public eye cannot control photographs taken by journalists, paparazzi, or the public, or the dissemination of videos in which they appear. It also will not help guard against deepfake videos created by an intimate partner or other individual with access to photographs of the individual. Significantly, in today’s society, obsessed as it is with the Internet, it simply is not practical to entirely withdraw from online life.

In January, the California Assembly introduced a criminal deepfakes bill. Assembly Bill 1903 would make it a criminal offense to “knowingly, and without the consent of the depicted individual,” prepare, produce, or develop any deepfake [as defined] “that depicts an individual personally engaging in sexual conduct” and to distribute it to or exchange it with others, or to offer to do so.77 The proposed penalty includes a fine of up to $1,000 and/or up to one year in a county jail.78 If the individual depicted is a minor, the fine increases to a maximum of $10,000, and, if imposed, the jail sentence can be deter-

42 Id
41 Id
40 Citron, supra note 24, at 1928.
39 Id
38 Id
37 Id
36 Id
35 Citron & Franks, supra note 23, at 1925.
34 Citron, supra note 24, at 1930.
33 MacGlynn & Rackley, supra note 31, at 1924.
32 Id.
31 Id.
30 Id.
29 Id.
28 Id.
27 Id.
26 Id.
25 Id.
24 Id.
23 Id.
22 Id.
21 Id.
20 Id.
19 Id.
18 Id.
17 Id.
16 Id.
8 Cole, supra note 1.
6 Agarwal et al., supra note 7.

www.washingtonpost.com/technology/2019/06/12/top-ai-researchers-race-detect-deepfake-videos-we-are-outgunned/.

6 Agarwal et al., supra note 7.
53 Id.
58 Bickert, supra note 56.
59 CIV. CODE §1708.86(a)(14).
60 CIV. CODE §§1708.86(a)(10) and (13).
61 CIV. CODE §1708.86(b)(1)-(2).
62 CIV. CODE §1708.86(c).
63 CIV. CODE §1708.86(d).
64 CIV. CODE §1708.86(a)(3)(A).
65 Id.
67 Id.
68 CIV. CODE §1708.86(e)(1)(A)-(B).
69 CIV. CODE §1708.86(e)(1)(C)-(E).
70 CIV. CODE §1708.86(f).
72 Citron, supra note 24, at 1958.
74 Id.
75 Id.
77 A.B. 1903, 2019-20 Leg., Reg. Sess. (Cal. 2020). A previous version of the bill was introduced in the prior session and died pursuant to Art. IV, Sec. 10(c) of the California Constitution.
78 Id.
79 Id.
80 Id.
WELCOME
TO OUR NEWEST MEMBERS

Robert Adams
Anoushe Akhavan
Robert Edward Allen
Pasha Ameli
Megan Katherine Ampe
Andrea Marissa Anaya
Matthew Avedikian
Stephanie I. Awanyai
Trent L. Barnes
Amanda Jane Barnett
Barr Benyamin
Esther Bitar
Mary Corroon Bullis
Nigel J. Burns
Venus Burns
Larissa Calva-Ruiz
Ruth Natalie Calvillo
Kirby Fernando Canon
Arman Thomas Carretta
Siena Mobery Caruso
Gina Cervino
Mark James Chimarusti
Tamala T.S. Choma
Christine Chou
Marisa Choy
Ming Hao Chuang
Ellina Chulpaeff
Ariel Donthnier Clark
Andrew Clark
Marc Cohen
Wanda Gail Coutee
Ashley H. Cruz
Michael J. Desantis
Gina Marie Di Domenico
Matthew D. Dobill
Kristin Dupont
Alyssa Michelle Engstrom
Eliza Rosa Finley
Rachel Fiset
Thomas Frisardi
Claudia S. Fu
Cindy Marie Garcia
Joseph Garibyan
Edita Ghushchyan
Lauren Colleen Glaser
Zina B. Gleason
Miri Elisheva Gold
Suzanne R. Gonzalez
Meryn C. Grant
Shuki Greer
Michael Alan Hale
Robert George Harrison
Stacie Feldman Hausner
Margaret Tephany Healy
Alice Reichman Hoesterey
Brianna Ricque Howard
Valerie H. Howell
Danielle Hubbard
Karen Nagad Jacobs
Jason Feng-Hsiang Jia
Eriin Margaret Kansy
James Alex Karagianides
Britt Lacey Karp
Jason Robert Kass
Kate Elizabeth Kearney
Angela Kim
Eunice Kim
Eric Kirkland
Lara M. Kislinger
Samantha Paxton Koppel
Kathryn E. Kuhn
Lisa K. Lansio
Kathryn Laquay
Matthew Ho Lee
Paul Lee
David P. Lefebvre
Ralph Samuel Lehman
Amanda Levin
John C. Madden
Summer A. Main
Alfonso Maldonado Silva
Denise Annabeth Mamaliger
Caelo Tenoch Marroquin
Heather Marie Martone
Robert Daniel Matranga
Aleen Mayelian
Amanda Lynn Mazin
Yvette McDowell
Ryan Paul McGinley-Stempel
Katherine Ramlose Morrow
Jennifer Meister
Nancy Mendez
Arash Merpour
Vahe K. Messerlian
Ronald Minassian
Kirk Leonard Moon
Melissa H. Moon
William B. Mujica, Jr.
Taylor Kevin Mulligan
Rohit D. Nath
Caitlein Teresa O’Brien
Michael William Oppenheim
Scott D. Owens
Dana Paul Palmer
Sylvia V. Panosian
Nicolas Aidan Pappas
Patricia Park
Ian B. Petersen
Ani Arsen Petrosyan
Eric C. Pettis
Natasha F. Phillips
Geoffrey Michael Pogue
Joseph Edward Porter
Rebecca Grace Powell
Alphonse F. Provinziano
Nima Rabiee
Ashwin J. Ram
Michelle Reagan Atalla
Benjamin S. Reccius
Michelle L. Reynolds
Charles Robinson
Rosales Salome Rosales
Jeremy H. Rothstein
Adrian Gidaya Roxas
T. Brit Rudman
Matthew Cody Samet
Tyler S. Sanders
Velma-Ahda J. Sands
Dominique Sanz-David
Dragana B. Scuric
Matthew C. Sferrazza
Nyanza Shaw
Benjamin Eli Strauss
Roopika Subramanian
Foster H. Taft
Anna Chhiv Tang
Tamar Terzian
Hon Bobbi Tillmon
Benjamin R. Trachtman
Vincent Tremonti
Aaron K. Tso
Christina V. Tusan
Jessica C. Vasquez
Catalina J. Vergara
Drew Alan Walleck
Darlene Sheryl Wanger
David Clay Washington
John F. Wilkins
David W. Williams
Dylan E. Williams
Keith L. Williams
Anita P. Wu
Justin T. Yedor
Thomas Yoo
Roland Young
Robern Allan T. Zorilla
Much of the talk in today’s entertainment industry revolves around the competition among subscription video on demand (SVOD) platforms for talent and subscribers. However, beyond the high-production value programs that are streaming on established and emerging SVOD platforms, a massive amount of content is being distributed solely on social media, YouTube, and other digital media platforms. On YouTube alone, it has been reported that an astounding 30,000 hours of new content is uploaded every hour, while every day over 100 million hours of videos are watched on Facebook, over 100 million photos and videos are uploaded to Instagram, and an estimated 14 billion video views occur on Snapchat. Moreover, TikTok has added an estimated 60 million users in the United States since its relatively recent launch, each of whom spends an average of 52 minutes per day on the platform. Anyone who believes he or she has something to say can produce content and distribute it directly to an online audience without having to commission a team of writers, secure budget approval, or ask for permission from anyone. Some of this content is good. The good stuff creates an audience. A lot of the bad stuff creates an audience, too. Either way, the audience is one that advertisers want to reach.

To reach that audience, advertisers and their agencies are increasingly engaging the services of the individuals who create the content. These creators have come to be known as “influencers” because they can often influence consumers to consider, engage with, buy, and use an advertiser’s product or service. Today, there are two types of influencers: micro-influencers, who have 1,000 to 100,000 followers, and macro-influencers, who have more than 100,000 followers.

Engaging an influencer is similar to engaging any celebrity talent to perform endorsement or commercial services for...
an advertiser, but also very different. These differences may implicate different kinds of legal issues for influencer engagements.

The parties to an influencer engagement agreement are the advertiser (as the party making the engagement) and the influencer (as the party being engaged). On the influencer side, however, the agreement will turn on whether the influencer has a loan-out company and may turn on whether the influencer is represented by an agency.

Some influencers, driven by tax or other considerations, have followed the lead of more traditional celebrity endorsers and formed a business entity known as a loan-out company, which has the exclusive right to loan out the services of the influencer and which agrees to do so as a party to the engagement agreement. If the influencer has a loan-out company, this company will be identified as the contracting party in the engagement agreement, followed by an express identification of the influencer whose services are being provided. Thus, the recital of the parties to the agreement will often state that it is between the advertiser, on the one hand, and “Loan-Out Company t/s/o Influencer,” on the other hand (the shorthand notation t/s/o meaning “for the services of”). The loan-out company agrees to cause the influencer to perform the services specified in the agreement, with a so-called “inducement” being signed by the influencer whereby the influencer agrees that he or she may be substituted as a party to the agreement if the loan-out company ceases to exist, ends its relationship with the influencer, or otherwise loses its authority to provide the influencer’s services.

Many influencer engagements are brokered for the influencer by an influencer agency. These agencies have a roster of influencer clients they can match with suitable advertisers. Working with such an agency saves the advertiser the trouble of having to scour countless digital media channels to identify the online content creators who have generated an audience or are otherwise a good fit for a brand or campaign. The agency’s role in the engagement agreement can vary.

Many agencies will be identified only in the notice provision of the agreement, which directs where formal notifications such as approvals or breaches should be sent. Beyond that, some agencies also include language expressly directing the advertiser to pay the agency’s commission directly to the agency, thus reducing the amount that would otherwise be paid to the influencer. Some agencies go even further than that, becoming a party to the engagement agreement and effectively acting as the influencer’s loan-out company.

California Talent Agency Act

If the agency or influencer in question is located in California, the agency must be licensed under the California Talent Agency Act (TAA). Running afoul of the TAA is a trap for the unwary and can be disastrous for an agency.

The TAA prohibits unlicensed talent agents from procuring employment for an artist. Under the TAA, anyone soliciting or procuring employment for an artist includes a so-called “manager” and expressly disclaims being an “agent.” If he or she acts as an agent, that person is held to the same standards as an agent. The TAA’s provisions apply regardless of whether the agent procured work for the artist once or many times.

The TAA is enforced by the California labor commissioner, who holds evidentiary hearings to determine whether someone is illegally acting as an unlicensed talent agent by procuring employment for an artist. Both the labor commissioner and the California courts have broadly interpreted the term “procurement” to include any attempt to solicit employment for an artist or negotiate the terms of the artist’s employment. This definition has been interpreted to include introducing artists to producers or directors, initiating contacts with employers, furthering an offer for an artist-client, or negotiating employment contracts.

When an influencer agency acts as an intermediary between the influencer and the advertiser, it is likely that the agency’s representation of its influencer client will, at least in part, involve procuring some sort of employment under the TAA. The next question is whether the influencer clients are considered artists under the TAA when they participate in these opportunities.

Under the TAA, “artist” means actors and actresses rendering services on the legitimate stage and in the production of motion pictures; radio artists; musical artists; musical organizations; directors of legitimate stage, motion picture, and radio productions; musical directors; writers; cinematographers; composers; lyricists; arrangers; models; and other artists and persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises. In practice, however, the question of whether a person is an artist under the TAA is intricately intertwined with the type of activity the person is engaged to perform. Labor Code Section 1700.04(b) has been interpreted by the California labor commissioner as limited to services that are creative or artistic in nature. The labor commissioner has stated often over the past decade that the intent of the TAA is to protect artists in their capacities as artists; therefore, this term means employment or engagements for the performance of professional artistic services in motion picture, theatrical, radio, television, and other entertainment enterprises, including advertising, that are creative or artistic in nature.

Not every influencer agreement involves performing services that are creative or artistic in nature. In those instances when an influencer agency secures a sponsorship or endorsement opportunity requiring the influencer to produce and/or appear in audio, visual, or audio-visual content for an advertiser, the services will likely be deemed “artistic services,” making the influencer an artist for purposes of the TAA.

Older precedent held that if the labor commissioner found that a person was acting as an unlicensed talent agent, the agent’s entire contract with the artist would be deemed void ab initio. Under that older precedent, the unlawful parts of the agent’s contract with the artist could not be severed, and the unlicensed talent agent would have to forfeit all commissions and other payments received over the term of the voided contract. To put that in perspective, if an influencer agency procured employment involving artistic services for an influencer client once over a multi-year relationship, at the end of that relationship, the influencer client could ask the labor commissioner to force the agency to disgorge all of the commissions it earned on the influencer’s compensation over the life of their relationship. However, more recent precedent holds that if the agent’s contract with the artist includes a so-called savings clause, the contract is subject to severance under California Civil Code Section 1599, and only the transactions that occur when the person is acting as an unlicensed talent agent should be voided.

If the influencer agency is licensed under the TAA, it may have no interest in acting as the influencer’s loan-out company. Obtaining a license under the TAA, however, restricts the talent agency’s ability to generate revenue from certain sources, principally accepting referral fees from vendors to whom the agency has referred its clients and dividing fees with any advertiser or other party that employs the agency’s influencer clients. Thus, some influencer agencies may elect not to become licensed while others may not know about the TAA’s licensing requirements.
Either way, an unlicensed influencer agency can seek to circumvent the TAA’s licensing requirements by acting as the influencer’s loan-out company.

Under existing labor commissioner precedent, a person or entity who directly employs or engages the services of an artist does not “procure” employment within the meaning of Labor Code Section 1700.4. A structure whereby an influencer agency directly employs or engages the influencer to perform services and then acts as the influencer’s loan-out company by entering into the engagement agreement t/s/o the influencer and promising to cause the influencer to perform the specified services for the advertiser would not constitute procuring employment. Taking that approach would, therefore, arguably allow the influencer agency to avoid acting in that instance as a talent agency under the TAA.

Whatever the motivation might be for the influencer agency to act as the loan-out company for the influencer, the question from the advertiser’s perspective is whether it should require the influencer himself or herself to sign an inducement under those circumstances. On the one hand, a well-designed inducement would give the advertiser the right to pursue claims directly against the influencer in the event of a breach. Such a direct remedy is important when the loan-out company is likely a shell company that has no assets and was set up by the influencer for personal reasons. On the other hand, if the loan-out company is an influencer agency that has a roster of clients and assets that can be pursued in the event of a breach, the advertiser might not need to pursue a claim directly against the influencer, making an inducement less critical.

Deal Terms

Once the parties to the engagement agreement have been determined, the types of services that the influencer will perform and the payment terms—i.e., what is the influencer going to do, and when and how much is he or she going to get paid—are business points that need to be mutually agreed upon. Beyond those fundamental points are several related concepts that require more in-depth understanding because the way they are addressed in most influencer agreements is different from the way they are addressed in other types of celebrity endorsement agreements, namely content ownership, approvals, clearance obligations, exclusivity, and union jurisdiction.

Celebrity talent that appears in film and television entertainment content, television commercials, and other advertising content almost invariably performs services on a work-made-for-hire basis under the Copyright Act, such that the copyright in that content is owned and controlled by the production entity that engaged the talent. To back up the work-made-for-hire provision, the talent agreement also will typically include language that says if and to the extent the engagement does not qualify as a work-made-for-hire, the talent irrevocably assigns all right, title, and interest in and to the content and the talent’s contributions to the content to the production entity throughout the universe in perpetuity. In contrast, an advertiser that expects to engage an influencer on a work-made-for-hire basis will often be disappointed.

The influencers themselves will often insist on owning the content they create on the advertiser’s behalf. Because most influencer content is not evergreen content and will not be the kind of content that is included in a library for future use or as a source of derivative works, determining which party owns the content will often be less important than how that content is used. If the advertiser is forced to let the influencer own the content, the advertiser will often seek to restrict the influencer from using the content with a competitor of the advertiser or in a way that is critical or disparaging of the advertiser that originally commissioned the content. At the same time, if the advertiser does not own the content, it will not have any right to use the content absent a license from the influencer. Thus, the advertiser will want to consider whether it needs to secure usage rights in the content, such as the right to amplify the content through paid media or the right to distribute the content in media channels beyond the platform on which the influencer originally posted it.

When a celebrity is engaged to appear in a commercial for an advertiser, the advertiser and its agency are generally in charge of the production. This means the celebrity must negotiate contractual consultation and approval rights over the commercial and how he or she appears in the commercial. When it comes to influencer content, these roles are often reversed. The influencer is being engaged in part for his or her ability to produce content that resonates with his or her audience, so the influencer will often oversee the production. This paradigm requires the advertiser to take a leap of faith that the influencer will get it right. To minimize the leap of faith required, the advertiser often will prepare a creative brief outlining the specifications for the content and talking points that need to be included in the influencer’s voice in the final edit of the content. This provides the influencer with guidance about what the advertiser expects. To ensure those expectations are met, the advertiser also will want the right to approve the content before the influencer posts it. If the advertiser determines that it cannot approve the version of the content that is first presented, the parties will often agree to one or more rounds in which the advertiser is entitled to provide feedback, and the influencer is required to incorporate that feedback to the extent reasonably possible by shooting additional footage or, if different footage already exists, using that different footage.

A special approval provision that is seen in nearly every influencer agreement relates to the disclosures that must accompany the influencer’s post. The Federal Trade Commission (FTC) has issued “Guides Concerning the Use of Endorsements and Testimonials in Advertising” (FTC Guides). The FTC Guides are not regulations, but they represent the FTC’s position on the disclosures needed to comply with Section 5 of the Federal Trade Commission Act when endorsements and testimonials are used in advertising. Activity that is inconsistent with the FTC Guides may be considered unlawful and could result in an enforcement action by the FTC.

The FTC Guides state that if there is a material connection between an advertiser and a person making an endorsement or testimonial about the advertiser or the advertiser’s product or service, and that material connection is not reasonably apparent
from the circumstances, the material connection needs to be disclosed. The FTC Guides define endorsement as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the advertiser. When there exists a connection between the endorser and the advertiser that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.

Under the FTC Guides as currently interpreted and enforced by the FTC, almost all influencer posts for an advertiser that has engaged the influencer must be accompanied by a disclosure. The major social media platforms have implemented disclosure policies that complement and largely mirror the FTC Guides requirements. The advertiser will want to ensure that the influencer’s post uses disclosures that comply with the FTC Guides because violations of such guidance by the influencer will be attributable to the advertiser.

To legally clear content broadly means that the party producing the content has either secured permission from the persons or entities that own or control third-party intellectual property that appears in the content, such as music or other copyrighted works, or concluded that the use of that intellectual property is noninfringing so that no such permissions are legally required. It is safe to say that most of the content posted on social media and other digital media channels has not been legally cleared. However, when an influencer produces and distributes content on an advertiser’s behalf, legal clearance becomes fundamentally important.

Commercial vs. Noncommercial Content
If the influencer plans to use third-party content in a post, with or without authorization, copyright and trademark are perhaps the two most obvious types of legal clearances that need to be evaluated. But the types of clearances needed will vary depending on whether the content is commercial or noncommercial.

Courts have concluded at various times and in various contexts that “noncommercial” speech includes matters that are in the public interest (broadly defined) and almost all reporting of current or recent events, and have recognized that expressive, artistic, or entertainment content itself is a significant medium for communicating ideas (i.e. noncommercial expression) and, therefore, entitled to the full breadth of First Amendment protection. In hybrid contexts in which artistic or newsworthy expression is combined with commercial promotion, the issue of whether the content is commercial or noncommercial becomes murkier. In such a hybrid context combining and intertwining commercial and noncommercial communication, the courts rely on a “common sense distinction between speech proposing a commercial transaction...and other varieties of speech.” Although that standard is less than helpful, depending on the substance of the influencer’s content and the level of control the advertiser has over the production of that content, it is possible that the influencer’s content could constitute commercial expression, triggering additional clearance requirements.

For example, the TikTok video platform allows its users to use a library of music that TikTok has licensed from the various stakeholders, including the music labels and music publishers that control the sound recordings and underlying musical compositions for that music. TikTok lets its users use this music in the videos they post on the platform because music makes almost every video more interesting. However, TikTok allows the music to be used only for noncommercial purposes. TikTok does not define what it considers to be a prohibited “commercial” use. Determining what type of use constitutes a commercial use ultimately depends in this context on the terms of the synchronization, master use, and public performance licenses that TikTok itself has entered into with the parties that control the relevant rights in the music. These underlying licenses are the source of the rights that TikTok is entitled to pass on to its users. Since TikTok has not disclosed the terms of these underlying licenses, advertisers are currently left to guess about whether an influencer’s use of TikTok music in a paid post falls within the scope of the licenses. If it does not, using the music in a paid post could expose the influencer and perhaps the advertiser to multiple copyright infringement claims.

More generally, the law requires advertisers to have adequate support (also known as “substantiation”) for express and implied claims that appear in their advertising and other commercial speech. Such support must exist before the advertising is distributed, and advertisers cannot use a testimonial to make a claim that the advertiser would be unable to independently substantiate. Feature films, television programs, or other entertainment content is considered noncommercial expression even though they are distributed for a profit, may contain liberal amounts of product placement, and may even be surrounded and interrupted by paid advertising. Claim substantiation is not normally required for film, television programs, or other content that is considered noncommercial. However, if an influencer’s paid post is considered to be commercial expression, any express or implied claims about the advertiser’s products or services will arguably need to be substantiated the same way they have to be substantiated in advertising content that is produced by the advertiser itself.

Finally, the distinction between commercial and noncommercial expression is fundamental to the rights and risk analysis under right of publicity law. State right of publicity laws prohibit the unauthorized commercial use of another person’s name, voice, likeness, or other personal characteristics (collectively, image). In deciding whether the unauthorized use of a third party’s image violates such third party’s publicity rights, the first level of inquiry is whether the use is properly categorized as a “commercial” or a “noncommercial” use. If an image is used without permission in a commercial context, such use almost certainly violates the publicity rights of the individual depicted because publicity law prohibits the mere use of an image in a commercial context without authorization (even if there is no false implication that the image owner has endorsed or approved of the use—if there is such a false implication, a further “false endorsement” claim will lie under the Lanham Act for such use). As a result, if an influencer’s paid post is considered to be commercial expression, use of a third party’s image in that post will clearly need to be cleared from a right of publicity perspective just as it has to be cleared in advertising content that is produced by the advertiser itself.

The scope of the exclusivity granted to the advertiser vis-à-vis competitors is an important provision in any celebrity endorsement agreement, with the advertiser often seeking to define its exclusive product category as broadly as possible and to impose the exclusivity obligation for months, or even a year or more, depending on how long the campaign featuring the celebrity will be in the market. The approach in influencer campaigns is typically different. Influencers are often sought after because they post on a consistent basis, sometimes multiple times a day, and credibly talk about products made by a small group of competitors in a niche area. Imposing a broad and long exclusivity obligation on an influencer jeopardizes the influencer’s ability to engage in the very type of activity that generated status as an influencer in the first place. So, instead of months or up to a year or more, advertisers
often must settle for an exclusivity period that lasts for days or weeks before and after the paid posts are made on the advertiser’s behalf.

Unless the advertiser is a signatory to the SAG-AFTRA Commercials Contract or the influencer being engaged is a member of SAG-AFTRA, the influencer agreement either will not address guild or union jurisdiction at all or will expressly state that the influencer’s services are not being performed under the jurisdiction of any union or guild. If the advertiser is such a signatory and/or the influencer is such a member, the parties will need to decide whether the services to be rendered are covered by the guild and, if so, under what guild agreement the influencer’s services should be performed.25

The SAG-AFTRA Commercials Contract is often seen as the most familiar guild agreement to use in an influencer campaign because the party engaging the influencer is an advertiser and advertisers are most commonly involved in producing commercials. This contract, however, imposes costs and usage restrictions that historically have not fit well with influencer campaigns. For example, under the contract, compensation to a performer in a commercial is based on (1) the services that the performer renders in connection with producing such commercial (e.g., showing up at a sound stage or location to film or record content) and (2) the use that the advertiser makes of the finished product.

This “dual basis” of compensation, whereby performers are paid initially for their services and then again for the use of the content embodying their services, does not align with the services or budget levels typically associated with influencer campaigns or the short and limited burst often associated with these campaigns. Thus, instead, the parties will often explore other options that will satisfy their obligations as either a signatory or member of SAG-AFTRA, sometimes settling on SAG-AFTRA’s New Media Agreement, which covers dramatic (scripted) and nondramatic (nonscripted) entertainment productions that are intended for initial exhibition via the Internet, mobile devices, or any other new media platform. The problem is that the New Media Agreement excludes commercials from its scope. So, if the influencer’s post constitutes a commercial, the parties will likely have no choice but to produce the content pursuant to the SAG-AFTRA Commercials Contract. There are, nevertheless, two helpful options under the Commercials Contract. First, if the influencer’s engagement constitutes a low-budget digital commercial with an overall budget under $50,000, the engagement can be governed by the Commercial Low Budget Digital Waiver, which covers low-budget digital, internet, and new media platform commercials and under which there are no set rates, so all principal and extra rates are negotiable. Second, the most recent amendments to the SAG-AFTRA Commercials Contract—which went into effect on April 1, 2019—have introduced “upfront use packages” that require advertisers to pay a normal session fee but also allow the advertiser to buy out one year of online use by paying a relatively low, one-time use fee. The upfront use package option is less than ideal because it requires the advertiser to forfeit exclusivity, make hefty contributions to the guild’s benefit plans, imposes editing restrictions, and still does not fit the services typically associated with influencer campaigns. It is nonetheless a step in the right direction.

Even as SVOD platforms proliferate, a massive audience is spending a lot of its time on social media, YouTube, and other digital media platforms. These digital media platforms have democratized content distribution and changed the way the public thinks about celebrity and influence. As these platforms become more integrated into daily life, they continue to unveil opportunities for advertisers looking to reach their audience, and those advertisers are increasingly turning to influencers. The landscape will continue to evolve as advertisers, influencers, and their agencies become more aware of traps for the unwary and seek to structure deals in ways that reflect the ever-shifting market.

1 WordStream, 37 Staggering Video Marketing Statistics for 2018, https://www.wordstream.com/blog/ws/2017/03/08/video-marketing-statistics (last viewed Mar. 23, 2020); Statista, Hours of video uploaded to YouTube every minute as of May 2019, https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute (last viewed Mar. 23, 2020); Omnicore, Instagram by the Numbers: Stats, Demographics & Fun Facts, https://www.omnicoreagency.com/instagram-statistics (updated Feb. 7, 2020) [hereinafter Instagram by the Numbers]; Statista, Definition of "procuring" to any type of negotiations—which went into effect on April 1, 2019—have introduced “upfront use packages” that require advertisers to pay a normal session fee but also allow the advertiser to buy out one year of online use by paying a relatively low, one-time use fee. The upfront use package option is less than ideal because it requires the advertiser to forfeit exclusivity, make hefty contributions to the guild’s benefit plans, imposes editing restrictions, and still does not fit the services typically associated with influencer campaigns. It is nonetheless a step in the right direction.

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Can AI Be Taxed?

In South Dakota v. Wayfair, the U.S. Supreme Court noted that “substantial virtual connections” should not be ignored.

While the word “innovation” is often used, only rarely does a new series of inventions—such as the wheel, electricity, and the Internet—entirely reshape society. Artificial intelligence (AI) is proving to be the next such powerful innovation, and the U.S. tax code is little prepared for it.

Defining AI can be a challenging task due to the broad nature of what falls under its rubric. Essentially, AI is the use of computer systems to perform tasks that historically have required human intelligence. Expanding on this definition, AI can interpret and learn from data, creating alone and using what it has learned from the data without additional human input. Such machine learning is further refined into deep learning in which artificial neural networks—algorithms that copy how the human brain works—mimic human behavior by processing vast amounts of data.1 This neural network approach of having computers “learn” in a manner similar to the human brain varies from the more traditional rule-based computer programming in which a computer is programmed with the explicit rules it will follow.2 Thus, with AI, computers copy human thinking rather than just routinely following set tasks.

AI is often described in futuristic terms in which machines outsmart the human race. The science fiction imagery exaggeration is only a function of time. While AI arguably performs rule-based tasks better than humans, for the moment it is still lagging behind in being able to outthink humans in many other areas. However, current projections are that within five years technology will have evolved to the state that the machines will exceed human intellectual capabilities across a greatly expanded spectrum of areas.3 Those currently creating this AI wave have enormous power as they are setting the standards from which the machines will operate in the future, outpacing human
AI can and will replace humans, displacing what is a biologically weak component in the supply chain with a seamless solution, terrifying in its efficiency. The current coronavirus pandemic is exposing the weaknesses of people, and will speed up the adoption of AI across a wide swath of industries that are no longer patient with the work force after suffering crippling disruptions due to quarantines, hoarding, and death. The entertainment industry, in particular, is not immune, with most productions shut down, live events cancelled, and top stars such as Tom Hanks needing to delay a movie due to catching the coronavirus.4  

AI is already present in daily life, though in what many consider to be the most rudimentary forms. It powers Google’s search and Amazon’s delivery system, the latter of which is performing an essential function during the coronavirus crisis by getting supplies out with merciless precision.5 In the Netherlands, Philips uses robots in lights out/dark factories to make electric razors, and even though Tesla’s CEO has had to admit overreliance on robots in the company’s “dark” factories, which only needed a few people to monitor the automated processes, both manufacturers’ methods indicate the future energy-saving prospect of AI.6 Going forward, AI will become more pervasive in ways that cannot yet be imagined. 

Companies whose business is involved in or overlaps with AI encompass a vast ecosystem. AI starts with hardware in the form of a semiconductor that drives everything. The AI (software based) is then run and stored on a further form of hardware (for example, a computer), which connects with a network and eventually the cloud. The cloud is a means of storing and accessing data and programs over the Internet instead of on a localized platform such as a computer. Robots, while visually arresting, merely represent a tool for AI. Eventually, AI will be run off a smartphone. AI growth is driven by evolving semiconductor processing power, 5G (a much faster wireless network), quantum computing and refinement of the software that runs on these other elements. The complexity of these systems is staggering and expanding rapidly.

Inherent in understanding AI are a few key terms, some of which are still conceptual in application but close to reaching practical adoption. Eventually, a digital twin will integrate with each person, adding vast intellectual and physical capabilities based on an individual’s own thinking and abilities, only better. This twin, and indeed much of life, will operate on more powerful smart phones. These smart phone-based digital twins will run people’s lives, determining what to think, watch, eat, read, and do. The complexity of these systems is staggering and expanding rapidly.

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Taxpayers in the United States are generally taxed on worldwide income, with some modifications after the Tax Cuts and Jobs Act passed in 2017. In contrast, nonresident aliens and foreign corporations are generally taxed based on sourcing rules that determine what is taxed and by whom, basically depending upon where the income is deemed sourced or derived.10 Income tax treaties can further refine which country has the right to tax certain income derived by a tax resident of either country. The source of income is typically considered where the relevant economic activity takes place.11 Such a presence can create a “permanent establishment,” i.e., the place where the taxpayer is deemed to reside with respect to determined income earned. When this income is “effectively connected” to that tax situs, tax is due to the country in which the permanent establishment exists. Global tax treaties can create different rules, including tie-breaker ones that determine the source when there are multiple establishments or no clear permanent establishment exists. New issues are presented by AI when a “permanent” establishment, if any at all, exists.

States have also waded into the online quagmire, most famously recently in South Dakota v. Wayfair, which uprooted longstanding legal precedent at the U.S. Supreme Court level.12 In Wayfair, South Dakota challenged whether an out-of-state seller was required to have an in-state presence for the state to tax the seller on sales above a certain amount made within the state. The Supreme Court decided in favor of South Dakota, determining that such taxation does not violate either the Due Process or Commerce Clauses of the U.S. Constitution. The Court also commented on
the disruptions to the traditional U.S. tax system resulting from the growth of online commerce, noting that these online merchants were availing themselves of benefits of a state and that “substantial virtual connections” should not be ignored. The Court in Wayfair also cited a Massachusetts law that taxes merchants when their customers have a seller’s app or cookies on their computer. Massachusetts has begun enforcing this law though how they can do so without violating privacy rights is puzzling.

While sourcing income related to AI may be one of the greatest challenges faced by taxing countries and states, AI may also present income issues. At one level, conceptually, the IRC should not be overly complex. However, tax practitioners (and indeed most non-tax practitioners) know otherwise. Indeed, the more tax one knows, the more complicated one knows it is. Tax code provisions are extensive in number and mind-numbingly convoluted at times in an effort to ensure that desired tax is assessed and paid. This includes characterization of various types of income that can have significant impact on the amount of tax liability, including tax rates and withholding obligations.

A tax is imposed each year on all earned income of individuals or corporations, with some limited exceptions. Income is defined in the IRC to mean all income from whatever source derived, including those forms of income that include: compensation for services, gross income derived from a business, gains derived from property dealings, interest, rents, royalties, dividends, annuities, life insurance payouts, pensions, income from discharge of indebtedness, distributed partnership income, income in respect of a decedent, and income from an interest in an estate or trust. Traditionally, income is defined as ordinary (essentially, actively earned income), passive (income earned without active participation) or portfolio (income from investments, such as dividends, interest, or royalties). Income includes capital gain on the sale of a capital asset. A significant challenge will be how to define and classify AI income.

While all types of income can have unique sourcing and characterization issues, intangible income, such as royalty streams, or the sale and exchange of assets that created such streams, can be harder to source and characterize and thus subject to a myriad of rules. The IRC seeks to determine the characterization of the income as ordinary or capital based in part upon whether the intangible asset was self-created (and if so it is usually taxed more like ordinary income; if not, it may be subject to the lower capital gains tax rate). Sourcing rules also become more complex when taxing intangibles. Digital assets can be harder to find and more easily shifted offshore, limiting the tax reach of the U.S. government.

Additionally, income abroad can be subject to lower tax rates under the global intangible low-taxed income (GILTI) or foreign derived intangible income (FDII) provisions of the IRC, depending upon the ultimate product, intangible or services sold. Both GILTI and FDII allow for a preferential deduction, with the latter, FDII, being applicable for intangibles and services sold abroad.

The everchanging nature of AI will be another challenge for U.S. tax laws. The current tax landscape is vastly limited and oftentimes inapplicable, in part because current laws do not contemplate the dynamic shifts it presents. Most people will be effectively and increasingly removed from their environment, operating in ever narrower fields but still living stable and enjoyable lives. When identifying related taxable income, the hardware and the starting software can be associated with a person or entity to be taxed. It is what happens afterwards that gets complicated. The intangible aspect and ongoing infinite iterations of AI are key reasons behind the complexity inherent in finding, sourcing, taxing, and understanding it. AI itself is capable of constant, ever-evolving change, iterating, mutating, and evolving millions of times in mere seconds, making it hard to track. Humans may, and likely will, not be able to keep up with AI creation and will take no part in such ongoing processes. Looking forward, then, the drafters of U.S. tax laws most likely will not be able to keep pace with AI as it develops on its own. Furthermore, the reality is that the laws have been written by humans, most of whom are not technologically sophisticated, and are certainly no match for deep learning-based AI.

Tax law is not the only area of law that may not be able to cope with AI. The laws of patents (which require an inventor), copyright (which requires human creation, originality, creativity, and the ability to fix an idea), and rights of publicity (an individual’s right to control and profit from commercial use of his or her name, likeness and persona) will need to evolve when all being created is done by automation yet mimicking a person, and sometimes alongside a person. Self-creation becomes impossible to define if a digital twin, better than me but not me, creates in place of the human creator and inevitably will continue to create long after the original human creator is no longer alive.

Unlike a corporation, AI presently does not have personhood standing for tax purposes or otherwise. However, one robot, Sophia, was given citizenship by Saudi Arabia in October of 2017. Built by Hong Kong-based company Hanson Robotics, Sophia is designed to look and act like a human being but only has human rights in Saudi Arabia. If AI is not a person, it is unclear how it is taxed and its earnings
accounted for. Simplistically, the AI owner could be taxed but that “person” might not practically be identifiable. Perhaps, AI may one day be the perfect offshore tax haven, existing as a digital and not physical location. Importantly, the concepts related to the rights surrounding intangibles do have tax implications as they define who owns what rights and thus help determine how related resulting transactions will be taxed.

Tax policy now favors AI in many ways, for example, the 100 percent depreciation deduction for qualified property. In the context of AI, the government is essentially subsidizing the use of technology to replace workers. While these replacement workers may be considered “robots,” they do not need to take human-like form to eliminate a job. Recently released cloud computing regulations have been criticized as not containing real world applicability though they do create opportunities for tax planning.

Ultimately, if AI is the creator and constantly evolving, the result may be the loss of the ability to reverse engineer its actions and trace further creations back to the original human creator of the software since such an exercise will not be practical or possible. Indeed, realistically, if a software program is changed enough from its original, billions of times over, it may not be appropriate or possible to trace the derivation back to the original creator. Additionally, given that the nature of digital AI content is so fluid, no source or nexus with a nation-state might exist.

Moreover, AI assets can go on in perpetuity and can be removed from a taxable estate through estate planning now, growing in value exponentially and permanently, creating a master class of AI asset owners and their successive generations who will own the assets that essentially run the world. Much as capital today is ever more concentrated among a smaller percentage of global population, that wealth disparity will only broaden as AI assets become the most valuable assets. Any early advantage, today being built mainly in China and the United States, will further concentrate wealth, creating long-term social problems. As a consequence, vast groups of individuals will not be able to find work and generate their own wealth, and the few who control the AI will control the wealth.

The practical reality is that long-term—when value is created and AI is behind the creation—no money may change hands. No taxable entity might be involved, and the location of any activity might be impossible to find. Creative evolution of AI will lead to outcomes no one can yet predict.

AI is a natural tax avoider and will find ways around human rules. If AI recognizes that it has too close of a connection to a taxing jurisdiction, it is nimble enough to modify itself to remain nontaxable.

Solutions do exist. Yet, globally, countries and companies continue struggling to address the ability of digital assets to evade taxation. The Organization for Economic Cooperation and Development (OECD), for example, is working to reach a global solution for taxing data, AI and non-AI related. Much OECD analysis for how to do so includes updating how permanent establishment is globally defined. Currently, a server is arguably more like a warehouse than a place of business and an Internet service provider is independent of a business, but the longevity of those certainties is being debated. While at a policy level both a robot or digital tax have also been proposed by various other interested parties and countries, ultimately defining, agreeing upon, and enforcing such taxes is proving to be an exceedingly complex undertaking. To date, most such efforts have focused on regional protection, not global solutions.

Perhaps the tax base of the United States may need to be centered around concepts...
such as data stored, connectivity used, minutes logged on a system, or some other demonstrable metric. Alternatively, the mark to market rules, which determine the value of a security at a set time each year, could be adapted for AI, thus leading to a particular asset value at a predetermined date. For example, in applying such a concept to AI creation, the AI in existence at a given time could be determined once annually, thus adding accountability and some identifiable asset to tax. Smart contracts will anticipate and adapt to change in agreements due to AI and perhaps the IRC can be rewritten (with the help of AI) to do the same.

What can be said for certain is that the robots (and AI in general) are coming, and they will usurp massive numbers of jobs. Further, the tax base will need to radically evolve with the new technology or face serious consequences. Governments have historically moved slower than technology, and the antiquated tax code does not yet address the new realities brought about by AI. With AI, the rules will be reset, and not just with respect to the IRC.

Tax advisors, among others, today will want answers, especially when landscapes start shifting rapidly. Traditional tax rules can be used creatively to plan into an AI future, anticipating that these rules will (by necessity) change at some upcoming time and building in protections to address when they do.

For those who think AI can be turned off if it misbehaves, the truth is that AI will outlive us and might see any attack on its existence, human or otherwise, as mere malware to be eradicated. In this sense, science fiction has elements of fact. Those who remain skeptical are going to be disappointed as all indications are that human weaknesses, as highlighted by the 2020 pandemic, are the problem and not the solution. In contrast, machines do not die and now cannot be forced to pay taxes, changing both of the two absolutes in life, i.e., death and taxes.

7 See, e.g., Raman Chitkara, Smartphone users are about to get a “Digital Twin”—is your company prepared for it?, Linked In (Mar. 8, 2018), https://www.linkedin.com/pulse/smartphone-users-get-digital-twin-your-company-raman-chitkara.
10 I.R.C. §§861, 862, 863, 865.
11 I.R.C. §§861, 862.
13 803 MASS. CODE REGS. 64H.1.7.
14 I.R.C. §561(a).
15 I.R.C. §197.
16 I.R.C. §951A.
17 I.R.C. §250.
19 I.R.C. §168(k).
20 I.R.C. §1,861-18.
22 See, e.g., Imagining the Internet, supra note 3.
The COVID-19 pandemic has caused the cancellation or postponement of numerous high-profile events, including Coachella, the Ultra Music Festival, Wimbledon,1 and the Tokyo Olympics. Parties affected by the cancellations are debating whether the coronavirus outbreak constitutes a force majeure event that excuses a party’s nonperformance of contractual obligations if an unforeseeable event prevents such performance.

A force majeure clause defines the scope of events that might excuse nonperformance by a party. These clauses are common and may list an “epidemic” (or something similar) as a triggering event. A-list performers are generally protected by broad force majeure clauses. Most force majeure clauses, however, do not list every triggering event because the purpose of these provisions is to protect against the unexpected.

Absent an applicable force majeure clause, courts may apply the common law doctrine of impracticability as a defense to performance under a contract. The Restatement (Second) of Contracts Section 261 recognizes the doctrine of impracticability as a defense when performance under a contract would involve “extreme and unreasonable difficulty, expense, injury, or loss.”2

Recent epidemics like Zika, Ebola, H1N1, and SARS did not result in the widespread cancellation of high-profile events. Consequently, there is no clear legal precedent for how courts would apply force majeure clauses or the impracticability doctrine to the coronavirus outbreak. However, existing case law suggests that nonperformance could be legally excused under current conditions.

For example, in Opera Co. of Boston v. Wolf Trap Foundation for the Performing Arts,3 an opera performance in a national park was canceled when a power outage endangered the safety of 6,500 ticket holders. The court recognized that the impracticability defense could be invoked because the unexpected (albeit foreseeable) power outage could have threatened public safety.

Conversely, in OWBR LLC v. Clear Channel Communications, Inc.,4 an event organizer canceled a music industry conference scheduled in Maui five months after the September 11 terrorist attacks. The court noted that, although a terrorist attack is a force majeure event, “poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants” are not. The court held that “a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event.” The court reasoned that there was “no specific terrorist threat to air travel to Maui” five months after September 11 and that to excuse “a party’s performance under a force majeure clause ad infinitum when an act of terrorism affects the American populace would render contracts meaningless in the present age.”

The takeaway from these cases is that “economic inadvisability,” even if caused by the coronavirus, is unlikely to excuse contractual nonperformance. Instead, the critical inquiry is whether the coronavirus outbreak threatens the health and safety of participants or causes “extreme and unreasonable” expense. Ultimately, this determination will turn on an evolving understanding of the coronavirus itself as well as facts specific to each event.

The coronavirus outbreak will undoubtedly result in a flood of lawsuits. Indeed, they have already begun. A ticketholder filed a putative class action in Los Angeles Superior Court against the organizer of the Lightning in a Bottle music festival for refusing to issue refunds for the canceled event.5

Event organizers and other companies involved in events should prepare themselves for the reality that when the COVID-19 crisis subsides, the courts will be interpreting the legal fallout for years.6

2 See, e.g., In re Marriage of Benjamins, 31 Cal. Rptr. 2d 313, 317 n.3 (Ct. App. 1994); Florida Laundry Svcs., Inc. v. Sage Condo. Ass’n, Inc., 193 So. 3d 68, 68 (Fla. 3d DCA 2016).
3 Opera Co. of Boston v. Wolf Trap Fdn. for Performing Arts, 817 F. 2d 1094 (4th Cir. 1987).

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